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AS AMENDED AND IN FORCE AT THE CLOSE OF THE
FORTY-FOURTH SESSION OF THE LEGISLATURE, 1921

IN FOUR VOLUMES

FULLY ANNOTATED BY
JAMES M. KERR

SECOND EDITION

VOLUME THREE

CODE OF CIVIL PROCEDURE

Adopted March 11, 1872

Optima est lex quæ minimum reliquit arbitrio judicis; optimus judex qui minimum sibi
(That law is best which leaves least to the discretion of the judge; that judge is best who leaves least to his own).—*Aphorism 46, Bacon's Works, Vol. VII, p. 143.*

Multitudo imperitorum perdit curiam
(The great number of unskilful practitioners ruins a court).—*2 Coke's Institutes 219.*

PART TWO—SECTIONS 577-1290

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CONSPECTUS

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CHAPTER I.

JUDGMENT IN GENERAL.

- § 577. Judgment defined.
- § 578. Judgment may be for or against one of the parties.
- § 579. Judgment may be against one party and action proceed as to others.
- § 580. The relief to be awarded to the plaintiff.
- § 581. Action may be dismissed or nonsuit entered.
- § 581a. Dismissal for failure to serve summons, when. By court of own motion.
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- § 582. All other judgments are on the merits.
- § 583. Dismissal of actions.

§ 577. JUDGMENT DEFINED. A judgment is the final determination of the rights of the parties in an action or proceeding.

History: Enacted March 11, 1872, re-enactment of § 144 of Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 143, held unconstitutional, see history, § 5 ante.

JUDGMENT GENERALLY.

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- 3. Against executrix—How to be made payable.
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- 31. Same—Vacating—Defect in affidavit of service.
- 32. Same—Same—Discretion of court.
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- 44, 45. Final judgment—Action upon.
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- 49, 50. Same—Order distinguished from final judgment.
51. Same—Order settling account of administrator.
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- 84, 85. Validity and effect of judgment—In general.
86. Same—Substance, not form.
87. Waiver of findings—Effect of.

1. Action on judgment—As to when may be maintained.—The general rule undoubtedly is that until a judgment becomes final by affirmance on appeal, or by the lapse of the time within which an appeal might be taken, such judgment is not admissible in evidence, and can not be relied upon as the foundation of rights declared in it.—*Sewell v. Price*, 164 Cal. 265, 128 Pac. 407, 409.

As to action on final judgment, see par. 44, this note.

2. Same—Evidence—Weight and sufficiency.—In an action to recover upon an instrument purporting to be a deficiency judgment of a sister state, evidence held to show service of summons to have been obtained by fraud so that the foreign court did not obtain jurisdiction to render a personal judgment.—*Fox v. Mick*, 20 Cal. App. 599, 129 Pac. 972, 973.

3. Against executrix—How to be made payable.—A judgment against the executrix upon a demand against the estate of her testator should have been made payable in due course of administration.—*Nathan v. Dierssen*, 164 Cal. 607, 130 Pac. 12, 14.
See, post, §1504 and note.

4. Against one of several.—It is not disputed that in an action against more than one defendant the court may render judgment against only one when a several judgment is proper. It is expressly so provided by section 579, post.—*Madary v. City of Fresno*, 20 Cal. App. 91, 128 Pac. 340, 341.

5. Assignment of judgment—Burden of proving assignment.—On a motion by the judgment debtor to have satisfaction entered of record, the burden is on the assignee of a part of the judgment of affirmatively showing that the judgment debtor had notice of the assignment before paying the judgment.—*Buckeye Refining Co. v. Kelly*, 163 Cal. 8, 124 Pac. 536.

As to effect of assignment, see notes 78 Am. St. Rep. 47; 54 Am. Dec. 366.

6. Same—Filing—Notice.—In the absence of a statute giving it such effect, the filing of the assignment of a judgment in the office of the clerk of the superior court in which the action was pending does not operate as constructive notice of the assignment.—*Buckeye Refining Co. v. Kelly*, 163 Cal. 8, 124 Pac. 536.

7. The payment of a judgment after partial assignment operates as a satisfaction of the judgment, as against a prior assignee of a part interest therein, if the judgment debtor, at the time of the payment, had no notice of the assignment.—*Buckeye Refining Co. v. Kelly*, 163 Cal. 8, 124 Pac. 536.

8. Becomes record of what court has determined—When entered, and is then as binding upon parties as if entered immediately upon its rendition.—*Crim v. Kessling*, 89 Cal. 478, 488, 23 Am. St. Rep. 491, 26 Pac. 1074.

9. Change in conclusions of law—Before entry of judgment.—Court may at any time before entry of judgment change its conclusions of law upon facts found; and such change may be made by another judge than the one who has tried the cause.—*Crim v. Kessing*, 89 Cal. 478, 489, 23 Am. St. Rep. 491, 26 Pac. 1074. See *Condee v. Barton*, 62 Cal. 1.

10. Changes in judgments—Are limited to cases and conditions expressed in statute by which they are authorized.—*McKay v. McKay*, 125 Cal. 65, 68, 57 Pac. 677.

11. Clerk's entry in minutes—Not judgment, when.—The clerk's entry in minutes of trial of judgment, after it has been rendered by court, does not constitute judgment, as such entry is but ministerial act of clerk.—*Crim v. Kessing*, 89 Cal. 478, 488, 23 Am. St. Rep. 491, 26 Pac. 1074.

As to entry of judgment, see, post, §§ 664 et seq. and notes.

12. Collateral attack on judgment—Grounds of.—Where a court of competent jurisdiction found that an executor's sale of real estate was without notice, but interpreted the will as authorizing the sale without any notice, and so confirming the sale itself, the decree of this court was not subject to collateral attack in a suit which was brought many years afterward to set aside the sale, nor could the correctness of such interpretation of the will be inquired into, as an examination of such matters would constitute a collateral attack on the judgment, a proceeding which will not be permitted.—*Bagley v. City and County of San Francisco*, 19 Cal. App. 255, 125 Pac. 931.

As to impeaching judgment, see pars. 62, 63, this note.

As to collateral attack on judgment in general, see notes 94 Am. Dec. 766; 40 Am. St. Rep. 730.

As to what a collateral attack is, see note 23 Am. St. Rep. 104.

As to whether a motion to set aside is a collateral attack, see note 5 Am. St. Rep. 453.

As to the grounds for collateral attack: That the court exceeded its jurisdiction, see note 29 Am. St. Rep. 78.

Same—Because for or against deceased persons, see note 29 Am. St. Rep. 816.

Same—Because founded on false return of process, see note 19 Am. Dec. 137.

Same—Because not within any of the issues, see note 38 Am. St. Rep. 752.

Same—Because of alleged forgery or alteration, see note 5 Am. St. Rep. 453.

13. Where no want of jurisdiction appears upon the face of the judgment-roll offered in evidence, it can not be collaterally assailed. A domestic judgment must be void upon its face to be the subject of collateral attack. Whatever may be the

rights of the parties, in an action in equity to set aside the judgment, it is clear that a domestic judgment regular upon its face is not the subject of collateral attack.—*Layne v. Johnson*, 19 Cal. App. 95, 124 Pac. 860.

14. Same—Judgment rendered in former trial.—In an action on three promissory notes, the defense to which was that they had been obtained by false representations, the defendant attempted to offer in evidence the reporter's record of the testimony received in a former trial upon the same case, to the admission of which the plaintiff's counsel offered the objection that the defense sought to be established thereby had been passed upon by the court in a former action and adjudicated adversely to the contention of the defense; the judgment having been entered in an earlier action to the effect that the plaintiff had acquired the notes for a valuable consideration, before maturity, as a purchaser in good faith. This objection was properly sustained by the court. If there were material errors in the former trial, they would have been available upon the appeal of that cause; but they have no place here, where all of the evidence taken in that case was offered in bulk as there received. No matter what the condition of the record in a former case may have been, the ultimate fact remains that upon the evidence adduced in the trial of that cause, the court, acting within its proper jurisdiction, had entered a judgment against the plaintiffs therein, and that was a subsisting judgment at the time of the trial of this cause.—*Smith v. Woods*, 164 Cal. 291, 128 Pac. 748.

15. Same—Rights of assignee.—On a motion to enter satisfaction of a judgment, the assignee can not, for mere error in the exercise of jurisdiction, attack the validity of the judgment on which the execution issued against his assignor.—*Buckeye Refining Co. v. Kelly*, 163 Cal. 8, 124 Pac. 536.

16. Conclusiveness of judgment—In general.—Where an action is commenced by a materialman against the trustees of a school district under section 1184, post, for the price of materials furnished in building of a school, and a judgment rendered against such trustees, such judgment, after becoming final, will operate as an estoppel or bar against the maintenance of an action against the school district alone, under the subcontractor's lien for the same transaction.—*Suisun Lumber Co. v. Fairfield School Dist.*, 19 Cal. App. 587, 127 Pac. 349.

As to conclusiveness in action of account as bar to subsequent suits for omitted items, see note 78 Am. Dec. 769.

As to conclusiveness in foreclosing a mortgage, see note 18 Am. St. Rep. 790.

As to conclusiveness in other actions involving the same questions, see note 38 Am. Rep. 778.

As to conclusiveness on demurrer, see note 44 Am. St. Rep. 566.

As to the conclusiveness of a judgment involving the fact or validity of marriage, see note Ann. Cas. 1912C, 245.

As to elements necessary in another action, see note 8 Am. St. Rep. 229.

Instances of conclusiveness, see notes 14 Am. St. Rep. 250; 15 Am. St. Rep. 142.

17. The position that the judgment in the former action can not be pleaded in this because the one was an action at law and the other a suit in equity is without any sound reason for its support. To sustain that position would be to declare that it is not the subject-matter of the action, but the remedy by which a party may seek, judicially, to assert a right that is the test determinative of the applicability of the plea of *res adjudicata*; but obviously the remedy is not nor could it be made the criterion without upsetting the very object of pleas in estoppel by judgment. If, for example, a county should proceed by the extraordinary legal remedy of *mandamus* to compel a county official to turn over to the public treasury certain moneys which, it was charged, he had collected in his official capacity and should lose out on the merits, could not such county official, in the ordinary action at law thereafter brought by the county to recover the same money, interpose with success the plea of estoppel based upon the judgment in mandate? The question answers itself.—*Sulsun Lumber Co. v. Fairfield School Dist.*, 19 Cal. App. 587, 127 Pac. 349, 352.

18. Same—Persons concluded.—There could be, it seems to us, no proposition less debatable than that, where an action is commenced against a party and a judgment entered for or against him, such judgment, after becoming final, will always operate as an estoppel or bar against the maintenance of another action thereafter brought against such party alone for the same cause, notwithstanding that other parties might have been joined with him in such action, and the subject-matter of the action is adjudicated as to all the parties thereto. In other words, it can not possibly be true that where, as here, a cause of action has been adjudicated as to all the defendants to an action, the judgment therein can not be successfully set up in bar of an action thereafter commenced for precisely the same cause of action against one of such defendants.—*Sulsun Lumber Co. v. Fairfield School Dist.*, 19 Cal. App. 587, 127 Pac. 349, 352.

As to conclusiveness as against holders of unrecorded deeds, see note 31 Am. St. Rep. 217.

As to conclusiveness against indemnitors, see note 22 Am. St. Rep. 204.

As to conclusiveness as to persons affected by decrees in probate, see note 48 Am. Dec. 744.

As to conclusiveness against persons not parties to action, see note 2 Am. St. Rep. 876.

As to the restriction of conclusiveness to party in the capacity in which he sued or defended, see note 7 Am. St. Rep. 175.

19. Same—Title to property.—In an action against a husband and wife, to obtain a decree requiring the wife to convey to the plaintiff the legal title to land standing in her name, on the theory that the same constituted community property of herself and her husband, and that he is the equitable owner thereof by reason of a conveyance thereof from the husband to himself, in which the court found, in accordance with the allegations in the cross-complaint of the wife, that the property was her separate property and was free of all just claims on the part of either the plaintiff or her husband, a judgment in a former action brought by the plaintiff after the conveyance by the husband, to quiet his title against the wife, in which the court found, in accordance with issues raised by the pleadings, that the property was community property, and that the wife held it solely in the capacity of trustee for the marital community, but that the plaintiff was not the owner of the legal title, and was not entitled to take anything by the action, operates, as between the plaintiff and the wife, to estop her from asserting that the property was not community property of her husband and herself, and also operates to estop the plaintiff from claiming, as between himself and the wife, that he acquired the legal title to the property by reason of the deed from the husband, or in any other way.—*Nolan v. Hyatt*, 163 Cal. 1, 124 Pac. 439.

20. Confession—Judgment based upon.—Judgment based upon confession of insolvent debtor made without request on part of creditor and without his knowledge, and entered up at instance of debtor alone, is not judgment within meaning of statute, as creditor is not bound to accept judgment as measure of his rights, nor would such confession bar action brought by him on same gravamen, nor estop party by whom confession was made from denying the facts set forth in it.—*Wilcoxson v. Burton*, 27 Cal. 228, 234, 87 Am. Dec. 66.

21. Judgment without parties, or judgment, however perfect in form, which is attended with none of consequences of a judgment, can be judgment only by pretension, and ratification of such pretended judgment by creditor can not affect rights acquired by third parties prior to ratification and while judgment was one only in name.—*Wilcoxson v. Burton*, 27 Cal. 228, 234, 87 Am. Dec. 66, distinguishing *Bailey v. Bryant*, 41 Mass. (24 Pick.) 198.

22. Conformity to findings.—In an action for damages for breach of a contract for legal services, where the plaintiff attached to his complaint a copy of his contract call-

ing for one thousand five hundred dollars, but made no allegation of non-payment, and the court rendered judgment for one thousand dollars, on appeal on the judgment-roll, such judgment is supported by the findings of fact under the pleadings.—*Newmire v. Ford*, 20 Cal. App. 337, 128 Pac. 952.

23. Construction—As to jurisdiction.—This section and section 1003, post, contain no prohibition of courts entering intermediate determination as exigencies of case may demand and no conflict is found between these sections and section 187, ante, relating to means provided for exercising jurisdiction.—*Thompson v. White*, 63 Cal. 505, 508.

24. Same—As to decrees in divorce.—This section must be read in connection with sections 138 and 139 Civil Code, in action for divorce and for custody and control of minor children.—*McKay v. McKay*, 125 Cal. 65, 68, 57 Pac. 677.

25. Constructive service—Affidavit, conclusiveness of.—The law permits, under some circumstances, a plaintiff to procure an order for the publication of summons where the defendant in the action, after the exercise of due diligence on the part of the plaintiff, can not be found within the state, and the fact is so made to appear by affidavit on behalf of the plaintiff. Such an affidavit is always *ex parte*, and the court, when it is sufficient in form, must accept and act upon it and grant the order. But in proceeding to avail himself of this statutory mode for constructive service of summons, a plaintiff must, in fact, have exercised due diligence. A mere formal compliance with the provisions of the statute, or a statement to that effect in his affidavit, will not suffice; nor will an order for publication based upon such affidavit, or a judgment following a service by publication thereon, be conclusive of the fact that such diligence was exercised. The question is open as between the parties under a direct attack on the ground of fraud in procuring the judgment. When a false affidavit is presented to the court for the purpose of obtaining an order for the service of summons by publication, this, of itself, is an act of fraud, both upon the court which was induced to make the order thereon and equally a fraud upon the defendant in the action.—*Stern v. Judson*, 163 Cal. 726, 127 Pac. 38.

As to conclusiveness of sheriff's return of service of process, see note 124 Am. St. Rep. 756.

As to the service of process upon a resident outside of state limits and the right of the state to authorize a personal judgment thereupon, see note Ann. Cas. 1912D, 695.

26. Evidence held sufficient to show that the plaintiff, in a former action, did not use bona fide diligence to ascertain the

whereabouts or address of the defendant therein, notwithstanding the recital of such diligence in an affidavit for publication.—*Stern v. Judson*, 163 Cal. 726, 127 Pac. 38.

27. Decree—Of dissolution of partnership, sale of property, and judgment therein against partner for moneys due from him to partnership, is final money judgment within meaning of statute, as by such decree whole matter in litigation is determined, nothing remaining to be done except to execute decree by sale of property and distribution of proceeds in manner fixed by decree itself; this being mere ministerial duty, and nothing left for court to do except to see that decree was properly executed.—*Clark v. Dunnam*, 46 Cal. 204, 205, 208.

28. Same—Refusing to set aside homestead is in its essentials judgment.—In re *Harrington's Estate*, 147 Cal. 124, 81 Pac. 546, 548.

29. Default judgment—Entry by clerk.—Where there is no answer on file, and the time for pleading to the complaint has expired, the clerk would be warranted in entering a default judgment.—*Rose v. Leland*, 20 Cal. App. 502, 129 Pac. 599, 600.

As to default judgment on failure to answer, see, post, § 585 and note.

30. The clerk of the superior court, in entering a default judgment, acts ministerially, and in no case is he warranted in making such entry where his authority so to do depends upon a determination of the sufficiency, either as to the substance or form, of a document on file purporting to constitute an answer to the complaint.—*Rose v. Leland*, 20 Cal. App. 502, 129 Pac. 599, 600.

31. Same—Vacating—Defect in affidavit of service.—A person seeking to vacate a default judgment against him, who admits that the summons was in fact duly and regularly served, can not complain of defects in the affidavit of service. By his own admission, the affidavit has served its purpose, nor can he have such judgment set aside in the absence of "mistake, inadvertence, surprise, and excusable neglect."—*Hamilton v. Hamilton*, 20 Cal. App. 117, 128 Pac. 338, 339.

As to vacating default judgments, see, ante, § 473 and note.

32. Same—Same—Discretion of court.—Where the trial court believed the defects in the complaint, so far as the defendants were concerned, were incurable, and was on the point of sustaining the last demurrer without leave to amend, in view, further, of the opposing statements of fact in the affidavits, and, finally, of the unquestionable fact that the attorneys for the plaintiff neglected for forty-eight days to secure any stipulation or extension of time, it can not be said that the statement attributed to defendants' attorneys, that he would not take a default against plaintiff, meant that plaintiff might go on indefinitely or forever

without pleading. The delay of forty-eight days was unexplained and unexcused; hence it can not be said that there was any abuse of discretion in the order appealed from.—*Lang v. Lilley & Thurston Co.*, 164 Cal. 294, 128 Pac. 1026, 1027.

33. Defined by section is judgment of which copy is to be included in judgment-roll.—*Colton L. & W. Co. v. Swartz*, 99 Cal. 278, 282, 33 Pac. 878.

34. Distinguished from order.—Where, on January 9th, a motion for a nonsuit was renewed by the defendant, a formal judgment of nonsuit in pursuance of this ruling being drawn and signed by the judge on January 10th, and on January 12th, this formal judgment was filed and entered, in the proper book, the court had not lost jurisdiction of the case, and its judgment entered on January 12th was the only judgment in the cause.—*In re Purcell's Estate*, 164 Cal. 300, 128 Pac. 932, 937.

As to order dissolving attachment not being a judgment, see par. 71, this note.

35. Doctrine of merger and bar—In general.—A merger takes place only where a security or indebtedness of an inferior passes into one of a superior degree, and as a judgment rendered upon a judgment of another state is of equal dignity, the former is not merged in the latter.—*Lilly-Brackett Co. v. Sonnemann*, 163 Cal. 632, 126 Pac. 483.

As to merger of mortgage lien in judgment, see note 38 Am. Rep. 133.

As to merger of one judgment into another, see note 92 Am. St. Rep. 778.

As to merger on recovery against one joint tort-feasor, see note 92 Am. St. Rep. 885.

36. Same—Foreign judgment.—The technical doctrine of merger is not applicable, in case of judgments rendered in different states, and a judgment rendered in a foreign state is enforceable in this state even though a judgment upon such judgment has been previously obtained in a third state.—*Lilly-Brackett Co. v. Sonnemann*, 163 Cal. 632, 126 Pac. 483.

37. Same—Same—Editorial note.—Point new in this state; authorities in other states very conflicting.

38. Same—Splitting causes of action—Single and entire cause of action.—Where one who has pledged shares of stock to another as security for the payment of a loan, and has been forced to sue to regain the stock upon offer of payment and has actually recovered judgment against the pledgee together with actual possession of the stock, whether this action be regarded as one in claim and delivery, or as a suit in equity for specific performance of the agreement to return pledged property, on payment of the debt, there can be no doubt that in that action plaintiff was entitled to recover all damages sustained through

the wrongful refusal of defendant to redeliver the property, but a judgment in such case is conclusive of all matters arising out of the withholding of the stock, which might have been presented to the court for determination, and such judgment will be a bar to a subsequent action for damages caused by wrongfully withholding such stock.—*Van Horne v. Treadwell*, 164 Cal. 620, 180 Pac. 5.

39. Entry of judgment—In general.—The entry of a judgment consists in the recording of it in the judgment-book; hence, in a legal sense, there can be no record of a judgment until so entered.—*Wilson v. Durkee*, 20 Cal. App. 492, 129 Pac. 617, 618.

See, post, §§ 664, 668 and notes.

As to judgment becoming final on entry, see par. 46, this note.

40. Same—In vacation under Practice Act—Editor's note.—Prior to enactment of code provisions, sections 48, 74, ante, doing away with terms of court, original section relating to judgment contained the words, "and may be entered in vacation." The following cases construe this original section, holding that rule that judgment can not be entered or execution issued in vacation never had any existence in this state under Practice Act.—*Marysville v. Buchanan*, 3 Cal. 212, 214; *McMillan v. Richards*, 12 Cal. 467, 468; *People ex rel. Wicks v. Jones*, 20 Cal. 50, 56; *Ex parte Bennett*, 44 Cal. 84, 87.

41. Same—More than one entry permitted.—It is of no consequence whether judgment consists of only one or of more than one entry; and where judgment in ejectment was rendered in behalf of plaintiff, and on same day decree of injunction perpetually restraining defendants from committing waste was signed and filed in clerk's office, and on following day entered in judgment-book; held that judgment in ejectment and decree of injunction constituted one judgment, and defendants having appealed from latter judgment, decree is necessarily included in appeal.—*McGarrahan v. Maxwell*, 28 Cal. 75, 87.

42. Same—Presumption as to entry.—Where from the exemplified copy of the record, it is shown that the clerk of a sister state, by an inspection of the record therein, finds a judgment against defendant, such judgment will be presumed to have been entered by the clerk of the court wherein it was given, in a book kept by him for that purpose, since official duty is presumed to have been regularly performed.—*Wilson v. Durkee*, 20 Cal. App. 492, 129 Pac. 617.

43. Expiration of term of judge—Effect of.—Where decision was rendered by judge before going out of office, and entry of judgment made by clerk after term had expired, and when his successor was in office, held that entry of judgment being but ministerial act could be performed by clerk after term of former judge had expired with as much effect as before.—*Crim v.*

Kessing, 89 Cal. 478, 489, 23 Am. St. Rep. 491, 26 Pac. 1074.

44. Final judgment—Action upon judgment will not lie until judgment has become final.—Feeney v. Hinckley, 134 Cal. 467, 468, 86 Am. St. Rep. 290, 66 Pac. 580. See Hills v. Sherwood, 33 Cal. 474, 479; Gillmore v. American C. I. Co., 65 Cal. 63, 2 Pac. 882.

As to action upon judgment, see par. 1, this note.

45. Every order of court or judge is in one sense a judgment. Term "final judgment" means ultimate or last judgment which puts an end to suit or proceeding. In matter of Smith, 98 Cal. 636, 639, 33 Pac. 744.

46. Same—Entry of—Final on.—A judgment becomes final upon its entry, not only as to matters actually determined, but also as to every other matter which parties might have litigated in cause and have had decided.—McKay v. McKay, 125 Cal. 65, 67, 57 Pac. 677.

As to entry of judgment, see pars. 39-42, this note.

47. Same—Legal or equitable relief.—Decision of court, if it amounts to final determination of rights of parties touching matters in controversy, is a judgment; and it is immaterial whether court grants relief to each of parties, or to one party only, or whether relief is in its character legal or equitable, or both.—McGarrahan v. Maxwell, 28 Cal. 75, 85.

48. Same—One judgment only is to be included in judgment-roll, and such judgment is one provided by this section as constituting "final determination" of rights of parties in action.—Colton L. & W. Co. v. Swartz, 99 Cal. 278, 282, 33 Pac. 878.

49. Same—Order distinguished from final judgment.—Distinction between order and final judgment is that former is decision made during progress of cause, either prior or subsequent to final judgment, settling some point of practice or some question collateral to main issue presented by pleadings, and necessary to be disposed of before such issue can be passed upon by court, or necessary to be determined in carrying final judgment into execution. The latter is determination of court upon issues presented by pleadings, which ascertains and fixes absolutely and finally rights of parties in particular suit in relation to matter in litigation, and puts an end to suit.—Wells v. Torrance, 119 Cal. 437, 440, 51 Pac. 626. See Loring v. Illsley, 1 Cal. 24, 28; McGuire v. Drew, 83 Cal. 225, 232, 23 Pac. 312; In matter of Smith, 98 Cal. 636, 640, 33 Pac. 744.

As to order discharging attachment not a judgment, see par. 71, this note.

50. Order as distinguished from final judgment is judgment or conclusion of court upon any motion or proceeding not declared determining rights of parties.—In matter of Rose, 80 Cal. 166, 170, 22 Pac. 86.

51. Same—Order settling account of administrator is not final determination of rights of parties in action or proceeding constituting judgment within meaning of this section, or within meaning of section 939, post, and especially where in settling account portions thereof were left unsettled and undetermined and referred for further consideration to new account which administrator was to present.—In matter of Rose, 80 Cal. 166, 170, 22 Pac. 86.

52. Same—Order settling receiver's account, where such account had been presented for settlement after order appointing receiver had been annulled, and where order finally determined rights of proponents therefrom, is final determination of rights parties within meaning of this section, and appeal therefrom, where taken, should be taken within six months after its entry.—Los Angeles v. Los Angeles C. W. Co., 134 Cal. 121, 124, 66 Pac. 198. See Trustees of I. I. F. v. Greenough, 105 U. S. 527, 26 L. ed. 1157; Hovey v. McDonald, 109 U. S. 150, 27 L. ed. 888, 3 Sup. Ct. Rep. 136.

53. Same — Same — Distinguished from Rochat v. Gee, 91 Cal. 355, 358, 27 Pac. 670; Illinois T. & S. Bank v. Pacific R. Co., 99 Cal. 407, 33 Pac. 1132, where orders appealed from were for settlement of receiver's accounts, which had been passed by court while he was in exercise of his office and which did not finally determine rights of parties.

54. Same—Purpose of section is not to abolish power of court of equity to pronounce what in equity practice was called interlocutory decree or decretal order, but only to provide that that which finally determines rights of parties should be called judgment, and that every other direction of court or judge made or entered in writing should be denominated an order.—Thompson v. White, 63 Cal. 505, 508.

55. This section and section 1003, post, were taken from New York code of procedure, and purpose thereof, as explained by codifiers of that state, is to avoid confusion incident to use of word "judgment" in two senses, one as interlocutory and other as final, it being better to use word only in latter sense and to designate all other written directions of court or judge as orders.—Thompson v. White, 63 Cal. 505, 508.

56. Same—Sections compared.—Judgment may be final in sense of term as used in this section and section 1908, post, and not final as term is used in section 939, post.—People ex rel. Bank Comrs. v. Mendocino Co., 133 Cal. 107, 108, 65 Pac. 124.

57. Same—Statute of limitations—When action on judgment barred.—Five years' statute of limitations under section 336, ante, barring action upon judgment, commences to run from date when judgment

has become final determination of controverted matters between parties litigant; and where appeal has been taken from judgment, five years can not be said to have commenced until final determination following such appeal, or in event no appeal is taken, then only when time within which such appeal might be taken has fully elapsed.—*Feeney v. Hinckley*, 134 Cal. 467, 468, 86 Am. St. Rep. 290, 66 Pac. 580.

58. Statutes of limitation do not begin to run before entry of judgment, and judgment is not final until recorded.—*Crim v. Kessing*, 89 Cal. 478, 491, 23 Am. St. Rep. 491, 26 Pac. 1074. See *Condee v. Barton*, 62 Cal. 1.

59. Finding as to corporate capacity.—A finding in an action by a corporation upon a foreign judgment that the plaintiff was a corporation existing under the laws of another state, is sufficiently sustained by the recital in the contract sued on in the action in which the judgment was obtained that the plaintiff was a corporation under a certain name, and by the fact that the judgment was recovered under such name.—*Cellulose Package Mfg. Co. v. Calhoun*, 166 Cal. 513, 137 Pac. 238.

60. Foreign judgment—Want of jurisdiction.—"Where a judgment recovered in one state is pleaded or presented in the courts of another state, whether as a cause of action or a defense or as evidence, a party sought to be bound or affected by it may always impeach its validity and escape its effect by showing that the court which rendered it had no jurisdiction over the parties or the subject-matter of the asking." Whatever may have been the law as announced by the early decisions, it is now well settled that the record in such case is not conclusive upon the question of jurisdiction, but may be controverted by extraneous evidence.—*Fox v. Mick*, 20 Cal. App. 599, 129 Pac. 972.

61. Form of judgment—Immaterial.—No particular form for judgment is prescribed in statute, but it must be rendered by court in such mode that will conform to cause of action stated and proof adduced on trial.—*McGarrahan v. Maxwell*, 28 Cal. 75, 85.

As to substance, not form, determining validity of judgment, see par. 86, this note.

62. Impeachment of—By evidence aliunde.—A judgment can not be impeached by any evidence outside of its own record; even inconsistency between findings and judgment will not impeach judgment, for question whether findings support judgment—in other words, whether judgment is erroneous—can not be raised in collateral action.—*Crim v. Kessing*, 89 Cal. 478, 490, 23 Am. St. Rep. 491, 26 Pac. 1074. See *Johnston v. San Francisco S. U.*, 75 Cal. 134, 139, 7 Am. St. Rep. 129, 16 Pac. 753.

As to collateral attack on judgment, see paras. 12-15, this note.

63. Same—Homestead proceeding in probate.—A judgment of court in probate in homestead proceeding raises estoppel against party seeking to have homestead right set aside, where right is denied upon ground that such person was not widow of deceased, and question of widowhood can not be afterwards raised in attempted litigation of same claim upon distribution.—*In re Harrington's Estate*, 147 Cal. 124, 81 Pac. 546, 547.

64. Judgment pro confesso on cross-bill in equity in federal court is interlocutory and not final, and where a motion was pending at the time such judgment was rendered, to dismiss for want of jurisdiction, the court had power, after adjournment of term, to set aside such judgment and dismiss the bill for want of equity, such dismissal carrying with it the entire fabric of the cross-bill, and no action can thereafter be maintained in the state court thereon, or to annul the order vacating the same.—*Blythe Co. v. Banker's Investment Co.*, 147 Cal. 95, 81 Pac. 281.

65. Law of case—Relative rights of parties determined on appeal, decision is as to that subject and to that extent law of case on subsequent appeal.—*Haggin v. Clark*, 71 Cal. 444, 452, 9 Pac. 736, 12 Pac. 478. See *Davidson v. Dallas*, 15 Cal. 75; *Leese v. Clark*, 20 Cal. 387; *Pico v. Cuyas*, 48 Cal. 639.

As to law of case, see, ante, § 53, note Part XVI.

66. Matters concluded—Essentials of jurisdiction—Facts necessary to sustain.—In 1862 a franchise was granted to construct a bridge and collect tolls thereon for twenty years. In 1885 the county supervisors passed an order declaring such bridge to be a free public bridge, which order was reviewed on certiorari and judgment rendered declaring the action of the county board to be in excess of its jurisdiction and annulling the order complained of. All that was adjudged in the judgment in certiorari was that the board of supervisors had no jurisdiction to make an order declaring the bridge to be a free public highway, but such judgment did not decide that such bridge was not a public highway. "That only is deemed to have been adjudged in a former judgment which appears on its face to have been so adjudged or which was actually and necessarily included therein or necessary thereto."—*Gardella v. Amador County*, 164 Cal. 555, 129 Pac. 993, 994.

67. Opening or setting aside—Affidavit on—Necessity for.—When the power under section 473, ante, to enlarge the time for answer had been exercised, and an order made from the bench enlarging such time, it was the ministerial duty of the clerk to have entered such order in the minutes, and a party defendant who answers and tenders for filing the answer within such enlarged time is not guilty of any mistake or neglect excusable or otherwise; and when the

attention of the court is called to the failure of the clerk to enter the proper minute order and the entry of default on account thereof and the rendition of judgment based upon such unauthorized default, it possesses the power, and it is the duty of the court to vacate such unwarranted proceeding, and restore the record to the condition in which it would have been, had the proper order of the court been recognized and obeyed. The enlarged time given defendant by a court to answer is as complete and protected from default as is the original time given to answer, as specified in the summons, in which latter case no affidavit of merits is requisite.—*Quan Quock Fong v. Lyons*, 20 Cal. App. 668, 130 Pac. 33, 34.

As to opening and setting aside judgments, see, ante, § 473, note Parts XXV, XXVII.

68. Same—Affidavit of merits—Sufficiency of.—An affidavit attached to a motion to set aside a default which only stated "that affiant was fully advised of the facts and circumstances involved in the defense," was insufficient as an affidavit of merits.—*Quan Quock Fong v. Lyons*, 20 Cal. App. 668, 130 Pac. 33, 34.

As to affidavit of merits and its sufficiency, see, ante, § 473, note Part II.

69. Same—Notice of application.—Section 1010, post, requires that the notice of motion to set aside a default shall state when the motion will be made, the grounds upon which it will be made, and the papers, if any, upon which it will be based. Where the notice of motion stated that the grounds were based upon the affidavit attached to and forming a part of the motion, this affidavit disclosed that the court had announced from the bench and entered upon the court calendar an order giving defendants until a certain date in which to answer, and reading this motion and affidavit together they state in a manner plainly to be understood that the motion would be based upon the grounds that the entry of default was made prematurely and within the time allowed by the court for answering.—*Quan Quock Fong v. Lyons*, 20 Cal. App. 668, 130 Pac. 33, 34.

70. Operative as bar.—Where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as a part of the subject in contest, but which was not brought forward only because they have through negligence, inadvertence or even accident, omitted part of their case. The plea of res adjudicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form

an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have put forward at the time.—*Sulsun Lumber Co. v. Fairfield School Dist.*, 19 Cal. App. 587, 127 Pac. 349, 354.

71. Order dissolving attachment—Not a judgment.—An order discharging an attachment is not a judgment.—*Crews v. Mayo*, 165 Cal. 493, 132 Pac. 1032.

As to order distinguished from judgment, see pars. 34, 49-53, this note.

72. Power of courts over judgment.—Where procedure is regulated by statute, jurisdiction of courts over subject-matter of action, as well as over parties, terminates with entry of final judgment therein, except for purpose of enforcing judgment and carrying out its provisions, or for correcting mistakes in record upon proper application therefor.—*McKay v. McKay*, 125 Cal. 65, 67, 57 Pac. 677.

73. Presumption as to validity.—All intendments are in favor of the validity of judgments of courts of general jurisdiction, and the jurisdiction of such courts in rendering a particular judgment is conclusively presumed to have been acquired, unless the record itself shows the contrary.—*Bagley v. City and County of San Francisco*, 19 Cal. App. 255, 125 Pac. 931.

74. Same—Identity of persons.—Notwithstanding the established rule that the same person can not be both plaintiff and defendant in an action, even though he sue in one capacity and defend in another, if the action has gone to judgment, and the judgment is made the subject of collateral attack, mere identity of name will not be taken to establish that the plaintiff and the defendant are the same person. On the contrary, as every presumption is in favor of the judgment, it will be presumed that the plaintiff, and the defendant, although bearing the same name, were different persons.—*Buckeye Refining Co. v. Kelly*, 163 Cal. 8, 124 Pac. 536.

75. Rendition of judgment.—Under provisions of this code whenever findings are required there can be no rendition of judgment until they are made and filed by clerk.—*Crim v. Kessing*, 89 Cal. 478, 488, 23 Am. St. Rep. 491, 26 Pac. 1074.

76. Res adjudicata.—Determination of fact is forever binding in every court between parties to that litigation and their privies, where issue vital to controversy has been tried, and judgment depending for its sufficiency upon finding of fact becomes final.—*In re Harrington's Estate*, 147 Cal. 124, 81 Pac. 546, 548. See *Quirk v. Rooney*, 130 Cal. 505, 62 Pac. 825; *Bingham v. Kearney*, 136 Cal. 175, 68 Pac. 597.

As to effect of judgment in criminal case as res adjudicata, see note 103 Am. St. Rep. 418.

As to the judgment being proof that the matter is *res judicata*, see note 44 Am. St. Rep. 562.

As to what facts are not *res judicata* although apparently found by the court, see note 96 Am. St. Rep. 775.

77. Where the action is against a number of defendants and the merits have been litigated and adjudicated as to all, and the same plaintiff thereafter proceeds in a subsequent action against one of said defendants for identically the same cause of action, then the later action is between the "same parties" as those to the former, in the sense that the plea of *res adjudicata* may with perfect legal propriety be set up, for, as between the plaintiff and the party defendant to the later action, the merits as to the same cause of action have been as definitely adjudicated as if such defendant were the only party defendant to the first. —*Suisun Lumber Co. v. Fairfield School Dist.*, 19 Cal. App. 587, 127 Pac. 349, 352.

78. Restoration of destroyed judgment. —Where the records of an action were destroyed by a conflagration while a motion for a new trial was pending, it was held that plaintiff had sufficient interest in the case to entitle him to an order for the restoration of the records under the act of June 16, 1906 (Stats. Ex. Sess. 1906, p. 73), which provides for the restoration of court records which have been lost, injured or destroyed by conflagration or other public calamity. —*Foerst v. Kelso*, 163 Cal. 436, 125 Pac. 1054.

79. The purpose of a proceeding under act of June 16, 1906 (Stats. Ex. Sess. 1906, p. 73), providing for the restoration of court records which have been lost, injured or destroyed by conflagration or other public calamity, is to permit a person apparently having some interest in a lost record, even though his interest is perhaps doubtful, to have the same restored, so that it may afford conclusive evidence of its contents and obviate the necessity of restoring to secondary evidence in any litigation that may arise to enforce rights or obligations established by such records; it can not be complicated by adding other issues with the question of the restoration of the record, and, as a rule, the regularity or legal effect of the record will not be considered. —*Foerst v. Kelso*, 163 Cal. 436, 125 Pac. 1054.

80. An application for the restoration of the judgment-roll in an action under the provisions of the act of June 16, 1906 (Stats. Ex. Sess. 1906, p. 73), providing for the restoration of court records lost, injured or destroyed by conflagration or other public calamity, does not bar any question as to the effect of the roll when restored, or as to the right of defendant to relief by or on account of the facts set up by him in an affidavit, to the effect that the court reporter's notes and transcript had been destroyed and that it was not possible for

him to prepare a bill of exceptions. —*Foerst v. Kelso*, 163 Cal. 436, 125 Pac. 1054.

81. Signature of judge. —There is no provision in our statute requiring any judgment to be signed by judge, and judgment which is produced from original records of court in which it was rendered needs no signature nor exemplification. Signature of judge is merely to give clerk surer means of accurately entering what has been adjudged. —*Crim v. Kessing*, 89 Cal. 478, 489, 23 Am. St. Rep. 491, 26 Pac. 1074. See *Clink v. Thurston*, 47 Cal. 21, 29; *In matter of Cook*, 77 Cal. 220, 227, 11 Am. St. Rep. 267, 1 L. R. A. 567, 17 Pac. 923, 19 Pac. 431.

See note 11 Am. St. Rep. 279.

82. Satisfaction of judgment—Entry of record. —Even if the sheriff were disqualified, on general principles, from levying the execution upon the judgment against himself and his sureties, the other judgment debtors had the right, under section 716, post, after the execution had been regularly issued, to satisfy the same without a formal levy. Upon making such payment, and the money having gone to the party entitled to receive it, they were entitled to have the judgment against them satisfied of record. —*Buckeye Refining Co. v. Kelly*, 163 Cal. 8, 124 Pac. 536.

83. A judgment-debtor, pending an appeal by him from the judgment, may waive his right to prosecute the appeal, and may satisfy the judgment by paying the amount thereof on an execution levied thereon against the judgment-creditor. He may do so, even if execution of the judgment had been stayed by an undertaking. —*Buckeye Refining Co. v. Kelly*, 163 Cal. 8, 124 Pac. 536.

84. Validity and effect of judgment.—In general. —The validity and effect of a judgment is governed by the laws of the state where it is rendered. —*Fox v. Mick*, 20 Cal. App. 599, 129 Pac. 972, 973.

See par. 86, this note.

As to the validity and effect of a judgment for or against insane person, see note 130 Am. St. Rep. 841.

As to the validity and effect of a judgment for or against a deceased person, see note 126 Am. St. Rep. 622.

85. If it be made to appear that the judgment sued upon in another state is void or for any reason nonenforceable, by statute or otherwise, in the courts of the state wherein rendered, it must be held likewise not enforceable in an action brought thereon in a sister state. —*Fox v. Mick*, 20 Cal. App. 599, 129 Pac. 972, 973.

86. Same—Substance, not form. —In the absence of any particular form being prescribed by statute, the test of the sufficiency of a judgment must be the substance rather than its form. —*Hentig v. Johnson*, 8 Cal. App. 221, 225, 96 Pac. 390.

As to form of judgment, see par. 61, this note.

87. **Waiver of findings—Effect of.**—Whenever findings are waived or are not required, entry of court's decision in minutes of court constitutes "rendition of judgment" in same manner as under Practice Act.—

Crim v. Kessing, 89 Cal. 478, 488, 23 Am. St. Rep. 491, 26 Pac. 1074. See *Gray v. Palmer*, 28 Cal. 416; *Genella v. Relyea*, 32 Cal. 159; *In matter of Cook*, 77 Cal. 220, 111 Am. St. Rep. 267, 1 L. R. A. 567, 17 Pac. 923, 19 Pac. 431.

§ 578. JUDGMENT MAY BE FOR OR AGAINST ONE OF THE PARTIES.

Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves.

History: Enacted March 11, 1872, re-enactment of § 145 of Practice Act.

JUDGMENT FOR OR AGAINST ONE PARTY.

1. Action for wrong—In general.
2. Same—Case distinguished.
3. Action to recover money—Change of interests of parties—Variance between findings and allegations of complaint.
4. Common-law rule—In general.
- 5, 6. Same—Abrogated.
- 7, 8. Same—Changed by code.
9. Construction—Language of section 145, Practice Act.
- 10, 11. Same—Terms of above section do not limit rule.
12. Defendants severally sued—Separate judgments—Vacating.
13. Enactment of section.
14. Husband as party—Failure to serve husband with summons.
15. Joint and several contracts—Rule of pleading.
16. Joint tort-feasors—Common-law rule—Modified by section.
17. Judgment against co-defendant—On pleadings.
18. Same—Copartner—Judgment against.
19. Misjoined plaintiffs—Judgment for interested, and dismissal as to plaintiffs without interest.
- 20, 21. Omission to enter judgment by default.
22. One of several plaintiffs—May recover.
23. Reversal of judgment—Joint tort-feasors.
24. Sham answer.
25. Tort-feasors, joint—Amendment dismissing as to one.
26. Same—Verdict against two or more—New trial as to some—Effect as to others.

As to judgments generally, see, ante, § 577 and note.

As to vacating, modifying, etc., judgments, see, ante, § 743 and note.

1. **Action for wrong—In general.**—Judgment is clearly erroneous where damages allowed thereby are severed in action for wrong, in which both defendants joined.—*McCool v. Mahoney*, 54 Cal. 491, 493.

2. **Same—Case distinguished.**—*Nichols v. Dunphy*, 58 Cal. 605, 607, holding that where, in action to recover damages alleged to have been caused by neglect of defendants, and where on appeal judgment was reversed against one defendant, that judgment against other defendant was unaffected by appeal of co-defendant and by subsequent proceedings thereon.

3. **Action to recover money—Change of interests of parties—Variance between findings and allegations of complaint.**—In a case in which the complaint charges that the defendants were jointly indebted to the plaintiff in a specified sum, for money jointly had and received by the defendants, to and for the use of the plaintiff and the court renders a judgment variant from the allegations in the complaint dividing the amount of money due from the defendants according to their respective interests as both at the time of the trial, was within the power of the court under the provisions of the above section and sections 579 and 580, post.—*Kirtley v. Perham*, 176 Cal. 333, 168 Pac. 351.

4. **Common-law rule—In general.**—At common law in action against two or more defendants on alleged joint undertaking or contract, judgment was required to be against all defendants, or in favor of all, and in such case if plaintiff failed to establish joint contract or undertaking, all defendants were entitled to verdict and judgment, although it was proved that one of them would have been liable if suit had been brought against him alone.—*Dobbs v. Purington*, 136 Cal. 70, 71, 68 Pac. 323.

5. **Same—Abrogated.**—The common-law rule to the effect that in an action on a joint contract the plaintiff must recover against all or none of the defendants has been abrogated in this state and in such an action the plaintiff is entitled to a judg-

ment against those of the defendants who are shown to be liable on the obligation, subject perhaps to the qualification that the defendants held liable are entitled to be protected against any material variance between the pleadings and the proof.—*Redwood City Salt Co. v. Whitney*, 153 Cal. 421, 423, 95 Pac. 885.

6. The common-law rule that in an action on a joint contract recovery must be against all or none of the defendants, is held to have been abrogated in this state by the rule of this section, as construed by the courts.—*Redwood City Salt Co. v. Whitney*, 153 Cal. 423, 95 Pac. 885.

7. **Same—Changed by code.**—Under the code rule at common law as to entry of judgment upon joint undertaking or contract has been changed, and where two persons are sued jointly upon joint contract, judgment may now be rendered in favor of plaintiff against one of defendants, or in favor of one of defendants against plaintiff.—*Dobbs v. Purington*, 136 Cal. 70, 71, 68 Pac. 323. See *Lewis v. Clarkin*, 18 Cal. 399; *People v. Frisbie*, 18 Cal. 402; *Shain v. Forbes*, 82 Cal. 577, 583, 23 Pac. 198; *Bailey L. Co. v. Hall*, 110 Cal. 490, 492, 42 Pac. 962.

8. Rule at common law that in action against two or more defendants upon alleged joint contract or liability, judgment was required to be against all defendants or in favor of all was changed by section 145, Practice Act, which act was afterwards adopted in *hæc verba* in this section with same effect.—*Morgan v. Righetti*, 5 Cal. Unrep. 397, 45 Pac. 260.

9. **Construction—Language of section 145, Practice Act** (being same as code section) is general, and actions arising out of contract are not to be excluded from operation of its provisions. While it would not do to give such construction as to enable party to prosecute his action against whomsoever he might desire without prejudice to his right of recovery against those really liable, its effect is to modify the common-law rule and limit its application with reference to judgment against joint debtors.—*Lewis v. Clarkin*, 18 Cal. 399, 401.

10. **Same—Terms of above section do not limit rule** declared to actions in which defendants have appeared and answered, but include as well those in which some of defendants have made default, the only limitation in such case being that found in section 580, post, that relief shall not exceed that which plaintiff shall have demanded in complaint.—*Bailey L. Co. v. Hall*, 110 Cal. 490, 492, 42 Pac. 962.

11. This section has no application to case where to apply it would be to authorize rendition of judgment for party in whose favor no cause of action is stated in complaint, and against party who has had no notice of any such cause of action or any opportunity to meet it.—*Weinreich v. John-*

ston, 78 Cal. 254, 257, 20 Pac. 556. See *Cotes v. Campbell*, 3 Cal. 191; *Curry v. Roundtree*, 51 Cal. 184; *McCord v. Seale*, 56 Cal. 262.

12. **Defendants sued severally—Separate judgments—Vacating.**—Where in an action by judgment-creditors of a corporation to recover from defendants as stockholders therein the amount of plaintiff judgment out of the unpaid subscriptions of such stockholders and the court made findings and conclusions of law, in the later it was found that the plaintiff was entitled to judgment against the defendants for the amounts to be applicable out of the unpaid subscriptions, respectively, to the plaintiff's judgment against the corporation, and entered judgment in accordance with such conclusions of law, and thereupon the defendants separately moved the court under the provisions of 663, post, to vacate the judgment so entered and to enter a judgment in favor of each of said defendants, and the court thereafter granted each of the said motions, thereupon each proceeded to enter a judgment in favor of the moving party against the plaintiff, thus in some two judgments were finally entered in the action but were in reality the same in so far as the plaintiff was concerned; on appeal the court held that in as much as the complaint against each of the defendants was several, as were also their defenses, which were separately and severally made, under the provisions of the above section the several judgments entered by the court were proper.—*Wilkins v. Grant*, — Cal. App. —, 189 Pac. 319, following the doctrine in *Shain v. Forbes*, 82 Cal. 577, 23 Pac. 198.

13. **Enactment of section.**—This section of the code, which was adopted in *hæc verba* from section 145, Practice Act, was re-enacted presumably with construction given in cases construing said section of the Practice Act, and where case was decided under said section of Practice Act questions so determined will be held conclusive of questions presented upon appeal after code section went into effect.—*Morgan v. Righetti*, 5 Cal. Unrep. 397, 45 Pac. 260. See *Rowe v. Chandler*, 1 Cal. 167; *Lewis v. Clarkin*, 18 Cal. 399; *People v. Frisbie*, 18 Cal. 402; *Shain v. Forbes*, 82 Cal. 577, 583, 23 Pac. 198.

14. **Husband as party—Failure to serve husband with summons.**—By this section and section 579, post, although court is authorized to enter judgment for or against one or more of several defendants, this applies only to cases in which such judgments are proper under rules established by code or general principles of law, where persons are severally liable or jointly liable, as in case of partners, etc., but not in case of suit where husband is joined as necessary party under express provisions of statute, and where he has no other interest in subject-matter of litigation, and held, therefore, that it was error to enter judgment

against wife before husband was served with summons.—*McDonald v. Porsh*, 138 Cal. 301, 302, 68 Pac. 817.

15. Joint and several contracts—Rule of pleading.—Where a contract is joint and several, so far as parties and pleadings are concerned, the rule is the same under the above section as it is where the obligation consists of a tort and is joint and several.—*Brooke v. Glide*, 39 Cal. App. 534, 179 Pac. 546.

16. Joint tort-feasors—Common-law rule—Modified by section.—In the case of an action against joint tort-feasors upon a joint tort the rule announced by the above section permitting a judgment to be entered against one or more and not against others modifies the common-law rule which requires the judgment to be against all or in favor of all joint tort-feasors.—*Haller v. Yolo Water & Power Co.*, 34 Cal. 317, 167 Pac. 197, following doctrine in *Zibbell v. Southern Pac. Co.*, 160 Cal. 237, 116 Pac. 513; *Dow v. City of Oroville*, 22 Cal. App. 215, 134 Pac. 197, distinguishing *Miller v. Highland Ditch Co.*, 87 Cal. 431, 22 Am. St. Rep. 254, 25 Pac. 550.

As to joint tort-feasors and amendment dismissing as to one, see pars. 25, 26, this note.

17. Judgment against co-defendant—On pleadings.—Where in action brought to recover moneys for goods sold and delivered to defendants, husband and wife, and husband admitted indebtedness against himself and consented that judgment be entered against him, and wife answering separately denied allegations in complaint, and case was thereafter tried by jury, who rendered verdict in favor of defendant wife against plaintiff, without any mention of other defendant, held that it was not necessary for jury to return verdict as to husband, as court would be authorized to enter judgment in favor of plaintiff against husband on pleadings.—*Etter v. Hughes*, 5 Cal. Unrep. 148, 41 Pac. 790.

18. Same—Copartners—Judgment against.—Where action is brought upon notes which are several as well as joint, and prayer of complaint is for judgment "against said defendants" for amount of notes, it is not necessary that judgment should run against defendants as copartners, although defendants alleged and admitted that copartnership existed.—*Bailey L. Co. v. Hall*, 110 Cal. 490, 493, 42 Pac. 962.

19. Misjoinder of plaintiffs—Judgment for interested, and dismissal as to plaintiffs without interest.—Where a party without interest is improperly joined, the proper practice is to dismiss the action as to such plaintiff, and render judgment for or against the others, according to the findings.—*Gillespie v. Gouly*, 152 Cal. 645, 93 Pac. 856.

See, also, par. 22, this note.

20. Omission to enter judgment by default against defendant who did not put in any answer, and where, consequently, there was no issue as to him, is not a thing of which co-defendant can complain.—*Golden Gate M. & M. Co. v. Joshua Hendy Machine Works*, 82 Cal. 184, 185, 23 Pac. 45.

21. Several judgment may be rendered against one member of partnership.—*Shain v. Forbes*, 82 Cal. 577, 584, 23 Pac. 198.

22. One of several plaintiffs—May recover.—Where two or more persons join as plaintiffs in an action at law it is not the law that both must recover or neither.—*Cullen v. Foster*, 39 Cal. App. 625, 179 Pac. 695.

As to judgment for interested plaintiff and dismissal of misjoined plaintiffs, see par. 19, this note.

23. Reversal of judgment—Joint tort-feasors.—The rule of the common law requiring the reversal of the judgment as to all where reversal as to one joint tort-feasor is necessary, does not control in this state, it having been modified by this section.—*Zibbell v. Southern Pac. Co.*, 160 Cal. 248, 116 Pac. 513.

24. Sham answer.—Court abuses its discretion in exercising power to grant continuance in favor of defendant, in case where defendant admittedly has no defense and files sham answer for purposes of delay.—*Herman v. Pacific J. M. Co.*, 131 Cal. 210, 211, 63 Pac. 344.

25. Tort-feasors, joint—Amendment dismissing as to one or more against whom action brought charging injury complained of was caused by their joint act, amendment alleging injury occasioned solely by act of remaining defendant, does not introduce a new cause of action.—*Atlantic & P. R. Co. v. Laird*, 164 U. S. 393, 401, 41 L. ed. 485, 488.

As to modification of common-law rule by above section, see par. 16, this note.

• As to reversal of judgment against joint tort-feasors, see par. 23, this note.

26. Same—Verdict against two or more—New trial as to some—Effect as to others.—In action against several joint tort-feasors, verdict and judgment against two or more, new trial as to one of them does not vacate judgment as to others.—*Fowden v. Pacific Coast S. S. Co.*, 149 Cal. 157, 86 Pac. 178, following *Nichols v. Dunphy*, 58 Cal. 605, distinguishing *Rankin v. Central Pac. R. Co.*, 73 Cal. 93, 15 Pac. 57, and *Chetwood v. California N. Bank*, 113 Cal. 414, 45 Pac. 704. See *Dawson v. Schloss*, 93 Cal. 194, 29 Pac. 31; *Grundel v. Union Iron Works et al.*, 127 Cal. 438, 78 Am. St. Rep. 75, 47 L. R. A. 467, 59 Pac. 826; *Hubbell v. Meigs*, 50 N. Y. 480; *Martin v. Farrell*, 66 App. Div. 179, 72 N. Y. Supp. 934.

§ 579. JUDGMENT MAY BE AGAINST ONE PARTY AND ACTION PROCEED AS TO OTHERS. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper.

History: Enacted March 11, 1872, re-enactment of § 146 of Practice Act.

JUDGMENT AGAINST ONE—PROCEEDING AS AGAINST OTHERS.

1. Court—Authorized to render judgment against one defendant.
2. Default against one party—Proceeding as to others.
3. Early rule—Requiring an entire judgment.
- 4, 5. Joint judgment against all defendants—As copartners.
6. Joint tort-feasors—Default against some—Proceeding as to others.
7. Judgment—As to all except custodian of property.
8. Same—Does not depend upon performance of clerk's duties.
9. Jurisdiction—Recital as to service of summons.
10. Several judgments—May be entered against several defendants.
11. Same—Valid judgment may be rendered against one of several defendants.

As to judgments generally, see, ante, § 577 and note.

1. Court—Authorized to render judgment against one defendant without determining liability of other defendants.—*Kelley v. Plover*, 103 Cal. 35, 36, 38 Pac. 1020.

2. Default against one party—Proceeding as to others.—In an action brought to quiet the title to certain lands the court may, under the express provisions of the above section, render judgment against one or more of the defendants, leaving the action to proceed against the others, in all those cases in which a several judgment will be proper.—*Rauer v. Hertweck*, 175 Cal. 278, 165 Pac. 946, following the doctrine in *Cole v. Roebbling Construction Co.*, 156 Cal. 433, 105 Pac. 255; *Bell v. Staacke*, 159 Cal. 193, 115 Pac. 221.

3. Early rule—Requiring an entire judgment against several joint tort-feasors to be reversed when reversal is necessary as to one has been modified by this and the previous section.—*Zibbell v. Southern Pac. Co.*, 160 Cal. 248, 116 Pac. 513.

4. Joint judgment against all defendants—As copartners can not be rendered where only one of copartners was served.—*Estell v. Chenery*, 3 Cal. 467, 468.

5. See *Stearns v. Aguirre*, 6 Cal. 176, 183, holding that common-law rule was not al-

tered or enlarged by rule declared in Practice Act, this case being afterwards overruled by later cases.

See, ante, § 578 and note pars. 4-11.

6. Joint tort-feasors—Default against some—Proceeding as to others.—In an action against two or more persons as joint tort-feasors where appearance is made by some, and not by others, a default judgment may be entered against those not appearing and a direction that the cause proceed to trial as against those appearing, under the provisions of the above section.—*Cole v. Roebbling Construction Co.*, 156 Cal. 443, 105 Pac. 255; *McNeely v. Superior Court*, 36 Cal. 602, 173 Pac. 102, distinguishing and disapproving *McCool v. Mahoney*, 54 Cal. 491; *Marriott v. Williams*, 152 Cal. 705, 93 Pac. 875.

As to joint tort-feasors generally, see, ante, § 578, note pars. 16, 25, 26.

7. Judgment—As to all except custodian of property.—The court may, in its discretion, render judgment as to all parties except the custodian of the property in controversy, who expresses a willingness to account for the same, and continue the cause as to him.—*Bell v. Staacke*, 159 Cal. 196, 115 Pac. 221.

8. Same—Does not depend upon performance of clerk's duty to make up judgment-roll, or preserving of papers.—*Lick v. Stockdale*, 18 Cal. 219, 223.

9. Jurisdiction—Recital as to service of summons.—Court has jurisdiction to enter judgment against defendant who failed to appear or answer where findings recite and show that such defendant was duly served with process, and this recital is sufficient to show that court had jurisdiction, and finding is sufficient to sustain judgment.—*Lick v. Stockdale*, 18 Cal. 219, 224.

10. Several judgments—May be entered against several defendants occupying different portions of property sued for in action of ejectment.—*Lick v. Stockdale*, 18 Cal. 219, 224.

11. Same—Valid judgment may be rendered against one of several defendants sued upon a joint contract and duly served with summons, even though other defendants are not before the court.—*Kelly v. Bandini*, 50 Cal. 530, 532.

§ 580. THE RELIEF TO BE AWARDED TO THE PLAINTIFF. The relief granted to the plaintiff, if there be no answer, can not exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue.

History: Enacted March 11, 1872, re-enactment of § 147 of Practice Act.

RELIEF THAT MAY BE AWARDED.

I. IN GENERAL, 1-15.

II. RELIEF WHERE ANSWER FILED, 16-57.

III. RELIEF WHERE NO ANSWER FILED, 58-87.

I. IN GENERAL.

1. As to construction of section—Amendment of complaint.
2. Same—Adheres closely to rule in equity.
- 3, 4. Same—Applies to extent of relief.
5. Same—Authorizes court to grant to plaintiff any relief consistent with cause made.
6. Same—Does not refer to any formal part of complaint.
7. Attachment — Complaint without prayer, or a sufficient prayer, as a basis.
8. Conversion—Damages in excess of claim.
9. Interest on judgment.
- 10-14. Judgment—In excess of relief demanded.
15. Modification of judgment.

II. RELIEF WHERE ANSWER FILED.

16. Action for recovery of stock, or its value.
- 17, 18. Action to determine water-right — Claim contested—Prayer not asking judgment as to ownership.
19. Amount of recoupment—To which plaintiff may in future be entitled.
20. Asking greater measure of relief than entitled to—Effect of.
21. Cause must be adjudged by issues—As made by pleading.
22. Character of remedy—How determined.
23. Complaint for deceit—Sufficiency of.
24. Decree—As to requirements of.
25. Same—Directing sale of real property.
26. Same—In action for specific performance.
27. Foreclosure—As to review of various facts.
28. Interest on contract and judgment.
29. Issues made control.
30. Judgment—As to in action to quiet title.
31. Same—As to municipal bonds.
32. Same—For money.
33. Same—For value of personal property.

34. Same—For reconveyance of property fraudulently obtained.
35. Same—Rendered for transfer and delivering up shares of stock.
36. Mistake as to form of remedy—Effect of.
37. Modification of judgment—To meet admissions.
38. Nonsuit—Granting as to proper party—Error.
39. Omission of prayer — Relief to be granted—Statutory provisions.
40. Prayer of complaint—Controls, when.
41. Same—Construction of.
42. Same—For general relief.
43. Same—May be disregarded, when.
44. Relief—Granted upon facts within the issues.
45. Same—Consistent with cause—Abatement of nuisance.
- 46, 47. Same—Court is authorized to grant any relief consistent with cause made.
48. Same—Court can not grant any relief not warranted by averments of complaint.
49. Same—Not measured by exact averments.
50. Same—Relief granted—In action for conversion.
51. Same—Same—Which is nearest possible approach to specific prayer of complaint.
52. Relief demanded—Does not characterize action or limit plaintiff.
53. Relief in cases of fraud—In general.
54. Removal of trustee.
55. Right to recover — Dependent upon prayer.
56. Stockholders—Recovery against.
57. Supreme court will modify judgment—By striking out parts.

III. RELIEF WHERE NO ANSWER FILED.

58. Allowance for counsel fees—In foreclosure action.
59. Same—Not “costs of suit.”
- 60, 61. Construction of section—Relief to be awarded plaintiff.
62. Conveyance to receiver.
63. Decree pro confesso—In equity, effect of.
64. Same—In divorce—No prayer for alimony—Power of court.

65. Excessive relief—Decree granting.
66. Same—Excessive judgment where no answer filed, effect of.
67. Same—Fraud can not be predicated.
68. Same—Prayer that "all defendants convey."
69. Same—Remedy against judgment granting more relief than plaintiff is entitled to.
70. Foreclosure of mortgage—Decree in.
71. Same—Same—Defaulted taxes—Prayer governs recovery.
- 72, 73. Interest upon demand—Error in prayer.
74. Intendments—In favor of regularity of judgment.
75. Judgment by default—Can not give any relief in excess of that demanded.
76. Same—Default admits material allegations of complaint.
77. Nature of action—Is to be determined from character of complaint.
- 78, 79. "Relief demanded in the complaint"—Refers to relief asked in prayer.
- 80, 81. Same—Excessive relief against defaulting defendant.
82. Same—Relief, other and different from that prayed for in complaint.
83. Relief against defaulting or disclaiming defendant—Must be consistent with cause made.
84. Same—In ejectment.
85. Same—Recital that default was regularly entered.
86. Taxes and interest—Allowance of.
87. Title to rents and profits—Improper adjudication upon.

See discussion of section in note Ann. Cas. 1913B, 89.

As to judgments generally, see notes §§ 473 and 577 and notes.

I. IN GENERAL.

1. **As to construction of section—Amendment of complaint.**—Court is authorized by this section to grant prayer for additional relief under original complaint without necessity of amending prayer of original complaint for that purpose alone.—*Kent v. Williams*, 146 Cal. 3, 11, 79 Pac. 527.

2. **Same—Adheres closely to rule in equity**, this section of our code does; that is to say, in case of default, relief is confined to relief demanded in complaint, as was rule under prayer for special relief in equity, while in other cases it is extended to granting relief similar to that granted under prayer for general relief in chancery courts.—*Johnson v. Polhemus*, 99 Cal. 240, 245, 33 Pac. 908.

3. **Same—Applies to extent of relief to be granted**, and not to question relating to

character in which defendant is liable.—*O'Brien v. Ballou*, 116 Cal. 318, 324, 48 Pac. 130.

4. This section is but concise statement of rule observed upon subject of relief in courts of equity.—*Mock v. City of Santa Rosa*, 126 Cal. 330, 342, 58 Pac. 826.

5. **Same—Authorizes court to grant to plaintiff any relief consistent with cause made** by plaintiff, when answer to complaint has been filed, and embraced within issue.—*Poladori v. Newman*, 116 Cal. 375, 377, 48 Pac. 25.

6. **Same—Does not refer to any formal part of complaint**; court may grant relief thereunder consistent within issues of complaint, even though such relief was not asked for in formal prayer at end thereof.—*Security L. & T. Co. v. Boston S. R. F. Co.*, 26 Cal. 418, 58 Pac. 941, 943, 59 Pac. 296.

7. **Attachment—Complaint without prayer, or a sufficient prayer, as a basis.**—A complaint for money accompanied by an affidavit for attachment, is sufficient as a basis for attachment, even though lacking prayer.—*Hoffman v. Pacific Coast Construction Co.*, 37 Cal. App. 125, 173 Pac. 776.

8. **Conversion—Damages in excess of claim.**—The measure of damages for the wrongful conversion of personal property is presumed to be (1) the value of the property at the time of the conversion, with interest, or (2) the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party, under the provisions of section 336 of the Civil Code. Where in an action charging conversion the defendant files an answer denying conversion this puts in issue the question of damages, not merely as alleged in the complaint but according to the measure specified in the code; and where the case was tried upon the theory that the complainant was entitled to recover upon whichever basis above set forth the jury should determine, and the jury returns a verdict in excess of the amount of damages claimed by the plaintiff in his complaint, this is such a case as is contemplated in the above section and the relief granted is "embraced within the issue."—*Kimball v. Swenson*, — Cal. App. —, 196 Pac. 781, following the doctrine in *O'Donnell v. Kramer*, 65 Cal. 353, 4 Pac. 204; *Johnson v. Polhemus*, 99 Cal. 240, 244, 33 Pac. 908; *Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 480, 111 Pac. 360.

As to judgment in excess of relief demanded, see pars. 10-14, this note.

9. **Interest on judgment.**—In entering a judgment it is not necessary to declare therein that it shall bear interest, as it bears interest at the rate of seven per cent per annum from its date by force of the law and not by reason of any declaration it

may contain to that effect.—*Glenn v. Rice*, 174 Cal. 269, 162 Pac. 1020.

See, also, pars. 28, 71, 72, this note.

As to interest on award to be entered in judgment, see *Kerr's Cyc. Civ. Code*, § 192 and note.

10. Judgment—In excess of relief demanded is not hereby made void in a case where the relief given is within the terms of the prayer for general relief, and is germane to the cause of action stated, although it may not be authorized by the facts alleged.—*Cohen v. Cohen*, 150 Cal. 102, 88 Pac. 267.

As to damages awarded in excess of claim, see par. 8, this note.

As to judgment where answer filed, see pars. 30-35, this note.

As to judgment where no answer filed, see pars. 65-68, this note.

11. Being merely erroneous, and not void, can not be amended or modified as to the excess by the court which rendered it, as an act done without jurisdiction.—*Cohen v. Cohen*, 150 Cal. 102, 88 Pac. 267.

12. Is not void as to such excess, and can not be collaterally attacked, even though there is no prayer for general relief.—*Cohen v. Cohen*, 150 Cal. 102, 88 Pac. 267.

13. May be erroneous as to the excess and subject to reversal or modification on appeal, but it is not void, nor subject to collateral attack on that ground.—*Cohen v. Cohen*, 150 Cal. 102, 88 Pac. 267.

14. May be modified by the court rendering it only by proceedings under section 473 Code of Civil Procedure, or by proceedings in equity.—*Cohen v. Cohen*, 150 Cal. 102, 88 Pac. 267.

15. Modification of judgment.—Where an error does not affect the verdict or require a new trial it may and should be corrected by modifying the judgment so as to conform to the verdict, read in connection with the pleadings.—*Compressed Air Machinery Co. v. West San Pablo Land & W. Co.*, 9 Cal. App. 361, 366, 99 Pac. 531.

As to modification of judgment to meet admissions, see par. 37, this note.

As to modification, etc., of judgment, see, ante, § 473 and note.

II. RELIEF WHERE ANSWER FILED.

16. Action for recovery of stock, or its value.—Where prayer of complaint in action upon alleged breach of contract, by which contract defendant agreed to purchase mine for joint benefit of himself and plaintiff, complaint praying for judgment against defendant for possession of certain shares of stock in mine, or value thereof in event possession could not be had in sum of stated amount, and where complaint, as amended, after setting out facts showing

that plaintiff was entitled to stock under contract, demanded, etc., and averred damages, verdict, and judgment for such sum, held to be within facts in issue, and such as plaintiff was entitled to, irrespective of prayer of complaint, where evidence was sufficient to uphold such judgment.—*Dennison v. Chapman*, 105 Cal. 447, 454, 39 Pac. 61.

17. Action to determine water-right—Claim contested—Prayer not asking judgment as to ownership.—In a case in which the plaintiff alleged ownership and possession of a described tract of land, together with the right to construct and maintain a reservoir at a designated place, and a right of way thereto and therefrom, and the complaint of the defendant was answered putting all the allegations in issue, where the prayer did not specifically ask for judgment as to the ownership of the water-right the court had power, under the provisions of the above section to adjudge as to ownership of the water-right and to declare that a certain instrument in writing executed by a named party, to the defendant, and set out in the complaint, conveyed no right, title or interest in said water-right, reservoir-site, and right of way.—*Potter Hauffman Land & Live Stock Co. v. Witcher*, — Cal. App. —, 191 Pac. 725.

18. In contested cases the demand in the prayer of the complaint does not limit the right of a recovery, and the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issues, although such relief is not specifically prayed for, under the provisions of the above section.—*Potter Hauffman Land & Live Stock Co. v. Witcher*, — Cal. App. —, 191 Pac. 725, following the doctrine in *Hurlbutt v. N. W. Spaulding Saw Co.*, 93 Cal. 55, 24 Pac. 795; *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786; *Dennison v. Chapman*, 105 Cal. 447, 39 Pac. 61; *Poledori v. Newman*, 116 Cal. 375, 48 Pac. 325; *Faulkner v. First Nat. Bank*, 130 Cal. 258, 62 Pac. 463; *Title Insurance & Trust Co. v. Ingersoll*, 58 Cal. 474, 11 Pac. 360; *Fox v. Hall*, 164 Cal. 287, 128 Pac. 749; *Cassinella v. Allen*, 168 Cal. 667, 144 Pac. 746; *Murphy v. Stelling*, 8 Cal. App. 702, 97 Pac. 672; *Haight v. Stewart*, 36 Cal. App. 514, 172 Pac. 769.

19. Amount of recoupment.—To which plaintiff may in future be entitled can not be determined by judgment in action, especial object of which was to cancel mortgage and permitting only relief that deed be reformed so as to express real intention of parties with reference to property to be included therein.—*Hoffman v. Kirby*, 136 Cal. 26, 30, 68 Pac. 321.

20. Asking greater measure of relief than entitled to—Effect of.—Fact that plaintiff asks for greater measure of relief than he is entitled does not justify court in re-

fusing to award such relief as facts warrant, and court should not, where interest of plaintiff as against defendant can be determined in action, summarily dismiss plaintiff from its forum without any relief upon judgment without prejudice to subsequent action.—*Bell v. Solomons*, 142 Cal. 59, 63, 75 Pac. 649.

21. Cause must be adjudged by issues—As made by pleadings and submitted to jury, and where there is answer, plaintiff is entitled to any relief that is consistent with case made by complaint and within issues.—*Reiner v. Schroeder*, 146 Cal. 411, 416, 80 Pac. 517.

As to issues made controlling, see par. 29, this note.

22. Character of remedy—How determined.—Circumstance that court of law can try questions of fraud and forgery, as well as court of equity, and that either court of equity or court of law can hear and determine any issue or fact which is presented for adjudication in proceeding properly before court, has no weight in determining whether or not, upon particular state of facts, remedy is legal or equitable.—*Angus v. Craven*, 132 Cal. 691, 698, 64 Pac. 1091.

23. Complaint for deceit—Sufficiency of.—Where complaint alleges in effect that plaintiff was induced to purchase property by false representations of defendant, which defendant knew to be false and which were made by him with intent to deceive, and there is no finding that defendant knew representations to be untrue or that he had any reasonable ground for believing them to be true, or that his deception of plaintiff was wilful, and result is therefore same as though complaint were insufficient to show fraud or deceit; held, that where facts alleged and found are such as to entitle plaintiff to relief on any ground, complaint is sufficient independently of alleged fraud.—*Hoffman v. Kirby*, 136 Cal. 26, 29, 68 Pac. 321.

24. Decree—As to requirements of.—A decree should be definite and certain, and grant no greater relief than that authorized by complaint.—*Ellis v. Rademacher*, 125 Cal. 556, 560, 58 Pac. 178.

25. Same—Directing sale of real property in action relating to such real property may be made by court, though such relief was not prayed for in original complaint, and decree directing sale held within the issues embraced in pleadings upon new trial.—*Kent v. San Francisco Sav. Union*, 130 Cal. 401, 406, 62 Pac. 620.

26. Same—In action for specific performance of contract grants more relief than is authorized, where it directs one party to specifically perform the contract while it does not so direct other party, and where it is made duty of one to perform contract, without reference to payments of considera-

tion by other in performing covenants of contract on his part, and where it enjoins owner of property from selling and conveying interest therein, without regard to question as to whether or not purchaser complies with his part of contract.—*Ellis v. Rademacher*, 125 Cal. 556, 559, 58 Pac. 178.

27. Foreclosure—As to review of various facts held to be embraced within issues in complaint in foreclosure, see *Johnson v. Polhemus*, 99 Cal. 240, 246, 247, 33 Pac. 908.

28. Interest on contract and judgment.—Where contract is set out in complaint, accruing interest thereon and interest on judgment are embraced within issue, notwithstanding they were not included in prayer.—*Lane v. Gluckauf*, 28 Cal. 283, 295, 87 Am. Dec. 121.

See, also, pars. 9, 71, 72, this note.

29. Issues made control.—Where an answer is filed the jurisdiction of the court to grant any particular relief does not depend upon the prayer of the complaint but upon the issues made by the pleadings.—*Murphy v. Stelling*, 8 Cal. App. 702, 707, 97 Pac. 672.

As to cause to be adjudged by issues as made in the pleadings, see par. 21, this note.

30. Judgment—As to in action to quiet title.—Where plaintiff distinctly claimed ownership and right of possession, and prayed that he be adjudged to be such owner, though as is usual in complaints to quiet title he did not allege that defendant claimed same interest in land nor did he call upon defendant to set forth his title, but defendant met complaint by denial of plaintiff's ownership and assertion of title in himself, court properly may adjudge plaintiff to be owner and entitled to possession, under issues thus formed after trial and general verdict in plaintiff's favor.—*Reiner v. Schroeder*, 146 Cal. 411, 416, 80 Pac. 517.

As to judgment in excess of amount claimed, see pars. 8, 10-14, this note.

As to modification of judgment, see par. 15, this note.

31. Same—As to municipal bonds.—As to judgment decreeing unlawful disposal of municipal bonds and proceeds thereof by officers liable for payment to municipality of the value of such bonds, held proper, and within issues in action brought to cancel and have declared void, municipal contract for construction of water works, to prevent construction thereunder, to have bonds issued by city returned to treasury, and to prevent any disposal of them otherwise than for moneys to be paid into treasury to end that neither bonds nor their proceeds should be used in payment of work and materials done and furnished under void and fraudulent contract.—See *Mock v. City of Santa Rosa*, 126 Cal. 330, 338, 341, 58 Pac. 826.

32. Same—For money may be given where answer presented an issue thereon, although complaint did not aver any money due.—*O'Donnell v. Kramer*, 65 Cal. 353, 4 Pac. 204.

As to in excess of amount claimed, see pars. 8, 10-14, this note.

33. Same—For value of personal property, rather than its possession, held to be proper where action was for rescission of contract, on grounds of false representation, and return of property to defendant, that defendant took possession of property received by plaintiff, and that written obligation be canceled and delivered, and for money judgment.—*Stewart v. Hollingsworth*, 129 Cal. 177, 179, 61 Pac. 936.

34. Same—For reconveyance of property fraudulently obtained.—Where suit was brought to annul deeds on grounds of undue influence and fraud, there being no attempt on part of plaintiffs prior to filing of complaint to rescind deeds in question, nor to restore consideration received, and where judgment required surrender upon payment of sums of money as conditions of conveyance to plaintiff, held that such relief granted by court—namely, reconveyance on terms imposed by judgment—was appropriate to case, and was justified by facts alleged in complaint and by prayer for general relief, and that rigid rules relating to rescission apply only to rescission to be effected by acts of parties, power of court of equity to cancel contract being of much wider scope and its exercise governed by other principles.—*More v. More*, 133 Cal. 489, 493, 65 Pac. 1044.

35. Same—Rendered for transfer and delivering up of shares of stock is substantial compliance with this section where complaint sets forth all facts concerning stock, even though formal prayer of complaint omits all mention of such stock.—*Security L. & T. Co. v. Boston S. R. F. Co.*, 126 Cal. 418, 58 Pac. 941, 943, 59 Pac. 296.

36. Mistake as to form of remedy—Effect of.—Action can not fail because plaintiff has made mistake as to form of remedy. If cause which he states entitles him to any remedy, either legal or equitable, his complaint is not to be dismissed because he has not prayed for judgment to which he is not entitled. He can be sent out of court only when his facts entitle him to no relief, either at law or in equity.—*Walsh v. McKeen*, 75 Cal. 519, 522, 17 Pac. 673. See *Grain v. Aldrich*, 38 Cal. 514, 520, 99 Am. Dec. 423.

37. Modification of judgment—To meet admissions.—Where plaintiff, in complaint in action for divorce, prayed for allowance to her of one hundred dollars per month for her permanent support, and defendant, in his denial, admitted this averment, there being no issue upon fact, court erred in finding for plaintiff in sum of one hundred and fifty dollars per month, and judgment

for latter amount was modified so as to reduce amount to sum prayed for in complaint, and as so modified judgment affirmed.—*Benton v. Benton*, 122 Cal. 395, 398, 55 Pac. 152. See *Burnett v. Stearns*, 33 Cal. 468; *Gregory v. Nelson*, 41 Cal. 278; *Slivey v. Neary*, 59 Cal. 97.

See, also, par. 15, this note.

38. Nonsuit—Granting as to proper party—Error.—Where an action is commenced by the stockholders of a corporation, suing on behalf of the corporation for the purpose of setting aside certain resolutions adopted by the company's board of directors, whereby such board rescinded a transfer to another corporation certain shares of the capital stock, and an answer is filed to the complaint putting the allegation in issue, the court may, under the provisions of the above section, grant to the plaintiff any relief consistent with the case made by the complaint and embraced within the issues; and where the court grants a nonsuit as to one of the parties who is a proper, although not a necessary, party defendant, this will be error.—*Young v. New Pedrera Onyx Co.*, — Cal. App. —, 192 Pac. 55.

39. Omission of prayer—Relief to be granted—Statutory provisions.—In view of the provisions of the above section, the plaintiff in an action may have some relief, although the complaint omits the prayer for the relief demanded, as required in section 426, ante, where issue has been raised by the answer filed.—*Hoffman v. Pacific Coast Const. Co.*, 37 Cal. App. 125, 173 Pac. 776, following the doctrine in *Johnson v. Polhemus*, 99 Cal. 240, 244, 33 Pac. 908; *Woods Central Irr. Ditch Co. v. Porter Slough Ditch Co.*, 173 Cal. 149, 159 Pac. 427, *Murphy v. Stelling*, 8 Cal. App. 702, 97 Pac. 672, approving *Donovan v. McDewitt*, 36 Mont. 61, 92 Pac. 49.

40. Prayer of complaint—Controls, when.—Where the defendant by his answer raises no issue as to the amount claimed to be due and unpaid, the rule applicable to one not answering, that is, that no more than is demanded can be recovered, applies to one admitting such allegation.—*Brown v. Caldwell*, 13 Cal. App. 29, 32, 108 Pac. 874.

41. Same—Construction of.—The prayer in complaint must receive reasonable interpretation, and is to be construed with reference to purposes and nature of action.—*Brooks v. Carpentier*, 53 Cal. 287, 288.

42. Same—For general relief.—In courts of equity rule is universal that under prayer for general relief no relief can be granted beyond that which is authorized by facts stated in bill; and to same effect is our statute.—*Carpentier v. Brenham*, 50 Cal. 549, 552; *Oliver v. Blair*, 2 Cal. Unrep. 564, 8 Pac. 612, 613.

43. Same—May be disregarded, when.—The prayer of the complaint may be dismissed from notice where there is answer

in case, and court is required to look to case made by complaint and embraced within the issue.—*Johnson v. Polhemus*, 99 Cal. 240, 244, 33 Pac. 908.

44. Relief—Granted upon facts within the issues and entitling to judgment, irrespective of prayer of complaint, provided always evidence is sufficient to uphold the judgment.—*Dennison v. Chapman*, 105 Cal. 447, 454, 39 Pac. 61.

45. Same—Consistent with cause—Abatement of nuisance.—Where complaint alleged, and court found, that nuisance existed, and was continuous, the answer denying all material allegations of complaint, and judgment was rendered enjoining defendants from continuing nuisance complained of, ordering that same be abated, and that plaintiff recover sum of one hundred dollars damages and costs; held that relief granted was consistent with case made by complaint and embraced within issues, and entirely proper, although prayer of pleading did not expressly ask for issuance of injunction, yet it asked "that said nuisance be abated."—*Sullivan v. Royer*, 72 Cal. 248, 249, 1 Am. St. Rep. 51, 13 Pac. 655.

46. Same—Court is authorized to grant any relief consistent with cause made, and embraced within issues, although not specifically prayed for.—*Zellerbach v. Allenberg*, 99 Cal. 57, 68, 33 Pac. 786; *More v. Finger*, 128 Cal. 313, 318, 60 Pac. 933. See *Gimmy v. Gimmy*, 22 Cal. 633; *Scott v. Sierra L. Co.*, 67 Cal. 71, 75, 7 Pac. 131; *Hurlbutt v. Spaulding S. Co.*, 93 Cal. 55, 28 Pac. 795; *More v. Finger*, 128 Cal. 313, 318, 60 Pac. 933.

47. Court can not grant any relief except such as consistent with case made by complaint and embraced within issues, and where, in action brought to obtain decree enjoining defendants from discharging debris from mineral lands into Sweetland Creek and Yuba River, court inserted in decree provisions relating to use of defendants' water supply on other lands than those of defendants and right relating to selling, etc., of defendants' mine, etc., judgment will be modified by striking out such portions as are not embraced within the issues.—*County of Yuba v. Kate Hays M. Co.*, 141 Cal. 360, 365, 74 Pac. 1049.

48. Same—Court can not grant any relief not warranted by averments of complaint, whether allegations of complaint are admitted by legal effect, silence of party, or by written answer.—*Ellis v. Rademacher*, 125 Cal. 556, 557, 58 Pac. 178. See *Hicks v. Murray*, 43 Cal. 515; *Carpentier v. Brenham*, 50 Cal. 549, 551; *Cummings v. Cummings*, 75 Cal. 434, 441, 17 Pac. 442.

49. Same—Not measured by exact averments.—"Relief consistent with case" is not required to be measured by exact averments in complaint, as where in action

brought to correct defective certificate of acknowledgment of deed of conveyance by married woman, complaint sets forth conveyance and its proper acknowledgment to notary, and alleges omission of notary in affixing certificate certifying as to separate examination of wife; and issue was taken by defendant upon several averments of complaint, and court rendered judgment in favor of plaintiff, and authorized correction of certificate with respect "that grantor did not wish to retract her execution of deed," held that such relief was consistent with case made by complaint, and embraced within issue.—*Poledori v. Newman*, 116 Cal. 375, 377, 48 Pac. 25.

50. Same—Relief granted—In action for conversion, where defendant filed answer, held consistent with case made by complaint and embraced within issues.—*McDonald v. McConkey*, 57 Cal. 325, 326.

51. Same—Same—Which is nearest possible approach to specific prayer of complaint, is consistent with case made under complaint, and authorized by prayer for general relief.—*Mock v. City of Santa Rosa*, 126 Cal. 330, 342, 58 Pac. 826.

52. Relief demanded—Does not characterize action or limit plaintiff in respect to remedy which he may have.—*Angus v. Craven*, 132 Cal. 691, 698, 64 Pac. 1091. See *Walsh v. McKeen*, 75 Cal. 519, 521, 522, 17 Pac. 673.

53. Relief in cases of fraud—In general.—Rescission is only one of remedies in cases of fraud and in cases where real or personal property is fraudulently obtained most common and familiar relief granted by court of equity is to convert party guilty of fraud into trustee.—*More v. More*, 133 Cal. 489, 493, 65 Pac. 1044. See *Field v. Austin*, 131 Cal. 379, 382, 63 Pac. 692.

54. Removal of trustee.—Court has right to remove trustee, and, where necessary, to appoint another in his place, under complaint setting up trust, and all facts connected with it, alleging that trustee had violated and repudiated his trust, that he had used trust property for his own benefit, and that he was unfit person to be trustee, where issues were joined, and trial had upon these averments.—*Schlessinger v. Mallard*, 70 Cal. 326, 334, 11 Pac. 728.

55. Right to recover—Dependent upon prayer.—The right to recover upon agreement depends, where there is answer in case, not upon prayer of complaint, but upon scope of pleading and issues made, or which might have been made under it.—*Johnson v. Polhemus*, 99 Cal. 240, 245, 33 Pac. 908.

56. Stockholders—Recovery against.—As to recovery against defendants as holders of stock, whether original subscribers thereto or not, and averments of complaint broad enough to justify such recovery, see

Tulare Sav. Bank v. Talbot, 131 Cal. 45, 48, 63 Pac. 172.

57. Supreme court will modify judgment—By striking out parts thereof where relief granted is beyond issues embraced in complaint, and as so modified judgment may be permitted to stand.—County of Yuba v. Kate Hays M. Co., 141 Cal. 360, 365, 74 Pac. 1049.

III. RELIEF WHERE NO ANSWER FILED.

58. Allowance for counsel fees—In foreclosure action, upon default, can not be given under prayer of general relief that mortgaged premises be sold, and proceeds applied to amount found due, etc., where mortgage provided that in event of foreclosure mortgagee might retain from proceeds of sale costs and charges of suit, "including counsel fees at rate of — per cent.," and where prayer did not, in terms, ask award of counsel fees.—**Brooks v. Forington**, 117 Cal. 219, 220, 48 Pac. 1073.

59. Same—Not "costs of suit."—Counsel fees in foreclosure suit can not be allowed under demand therein "for costs of suit."—**Brooks v. Forington**, 117 Cal. 219, 221, 48 Pac. 1073. See **Prescott v. Grady**, 91 Cal. 518, 27 Pac. 755.

60. Construction of section—Relief to be awarded plaintiff.—This section regulates the granting of a judgment upon default; it limits the relief which may be awarded against a defendant who does not appear, and that is its sole purpose.—**Cassinella v. Allen**, 168 Cal. 677, 144 Pac. 746.

61. That a court of equity will give relief by way of money damages where, for any reason the equitable relief sought can not be granted is applicable only to where the relief granted is not inconsistent with the complaint and not outside the issues.—**Simmons v. Simmons**, 166 Cal. 438, 137 Pac. 20.

62. Conveyance to receiver.—Where decree directs that property be conveyed to receiver, and such relief is clearly in excess of relief asked, judgment, where there is no answer, will be reversed.—**Foley v. Foley**, 120 Cal. 33, 43, 65 Am. St. Rep. 147, 52 Pac. 122.

63. Decree pro confesso—In equity, effect of is only to conclude party as to averments in bill and does not amount to a confession of any fact not alleged in it; and this is rule found in this section.—**Savings & L. Soc. v. Horton**, 63 Cal. 105, 106, citing **De Leuw v. Neely**, 71 Ill. 473.

64. Same—In divorce—No prayer for alimony—Power of court.—In an action for a divorce where the wife's complaint does not contain a prayer for alimony, and contains no allegations upon which to base

such a prayer, under the provisions of the above section the trial court has power, on default made by the defendant to provide, in its interlocutory decree, for the payment of alimony.—**Bennett v. Bennett**, — Cal. App. —, 194 Pac. 503, following doctrine in **Foley v. Foley**, 120 Cal. 42, 65 Am. St. Rep. 147, 52 Pac. 122; **Benton v. Benton**, 122 Cal. 395, 55 Pac. 152; **Staacke v. Bell**, 125 Cal. 309, 57 Pac. 1012; **Cohen v. Cohen**, 150 Cal. 99, 11 Ann. Cas. 520, 88 Pac. 267.

65. Excessive relief—Decree granting.—Judgment rendered granting excessive relief is act of court, and not of judgment of creditor, and action will not lie to quash execution and to perpetually enjoin collection of judgment upon ground that it was obtained by fraud; there being no promise, misrepresentation, or understanding between parties outside of the record, by which defaulting defendants against whom excessive judgment was rendered were deceived or misled in any way.—**Murdock v. De Vries**, 37 Cal. 527, 528.

As to judgment in excess of damages claimed in an action for conversion where an answer filed, see par. 8, this note.

As to judgment in excess of demand generally where answer filed, see pars. 10-14, this note.

66. Same—Excessive judgment where no answer filed, effect of.—Judgment rendered by court in cause in which it had jurisdiction of subject-matter and of person, even though it might exceed measure of relief demanded in complaint, and no answer had been filed, would not be void for that reason, but erroneous merely, as provisions such as contained in this statute have no application to question of jurisdiction.—**Chase v. Christianson**, 41 Cal. 253, 256.

67. Same—Fraud can not be predicated upon fact that plaintiff obtained more relief from court than he was entitled to take by his action in view of fact that defendants had filed no answers. Of such act nothing more can be predicated than that plaintiff had obtained erroneous judgment, which will be reversed or modified on appeal, or possibly one which is, pro tanto, absolutely void.—**Murdock v. De Vries**, 37 Cal. 527, 528.

68. Same—Prayer that "all" defendants convey quantity of land sufficient in aggregate to make up total amount claimed, decree dismissing action as to two defendants, and that other defendant convey to plaintiff whole amount claimed, held not to be granting of relief in excess of that prayed for, where default was entered, as obvious meaning of prayer was that defendants, or such of them as should be adjudged to have interest in land which was subject to plaintiff's right, should be required to convey.—**Brooks v. Carpentier**, 53 Cal. 287, 289.

69. Same — Remedy against judgment granting more relief than plaintiff is entitled to under complaint, in cases of default, is by appeal, whereas if judgment be void upon its face, defendant, in addition, has remedy by motion at any time in court which judgment was rendered.—*Murdock v. De Vries*, 37 Cal. 527, 528. See *Chipman v. Bowman*, 14 Cal. 157.; *Logan v. Hillegass*, 16 Cal. 200; *Bell v. Thompson*, 19 Cal. 706; *Sanchez v. Carriaga*, 31 Cal. 170.

70. Foreclosure of mortgage—Decree in.—Under rule that where judgment is taken in case by default, decree can give no relief beyond which is demanded in bill, judgment is erroneous that decrees sale of property in manner differing from that prescribed in statute for sales of real property under execution, where complaint simply asks foreclosure of mortgage and sale of property to satisfy judgment.—*Raun v. Reynolds*, 11 Cal. 14, 19.

71. Same — Same — Defaulted taxes — Prayer governs recovery.—In a case in which an action is brought to foreclose a mortgage because of default in paying the taxes upon the land, in which the plaintiff prayed judgment against the default for the sum of promissory note secured with interest thereon at seven per cent from estate of date, and for the sum of money paid as taxes from a named date to a named date, followed by a demand for attorney's fees, costs, order of sale, etc., and on default judgment rendered for a greater sum than asked for in the prayer authorized this constitutes such error as will require the reversal of the judgment.—*Von der Kuhlen v. Hegel*, — Cal. App. —, 196 Pac. 913.

72. Interest upon demand—Error in prayer.—Where, by error in complaint, plaintiff demands judgment for precise sum due, including interest, and does not ask interest from time of filing complaint until entry of judgment, but only that judgment shall bear interest, judgment, strictly speaking, where defendant defaults, is erroneous in including interest from date of filing complaint instead of from date of judgment, and will be modified as to such excess.—*Gage v. Rogers*, 20 Cal. 91, 92.

See, also, pars. 9, 28, this note.

73. Judgment for interest upon a default can not be maintained in the absence of any allegation with reference thereto, or from which claim of interest could be implied.—*First State Bank v. Blackinton*, 16 Cal. App. 141, 116 Pac. 311.

74. Intendments—In favor of regularity of judgment, and where cause is appealed on judgment-roll, with no bill of exceptions or statement, and nothing to show that appellant ever asked for any other or further relief than that which he prayed for and received, appellant can not complain.—*Treat v. Dorman*, 100 Cal. 623, 625, 35 Pac. 86.

75. Judgment by default—Can not give any relief in excess of that demanded in complaint.—*Ellis v. Rademacher*, 125 Cal. 556, 557, 58 Pac. 178. See *Raun v. Reynolds*, 11 Cal. 14, 19; *Lamping & Co. v. Hyatt*, 27 Cal. 99, 102.

76. Same—Default admits material allegations of complaint and no more.—*Ellis v. Rademacher*, 125 Cal. 556, 557, 58 Pac. 178.

77. Nature of action—Is to be determined from character of complaint and from character of judgment which might be rendered upon default thereto.—*McFarland v. Martin*, 144 Cal. 771, 774, 78 Pac. 239.

78. "Relief demanded in the complaint"—Refers to relief asked in prayer.—The feature of pleading to which alone reference may be had in default cases, to ascertain what relief plaintiff seeks; rule of statute applies in its strictness to actions in foreclosure, alike with those of any other character.—*Brooks v. Forington*, 117 Cal. 219, 220, 48 Pac. 1073. See *Raun v. Reynolds*, 11 Cal. 14, 19; *Gautier v. English*, 29 Cal. 165; *Parrott v. Den*, 34 Cal. 79.

79. Defendant may rest secure in his right to assume, under provisions of this section, that relief granted will not be in excess of relief demanded in complaint.—*Staacke v. Bell*, 125 Cal. 309, 313, 57 Pac. 1012.

80. Same—Excessive relief against defaulting defendant.—Decree granting relief beyond that authorized in complaint, and based upon answers which were not served upon defaulting defendant, the nature and contents of which answers defaulting defendant had no notice, will be reversed as to such defaulting defendant in so far as same is in excess of relief demanded in complaint.—*Staacke v. Bell*, 125 Cal. 309, 313, 57 Pac. 1012.

81. General prayer can not enlarge power of court to grant relief not prayed for against defaulting defendant.—*Staacke v. Bell*, 125 Cal. 309, 313, 57 Pac. 1012.

82. Same—Relief, other and different from that prayed for in complaint, and specified in summons, is improper to grant where in action defendant defaulted.—*Mudge v. Steinhart*, 78 Cal. 34, 40, 12 Am. St. Rep. 17, 20 Pac. 147; *Staacke v. Bell*, 125 Cal. 309, 312, 57 Pac. 1012; *McFarland v. Martin*, 144 Cal. 771, 775, 78 Pac. 239.

83. Relief against defaulting or disclaiming defendant—Must be consistent with cause made upon complaint and embraced within issues.—*Balfour-Guthrie I. Co. v. Sawday*, 133 Cal. 228, 230, 65 Pac. 400. See *Holman v. Vallejo*, 19 Cal. 498, 499.

84. Same—In ejectment.—A judgment against disclaiming defendant, in ejectment and to quiet title, where complaint describes land and premises by government subdivisions alone, should not, upon evidence taken ex parte, describe lands by metes and bounds and by designating na-

tural boundaries and monuments, without giving disclaiming party opportunity to be heard in reference to identity of such land described in judgment with lands described in complaint.—*Balfour-Guthrie I. Co. v. Sawday*, 133 Cal. 228, 231, 65 Pac. 400.

85. Same—Recital that default was regularly entered, according to law, is not necessarily based upon affidavit showing publication contained in record; for it may have been made to appear to court, in action, that affidavit, showing due publication, was filed within proper time, and recital may have been based upon that fact, and court, in collateral attack upon judgment, will in support of judgment assume that recital in judgment was based upon such other affidavit, and that same may have been lost or omitted from record, where record does not purport to show all that was done, and judgment states that all that was necessary to be done was done.—*Sacramento Bank v. Montgomery*, 146 Cal. 745, 752, 81 Pac. 138.

86. Taxes and interest—Allowance of.—Judgment is erroneous in action upon note,

where allowance is made for taxes and interest thereon, and for interest on counsel fees, where prayer of complaint asked for five per cent as counsel fees, but did not ask for taxes or interest thereon, and such judgment will be modified by striking therefrom excess not warranted under complaint.—*Parrott v. Den*, 34 Cal. 79, 81.

87. Title to rents and profits—Improper adjudication upon.—The title of defendants to rents and profits, consisting of moneys in hands of receiver, pending foreclosure, is in no way affected by possession of receiver and can not be divested otherwise than by valid adjudication, and where in action there is neither any allegation nor prayer to justify such adjudication, and defendant being in default, it is incompetent for court to adjudge defendants divested of such title.—*Garretson I. Co. v. Arndt*, 144 Cal. 64, 67, 77 Pac. 770. See *Scott v. Hotchkiss*, 115 Cal. 89, 94, 47 Pac. 45; *Brooks v. Farrington*, 117 Cal. 219, 220, 48 Pac. 1073; *Foley v. Foley*, 120 Cal. 33, 42, 43, 65 Am. St. Rep. 147, 52 Pac. 122; *Staacke v. Bell*, 125 Cal. 309, 312, 57 Pac. 1012.

§ 581. ACTION MAY BE DISMISSED OR NONSUIT ENTERED. An action may be dismissed, or a judgment of nonsuit entered, in the following cases:

1. By the plaintiff, by written request to the clerk, filed with the papers in the case, at any time before the trial, upon payment of his costs; provided, a counterclaim has not been set up, or affirmative relief sought by the cross-complaint or answer of the defendant. If a provisional remedy has been allowed, the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon;
2. By either party, upon the written consent of the other;
3. By the court, when either party fails to appear on the trial, and the other party appears and asks for the dismissal;
4. By the court, when, upon the trial and before the final submission of the case, the plaintiff abandons it;
5. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury.

But no dismissal mentioned in subdivisions one and two hereof shall be entered unless upon written consent of his attorney of record, or if said consent is not obtained, upon order of the court, after notice to the attorney.

The dismissals mentioned in said subdivisions one and two hereof, when written consent of the attorney of record of the party requesting the dismissals are [is] filed, may be made by entry in the clerk's register.

The dismissals mentioned in subdivisions three, four, and five of this section must be made by orders of the court entered upon the minutes thereof, and are

effective for all purposes when so entered; but the clerk of the court must note such orders in his register of actions in the case.

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DISMISSAL AND NONSUIT.

- I. IN GENERAL, 1-34.
- II. DISMISSAL BY PLAINTIFF—SUBDIVISION 1, 35-93.
- III. DISMISSAL BY WRITTEN CONSENT—SUBDIVISION 2, 94-104.
- IV. DISMISSAL BY THE COURT—FAILURE TO APPEAR AT TRIAL—SUBDIVISION 3, 105-111.
- V. SAME—ON ABANDONMENT OF CAUSE—SUBDIVISION 4, 112, 113.
- VI. SAME—NONSUIT—SUBDIVISION 5, 114-233.
- VII. SAME—AFTER VERDICT OR SUBMISSION—NEGLECT TO DEMAND ENTRY—SUBDIVISION 6. [Repealed], 234-253.
- I. IN GENERAL.
 1. Action by state to recover taxes.
 2. Claim against municipality—Approval by common counsel—Action upon claim.
 3. Conditional dismissal.
 - 4-8. Construction of section—In general.
 9. Same—Interpleader—"An" is equivalent to "any."
 10. Court—May summarily vacate void judgment.
 11. Design of statute—Is for benefit of defendants.
 12. Dismissal—Final judgment—Appealable.
 13. Same—In cases not provided for by code.
 14. Same—Not effective until entered—Setting aside—Power of court prior to entering.
 15. Same—Of condemnation proceedings.
 16. Same—Without motion, is not a dismissal or nonsuit.
 17. Erroneous judgment by clerk.
 18. Entry of judgment of dismissal—Is not required under first two subdivisions.
 19. Same—Entry of order of dismissal in the minute-book of court, is in its nature of final judgment.
 20. Improper dismissal—Remedy for.
 21. Judgment of court—Defined.
 22. Judgment of dismissal—Presumption.

- 23, 24. Judgment after demurrer sustained and refusal to amend.
- 25, 26. Mandamus to compel dismissal of action—Answers and cross-complaints filed.
27. Motion to dismiss action—Not authorized by above section, when.
28. Order of dismissal—Judgment on merits.
29. Same—Refusing to vacate judgment of dismissal—Not appealable.
30. Same—Vacating dismissal—Effect of.
31. Power to dismiss action—Was first exercised by equity courts.
32. Proceeding for obtaining dismissal.
33. Waiver of notice of motion to vacate—By appearance of counsel.
34. Word "may" can not be read "must."
- II. DISMISSAL BY PLAINTIFF—SUBDIVISION 1.
 35. Absolute right is given to plaintiff.
 36. Same—Order depends upon.
 37. Action for accounting—Affirmative relief.
 38. Action for divorce—Affirmative relief.
 39. Same—Control of court to allow alimony.
 40. Same—Same—As to rule since amendment.
 41. Same—Judgment of dismissal in divorce action.
 - 42, 43. Same—Order in relation to alimony and counsel fees.
 44. Action in ejectment—Counter-claim.
 - 45, 46. Action to quiet title—Affirmative relief.
 47. Action against trustee—Affirmative relief.
 48. Advisement—Cause held under.
 49. Answer—Prayer for affirmative relief—Does not change to cross-complaint.
 50. Construction of section—Subdivision 1 of above section can not be restricted.
 - 51, 52. Counter-claim or cross-complaint—Dismissal where affirmative relief sought.

- 53. Same—Filing answer containing counter-claim, after order dismissing cause.
- 54. Same—Matters set out in cross-bill.
- 55. Same—Striken from answer—Effect of.
- 56. Same—Striking cross-complaint from files—Effect of.
- 57-59. Costs—What consist of.
- 60. "Dismissal before the trial"—Means dismissal before submission.
- 61. Dismissal by part of plaintiffs—After findings and judgment.
- 62. Dismissal of complaint—After demurrer sustained.
- 63, 64. Same—After intervention.
- 65, 66. Entry of judgment upon order—Action is not dismissed until.
- 67. Failure of clerk to perform ministerial duties—Effect of.
- 68. Filing cross-complaint—After receiving notice.
- 69. Intervention—Action may be dismissed upon motion of plaintiff.
- 70. Same—Death of party.
- 71. Same—Effect of filing complaint in intervention.
- 72. Same—Judgment rendered against interveners.
- 73, 74. Judgment of dismissal by plaintiff—No bar to subsequent action.
- 75. Same—Nullity, when.
- 76. Same—Will be held to relate to date of demand.
- 77. Mandamus—Will not lie to compel party to enter judgment.
- 78. Motion—Proceeding by.
- 79. Same—To transfer cause—Dismissed defendant.
- 80. Retraxit—A common law.
- 81. Same—Dismissal of first action is not bar to second.
- 82. Same—Judgment entered "without prejudice at plaintiff's costs."
- 83. Same—Judgment of United States circuit court dismissing bill.
- 84. Same—Power to make retraxit.
- 85. Stipulation between parties—Providing for contingencies.
- 86. Trial and submission set aside—Effect of.
- 87. Validity of judgment—Entered under subdivision 1.
- 88. Same—Decided by reference to pleadings.
- 89. Voluntary dismissal—"Without prejudices at plaintiff's costs."
- 90. Writ of mandate—Will issue to compel entry of dismissal.
- 91. Same—Writ of mandate is only plain, speedy or adequate remedy.
- 92. Same—Writ of mandate—Will issue to compel court to try cause.

- 93. Same—Writ of prohibition.

III. DISMISSAL BY WRITTEN CONSENT—SUBDIVISION 2.

- 94. Complaint stricken out by consent of parties—Effect of.
- 95. Dismissal on stipulation—Judgment on merits, when.
- 96. Judgment of dismissal by consent—When judgment on merits.
- 97. Offer to dismiss—Failure to file written consent—Failure of court to pass on motion.
- 98. Parties not aggrieved—By order setting aside order or judgment of dismissal.
- 99. Retraxit—Dismissal by written consent and act as a.
- 100. Stipulation for dismissal—When invalid.
- 101-103. "Written consent"—Must be from attorney of record.
- 104. Same—Must be signed by attorney of consenting party.

IV. DISMISSAL BY COURT—FAILURE TO APPEAR AT TRIAL—SUBDIVISION 3.

- 105. Consent—When necessary.
- 106. Divorce—Inability to pay costs.
- 107. Failure of plaintiff to appear at trial.
- 108. Judgment of dismissal—Is not judgment in bar.
- 109, 110. Judgment that can not be pleaded in bar—Effect of.
- 111. Notice of hearing—Proof of necessary.

V. DISMISSAL BY COURT—ON ABANDONMENT OF CAUSE—SUBDIVISION 4.

- 112. Right of plaintiff to dismiss action—At any time before final submission.
- 113. Right of defendant to dismiss answer—Notwithstanding prayer.

VI. DISMISSAL BY COURT—NONSUIT—SUBDIVISION 5.

- 114. Action for damages—Based on law of road.
- 115. Action in ejectment.
- 116. Action prematurely commenced—Not a breach of contract.
- 117. Attachment dissolved by.
- 118. Common-law rule.
- 119. Conflict of evidence.
- 120, 121. Construction of section—In general.
- 122. Same—Granted or denied, when.
- 123. Same—Provisions exclusive.
- 124, 125. Contest of will—Rules of nonsuit in.
- 126. Same—Consideration of evidence upon nonsuit.
- 127, 128. Contributory negligence of employee.

129. Court—Authority to grant judgment of nonsuit.
130. Same—May dismiss action as to one defendant.
131. Denial of—Evidence subsequently introduced.
- 132-136. Directing verdict—In general.
137. Discretion of court—As to denying a motion for nonsuit.
138. Same—In actions for negligence.
139. Same—Judge should grant nonsuit where verdict in favor of plaintiff should be set aside.
140. Same—To justify submission of any question of fact to jury.
141. Dismissal at instance of court.
142. Duty of judge—Nonsuit and directing verdicts.
143. Effect of granting nonsuit—Reasons assigned and reasoning of judge.
144. Effect of plaintiff's evidence—Prima facie cause.
145. Error in admitting evidence—Can not be reviewed on motion for nonsuit.
146. Estoppel by judgment.
147. Evidence following ruling on nonsuit—When erroneous ruling cured.
148. Evidence to meet objection of motion—Discretion of court.
149. Exception to ruling—Must be taken.
150. Same—Same—Editorial note.
151. Same—Ruling presents question of law.
- 152, 153. Facts showing nonsuit improper.
154. False conclusion of law.
- 155, 156. Finding of facts and conclusions of law—Are not required, when.
157. Judgment of nonsuit—A formal, not necessary.
158. Same—In action by vendee to recover purchase-money.
159. Same—In action of ejectment—Where it does not appear, etc.
160. Same—Not followed by dismissal—Appealable.
161. Same—Upon nonsuit granted.
162. Jury fees—Payment of upon nonsuit granted.
163. Motion for nonsuit—As to necessity for.
164. Same—Same—Mere motion pending and undetermined.
165. Same—Same—Motion in open court.
166. Same—A demurrer to evidence—Question of law.
- 167-175. Same—Effect of motion—Admits what.
- 176, 177. Same—Same—Facts assumed as true.
178. Same—Grounded on contributory negligence—Sufficiency of.
179. Same—Same—Amendment of 1907—Did not change rule.
180. Same—Same—Erroneous granting without.
181. Same—Same—Reason of rule.
182. Same—Same—Stating plaintiff failed to prove cause—Insufficient.
- 183-186. Same—Should specify grounds.
187. Same—Objection not available on.
188. Same—When granted.
189. Nonsuit—As to certain defendants—In consolidated action.
190. Same—After evidence closed.
191. Same—Bar when made on merits.
- 192-195. Same—Properly granted when—In general.
196. Same—Same—Discharging jury without verdict.
197. Same—Same—Fraud and undue influence.
- 198-200. Same—Same—In action for damages by ignition of escaping gas.
- 201-204. Same—Same—In action upon written acknowledgment and receipt.
205. Same—Same—Rule as to granting motion.
- 206, 211. Same—Should be denied, when.
212. Order granting nonsuit—After submission on briefs.
- 213, 214. Order refusing nonsuit—Non-appealable order.
215. Presumptions—In favor of judgment of nonsuit.
- 216-218. Prima facie cause—Nonsuit denied where made out.
- 219, 220. Purpose of stating grounds for nonsuit—In general.
221. Same—Reason of rule.
222. Question presented on motion for nonsuit.
223. Res adjudicata—Motion to dismiss on ground of.
- 224, 225. Review on appeal—In general.
226. Right to new trial—As test on motion for nonsuit.
227. Rules as to nonsuit—Same whether the trial is by court or by jury.
228. Submission of cause—Right precluded by.
229. Truth of plaintiff's evidence admitted.
230. Variance—Motion for nonsuit is proper method.
231. Same—May be taken advantage of either by objecting to admissibility of evidence, etc.
232. Waiver of erroneous refusal of nonsuit.
233. Word "trial"—As used in section 148, Practice Act.

VII. DISMISSAL BY COURT—AFTER VERDICT OR SUBMISSION — NEGLECT TO DEMAND ENTRY—SUBDIVISION 6. [Repealed.]

- 234. Editorial Note.
- 235. Same—Subdivision 7.
- 236-238. Construction of subdivision 8—As not mandatory.
- 239. Directing jury as to verdict.
- 240. Defendant who fails to demand nonsuit—Not in default.
- 241. Dismissal because of neglect.
- 242, 243. Failure to obtain entry of judgment—Presumed to be result of negligence of clerk.
- 244. Same—Instance of abuse of discretion.
- 245. Intention of legislature—Amendment to subdivision 6.
- 246. Judgment of nonsuit—Court is not authorized to enter, when.
- 247. Jurisdiction of court—Not lost by failure to enter judgment.
- 248. Nunc pro tunc judgment.
- 249. Party is not guilty of negligence, when.
- 250. Provisions of original section.
- 251. Rule established by statute.
- 252. Special proceeding—Dismissal in.
- 253. Verbal order to clerk to enter judgment.

I. IN GENERAL.

As to dismissal on stipulation being a judgment on the merits, see par. 95, this note.

As to judgments generally, see, ante, §§ 473 and 577 and notes.

As to waiver, see, ante, § 373 and note.

1. Action by state to recover taxes.—As to construction of word "dismissed" in statute of March 15, 1876, relating to actions brought in name of state, to recover taxes, see *People v. Lathan*, 53 Cal. 386, 388.

2. Claim against municipality—Approval by common council.—Action upon claim.—There is no good reason why a claimant whose claim has been favorably passed upon by the common council should not have a judgment, notwithstanding the fact that a judgment has no additional force except to conclusively establish the validity of the contract and of the indebtedness against the city and of its officers; such an action is not one following within the per-view of the above section or of succeeding sections.—*Engelbreton v. City of San Diego*, 185 Cal. 475, 197 Pac. 651.

3. Conditional dismissal.—There is a marked distinction between a conditional dismissal, the effect of which is to order a dismissal to be entered upon the performance of certain conditions, which is not to be effective until the conditions are performed, and a dismissal ordered without

the performance of the conditions, but with an effort as a part thereof to render a judgment for an amount in excess of that which a court is authorized to order upon an absolute dismissal.—*Southern Pac. R. Co. v. Reis Estate Co.*, 15 Cal. App. 216, 114 Pac. 808.

4. Construction of section—In general.—This section deals with subject of orders of dismissals of actions and should be held to apply to all dismissals.—*Marks v. Keenan*, 140 Cal. 33, 34, 73 Pac. 751.

5. The cost referred to as being required to be paid by the plaintiff when he files his dismissal with the clerk are only the costs of entering the order of dismissal. But on the other hand, the dismissal so made does not interfere with the right of the defendant to have a judgment following it entered and this would secure to him the expenses incurred which were in their nature proper costs.—Spinks v. Superior Court, 26 Cal. App. 793, 148 Pac. 798.

6. None of the orders or judgments provided to be made by this section need be entered in the judgment-book at all or appear in any record except that containing the minutes of the court.—Commins v. Guaranty Oil Co., 29 Cal. App. 139, 154 Pac. 882.

7. An order granting a motion for a nonsuit, entered only in the minutes of the court and not followed by a formal judgment of dismissal, is an appealable order under above section.—Commins v. Guaranty Oil Co., 29 Cal. App. 139, 154 Pac. 882.

8. This subdivision does not apply to dismissal of condemnation proceedings, these being governed by section 1255a, post.—Silver Lake Power & Irr. Co. v. City of Los Angeles, 32 Cal. App. 123, 162 Pac. 432.

9. Same—Interpleader—"An" equivalent to "any."—Particle "an" in subdivision 1 is equivalent to "any," and provisions of section are applicable to action in interpleader as well as to other forms and causes of action.—*Kaufman v. Superior Court*, 115 Cal. 152, 155, 46 Pac. 904.

10. Court—May summarily vacate void judgment of dismissal.—Acock v. Halsey, 90 Cal. 215, 219, 27 Pac. 193.

11. Design of statute—Is for benefit of defendants in actions to relieve them from assertions of stale demands, and to insure proper diligence in prosecution of asserted claims.—Pacific Pav. Co. v. Vizelech, 141 Cal. 4, 9, 74 Pac. 352.

12. Dismissal—Final judgment—Appealable.—Under the provisions of the above section an order entered in the minutes of the court dismissing an action for a final action from which an appeal can be taken.—*Boyer v. City of Long Beach*, — Cal. App. —, 191 Pac. 35, following the doctrine in *Marks v. Keenan*, 140 Cal. 33, 73 Pac. 751.

As to dismissal order being final judgment, from which appeal lies, see pars. 16, 28, this note.

13. Same—In cases not provided for by the code.—The court may, in its discretion order the dismissal of an action in a case not provided by the code.—*MacDermot v. Grant*, 181 Cal. 332, 184 Pac. 396.

14. Same—Not effective until entered.—Setting aside.—Power of court prior to entering.—The dismissal of an action under the provisions of section 581a, post, which is supplementary to the above section, for failure to issue summons may be revoked at any time before its entry either in the minutes of the court or in the judgment-book, if it be found to have been made inadvertently or through a mistake since the order or dismissal does not become effective as a judgment until after it has been entered.—*Consol. Const. Co. v. Pac. Electric R. Co.*, 184 Cal. 244, 193 Pac. 238, applying the doctrine in *Fresno Estate Co. v. Fisk*, 172 Cal. 583, 599, 157 Pac. 1127.

15. Same—Of condemnation proceedings under act of 1909 relating to street improvement not authorized under provision of this section.—*Title Ins. & T. Co. v. Lusk*, 15 Cal. App. 362, 115 Pac. 53.

16. Same—Without motion—Is not a dismissal, or a nonsuit, on plaintiff's motion, under this section, which, prior to 1909, required an exception, but a final judgment, which never required an exception.—*Saul v. Moscone*, 16 Cal. App. 509, 118 Pac. 452.

See, also, par. 28, this note.

17. Erroneous judgment by clerk.—Clerk has no authority "to order, adjudge, and decree that said action be, and same is, hereby dismissed,"—and this entry by him in his register is not entry of judgment.—*Wolters v. Rossi*, 126 Cal. 644, 649, 59 Pac. 143.

See par. 18, this note.

18. Entry of judgment of dismissal—Is not required under first two subdivisions of section. Mere entry of order upon clerk's register is sufficient.—*Hopkins v. Superior Court*, 136 Cal. 552, 555, 69 Pac. 299.

See par. 17, this note.

19. Same—Entry of order of dismissal in the minute-book of court, is in its nature a final judgment, and from the date of that entry the time within which an appeal may be taken begins to run, and not from the date of formal entry of judgment of dismissal subsequently made.—*Matthal v. Kennedy*, 148 Cal. 699, 84 Pac. 37. See *Marks v. Keenan*, 140 Cal. 33, 73 Pac. 751; *Pacific Pav. Co. v. Vizelich*, 141 Cal. 4, 74 Pac. 352; *Swortfiguer v. White*, 141 Cal. 579, 75 Pac. 172.

20. Improper dismissal—Remedy for.—If dismissal is entered improperly, defendants' remedy is by appeal from judgment, and not by collateral attack upon judgment.

—*Higgins v. Mahoney*, 50 Cal. 444; *Westbay v. Gray*, 116 Cal. 660, 667, 48 Pac. 800.

21. Judgment of court—Defined.—Judgment to be entered upon order of dismissal is judgment of court, although entered by clerk.—*Wolters v. Rossi*, 126 Cal. 644, 649, 59 Pac. 143.

22. Judgment of dismissal—Presumption.—A judgment of dismissal, is absence of any showing to contrary, will be presumed to have been made on some good ground, and that in ordering it court properly exercised its power in conformity with rules of law.—*Wood v. Diepenbrock*, 141 Cal. 55, 74 Pac. 546.

23. Judgment after demurrer sustained and refusal to amend.—Judgment of dismissal is proper where, upon issue of law involving sufficiency of complaint, demurrer was sustained, and plaintiff refused to amend.—*Saddlemire v. Stockton S. & L. Soc.*, 144 Cal. 650, 656, 79 Pac. 381.

24. Distinguished: from *Pacific Pav. Co. v. Vizelich*, 141 Cal. 4, 74 Pac. 352, in which court held that insufficiency of complaint is not available on motion to dismiss action, and can not be considered upon appeal from order granting motion.

25. Mandamus to compel dismissal of action—Answers and cross-complaints filed.—The clerk of a superior court can not be compelled to file and enter on his register dismissals of actions instituted in the superior court on reference of contests of conflicting claims to purchase state lands by the surveyor-general, where the defendants had filed answers and cross-complaints to which plaintiff had demurred.—*Montgomery v. Neillon*, 41 Cal. App. 184, 182 Pac. 456.

26. If the pleadings of the defendants were insufficient, plaintiffs remedy was by appeal.—*Montgomery v. Neillon*, 41 Cal. App. 184, 182 Pac. 456.

27. Motion to dismiss action—Not authorized by above section when it does not appear that either party was entitled to demand entry of judgment at any time before motion to dismiss was made.—*Neihaus v. Morgan*, 5 Cal. Unrep. 391, 45 Pac. 255, 257.

28. Order of dismissal—Judgment on merits.—Judgment of dismissal not being for one of the causes provided in this section must be held a judgment upon the merits under section 582.—*Brown v. Sterling Fixtures Co.*, 175 Cal. 563, 166 Pac. 322; *Amestoy v. City of Los Angeles*, 5 Cal. App. 273, 275, 90 Pac. 42; *Saul v. Moscone*, 16 Cal. App. 506, 509, 118 Pac. 452.

29. Same—Refusing to vacate judgment of dismissal—Not appealable, see *Estate of Gregory*, 122 Cal. 483, 485, 55 Pac. 144.

30. Same—Vacating dismissal—Effect of.—Entry of order for dismissal by clerk in register, whatever its effect may be, is completely annulled by subsequent order of

court vacating it.—*Wolters v. Rossi*, 126 Cal. 644, 648, 59 Pac. 143.

31. Power to dismiss action.—Was first exercised by equity courts.—For long period, however, courts of law have exercised authority as part of their inherent powers; and same rules now apply to dismissal at law or equity, under code proceedings.—*People ex rel. Stone v. Jefferts*, 126 Cal. 296, 300, 58 Pac. 704.

32. Proceeding for obtaining dismissal.—When it is said that action may be dismissed, or judgment of nonsuit entered by plaintiff himself, no more is meant than that he may apply to clerk for entry of dismissal in clerk's register and judgment accordingly. Power of clerk to enter judgment depends upon his power to make entry of dismissal in register.—*Page v. Superior Court*, 76 Cal. 372, 374, 18 Pac. 385.

33. Waiver of notice of motion to vacate.—By appearance of counsel at hearing of motion to vacate order or judgment of dismissal and contesting motion on such appearance, waiver of notice of motion to vacate is regarded as waived.—*Acocck v. Halsey*, 90 Cal. 215, 218, 27 Pac. 193. See *McLeran v. Shartzler*, 5 Cal. 70; *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459.

34. Word "may"—Can not be read "must" as applied to first two subdivisions, as these subdivisions are not addressed to clerk, but define right of plaintiff.—*Rosenthal v. McMann*, 93 Cal. 505, 511, 29 Pac. 121.

II. DISMISSAL BY PLAINTIFF—SUBDIVISION 1.

35. Absolute right is given to plaintiff, by subdivision 1 of this section, to dismiss his action at any time "providing counterclaim has not been made, or affirmative relief sought by the cross-complaint or answer of defendant."—*Alpers v. Bliss*, 145 Cal. 565, 570, 79 Pac. 171. See *Thompson v. Spraug*, 66 Cal. 350, 5 Pac. 506.

36. Same—What depends upon.—Right of plaintiff to have action dismissed, and authority of clerk to enter judgment of dismissal, depends upon condition of pleadings at time plaintiff makes request for such dismissal.—*Alpers v. Bliss*, 145 Cal. 565, 569, 79 Pac. 171.

37. Action for accounting—Affirmative relief.—Where in action for accounting, administratrix sought to obtain decree that defendant convey certain real estate, which had been conveyed to him by plaintiff's intestate as security for certain moneys, alleging that amounts received by defendant, and value and use of occupation were sufficient to pay off indebtedness, and defendant's answer averred advances, and payment of expenses by him of more than amounts received, claiming balance, and asking for accounting, and that real estate conveyed as security be sold to satisfy amount due him, held that such answer

sought affirmative relief growing out of action set forth in plaintiff's complaint, and that plaintiff could not dismiss action of his own motion.—*Clark v. Hundley*, 65 Cal. 96, 97, 3 Pac. 131.

38. Action for divorce—Affirmative relief.—An action for divorce comes within purview of subdivision 1 of this section, where defendant in action files cross-complaint, and upon such cross-complaint, prays affirmative relief.—*Mott v. Mott*, 82 Cal. 413, 416, 22 Pac. 1140.

39. Same—Control of court to allow alimony and counsel fees pendente lite in action for divorce, is not lost until judgment of dismissal is entered.—*Page v. Page*, 77 Cal. 83, 85, 19 Pac. 183.

40. Same—Same—As to rule since amendment of code provision abrogating rule declared in *Page v. Superior Court*, 76 Cal. 372, 376, 18 Pac. 385, and in *Page v. Page*, 77 Cal. 83, 85, 19 Pac. 183.

See par. 43, this note.

41. Same—Judgment of dismissal in divorce action will be reversed on appeal, where defendant files cross-complaint seeking affirmative relief.—*Mott v. Mott*, 82 Cal. 413, 420, 22 Pac. 1140.

42. Same—Orders in relation to alimony and counsel fees in divorce suit, are not void and can not be annulled on certiorari, where made after entry of dismissal, but before judgment of dismissal was entered in judgment-book.—*Page v. Superior Court*, 76 Cal. 372, 376, 18 Pac. 385.

43. Compare: *Hopkins v. Superior Court*, 136 Cal. 552, 554, 69 Pac. 299, as to construction of law as amended since the decision in *Page v. Superior Court*, supra, eliminating the provision "that judgment may thereupon be entered accordingly," and holding that mere entry of order of dismissal in clerk's register is now sufficient, and that only jurisdiction left in court upon proper showing of application for dismissal is to order clerk to make proper entry.—See *Kaufman v. Superior Court*, 115 Cal. 152, 155, 46 Pac. 904.

44. Action in ejectment—Counter-claim.—Where defendant, in action for ejectment, averred himself to be owner of premises and entitled to possession thereof, and alleged contract by which plaintiff becomes his tenant, claiming thereunder rent for use and occupation, and praying judgment for same in certain sum, does not constitute counter-claim whether or not denominated as such, according to construction placed on language contained in section 438, subdivision 1, ante.—*Carpenter v. Hewel*, 67 Cal. 589, 590, 8 Pac. 314. See *Moyle v. Porter*, 51 Cal. 639, 640; *James v. Center*, 53 Cal. 31.

45. Action to quiet title—Affirmative relief.—Judgment of dismissal in action to quiet title is erroneous where defendant in his answer asserted certain title in him-

self, denying plaintiff's right of possession, alleging an ouster by plaintiff of defendant's possession, and concluding with prayer for decree establishing his title and enjoining plaintiff from asserting any claim to land or interfering in any manner with possession thereof.—*Wood v. Jordan*, 125 Cal. 263, 264, 57 Pac. 998.

46. Overruled: In *Islais & S. W. Co. v. Allen*, 132 Cal. 432, 437, 64 Pac. 713, holding that in action to quiet title, though defendant's title may never have been questioned, and therefore no cause of action has existed in his favor against any one, yet if plaintiff, by bringing action, creates cause of action in defendant's favor against plaintiff, assertion of adverse claim or interest in same property by defendant as against plaintiff, where there are affirmative allegations, which, if sustained by evidence, entitle defendant to affirmative relief, such affirmative relief is demanded within meaning of this section.—See *Robinson v. Placerville S. V. R. Co.*, 65 Cal. 263, 3 Pac. 878; *Kitts v. Austin*, 83 Cal. 167, 172, 23 Pac. 290.

47. Action against trustees—Affirmative relief.—Where, in action to remove trustees, plaintiff, averring that he was holder of certain bonds of defendant railroad company, secured by mortgage on property of railroad to defendant as trustees for bondholders, and that trustees had failed to discharge duties of trust; and where answer contained averment that bonds held by plaintiff were paid, satisfied, and discharged, and asked as affirmative relief that bonds be delivered up and canceled, or in default of such delivery, be declared void, held that plaintiff, where answer claimed such affirmative relief, was not authorized to dismiss action.—*Robinson v. Placerville & S. V. R. Co.*, 65 Cal. 263, 266, 3 Pac. 878.

48. Advise ment—Cause held under.—Plaintiff has no right, and court has no authority, to dismiss cause after trial and submission to court, and where case is held under advisement.—*Heinlen v. Castro*, 22 Cal. 100; *Westbay v. Gray*, 116 Cal. 660, 667, 48 Pac. 800.

49. Answer—Prayer for affirmative relief—Does not change to cross-complaint.—In an action upon a promissory note the defendant interposed an answer setting up the facts upon which he based a demand for a cancellation of the note, followed by a prayer for such relief. Under the provisions of the above section the defendants in such an action, with the leave of the court, may dismiss and withdraw such answer so filed; because the matters being proper as a defense were not turned into a counter-claim or cross-complaint merely by the prayer for affirmative relief and deprived the parties of the right to dismiss.—*Ward v. Goetting*, 44 Cal. App. 435, 186 Pac. 640, following *Shain v. Belvins*, 79 Cal. 262, 21 Pac. 747.

50. Construction of section—Subdivision 1 of above section can not be restricted in its meaning to trials of merit after answer, for there may be such trial on general demurrer to complaint as will effectually dispose of case, where plaintiff has properly alleged all facts which constituted his cause of action. If demurrer is sustained, he stands on his pleading and submits to judgment on demurrer, and if not satisfied, has his remedy by appeal. In such case there will be trial within meaning of code, and judgment would cut off right of dismissal unless it was first set aside, or leave given to amend.—*Goldtree v. Spreckels*, 135 Cal. 666, 672, 67 Pac. 1091. See *Hancock D. Co. v. Bradford*, 13 Cal. 637; *Brown v. Harter*, 18 Cal. 76; *Tregambo v. Comanche M. & M. Co.*, 57 Cal. 501; *Finn v. Spagnoli*, 67 Cal. 330, 7 Pac. 746. *Neb. State v. Scott*, 22 Neb. 628, 36 N. W. 121. *Ohio. Beaumont v. Herrick*, 24 Ohio St. 445, 446. *Tex. Scherff v. Missouri Pac. R. Co.*, 81 Texas 471, 26 Am. St. Rep. 328, 17 S. W. 39.

51. Counter-claim or cross-complaint—Dismissal where affirmative relief sought.—Party has no right to dismiss cross-complaint against objection of plaintiff, who had answered showing that he was entitled to affirmative relief, and praying that same be granted as to no mortgage set up in cross-complaint. Cross-complaint in such case is in same position with reference to right to dismiss as if he were original plaintiff, and can not, under circumstances, dismiss without consent of party who has prayed affirmative relief as to matters contained in cross-complaint.—*Rodgers v. Parker*, 136 Cal. 313, 316, 68 Pac. 975. See *Islais & S. W. Co. v. Allen*, 132 Cal. 432, 434, 64 Pac. 713.

52. Counter-claim or cross-complaint, to prevent dismissal under subdivision 1, must be one upon which defendant would be entitled to affirmative relief.—*Mott v. Mott*, 82 Cal. 413, 415, 22 Pac. 1140. See *Belleau v. Thompson*, 33 Cal. 495, 496.

53. Same—Filing answer containing counter-claim, after order dismissing cause has been entered in minutes, and before actual entry of judgment, can not prevent dismissal. Plaintiff who, in proper case, has himself ordered action to be dismissed, or has obtained order of dismissal from court, can not thus be defeated and judgment will be entered *nunc pro tunc*.—*Evans v. Johnston*, 115 Cal. 180, 183, 46 Pac. 906.

54. Same—Matters set out in cross-bill so-called, held not to constitute counter-claim, because not arising out of transaction set forth in complaint, and not connected with subject of action, and that judgment of dismissal entered by clerk was properly entered. Inasmuch as there was no counter-claim under statute.—*James v. Cenner*, 53 Cal. 31, 32.

55. Same—Stricken from answer—Effect of.—Where cross-complaint has been stricken from answer of defendant, and latter pleading left with matter of defense only, plaintiff is at liberty to dismiss action at any time before trial, upon payment of costs.—*Thompson v. Spraug*, 66 Cal. 359, 5 Pac. 506.

56. Same—Striking cross-complaint from files—Effect of.—Plaintiff's right to dismiss action is absolute, where cross-complaint, though filed had been stricken from files under order of court—the only pleading on file in action remaining on defendant's part being his answer, in which no demand for affirmative relief was made.—*Alpers v. Bliss*, 145 Cal. 565, 570, 79 Pac. 171.

57. Costs—What consist of.—The costs which plaintiff is required to pay before dismissal of action, are clerk's costs for entering order.—*Hopkins v. Superior Court*, 136 Cal. 552, 553, 69 Pac. 299.

58. Defendant's right to recover costs, whatever such right may be, arises only after dismissal, and prepayment of defendant's costs is not prerequisite to plaintiff's right.—*Hopkins v. Superior Court*, 136 Cal. 552, 553, 69 Pac. 299.

59. Plaintiff has absolute right, upon payment of his own costs, to order of dismissal.—*Hopkins v. Superior Court*, 136 Cal. 552, 554, 69 Pac. 299.

60. "Dismissal before the trial"—Means dismissal before submission.—"Dismissal before the trial" means dismissal before submission, and before the court trying the case without a jury, has taken it under advisement, after the close of the evidence and argument.—*MacDermot v. Grant*, 181 Cal. 332, 184 Pac. 396.

61. Dismissal by part of plaintiffs—After findings and judgment.—In an action on a promissory note brought by four plaintiffs, an attempted dismissal by three of the plaintiffs so far as they were concerned after the findings and judgment had been signed, but before they had been filed can not be given effect under any of the provisions of the code expressly authorizing a dismissal.—*MacDermot v. Grant*, 181 Cal. 332, 184 Pac. 396.

62. Dismissal of complaint—After demurrer sustained.—Where a demurrer to a complaint was sustained with leave to amend and plaintiff, before the expiration of the time to amend, and without amending, dismissed the action, an order vacating the dismissal and rendering judgment for the defendant was void.—*Home Real Estate Co. v. Winnants*, 39 Cal. App. 643, 179 Pac. 534.

63. Same—After intervention by which it is prayed that the plaintiff take nothing, the plaintiff can not dismiss his action as against certain defendants and take judgment against the others without notice to, or giving the intervener an opportunity

to be heard, nor can the court render judgment without the presence of the intervener in the absence of proof of notice to the intervener as prescribed by section 594.—*Townsend v. Driver*, 5 Cal. App. 581, 585, 90 Pac. 1061.

As to dismissal after intervention, see pars. 69-72, this note.

64. Where intervention has been allowed and complaint in intervention filed whereby the interveners pray that the plaintiff take nothing and that they be allowed their costs, the plaintiff may dismiss the action entirely as thereby he expresses his willingness to take nothing and the object sought by the intervention has been accomplished.—*Townsend v. Driver*, 5 Cal. App. 581, 584, 90 Pac. 1061.

65. Entry of judgment upon order—Action is not dismissed until judgment is entered.—Page v. Superior Court, 76 Cal. 372, 374, 18 Pac. 385; Page v. Page, 77 Cal. 77, 83, 19 Pac. 183. See *Rochat v. Gee*, 91 Cal. 355, 356, 27 Pac. 670; *Barnes v. Barnes*, 95 Cal. 171, 173, 16 L. R. A. 660, 30 Pac. 298; *Brady v. Times-Mirror Co.*, 106 Cal. 56, 62, 39 Pac. 209; *Evans v. Johnston*, 115 Cal. 180, 183, 46 Pac. 906.

66. Compare: *Thompson v. Spraug*, 66 Cal. 350, sub nom. *Thompson v. Spray*, 4 Pac. 418, 5 Pac. 506, and *Hopkins v. Superior Court*, 136 Cal. 552, 554, 69 Pac. 299, holding that entry of judgment of dismissal is not required and that mere entry of order by clerk is sufficient.

See par. 43, this note.

67. Failure of clerk to perform ministerial duties—Effect of.—The failure of clerk to perform his ministerial duties by entering dismissal in register, and causing proper judgment of dismissal to be entered in his judgment-book, can not affect substantial rights of parties.—*Kaufman v. Superior Court*, 115 Cal. 152, 156, 46 Pac. 904.

68. Filing cross-complaint—After receiving notice.—Defendants can not, by filing cross-complaint, after receiving notice of intention to move for order that judgment of dismissal be entered, deprive plaintiff of this right.—*Hinkel v. Donohue*, 90 Cal. 389, 392, 27 Pac. 301.

69. Intervention—Action may be dismissed upon motion of plaintiff before trial, where there is no counter-claim or cross-complaint or answer of defendant, seeking affirmative relief. Notwithstanding filing of complaint in intervention and insistence of intervener that case proceed to trial.—*Henry v. Vineland Irr. Dist.*, 140 Cal. 376, 377, 73 Pac. 1061.

As to dismissal after intervention, see pars. 63, 64, this note.

70. Same—Death of party.—Intervener, against whom no relief is prayed, may dismiss his petition of intervention, and fact of death of one of plaintiffs does not take away, or in any manner affect, this right.—*Sheldon v. Gunn*, 56 Cal. 582, 587.

71. Same—Effect of filing complaint in intervention.—Where intervener becomes party for purpose of resisting, with defendant, claims of plaintiff, and where intervener could accomplish nothing by judgment upon merits that would not be accomplished by dismissal of action, plaintiff may dismiss action, for in such case, pleading of interveners, although termed complaint, is in effect answer to complaint of plaintiff.—*Henry v. Vineland Irr. Dist.*, 140 Cal. 376, 378, 73 Pac. 1061. See *People ex rel. Fogg v. Ferris Irr. Dist.*, 132 Cal. 289, 64 Pac. 399, 773.

72. Same—Judgment rendered against interveners is erroneous where such interveners abandoned contest, and were out of case by virtue of dismissal.—*Sheldon v. Gunn*, 56 Cal. 582, 585.

73. Judgment of dismissal by plaintiff—Not a bar to subsequent action.—Where defendant obtained a transfer of the action to the federal court from the state court, for diverse citizenship, and the plaintiff thereafter dismissed the action, and obtained a judgment of dismissal in the federal court, such judgment of dismissal does not constitute a bar to a subsequent action in the state court.—*Carr v. Howell*, 154 Cal. 383, 97 Pac. 885.

74. An action by a wife for a divorce, which is dismissed by her, under subdivision 1 of this section, without the consent or knowledge of the defendant, and without a consideration of any kind from him to her, is not a bar to a subsequent action concerning the matters involved therein.—*Clopton v. Clopton*, 162 Cal. 27, 32, 121 Pac. 720.

75. Same—Nullity when defendant, in his answer, seeks affirmative relief.—*Thompson v. Spray*, 2 Cal. Unrep. 346, 4 Pac. 418.

76. Same—Will be held to relate to date of demand, where necessary to preserve substantial rights of parties.—*Kaufman v. Superior Court*, 115 Cal. 152, 157, 46 Pac. 904.

77. Mandamus—Will not lie to compel party to enter judgment of dismissal, where motion to dismiss is contested upon ground that defendant had made counter-claim, and where real and substantial question presented for decision of court by motion to dismiss is whether defendant had set up counter-claim against plaintiffs, upon which he is seeking affirmative relief; where solution of that question depends upon judicial reading and consideration of defendant's answer, stipulation between parties, and effect of latter upon former, in deciding which judge acts judicially, not ministerially.—*People ex rel. Polhemus v. Pratt*, 28 Cal. 166, 169, 87 Am. Dec. 110. See *People ex rel. Meminger v. Sexton*, 24 Cal. 79.

78. Motion — Proceeding by.—Mode pointed out in subdivision 1 is not exclusive or mandatory, and plaintiff may adopt proceeding of making motion to court and taking order of dismissal, which, when

entered, shall be noted by clerk in register of action.—*Richards v. Bradley*, 129 Cal. 670, 672, 62 Pac. 316. See *Hinkel v. Donohue*, 90 Cal. 389, 27 Pac. 301; *Westbay v. Gray*, 116 Cal. 660, 48 Pac. 800.

79. Same—To transfer cause—Dismissed defendant.—Where plaintiff dismissed action as to two defendants, leaving action to proceed against other parties, and no application had been made to set aside default judgment rendered thereon, held that dismissed defendant was no longer party to action, and not in position to contest validity or regularity of judgment, and his motion to transfer cause could not therefore be properly entertained.—*Reed v. Calderwood*, 22 Cal. 463, 465.

80. Retraxit—At common law occurred when plaintiff came into court in person (under our practice this may be by counsel), and voluntarily renounced his suit or cause of action, and when this was done, judgment was entered in favor of defendant, and plaintiff's cause of action was forever gone.—*Westbay v. Gray*, 116 Cal. 660, 666, 48 Pac. 800; *Hibernia S. & L. Soc. v. Portener*, 139 Cal. 90, 94, 72 Pac. 716. See *Board of Commissioners v. Younger*, 29 Cal. 147, 87 Am. Dec. 164; *Merritt v. Campbell*, 47 Cal. 542.

As to retraxit, see par. 99, this note; also, ante, § 283, note pars. 206, 207.

81. Same—Dismissal of first action is not bar to second, nor judgment on merits, except where judgment is, in effect, retraxit.—*Westbay v. Gray*, 116 Cal. 660, 666, 48 Pac. 800; *Hibernia S. & L. Soc. v. Portener*, 139 Cal. 90, 93, 72 Pac. 716. See *Heinlin v. Castro*, 22 Cal. 100; *Merritt v. Campbell*, 47 Cal. 542; *Crossman v. Davis*, 79 Cal. 603, 21 Pac. 693; *Rosenthal v. McMann*, 93 Cal. 505, 29 Pac. 121.

82. Same—Judgment entered "without prejudice at plaintiff's costs" is not judgment on merits and is not bar to subsequent action, nor is it an estoppel under section 1908, post.—*Hibernia S. & L. Soc. v. Portener*, 139 Cal. 90, 94, 72 Pac. 716.

83. Same—Judgment of United States circuit court dismissing bill for same cause of action set up in complaint, in state court, is not bar to action in state court, where it does not appear that merits of case were determined in circuit court.—*Wills v. Pauly*, 116 Cal. 575, 582, 48 Pac. 709.

84. Same—Power to make retraxit under our statute is conferred upon attorney of record in case.—*Merritt v. Campbell*, 47 Cal. 542, 545.

See, ante, § 283 and note pars. 206, 207.

85. Stipulation between parties—Providing for contingencies in relation to judgment, held not such in its terms as to deprive plaintiff of right to dismiss the action before trial, upon payment of costs, where no counter-claim had been made, nor affirmative relief sought by cross-complaint or answer.—*Southern Cal. M. W. Co. v. Cam-*

eron, 141 Cal. 283, 287, 74 Pac. 838 (Beatty, C. J., dissenting).

86. Trial and submission set aside—Effect of.—Plaintiff has right to apply for, and court has right to grant, dismissal in case where action had been tried and submitted, but order of submission had been set aside and leave given to amend pleadings. Case stands then as though no submission had ever been had.—*Westbay v. Gray*, 116 Cal. 660, 667, 48 Pac. 800.

87. Validity of judgment—Entered under subdivision 1 of this section, can not be questioned where judgment is entered by clerk without payment of costs referred to in subdivision.—*Hinkel v. Donohue*, 90 Cal. 389, 27 Pac. 301. See *Kaufman v. Superior Court*, 115 Cal. 152, 46 Pac. 904.

88. Same—Decided by reference to pleadings.—The validity of entry in register, or of judgment thereon, must be decided by reference to pleadings in the action, where such validity is brought into question, either directly or collaterally.—*Page v. Superior Court*, 76 Cal. 372, 374, 18 Pac. 385.

See par. 43, this note.

89. Voluntary dismissal—"Without prejudices at plaintiff's costs," of action, is proper under subdivision 1 of this section, in case where defendant, after having default judgment set aside, had obtained leave to answer, but had not answered at time of dismissal.—*Hibernia S. & L. Soc. v. Portener*, 139 Cal. 90, 92, 72 Pac. 716.

90. Writ of mandate—Will issue to compel entry of dismissal of action by plaintiff in divorce suit, upon payment of her costs, where clerk refused to enter dismissal, basing his action upon order of superior court directing that all proceedings in relation to dismissal be stayed unless plaintiff pays to defendant amount of his costs, and if plaintiff failed to make such payment, then attempted dismissal of action be annulled and set aside.—*Hopkins v. Superior Court*, 136 Cal. 552, 555, 69 Pac. 299.

91. Same—Writ of mandate is only plain, speedy, or adequate remedy of plaintiff to compel entry of dismissal, where court refuses to order proper entry of dismissal in register, and where proper application is made under provisions of section.—*Hopkins v. Superior Court*, 136 Cal. 552, 555, 69 Pac. 299.

92. Same—Writ of mandate—Will issue to compel court to try cause attempted to be dismissed by plaintiff, where affirmative relief is sought by answer.—*Clark v. Hundley*, 65 Cal. 96, 97, 3 Pac. 131.

93. Same—Writ of prohibition will issue to restrain superior court from proceeding with action commenced by receiver in interpleader for purpose of determining rights of rival claimants of fund, where receiver afterwards dismissed action, and court subsequently set aside order of dismissal and threatened further proceedings in action.—*Kaufman v. Superior Court*, 115 Cal. 152, 157, 46 Pac. 904.

III. DISMISSAL BY WRITTEN CONSENT —SUBDIVISION 2.

94. Complaint stricken out by consent of parties—Effect of.—Complaint stricken out by consent of both parties is properly followed by dismissal of proceedings.—*Smith v. Ling*, 73 Cal. 72, 73, 14 Pac. 390.

95. Dismissal on stipulation—Judgment on merits, when.—Where the parties appear in open court and stipulate for a dismissal, the situation is covered by the provisions of the above section, but a judgment entered thereon is a judgment on the merits, within the contemplation of section 582, post.—*McCord v. Martin*, — Cal. App. —, 191 Pac. 89.

As to order of dismissal being judgment on merits, see pars. 12, 28, 96, this note.

96. Judgment of dismissal by consent—When judgment on merits.—A judgment of dismissal by consent of parties which does not come within meaning of the subdivisions of this section, must be deemed to be judgment on merits.—*Merritt v. Campbell*, 47 Cal. 542, 548.

97. Offer to dismiss—Failure to file written consent—Failure of court to pass on motion.—In a case in which an action is brought against two defendants to recover damages for personal injuries received by the plaintiff where during the course of the trial plaintiff's counsel remarked "just to show that we are willing to do the right thing, we will dismiss the case, with Your Honor's permission, against," naming the defendants, "at this time." The named defendant did not file the written consent under the provisions of subdivision 2 of the above section and the court refused to rule on the suggestion; on appeal it was held that there was no prejudicial error in the court's action in refusing to pass on the alleged motion to dismiss as to one of the defendants for the reason that such defendant did not bring himself within the provisions of subdivisions of the above section, entitling him to a ruling on the motion and a dismissal from the case.—*Lampton v. Davis Standard Bread Co.*, — Cal. App. —, 191 Pac. 710.

98. Parties not aggrieved—By order setting aside order or judgment of dismissal unless such order or judgment operated as a retraxit and so barred any future action by plaintiffs for same cause.—*Stoutenborough v. Board of Education*, 104 Cal. 664, 667, 38 Pac. 449.

99. Retraxit—Dismissal by written consent will act as a.—Only such dismissal, under our statute, as is had "by either party upon the written consent of the other," will operate as a retraxit.—*Stoutenborough v. Board of Education*, 104 Cal. 664, 667, 38 Pac. 449.

As to retraxit, see pars. 80-83, this note; also, ante, § 283, note pars. 206, 207.

100. Stipulation for dismissal—When invalid.—Where previous to commencement of action, plaintiff entered into written contract with his attorneys, by which they were to have one-half of whatever might be recovered in action, as compensation for their services, said attorneys agreeing to pay costs of case, and where, thereafter, plaintiff, without any substitution or change as to his attorneys, and without their knowledge or consent, in person, signed and delivered to defendant's attorney, written stipulation authorizing dismissal of case, and judgment of dismissal was accordingly entered; held that such stipulation was unauthorized, and judgment was no better than it would have been if court had thereby dismissed action without any stipulation or motion whatever.—*Toy v. Haskell*, 128 Cal. 558, 561, 79 Am. St. Rep. 70, 61 Pac. 89.

As to stipulations by attorney, see, ante, § 283, note pars. 214 et seq.

101. "Written consent"—Must come from attorney of record.—Written consent that action be dismissed must come, where there is an attorney of record, from such attorney or be sanctioned by him.—*Board of Commissioners Funded Debt v. Younger*, 29 Cal. 147, 150, 87 Am. Dec. 164.

See, ante, § 283 and note pars. 59-62.

102. No stipulation as to conduct or disposal of action shall be entertained by court unless same is signed or assented to by attorney of record. — *Board Commissioners Funded Debt v. Younger*, 29 Cal. 147, 149, 87 Am. Dec. 164.

103. Party to action may appear in his own proper person or by attorney, but he can not do both. If he appear by attorney he must be heard through him, and it is indispensable to decorum of court, and due and orderly conduct of cause that such attorney should have management and control of action and his acts go unquestioned by any one except party whom he represents.—*Board Commissioners Funded Debt v. Younger*, 29 Cal. 147, 149, 87 Am. Dec. 164.

104. Same—Must be signed by attorney of consenting party.—The "written consent" referred to in subdivision 2 of the above section, is wholly ineffective unless it is signed by the attorney of record of the consenting party.—*MacDermot v. Grant*, 181 Cal. 332, 184 Pac. 396.

IV. DISMISSAL BY COURT—FAILURE TO APPEAR AT TRIAL—SUBDIVISION 3.

105. Consent—When necessary.—Action can not be dismissed under subdivision 3 of this section where plaintiff does not appear at trial, without consent of defendant in action where affirmative relief is sought by the answer.—*Clune v. Quitzow*, 125 Cal. 213, 214, 57 Pac. 886.

106. Divorce—Inability to pay costs.—Where plaintiff in a divorce action refuses to go to trial upon the ground that she has

been unable to pay the expenses thereof, the court may dismiss her complaint where it had theretofore heard and denied a motion for an allowance to pay such cost.—*Stewart v. Stewart*, 156 Cal. 651, 656, 105 Pac. 955.

107. Failure of plaintiff to appear at trial.—It is right of defendant, where plaintiff fails to appear at trial, to proceed with case, and to have judgment entered, finally disposing of case, and court does not err in granting defendant judgment on merits.—*Clune v. Quitzow*, 125 Cal. 213, 214, 57 Pac. 886.

108. Judgment of dismissal—Is not judgment in bar of another action, where facts are as follows: Plaintiff filed her complaint, and defendant answered; time arrived for trial and plaintiff's attorney failed to appear; thereupon defendant answered ready and made motion that action be dismissed by reason of non-appearance of plaintiff; at this stage of proceedings, plaintiff's attorney appeared and declined to further prosecute action; court thereupon ordered action dismissed for want of prosecution, and gave judgment in favor of defendant for his costs; thereupon new complaint was filed upon same cause of action, and defendant, by his answer, pleaded aforesaid judgment in bar to prosecution of such subsequent action.—*Pyle v. Piercy*, 122 Cal. 383, 385, 55 Pac. 141. See *Laird v. Morris*, 23 Nev. 34, 42 Pac. 11.

109. Judgment that can not be pleaded in bar—Effect of.—A judgment that can not be pleaded in bar necessarily can not be pleaded in abatement and avoidance.—*Pyle v. Piercy*, 122 Cal. 383, 385, 55 Pac. 141.

110. When there has been no adjudication of cause upon its merits, it will only be in exceptional cases that court will hold that judgment of dismissal is equivalent of judgment of res adjudicata upon facts. Upon reason there is nothing to justify such a rule; nothing has been litigated and no principle of estoppel can be invoked.—*Pyle v. Piercy*, 122 Cal. 383, 385, 55 Pac. 141.

111. Notice of hearing—Proof of necessary.—A court should not dismiss an action under subdivision 3 of above section, for failure of the plaintiff to appear on the trial, except upon proof made of due service of notice of trial in accordance with the requirements of section 594, post, which section is designed to prevent the manifest injustice of dismissing a party's action, or trying it in his absence, because of his failure to appear at a time at which he could not be held to have had notice that the trial would be had, or that any proceeding would be taken against him.—*Estate of Dean*, 149 Cal. 491, 87 Pac. 13.

V. DISMISSAL BY COURT—ON ABANDONMENT OF CAUSE—SUBDIVISION 4.

112. Right of plaintiff to dismiss action—At any time before final submission of cause.—See pars. 22-79, this note.

113. Right of defendant to dismiss answer.—Notwithstanding prayer for affirmative relief; such prayer does not change the answer into a cross-complaint.—See par. 49, this note.

VI. DISMISSAL BY COURT—NONSUIT—SUBDIVISION 5.

As to nonsuit in an action for negligence where plaintiff made out a prima facie case, see Kerr's Cyc. Civil Code, § 1714 and note.

As to when compulsory nonsuit is to be granted, see note 24 Am. Dec. 620.

114. Action for damages.—Based on law of road.—Under facts as proved, contributory negligence not shown and nonsuit properly denied.—McKernan v. Los Angeles Gas & Elec. Corp., 16 Cal. App. 282, 116 Pac. 677.

115. Action in ejectment.—An order of judgment of nonsuit on defendant's motion determines nothing as to the title of either party, and has no other effect except to determine that plaintiff has failed to make proof of his title.—City and County v. Brown, 153 Cal. 647, 96 Pac. 281.

116. Action prematurely commenced.—No breach of contract.—In an action on an insurance policy, where proof of loss was made November 18, 1908, and under the terms of the policy payment of loss was not obligatory until after the lapse of sixty days from such proof of a loss, there was no breach of contract on December 22, 1908, when action was commenced, and defendant's motion for nonsuit was erroneously denied.—Irwin v. Insurance Co. of N. A., 16 Cal. App. 146, 116 Pac. 294.

117. Attachment dissolved by.—In an action in which there has been an attachment levied upon goods and a nonsuit is granted by the court and entry thereof duly made under the provisions of the above section this has the effect to dissolve the attachment theretofore levied upon the goods.—Clark v. Superior Court, 37 Cal. App. 732, 174 Pac. 681.

118. Common-law rule.—At common law, it was right of plaintiff to take nonsuit at any time before jury retired, and statute does not alter rule.—Hancock D. Co. v. Bradford, 13 Cal. 637.

119. Conflict of evidence.—Where there is any substantial evidence tending to prove the facts alleged in plaintiff's complaint, he is entitled to a trial upon the merits, and a nonsuit should never be granted where there is a conflict in the evidence.—Christenson Lumber Co. v. Buckley, 17 Cal. App. 44, 118 Pac. 466.

120. Construction of subdivision.—In general.—The evidence on a motion for a nonsuit on the close of plaintiff's case must be accorded the benefit of its full probative force, and this is true whether the evidence has been erroneously admitted or not. It

is also true that on such motion the evidence must be taken most strongly against the defendant.—Estate of Daly, 15 Cal. App. 329, 114 Pac. 787.

121. The rules as to nonsuit are the same whether the trial is by the court or by a jury. The motion admits the truth of all the plaintiff's evidence and every inference of fact that can be legitimately drawn therefrom and the evidence should be interpreted most strongly against the defendant. Whatever facts relevant to the issue the evidence tended to prove on plaintiff's behalf must be regarded as proof and the sufficiency or insufficiency of the evidence tending to sustain plaintiff's case can not be considered.—Hercules Oil Refining Co. v. Hocknell, 5 Cal. App. 702, 707, 91 Pac. 341.

122. Same.—Granted or denied when.—A nonsuit should be denied where the evidence and the presumption reasonably arising therefrom are legally sufficient to prove the material allegations of the complaint, and it should be granted where they are not.—Hercules Oil Refining Co. v. Hocknell, 5 Cal. App. 702, 707, 91 Pac. 341.

123. Same.—Provisions exclusive.—The cases in which a judgment of nonsuit may be entered are set forth in this section, and the court has authority to grant such judgment only in the cases specified by law.—Estate of Higgins, 156 Cal. 257, 260, 104 Pac. 6.

124. Contest of will.—Rules of nonsuit in civil cases, held applicable to contest of wills.—In re Daly, 15 Cal. App. 331, 114 Pac. 787. See In re Weber, 15 Cal. App. 224, 235, 114 Pac. 597.

125. Will contest, so far as the granting of nonsuit is concerned, is governed by the provisions of this section and the same rules as apply in civil actions.—Estate of Daly, 15 Cal. App. 329, 114 Pac. 787.

126. Same.—Consideration of evidence upon nonsuit.—Entire evidence presented is to be viewed from a point most favorable to contestant. Contradictory evidence must be disregarded. All facts supporting contestant's case must be taken as true, and all presumptions and all reasonable inferences considered as facts proven in his favor.—Estate of Ricks, 160 Cal. 459, 117 Pac. 532.

127. Contributory negligence of employee in action against employer. When question of law, and when question of fact.—Payne v. Oakland Traction Co., 15 Cal. App. 137, 113 Pac. 1074.

See, also, Kerr's Cyc. Civ. Code, 2d ed., § 1970 and note.

128. As to negligence of employer and his duty to make, promulgate and enforce rules and regulations; and as to when question of law or fact.—See Kerr's Cyc. Civ. Code, § 1970 and note.

129. Court—Authority to grant judgment of nonsuit only in certain cases specified by law.—*Hanna v. De Garmo*, 140 Cal. 172, 174, 73 Pac. 830.

130. Same—May dismiss action as to one defendant and give him judgment against plaintiff for his costs, where no case is made by plaintiff against such defendant, notwithstanding action is to proceed as between plaintiff and other defendants.—*Rowe v. Simmons*, 113 Cal. 688, 692, 45 Pac. 983.

131. Denial of—Evidence subsequently introduced.—Error, or possible error, in the denial of a motion for nonsuit at the close of plaintiff's case, becomes of no consequence if, upon the conclusion of the whole case, there is evidence upon material issues warranting submission of the cause to the jury.—*Peters v. Southern Pac. Co.*, 160 Cal. 52, 116 Pac. 400.

132. Directing verdict—In general.—The court may grant a nonsuit only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given; if in such a case no motion for nonsuit has been made and the issues have been turned over to the consideration of the jury, and that jury has rendered a verdict in favor of plaintiff, the verdict being supported by any substantial evidence, it becomes the imperative duty of the court to set it aside, but when, and only when, the evidence of the proponent is thus insufficient the court may and should grant a nonsuit, and may and should on motion direct a verdict.—*Estate of Caspar*, 172 Cal. 147, 155 Pac. 631.

As to distinction in duties of judge in granting nonsuit and directing verdict, see par. 142, this note.

133. The right of a court to direct a verdict is, touching the condition of the evidence; the same as the right of the court to grant a nonsuit.—*Estate of Caspar*, 172 Cal. 147, 155 Pac. 631.

134. The court is authorized to take the case from the jury when, upon the whole evidence, were a verdict returned in favor of the plaintiff, the court would feel impelled to set it aside as unsupported by the evidence.—*Gaskill v. Pacific Elec. R. Co.*, 30 Cal. App. 593, 159 Pac. 200.

135. Where the court directs the verdict of the jury it is immaterial whether the jurors agree with the court or not.—*Gaskill v. Pacific Elec. R. Co.*, 30 Cal. App. 593, 159 Pac. 200.

136. Where the trial court has, at the conclusion of the plaintiff's case, denied defendant's motion for a nonsuit, the invalidity of the contract and the facts ad-

duced by the plaintiff in support of his plea of estoppel at that time appearing, it is not error for it subsequently to grant the motion of the defendants to direct the jury to return a verdict in their favor.—*Sellers v. Solway Land Co.*, 31 Cal. App. 259, 160 Pac. 175.

137. Discretion of court—As to denying motion for nonsuit will not be disturbed where there was sufficient testimony to justify court in overruling motion and submitting facts to jury.—*Anderson v. Hinshaw*, 110 Cal. 682, 686, 42 Pac. 389.

138. Same—In actions for negligence, it is only when facts are undisputed and are such that reasonable men can fairly draw but one conclusion from them that question of negligence is ever considered one of law for the court or court justified in granting nonsuit.—*Hanley v. California B. & C. Co.*, 127 Cal. 232, 241, 47 L. R. A. 597, 59 Pac. 577. See *Union Pac. Co. v. Jarvi*, 3 C. C. A. 433, 53 Fed. 65.

139. Same—Judge should grant nonsuit where verdict in favor of plaintiff should be set aside for want of evidence to support it, and, in absence of jury, where evidence is insufficient to support judgment for plaintiff; judge of trial court is presumed to have acted on this principle and to have concluded that evidence was thus insufficient in granting motion for nonsuit.—*Downing v. Murray*, 113 Cal. 455, 463, 45 Pac. 869.

140. Same—To justify submission of any question of fact to jury, proof must be sufficient to raise more than mere conjecture or surmise that fact is as alleged. It must be such that a rational and well-constructed mind can reasonably draw conclusion that fact exists, and when evidence is not sufficient to justify such an inference, court may properly refuse to submit question to jury.—*Janin v. London & S. F. Bank*, 92 Cal. 14, 27, 27 Am. St. Rep. 82, 14 L. R. A. 320, 27 Pac. 1100 (*Paterson, J.*, dissenting and holding that where inability of party to produce evidence may have been caused by lapse of time in giving notice by adverse party that this and other circumstances were peculiarly questions for the jury under proper instruction from the court). See *Goldstone v. Merchant's I. & C. S. Co.*, 123 Cal. 625, 627, 56 Pac. 776.

141. Dismissal at instance of court.—Judgment is entitled to no greater consideration from mere fact that by its terms it is given upon dismissal of action at instance of court, than if it were merely judgment of nonsuit at instance of plaintiff (*dis. op.*).—*City of Oakland v. Oakland W. F. Co.*, 118 Cal. 160, 221, 50 Pac. 277.

142. Duties of judge—Nonsuit and directing verdict.—As to difference between duties of judge granting nonsuit or directing verdict, and for a historical discussion of the subject, see opinion of Judge Lurton in

Mt. Adams & E. P. Inclined R. Co. v. Lowery, 20 C. C. A. 596, 74 Fed. 463.

As to directing verdict, see pars. 132-136, this note.

143. Effect of granting nonsuit—Reasons assigned and reasoning of judge.—Where a trial court by its order grants a motion for a nonsuit in general terms, it may not be contended on appeal that its order in granting the same is to be limited by the discussion in which the court indulged in the course of granting the order; and if it appears that the motion should have been granted upon either or both of the grounds upon which the same was made, the action of the trial court should be sustained on appeal.—*Ford v. Weed Lumber Co.*, 25 Cal. App. 702, 147 Pac. 112.

144. Effect of plaintiff's evidence—Prima facie case.—Full probative effect must be given plaintiff's evidence, on a motion for nonsuit, whether admitted erroneously or not, and its effect taken most strongly against defendant; and if, in this view, plaintiff's evidence makes a prima facie case, the motion must be denied.—*In re Daly*, 15 Cal. App. 331, 114 Pac. 787.

145. Error in admitting evidence—Can not be reviewed on motion for nonsuit; and where motion for nonsuit is not made on ground that evidence which had been admitted did not substantially tend to prove all facts essential to plaintiff's cause of action, but only on same ground upon which portions of evidence had been objected to when offered and to admission of which defendant duly excepted, such motion for nonsuit is properly denied.—*O'Connor v. Hooper*, 102 Cal. 528, 529, 36 Pac. 939.

146. Estoppel by judgment.—As to judgment of nonsuit in former action not such as to raise an estoppel against defendants in subsequent action.—See *Jacob v. Day*, 111 Cal. 571, 579, 44 Pac. 243.

147. Evidence following ruling on nonsuit—When erroneous ruling cured.—If, after motion for nonsuit for want of testimony upon any material point has been erroneously overruled, defendant proceeds and supplies defect by evidence which he himself introduced, then error committed in overruling nonsuit is cured. But, if motion for nonsuit should have been granted, and no evidence is afterwards introduced by defendant which changes status of case, then he may avail himself of error committed in denying nonsuit.—*Elmore v. Elmore*, 114 Cal. 516, 520, 46 Pac. 458. See *Smith v. Compton*, 6 Cal. 24, 25; *Winans v. Hardenbergh*, 8 Cal. 291, 293; *Abbey H. Assoc. v. Willard*, 48 Cal. 614; *Higgins v. Ragsdale*, 83 Cal. 219, 23 Pac. 316.

148. Evidence to meet objection of motion—Discretion of court.—It is discretionary with the court to allow evidence to meet the objections made by the motion for a nonsuit on the ground of lack of proof

on certain matters.—*Fee v. McPhee*, 31 Cal. App. 295, 160 Pac. 397.

149. Exception to ruling—Must be taken.—Order of court granting nonsuit, unless excepted to and assigned as error, can not be assailed, and appellate court will not in such case review action of trial court.—*Toulouse v. Pare*, 103 Cal. 251, 252, 37 Pac. 146; *Hanna v. De Garmo*, 140 Cal. 172, 174, 73 Pac. 830.

150. Same—Same—Editorial note: This rule is probably not applicable since the amendment of 1919 to above section, by the provisions of which dismissals under subdivision 5 are required to be made by "order of the court, entered upon the minutes thereof," and when so made "is effectual for all purposes," and is an appealable order (see pars. 7, 12, 16, this note), being a "final judgment" made "on the merits" (see par. 28, this note; also, post, § 581a, note par. 73), and is thought to be "deemed excepted to," under the provisions of section 647, post, as amended 1909, which expressly enumerates an "order denying a nonsuit" (but see par. 213, this note), and the "final decision in an action or proceeding," which will surely include an order of dismissal of an action or motion for nonsuit, and an order of nonsuit having been decided to be appealable (see par. 12, this note), where not followed by a judgment of dismissal.—See pars. 7, 16, 160, this note.

151. Same—Ruling presents question of law.—The ruling of trial court upon motion for nonsuit presents question of law, and must be both excepted to and specified as error of law occurring at trial, and bill of exceptions or statement must affirmatively show that ruling assigned as error actually took place at trial and was excepted to.—*Hanna v. De Garmo*, 140 Cal. 172, 174, 73 Pac. 830. See *Flashner v. Waldron*, 86 Cal. 211, 24 Pac. 1063; *Warner v. Darrow*, 91 Cal. 309, 27 Pac. 737; *Malone v. Beardsley*, 92 Cal. 150, 28 Pac. 218; *Craig v. Hesperia L. & W. Co.*, 107 Cal. 675, 40 Pac. 1057.

152. Facts showing nonsuit improper.—Where a person was placed in charge of a ranch under an agreement that he was to pay all taxes on the same, and pay upon the mortgage thereon the net income from such ranch, a complaint against such person for the proceeds of said ranch which avers the receipt by the defendant of large sums of money, as the net income of the ranch, together with an allegation of his failure to devote that portion of its net income to the payment of the mortgage deed, but without actual proof of the expense incurred in operating the ranch, even though it be considered insufficient as the basis for a judgment against said manager of such ranch, nevertheless where such complaint closed with a prayer for general relief, it is the right and duty of the court to grant any relief consistent with the case made by the complaint and embraced within the

issues, and nonsuit is improperly entered.—*Fox v. Hall*, 164 Cal. 287, 128 Pac. 749, 750.

153. The court erred in granting a motion for a nonsuit on the ground that the evidence showed no ground for the relief sought by the complaint. It is held that the complaint showed a ground for relief, whether for that prayed for, or for damages against the estate of his deceased mother. But it is held further, whether the complaint states a cause of action or not, the insufficiency of the complaint is not a ground for a nonsuit.—*Keefe v. Keefe*, 19 Cal. App. 310, 125 Pac. 929.

154. **False conclusion of law.**—A statement in a motion for nonsuit that a corporation as a subcontractor has no claim of lien under the law is not a ground for nonsuit, but is merely a false conclusion of law and of no effect.—*Coghlan v. Quartararo*, 15 Cal. App. 668, 115 Pac. 664.

155. **Findings of fact and conclusions of law.**—Are not required when plaintiff is nonsuited at trial.—*Gilson Q. M. Co. v. Gilson*, 47 Cal. 597, 601; *Reynolds v. Brumagim*, 54 Cal. 254; *Harney v. McLeran*, 66 Cal. 34, 4 Pac. 884; *Toulouse v. Pare*, 103 Cal. 251, 252, 37 Pac. 146; *Kennedy & S. L. Co. v. Dusenbery*, 116 Cal. 124, 125, 47 Pac. 1008.

156. Where a motion for nonsuit discloses the grounds upon which the motion was based, findings of fact are unnecessary.—*New York Life Ins. Co. v. Daley*, 25 Cal. App. 376, 143 Pac. 1033.

157. **Judgment of nonsuit.**—A formal, not necessary.—A formal judgment of dismissal need not follow the order or judgment of nonsuit, for the judgment of nonsuit in itself constitutes a dismissal of the action.—*Commins v. Guaranty Oil Co.*, 29 Cal. App. 139, 154 Pac. 882.

158. **Same.**—In action by vendee to recover purchase-money.—A judgment of nonsuit in an action by a vendee to recover money which he has paid under his contract of purchase will be presumed to have been based on his failure to prove a cause of action.—*McGibbon v. Schmidt*, 172 Cal. 70, 155 Pac. 460.

159. **Same.**—In action of ejectment.—Where it does not appear that plaintiffs failed to prove sufficient case for jury, nor that defendants moved for judgment of nonsuit, can not be treated as judgment of dismissal under subdivision 5 of above section.—*Hancock v. Lopez*, 53 Cal. 362, 370.

160. **Same.**—Not followed by dismissal.—Appealable by the provisions of the above section as amended 1907.—*Brown v. Sterling Fixture Co.*, 175 Cal. 563, 166 Pac. 322; *Amestoy v. City of Los Angeles*, 5 Cal. App. 273, 275, 90 Pac. 42; *Saul v. Moscone*, 16 Cal. App. 509, 118 Pac. 452.

161. **Same.**—Upon nonsuit granted.—The party in whose favor a nonsuit is ordered

is entitled to judgment thereon.—*Estate of Ricks*, 160 Cal. 467, 117 Pac. 532.

162. **Jury fees.**—Payment of upon nonsuit granted.—Court is justified to order plaintiff to pay jury fees where he was nonsuited upon trial before jury.—*Fairchild v. King*, 102 Cal. 320, 321, 36 Pac. 649. See *Lukes v. Logan*, 66 Cal. 33, 4 Pac. 883.

163. **Motion for nonsuit.**—As to necessity for.—While an action may be dismissed, after the evidence on both sides is in, under the provisions of this section, such dismissal requires a motion by defendant.—*Saul v. Moscone*, 16 Cal. App. 510, 118 Pac. 452.

164. **Same.**—Same.—Mere motion pending and undetermined, is not dismissal, and does not divest the court of jurisdiction.—*Boca & L. R. Co. v. Superior Court*, 150 Cal. 155, 88 Pac. 718.

165. **Same.**—Same.—Motion in open court.—While the plaintiff may dismiss the action where no affirmative relief is asked against him, such dismissal must be accomplished in the manner prescribed, i. e., by written request filed with the clerk, where, instead of pursuing the statutory method, motion is made in open court, the inherent jurisdiction of the court is invoked, in the exercise of which the motion may be either granted or denied.—*Huntington Park Co. v. Superior Court*, 17 Cal. App. 694, 121 Pac. 701.

166. **Same.**—A demurrer to evidence.—Question of law.—A motion for nonsuit presents a question of law, and is equivalent to a demurrer to the evidence, or an objection that, admitting all the proved facts and that their legal effect is as claimed by plaintiff, they do not entitle him to the relief asked for.—*In re Daly*, 15 Cal. App. 331, 114 Pac. 787.

167. **Same.**—Effect of motion.—Admits what.—The motion for nonsuit admits the truth of plaintiff's evidence, and every inference of fact that can be legitimately drawn therefrom, and upon such motion the evidence should be interpreted most strongly against the defendant.—*O'Connor v. Mennie*, 169 Cal. 217, 146 Pac. 674.

168. In order to justify the submission of any question of fact to a jury, the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists, and, when the evidence is not sufficient to justify such an inference, the court may properly refuse to submit the question to the jury.—*O'Connor v. Mennie*, 169 Cal. 217, 146 Pac. 674.

169. In passing upon a motion for a nonsuit, the evidence must be interpreted most strongly against the defendant, and every favorable inference of fact that can be legitimately drawn in support of the action should be made.—*Lupton v. Domestic Utilities Mfg. Co.*, 173 Cal. 415, 160 Pac. 241.

170. In deciding a motion for a nonsuit every favorable inference fairly deducible from the evidence produced must be considered as facts proved in favor of the plaintiff. If there is any substantial evidence tending to prove all the facts in issue constituting the plaintiff's case, he is entitled to have the case go to the jury for a verdict on the merits.—*Lassen v. Southern Pac. Co.*, 173 Cal. 71, 159 Pac. 143.

171. Admits the truth of all evidence tending to support plaintiff's case, and every inference reasonably deducible therefrom. Contradictory evidence disregarded. Evidence construed most strongly against defendant.—*Larson v. Larson*, 15 Cal. App. 534, 115 Pac. 340.

172. The motion for nonsuit admits the truth of plaintiff's evidence, and every inference of fact that may be legitimately drawn therefrom, and upon such motion the evidence is interpreted most strongly against the defendant. If there is any substantial evidence tending to sustain plaintiff's action, the nonsuit should be denied, without passing upon the sufficiency of such evidence; and when there is a conflict in the evidence, some of which tends to sustain plaintiff's case, a motion for a nonsuit should not be granted.—*Hill v. Pacific Gas & Elec. Corp.*, 22 Cal. App. 788, 136 Pac. 492.

173. One of the chief objects subserved by a motion for nonsuit is to point out to the court and to opposing counsel the specific oversights and defects in the plaintiff's proof of his case; and this in order that, as to the latter, he may supply, if possible, the specified deficiencies in his proof.—*Sferlazzo v. Oliphant*, 24 Cal. App. 81, 140 Pac. 289.

174. And it is the duty of the court, when the attention of the plaintiff is thus called to defects in his proof, to permit him to supply the missing evidence.—*Sferlazzo v. Oliphant*, 24 Cal. App. 81, 140 Pac. 289.

175. On a motion for nonsuit every favorable inference, fairly deducible, and every favorable presumption fairly arising from the evidence produced must be considered as facts in favor of the contestants. Where the evidence is fairly susceptible of two constructions or if any of several inferences may reasonably be made, the court must take the view most favorable to the contestants. All the evidence in favor of the contestants must be taken as true and if contradictory evidence has been given it must be disregarded. If there is any substantial evidence tending to prove in favor of contestants the facts necessary to make out their case they are entitled to have the case go to the jury for a verdict on the merits.—*Boyle v. Coast Imp. Co.*, 27 Cal. App. 714, 151 Pac. 25.

176. Same—Same—Facts assumed as true.—A motion for nonsuit assumes as true every fact which the evidence, and pre-

sumptions fairly deducible therefrom, tend to prove, and which are essential to entitle the plaintiff to recover. On such motion the evidence must be taken most strongly against the defendant. Contradictory evidence must be disregarded, and the motion denied, if there is any substantial evidence tending to prove plaintiff's case without passing on the sufficiency of such evidence.—*Marron v. Marron*, 19 Cal. App. 326, 125 Pac. 914.

177. Even though the defense of defect of parties plaintiff was properly before the court, it could not justify an order of nonsuit unless the evidence plainly established the truth of the plea. The most that can be said that the evidence on the point is conflicting. There is testimony tending to show that the automobile was purchased and owned by the partnership. On the other hand, testimony was introduced tending to show that the automobile was the individual property of Burr, the plaintiff. The conflict, then, was one of fact to be resolved by the jury, and not to be determined by the court as matter of law on motion for nonsuit.—*Burr v. United Railroads of San Francisco*, 163 Cal. 663, 126 Pac. 873, 874.

178. Same—Grounded on contributory negligence—Sufficiency of.—In an action for personal injuries resulting in death to plaintiff's wife and injuries to the automobile he was driving when it was struck by an electric train at a grade crossing at the close of the plaintiff's evidence the defendant made a motion for nonsuit among other things on the ground that "the uncontradicted evidence was contributory negligence on the part of the plaintiff that contributed proximately to the injury"; the court held this motion sufficient to inform both the court and the counsel, and fulfill all the requirements of subdivision 5 of the above section where the motion on that ground was permissible on the pleadings.—*Griswold v. Pacific Electric R. Co.*, — Cal. App. —, 187 Pac. 65.

179. Same—Same—Amendment of 1907—Did not change rule.—The amendment to the above section in 1907 did not change the uniform and settled law of this state requiring the party moving for nonsuit to state in his motion precisely the grounds upon which he relies.—*Brown v. Sterling Fixture Co.*, 175 Cal. 563, 166 Pac. 322, following the doctrine in *Sanchez v. Neary*, 41 Cal. 487; *Coffey v. Greenfield*, 62 Cal. 608; *Shain v. Forbes*, 82 Cal. 582, 23 Pac. 198; *Bronzan v. Drobaz*, 93 Cal. 650, 29 Pac. 254; *Durfee v. Seale*, 139 Cal. 607, 73 Pac. 435; *Coghlan v. Quartararo*, 15 Cal. App. 662, 668, 115 Pac. 664.

180. Same—Same—Erroneous granting without.—Where the motion is based upon an alleged variance between pleading and proof, and the defect could have been remedied by amendment, it was error to grant the motion without a statement of the grounds, and without giving the plaintiff

an opportunity to amend.—*Christenson Lumber Co. v. Buckley*, 17 Cal. App. 43, 118 Pac. 466.

181. **Same—Same—Reason of rule.**—The requirement as to the statement of grounds of motion for nonsuit is to enable the plaintiff to remedy defects of pleading and proof, but where the defect could not be remedied, if pointed out, the omission to state the grounds of the motion is not prejudicial, and the rule does not apply.—*Christenson Lumber Co. v. Buckley*, 17 Cal. App. 43, 118 Pac. 466.

182. **Same—Same—Stating plaintiff failed to prove cause, insufficient.**—A motion for nonsuit must specify the particular grounds, and a statement in general terms that plaintiff had failed to prove his cause is wholly insufficient.—*Coghlan v. Quartararo*, 15 Cal. App. 662, 668, 115 Pac. 664.

183. **Same—Should specify grounds upon which it is made, and ordinarily ground which is not stated can not be considered.**—*Daley v. Russ*, 86 Cal. 114, 117, 24 Pac. 867. See *Kiler v. Kimbal*, 10 Cal. 268; *McGarrity v. Byington*, 12 Cal. 426, 429; *Holverstot v. Bugby*, 13 Cal. 43, 44; *Baker v. Joseph*, 16 Cal. 173, 180; *Sanchez v. Neary*, 41 Cal. 485, 487; *Raimond v. Eldridge*, 43 Cal. 506, 508; *Silva v. Holland*, 74 Cal. 530, 16 Pac. 385; *Loring v. Stuart*, 79 Cal. 200, 201, 21 Pac. 651; *Miller v. Luco*, 80 Cal. 257, 261, 22 Pac. 195; *Palmer & Rey v. Marysville D. P. Co.*, 90 Cal. 168, 27 Pac. 21; *Fontana v. Pacific C. Co.*, 129 Cal. 51, 55, 61 Pac. 580.

184. Where the motion for a nonsuit was directed "to all the causes of action mentioned in the complaint," it was not tenable unless, as to all, there was a failure of evidence.—*Pacific Vinegar & Pickle Works v. Smith*, 152 Cal. 513, 93 Pac. 85.

185. The ground relied upon for a nonsuit should be stated to the trial court.—*Sebring v. Harris*, 20 Cal. App. 56, 128 Pac. 7, 8.

186. A motion for a nonsuit "on the ground and for the reason plaintiff had not produced sufficient evidence to warrant the court in submitting the same to the jury" is sufficient as specifying the particular ground of the weakness of the adversary's case.—*Johnson v. Southern Cal. Edison Co.*, 27 Cal. App. 425, 150 Pac. 656.

187. **Same—Objection not available on.**—An objection that a complaint does not state facts sufficient to constitute a cause of action is not available on a motion for a nonsuit.—*Keefe v. Keefe*, 19 Cal. App. 310, 125 Pac. 929.

188. **Same—When granted.**—It is elementary that a motion for nonsuit is not to be granted where there is any substantial evidence which, with the aid of all legitimate inferences favorable to the plaintiff, would support a verdict or finding that the material allegations of the complaint are true.—*Burr v. United Railroads of San Francisco*, 163 Cal. 663, 126 Pac. 873, 874.

189. **Nonsuit—As to certain defendants.**—In consolidated action for foreclosure of mechanics' liens held not to affect default of party previously entered or right to judgment authorized by such default.—*Kennedy & S. L. Co. v. Dusenbery*, 116 Cal. 124, 126, 47 Pac. 1008.

190. **Same—After evidence closed.**—A nonsuit can be properly granted after evidence closed on both sides.—*Toulouse v. Pare*, 103 Cal. 251, 252, 37 Pac. 146. See *Geary v. Simmons*, 39 Cal. 224; *Vanderford v. Foster*, 65 Cal. 49, 2 Pac. 736.

191. **Same—Bar when made on merits.**—A nonsuit, to operate as bar, must be one rendered upon merits of proceedings in former action, and must amount to re-traxit as known in suits at common law, which is "an open and voluntary renunciation of plaintiff's suit in court," plaintiff not being at liberty afterwards to renew it.—*Merritt v. Campbell*, 47 Cal. 542, 545.

192. **Same—Properly granted when.**—In general.—A nonsuit should be granted where a verdict in the plaintiff's favor would have to be set aside for want of evidence to support it.—*McKenzie v. Ray*, 168 Cal. 618, 143 Pac. 1018.

193. In order to justify the submission of any question of fact to a jury, the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists, and when the evidence is not sufficient to justify such an inference, the court may properly refuse to submit the question to the jury.—*O'Connor v. Mennie*, 169 Cal. 217, 146 Pac. 674.

194. A motion for a nonsuit may not be granted if there is any evidence tending to sustain the plaintiff's cause of action.—*Donovan v. Kemper*, 26 Cal. App. 352, 146 Pac. 1044.

195. Where a motion for a nonsuit is made and denied, and evidence is thereafter admitted on the part of both parties, the order will not be disturbed if the evidence supports the verdict.—*Silva v. Northern Cal. Power Co.*, 32 Cal. App. 139, 162 Pac. 412.

196. **Same—Same—Discharging jury without verdict.**—Court is justified in refusing to submit evidence to jury, and in discharging jury without verdict, thereby practically granting nonsuit, if evidence on behalf of plaintiff would not justify verdict in his favor on issues presented, for under such circumstances it would be duty of court to set aside verdict should cause go to jury.—*Estate of Morey*, 147 Cal. 495, 82 Pac. 57, 59.

197. **Same—Same—Fraud and undue influence.**—Action for recovery of lands alleged to have been conveyed without consideration and by means of fraud and undue influence; nonsuit held properly granted where no evidence offered by plain-

tiff tended to show any fraud or undue influence connected with execution of deed.—*Sepulveda v. Sepulveda*, 128 Cal. 661, 662, 61 Pac. 272.

198. Same—Same—In action for damages by ignition of escaping gas.—A nonsuit is properly granted in an action against a gas company to recover damages for the destruction of a building alleged to have been caused by the ignition of escaping gas, where there is failure to establish a causal connection between the only facts that may be taken as proved, namely, the insecure fastening of the gas supply pipe and the burning of the building.—*Union Investment Co. v. San Francisco Gas & Elec. Co.*, 168 Cal. 58, 141 Pac. 807.

199. Evidence in such an action that the pipe was insecurely fastened, coupled with proof that it was found broken after the fire and that gas was burning in the building during such conflagration, does not establish the plaintiff's case.—*Union Investment Co. v. San Francisco Gas & Elec. Co.*, 168 Cal. 58, 141 Pac. 807.

200. A case is not made out by proving the defendant's negligence without in some way fastening that negligence to the injury.—*Union Investment Co. v. San Francisco Gas & Elec. Co.*, 168 Cal. 58, 141 Pac. 807.

201. Same—Same—In action upon written acknowledgment and receipt.—A nonsuit is properly granted in an action upon a writing acknowledging the receipt of a sum of money payable on return of the writing properly indorsed, where the answer sets up two receipts of later dates acknowledging payment in full of all moneys owing from the defendant to the estate of the holder of the writing, and there is no denial by affidavit of the genuineness or due execution of such receipts, or attempt made on the trial to contradict or explain the same by written or parol testimony.—*McKenzie v. Ray*, 168 Cal. 618, 143 Pac. 1018.

202. The admission of the genuineness and due execution of such receipts by the failure to file the affidavit of denial required by section 448, ante, overcomes the presumption of non-payment arising from the possession of the instrument sued upon.—*McKenzie v. Ray*, 168 Cal. 618, 143 Pac. 1018.

203. While neither an ordinary receipt nor a receipt in full is conclusive against all attack, yet if uncontradicted and unexplained, it stands as conclusive.—*McKenzie v. Ray*, 168 Cal. 618, 143 Pac. 1018.

204. Such receipts being unquestioned by the plaintiff it is for the court to construe them and to determine their meaning and effect.—*McKenzie v. Ray*, 168 Cal. 618, 143 Pac. 1018.

205. Same—Same—Rule as to granting motion.—Motion for nonsuit should be granted where plaintiff's evidence is such that if case had gone to jury on that evi-

dence and verdict had been rendered for him, evidence would be held sufficient to support judgment upon verdict.—*Freese v. Hibernia S. & L. Soc.*, 139 Cal. 392, 394, 73 Pac. 172.

206. Same—Should be denied when.—Motion for nonsuit should never be granted where there is conflict in evidence.—*Pacific Mut. L. I. Co. v. Fisher*, 109 Cal. 566, 569, 42 Pac. 154.

207. Motion should be denied where evidence and presumptions reasonably arising therefrom are legally sufficient to prove material allegations of complaint.—*Goldstone v. Merchants' I. & C. S. Co.*, 123 Cal. 625, 627, 56 Pac. 776. See *De Ro v. Cordes*, 4 Cal. 117, 118; *McKee v. Greene*, 31 Cal. 418; *Alvarado v. De Cells*, 54 Cal. 588; *Felton v. Millard*, 81 Cal. 540, 21 Pac. 533, 22 Pac. 750; *Higgins v. Ragsdale*, 83 Cal. 219, 23 Pac. 316.

208. Motion should be denied where there is any evidence tending to sustain plaintiff's case without passing upon question as to sufficiency of such evidence.—*Zilmer v. Gerichten*, 111 Cal. 73, 77, 43 Pac. 408. See *Felton v. Millard*, 81 Cal. 540, 21 Pac. 533, 22 Pac. 750.

209. Motion held erroneously granted in action upon contract where evidence entitled plaintiff to go to jury on issue that work was done in accordance with requirements of contract.—*Gilliam v. Brown*, 126 Cal. 160, 163, 58 Pac. 466.

210. Motion is properly overruled in action to recover money due from an estate where ground of motion was that no claim of money sued for had been presented and that there was no evidence to justify or sustain the demand where defendant expressly admitted that claim was presented to and rejected by him and there was some evidence sufficient to justify and sustain demand.—*Warren v. McGill*, 103 Cal. 153, 156, 37 Pac. 144.

211. A motion for a nonsuit may not be granted if there is any evidence tending to sustain the plaintiff's cause of action.—*Donovan v. Kemper*, 26 Cal. App. 352, 146 Pac. 1044.

212. Order granting nonsuit—After submission on briefs.—Order granting nonsuit and dismissing action after cause was submitted upon briefs to be filed, but granted before time for presenting reply brief had expired held harmless where upon case made plaintiff was not entitled to recover.—*Vincent v. Pacific Grove*, 102 Cal. 405, 410, 36 Pac. 773.

213. Order refusing nonsuit—Nonappealable order.—An order refusing to dismiss an action is not appealable in itself.—*Forrester v. Lawler*, 14 Cal. App. 171, 111 Pac. 284.

214. This rule is not applicable since the amendment of 1909 to section 647, post.—See par. 150, this note.

215. Presumptions.—In favor of judgment of nonsuit, as of other judgments, and nothing appearing in record inconsistent with that conclusion, it is presumed on appeal that motion for nonsuit was regularly made and granted.—*Hanna v. De Garmo*, 140 Cal. 172, 174, 73 Pac. 880.

216. Prima facie cause.—Nonsuit denied where made out.—Motion for nonsuit is properly denied where plaintiff has made out prima facie case and there is no material variance between averments and proofs.—*Chapman v. Neary*, 115 Cal. 79, 83, 46 Pac. 867.

217. If there is any substantial evidence tending to prove the facts necessary to make a case, the plaintiff is entitled to a trial upon the merits, and the motion should be denied.—*Larson v. Larson*, 15 Cal. App. 534, 115 Pac. 340.

218. A defendant's motion for a nonsuit is properly denied where plaintiff establishes a prima facie case.—*Creditor's Union v. Lundy*, 16 Cal. App. 569, 117 Pac. 624.

219. Purpose of stating grounds for nonsuit.—In general.—Party must state particular grounds upon which motion for nonsuit is based in order that attention of court and counsel may be called so that any defects in proof may, if possible, be obviated, and where motion does not specify any grounds whatever, it is properly denied.—*Durfee v. Seale*, 139 Cal. 603, 73 Pac. 435. See *Silva v. Holland*, 74 Cal. 530, 531, 16 Pac. 385.

220. Rule as to nonsuit in preceding paragraph does not apply if case is one that can not be cured, although attention is specifically called to defects.—*Fontana v. Pacific C. Co.*, 129 Cal. 51, 55, 61 Pac. 580. See *Daley v. Russ*, 86 Cal. 114, 117, 24 Pac. 867.

221. Same.—Reason of rule is to afford opportunity to correct such defects as admit of corrections. It does not apply where defects do not admit of correction, in which case error in not specifying ground of motion is immaterial.—*Daley v. Russ*, 86 Cal. 114, 117, 24 Pac. 867. See *Nightingale v. Scannell*, 18 Cal. 315.

222. Question presented on motion for nonsuit is question of law, and in statement on new trial decision on motion should be specified as error of law.—*Donahue v. Gallavan*, 43 Cal. 573, 576. See *McCreery v. Everding*, 44 Cal. 284; *Toulouse v. Pare*, 103 Cal. 251, 252, 37 Pac. 146.

223. Res adjudicata.—Motion to dismiss on ground of.—A motion to dismiss on the ground that the answer shows the cause of action pleaded in the complaint to be in all respects res adjudicata, is not the proper practice.—*Forrester v. Lawler*, 14 Cal. App. 171, 111 Pac. 284.

224. Review on appeal.—In general.—The appellate court is limited in its consideration of the propriety of a nonsuit to the particular grounds upon which the motion

was made.—*Stanton v. Carnahan*, 15 Cal. App. 530, 115 Pac. 339.

225. When excepted to and specified as an error of law, may be reviewed on appeal as such.—*Martin v. Southern Pacific Co.*, 150 Cal. 131, 88 Pac. 701.

226. Right to new trial.—As test on motion for nonsuit.—Whenever evidence produced by plaintiff so conclusively establishes defects as that court might properly grant new trial in case of verdict in his favor upon like evidence, court may direct judgment by way of nonsuit.—*Goldstone v. Merchants' I. & C. S. Co.*, 123 Cal. 625, 627, 56 Pac. 776. See *McQuilken v. Central Pac. R. Co.*, 50 Cal. 7.

227. Rules as to nonsuit.—Same whether the trial is by court or by jury.—*Freese v. Hibernia S. & L. Soc.*, 139 Cal. 392, 394, 73 Pac. 172. See *Goldstone v. Merchants' I. & C. S. Co.*, 123 Cal. 625, 56 Pac. 776.

228. Submission of cause.—Right precluded by.—Plaintiff has not absolute right to take nonsuit after case has been finally submitted and jury has retired, but might do so at any time before such submission and retirement.—*Brown v. Harter*, 18 Cal. 76; *Heinlen v. Castro*, 22 Cal. 100.

229. Truth of plaintiff's evidence admitted.—Motion for nonsuit admits truth of plaintiff's evidence, and every inference of fact that can be legitimately drawn therefrom, and, upon such motion, evidence should be interpreted most strongly against defendant.—*Hanley v. California B. & C. Co.*, 127 Cal. 232, 237, 47 L. R. A. 597, 59 Pac. 577. See *Goldstone v. Merchants' I. & C. S. Co.*, 123 Cal. 625, 56 Pac. 776.

230. Variance.—Motion for nonsuit is proper method by which to raise question of variance between pleadings and proof.—*Elmore v. Elmore*, 114 Cal. 516, 521, 46 Pac. 458.

231. Same.—May be taken advantage of either by objecting to admissibility of evidence or by motion for nonsuit, and defendant is not precluded from moving for nonsuit on ground of variance by reason of failure to object to admissibility of evidence.—*Elmore v. Elmore*, 114 Cal. 516, 521, 46 Pac. 458 (quoting from *Hayne on New Trial and Appeal*, par. 115). See *Farmer v. Cram*, 7 Cal. 135; *Tomlinson v. Monroe*, 41 Cal. 94; *Johnson v. Moss*, 45 Cal. 515.

232. Waiver of erroneous refusal of nonsuit.—Where the defendant proceeds and supplies the defect of proof relied upon in his motion for a nonsuit, after denial thereof, he is held to waive whatever error was committed in such denial.—*Lowe v. San Francisco & N. W. R. Co.*, 154 Cal. 576, 98 Pac. 678.

233. Word "trial".—As used in section 148, *Practice Act*, means determination or findings in case.—*Hancock D. Co. v. Bradford*, 13 Cal. 637.

VII. DISMISSAL BY COURT—AFTER VERDICT OR SUBMISSION—ON NEGLECT TO DEMAND ENTRY—SUBDIVISION 6 [REPEALED].

234. Editorial Note: Section 581 formerly contained two more subdivisions, numbered respectively 6 and 7. In its present amended form both these subdivisions have been eliminated, and the point in subdivision 6 is covered by section 664, post, as amended in 1907; but there is not a place in the annotation to that section into which the decisions made under subdivision 6 will fit, and for that reason they are retained in this place. They may have some value, and for that reason are retained. Whatever interest or value they may have is thought to be purely antiquarian.

235. Same—Subdivision 7 was amplified and re-enacted as section 581a, and the decisions of the court made under the old subdivision 7 still have a practical interest and value, and will be found collected in Part II in the note to section 581a, post.

236. Construction of subdivision 6—As not mandatory, and authorizes discretionary power of court in granting or denying motion to dismiss action for cause therein mentioned, and dismissal will not be disturbed except for apparent abuse of such power.—*Neilhaus v. Morgan*, 5 Cal. Unrep. 391, 45 Pac. 255, 256; *Rosenthal v. McMann*, 93 Cal. 505, 29 Pac. 121; *In matter of McDevitt*, 95 Cal. 17, 30 Pac. 101; *Jones v. Chalfant*, 3 Cal. Unrep. 585, 31 Pac. 257, 258; *Marshall v. Taylor*, 97 Cal. 422, 32 Pac. 515.

237. Subdivision 6 of this section is not mandatory, and if it were, would not authorize dismissal of action, showing no neglect on part of plaintiff.—*Marshall v. Taylor*, 97 Cal. 422, 425, 32 Pac. 515. See *Rosenthal v. McMann*, 93 Cal. 505, 29 Pac. 121.

238. This subdivision of section does not confer on plaintiff absolute right to dismissal.—*Jones v. Chalfant*, 3 Cal. Unrep. 585, 31 Pac. 257, 258.

239. Directing jury as to verdict.—Court is justified in telling jury what verdict should be where there is nothing to be determined in case except question of law.—*Jones v. Chalfant*, 3 Cal. Unrep. 585, 31 Pac. 257, 258.

240. Defendant who fails to demand nonsuit—Not in default under this subdivision. It is his privilege and right, although he can obtain nonsuit, to demand instead regular judgment on merits.—*San Jose R. Co. v. San Jose L. & W. Co.*, 126 Cal. 322, 324, 58 Pac. 824.

241. Dismissal because of neglect, and whether neglect be such as to warrant and justify dismissal, is subject to review on appeal.—*San Jose R. Co. v. San Jose L. & W. Co.*, 126 Cal. 322, 324, 58 Pac. 824.

242. Failure to obtain entry of judgment—Presumed to be result of negligence of clerk, and not of defendant, where defendant did not neglect to demand that judgment be entered in proper time, although it did not appear that defendant paid or tendered to clerk fee for entry, and where it did not appear that he did not do so.—*Jones v. Chalfant*, 3 Cal. Unrep. 585, 31 Pac. 257, 258.

243. Where such failure was not due to wantonness or indifference, but to inadvertence and inexperience, and the result was unproductive of injury but rather of benefit to the party, it is unhesitatingly held that a dismissal which deprives a litigant of the just fruits of the judgment is inequitable, and an abuse of discretion by the court.—*Rickey Land etc., Co. v. Glader*, 153 Cal. 181, 94 Pac. 768.

244. Same—Instance of abuse of discretion.—Where a case was fully and elaborately heard upon its merits, and, after three weeks' trial, judgment was ordered for plaintiff, and detailed findings and conclusions prepared, signed and filed, but, owing to the inadvertence of a young and inexperienced attorney, acting in the absence of his father, chief counsel for plaintiff, judgment was not entered, and no request therefor made within six months, facts first coming to the knowledge of plaintiff's counsel with the notice of motion to dismiss, it was an abuse of discretion to grant the motion to dismiss.—*Rickey Land & C. Co. v. Glader*, 153 Cal. 180, 94 Pac. 768.

245. Intention of legislature—Amendment to subdivision 6, which took effect May 9, 1885, was intended by legislature to apply to existing verdicts unless there were six months' neglect after taking effect of act. It was not intention to make provision apply to cases where six months had already expired when act took effect.—*Gardner v. Tatum*, 77 Cal. 458, 459, 19 Pac. 879.

246. Judgment of nonsuit—Court is not authorized to enter judgment of dismissal, under subdivision 6 of this section, in case submitted to its decision for more than six months before by determining that "defendant is entitled to nonsuit and that defendant has failed to demand nonsuit for more than six months," and thereupon ordering and adjudging that "nonsuit be granted and that action be dismissed," as under this subdivision party is not in default in case submitted on merits in failing to demand nonsuit or in failing to have judgment entered for more than six months.—*San Jose R. Co. v. San Jose L. & W. Co.*, 126 Cal. 322, 324, 58 Pac. 824.

247. Jurisdiction of court—Not lost by failure to enter judgment as prescribed by section 664, post, or by failure of clerk to perform his duty. Only penalty provided for such case is to be found in subdivision 6 of this section, which authorizes court to dismiss action where, for six months after

verdict or final submission, party entitled to judgment neglects to have same entered.—*Waters v. Dumas*, 75 Cal. 563, 565, 17 Pac. 685.

248. Nunc pro tunc judgment.—Rule is that where court has actually rendered judgment, but same has not been entered on record, whether in consequence of neglect of court or neglect or misprision of clerk, order may be made that judgment rendered be entered nunc pro tunc, and this may be done without expiration of term, in this state, after expiration of six months.—*Marshall v. Taylor*, 97 Cal. 422, 426, 32 Pac. 515.

249. Party is not guilty of negligence when he pays clerk fees for entry of judgment and requests him to enter it, and understands from clerk that such judgment would be entered as requested; and where he supposed judgment had been entered, as requested, and had no intimation that same had not been done until service of notice of general motion to dismiss.—*Gardner v. Tatum*, 77 Cal. 458, 460, 19 Pac. 879.

250. Provision of original section providing for dismissal, where plaintiff neg-

lected to have judgment entered for more than six months, held not mandatory.—*Rosenthal v. McMann*, 93 Cal. 505, 511, 29 Pac. 121.

251. Rule established by statute under subdivision 6 applies to cases where party has been guilty of negligence.—*Gardner v. Tatum*, 77 Cal. 458, 460, 19 Pac. 879.

252. Special proceeding—Dismissal in.—As to proceeding under section 1664, post, being special proceeding and not civil action requiring entry of judgment in judgment-book, and not attempted dismissal under subdivision 6 of this section, as penalty for omission to demand and have judgment entered for more than six months.—See *In matter of Blythe*, 110 Cal. 226, 227, 42 Pac. 641;

253—Verbal order to clerk to enter judgment in order-book kept merely for convenience of clerk, does not constitute neglect, where law does not require such book to be kept, and where party pays clerk, who accepts fees for entering judgment and promises to enter it.—*Gardner v. Tatum*, 77 Cal. 458, 460, 19 Pac. 879.

§ 581a. DISMISSAL FOR FAILURE TO SERVE SUMMONS, WHEN. BY COURT OF OWN MOTION. No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced must be dismissed by the court in which the same shall have been commenced, on its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have issued within one year, and all such actions must be in like manner dismissed, unless the summons shall be served and return thereon made within three years after the commencement of said action.

[Appearance without service—Prosecution.] But all such actions may be prosecuted, if appearance has been made by the defendant or defendants, within said three years in the same manner as if summons had been issued and served; provided,

[Exception in partition and conflicting claims to property.] That, except in actions to partition or to recover possession of, or to enforce a lien upon, or to determine conflicting claims to, real or personal property, no dismissal shall be had under this section as to any defendant because of the failure to serve summons on him during his absence from the state, or while he has secreted himself within the state to prevent the service of summons on him.

History: Enactment approved March 20, 1907, Stats. and Amdts. 1907, p. 712, Kerr's Stats. and Amdts. 1906-7, p. 446.

DISMISSAL FOR FAILURE TO SERVE SUMMONS.

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 56. Same—Leave to amend, effect of.
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 59. Same—Want of prosecution—Power of court to dismiss.
 60. Same—Same—Independent of statute.
 61. Dismissal of action—As to defendants not appearing.
 - 62, 63. Entry of appearance—Not filed within three years—Dismissal error, when.
 64. Same—Same—Excusable delay.
 65. Same—Same—Mandatory provision.
 66. Express waiver of benefit of provisions of section, subdivision 7.
 67. Foreclosure—Against heirs of deceased mortgageor—Administrator subsequently appointed.
 68. Judgment of dismissal—Modified on appeal, when.
 69. Jurisdiction—Appearance by personal representative.
 70. Same—Stipulation for appearance.
 71. Same—Voluntary appearance.
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 73. Order—Dismissing action—Is final judgment.
 74. Same—Vacating judgment of dismissal—When proper.
 - 75, 76. Presumption—Are in favor of correctness of court's action.
 77. Statute—Imposes penalty of dismissal in all cases, when.
 78. Stipulation—As to delay.
 79. Same—As to judgment.
 80. Same—Statute does not limit right.
 81. Same—Virtual appearance.
 82. Successor in interest of deceased defendant.
 83. Validity of judgment—Affidavit of publication of summons.
 - 84, 85. Verbal solicitations for continuance—Verbal authority to "take judgment at any time"—Not an appearance.
 86. Words "and served and returned thereon made"—Refer to summons.
 87. Same—Same—Amendment of 1895—Intended to make legislative intent free from ambiguity.
 88. Writ of prohibition—When granted.
- As to dismissal by part of plaintiffs after findings and judgment, see, ante, § 581, note Part II.
- I. DECISIONS UNDER PRESENT SECTION.
1. Editorial Note: This section was formerly subdivision 7 of section 581, ante, but by amendment of 1907 the subdivision was taken out of that section, amplified,

and enacted as the above section. All the decisions under the section as it now stands are found in Part I of this note; all decisions under subdivision 7 of section 581 are collected in Part II of this note.

2. Commencement of time.—This section does not allow three years within which to serve and make return of the summons from the expiration of the one year within which the summons must be issued. It must be served and returned within three years after the commencement of the action.—*Bernard v. Parmelee*, 6 Cal. App. 537, 545, 92 Pac. 658.

3. Construction of section—As imposing duty to dismiss.—This section imposes upon the court the duty of dismissing an action unless the summons shall be served and return made within three years after the commencement of the action, unless, as provided in the exception thereto, the failure was due to the fact that the defendant secreted herself within the state to avoid service of summons or was absent therefrom. Proof that she secreted herself to avoid such service might be made to avoid dismissal; but where the evidence was conflicting on that question, the finding of the court that she did not so secrete herself must be deemed conclusive, and the order of the court dismissing the action can not be disturbed.—*Willson v. Leo*, 19 Cal. App. 793, 796, 127 Pac. 1043.

4. Same—As to object.—The object intended to be attained by the above section is, obviously, to compel reasonable diligence in the prosecution of an action after it has been commenced, and thus afford the party or parties against whom it is brought an opportunity to present such evidential support to any defense he or they may have thereto as may be available at the time the action is instituted, but it may be lost or destroyed through the death of witnesses or otherwise before the action is brought to issue by reason of an unreasonably long delay in serving the defendant or defendants with appropriate legal process notifying him or them of the pending of the action.—*People v. Kings County Development Co.*, — Cal. App. —, 191 Pac. 1004.

5. Same—Discretion of court to dismiss before expiration of time.—This section merely fixes a limit beyond which the court's discretion can not go, and does not prevent dismissal before the expiration of the time.—*Watterson v. Hillside Water Co.*, 42 Cal. App. 364, 183 Pac. 592.

6. Contractual limitation of action—Reasonableness of—Failure to serve summons within.—In a case in which a sales agent enters into a contract with his firm, it being stipulated that the place of the contract was the effective office of the firm at Baltimore, Maryland, that of statements rendered by the firm to agents as to commissions earned, should be deemed correct in all particulars, and to be so accepted as

are final and binding on all agents unless written objection filed within ten days after the rendering of said statement and that no suit should be brought against the firm on any accounts rendered after the elapse of six months from the date of rendering the same and the agent delayed bringing suit beyond the six-month period on the ground, as alleged that he was waiting until defendants had counts within the time sufficient to justify proceeding by attachment, the court held that the six-month limitations was not unreasonable, and that the delay beyond that period entitled the defendant to a dismissal of the cause of action on the ground that the period of limitation had expired.—*Beeson v. Schloss*, 183 Cal. 618, 192 Pac. 292.

7. Cross-complaint—Failure to serve summons.—Under the provisions of section 442, ante, as amended in 1909 requiring the service of a summons on a cross-complaint do not have an effect of making applicable the above section where such summons is not issued and served upon such cross-complaint.—*Seaman v. Superior Court*, 183 Cal. 47, 190 Pac. 441.

8. Delay in serving summons—Dismissal of action—Provision mandatory.—Under above section as enacted in 1907 (Stats. 1907, p. 712), it is mandatory upon the court to dismiss an action where the summons has not been issued within one year, or served and returned within three years; but this does not affect the discretionary power of the court to dismiss for undue delay in issuing or serving summons, even though the delay has been for a shorter period than that named in the statute.—*Witter v. Phelps*, 163 Cal. 655, 126 Pac. 593.

9. The defendants in a suit to quiet title, by filing their answers, waive any laches predicated upon the ground of failure on the part of the plaintiff to prosecute the action prior to the filing of the answers, and after filing their answers the only showing of fact which the defendants are entitled to make or have considered by the court in support of a motion of dismissal is the plaintiff's neglect in prosecuting the case after the date of such filing.—*Johnston v. Baker*, 167 Cal. 260, 139 Pac. 86.

10. Where evidence was presented sufficient to support the conclusion that the summons had never been served and defendant had never appeared in the action, though it had been commenced more than five years before the making of the motion to dismiss, and the fact was established to the satisfaction of the court it was not only the right but the plain duty of the court to dismiss the action.—*McColgan v. Piercy*, 17 Cal. App. 162, 118 Pac. 957.

11. The above section makes it mandatory upon the court to dismiss an action where summons has not been served and return thereon made within three years after the commencement of the action, but the court may, in the exercise of a sound

judicial discretion, dismiss an action before the expiration of the three years, if there has been, under the circumstances of the case, an unreasonable delay in its prosecution.—*Caldwell v. Regents of University of California*, 23 Cal. App. 29, 136 Pac. 371.

12. Where an action is brought to quiet title to land ten years after an alleged void foreclosure sale, and a lis pendens is filed at the time of the commencement of the action, it is not a sufficient excuse for a delay of nineteen months in serving summons that the plaintiff required that time to raise the amount of money, for which the sale was made, to tender to the defendant, but which he claims he is not legally or equitably obliged to pay. The court does not, therefore, abuse its discretion in dismissing the action on the ground of unreasonable delay in its prosecution.—*Caldwell v. Regents of University of California*, 23 Cal. App. 29, 136 Pac. 731.

13. A party bringing an action should be prepared, when he files his complaint, if he is proceeding in good faith, to meet, as far as he is able to, every requirement which the nature and circumstances of the action and the averments of the complaint call for.—*Caldwell v. Regents of University of California*, 23 Cal. App. 29, 136 Pac. 731.

14. The mere making and presentation of a motion to dismiss an action upon the ground of unreasonable delay in the service of summons is not a general appearance of the defendant which subjects him to the jurisdiction of the court for all of the purposes of the action.—*Anderson v. Nawa*, 25 Cal. App. 151, 143 Pac. 555.

15. It is not an abuse of discretion to dismiss an action brought by the bank commissioner against the stockholders of an insolvent banking corporation on behalf of its creditors, for a delay of two years and ten months in serving summons on the moving defendant, where it appears that the summons could have been served at all times without any difficulty, although it is made to appear in opposition to the motion that during all of such period the plaintiff was actively engaged in an investigation of the bank's assets, which, if successful, would thereby reduce the defendant's liability as stockholder.—*Anderson v. Nawa*, 25 Cal. App. 151, 143 Pac. 555.

16. The fact that the delay in the service of summons did not operate to deprive the defendant of any defense which he may have had to the action will not suffice to excuse such delay.—*Anderson v. Nawa*, 25 Cal. App. 151, 143 Pac. 555.

17. The dismissal of an action because of unreasonable delay in the service of summons may be made without regard to the merits or demerits of the cause of action; the motion is granted as to a meritorious cause of action as well as to one without merit, because in either case there has been a failure upon the part of the plaintiff to

use the diligence which the law requires to make an end of litigation.—*Anderson v. Nawa*, 25 Cal. App. 151, 143 Pac. 355.

18. The state bank commissioner, in his action to enforce the liability of stockholders of an insolvent bank on behalf of its creditors, is not invested with the sovereignty of the state, and can not, on motion by a defendant to dismiss the action for delay in serving summons, invoke the rule that laches can not be imputed to the state.—*Anderson v. Nawa*, 25 Cal. App. 151, 143 Pac. 555.

19. The difficulty of locating some of the defendants in such an action is not a sufficient excuse for delay in the service of process upon a defendant whose whereabouts is known. The liability of such defendant as a stockholder is primary and independent, and in no sense and to no extent dependent or contingent upon the liability of the remaining defendants, and the court in its discretion might render a several judgment against him without regard to the liability of the remaining defendants, and regardless of whether or not any or all of them have been served with process.—*Anderson v. Nawa*, 25 Cal. App. 151, 143 Pac. 555.

20. Where summons in an action brought in a federal court is issued by the clerk within one year after the complaint has been filed, the action will not be dismissed because the summons is not placed in the hands of the marshal for service until after the expiration of the year.—*Perris Irr. Dist. v. Turnbull*, 215 Fed. 562.

21. **Same—Same—Action involving real estate.**—Where the record title to real property is challenged by an action at law or a suit in equity, it is the duty of the plaintiff to act with all proper diligence in bringing the question to issue in the court, so far as it is within his power to do so, and when he does not do so for a long period of time—that is to say, where he fails, for what appears to be an unreasonable length of time, legally to notify the party upon whose title he has thus made an assault that he has done so—he should not be excused for his neglect, where he is called upon to account for it, except upon a showing of the most satisfactory and conclusive character.—*Caldwell v. Regents of University of California*, 23 Cal. App. 29, 136 Pac. 731.

22. **Same—Same—Excuses justifying failure to serve.**—A motion to dismiss an action, made for want of service of summons, may be successfully resisted by showing that the defendant was absent from the state or had concealed herself to avoid service.—*Wilson v. Leo*, 19 Cal. App. 793, 127 Pac. 1043.

23. **Delay in returning summons for three years—Appearance to move dismissal—General appearance.**—In a case in which a summons has not been served or returned

within the three-year period required by the provisions of the above section an appearance to move dismissal, whether treated as a general or special appearance, after the expiration of the three-year period provided the court upon motion is required to dismiss the action.—*Bellingham Bay Lumber Co. v. Western Amusement Co.*, 35 Cal. App. 515, 170 Pac. 632.

24. Same—Construed to apply only to pending actions that have never been tried, and not to apply to actions that have gone to judgment.—*Jones v. Gunn*, 149 Cal. 694, 87 Pac. 577.

25. Same—Dismissal—In general.—In a case in which a summons is served before three years but the return is delayed until after three years, the cause must be dismissed under the provisions of the penalty in the above section, for the reason that the court is deprived of jurisdiction to take any other action than to dismiss the cause, and this is true whether one day or many years elapse before attention is called to the subject.—*Bellingham Bay Lumber Co. v. Western Amusement Co.*, 35 Cal. App. 515, 170 Pac. 632, following *Modoc Land Co. v. Superior Court*, 128 Cal. 255, 60 Pac. 848.

26. Where plaintiff, in an action to foreclose a street-assessment lien fails to cause return of summons, with proof of service, to be made within three years, the court is deprived of jurisdiction to take any other action than to dismiss the case.—*Ransome-Crummey Co. v. Wood*, 40 Cal. App. 355, 180 Pac. 951.

27. The court may dismiss the action without notice and on its own motion.—*Ransome-Crummey Co. v. Wood*, 40 Cal. App. 355, 180 Pac. 951.

28. Discretionary power of court.—Notwithstanding this section, making it mandatory upon the trial court to dismiss an action where the summons has not been issued within one year, or served and returned within three years, the court still retains the discretionary power to dismiss for undue delay in issuing or serving summons even though the delay has been for a shorter period than that named in the section.—*Witter v. Phelps*, 163 Cal. 655, 656, 126 Pac. 593.

29. In a motion to dismiss an action for failure to serve the summons within a reasonable time, where defendant's affidavit showed that the plaintiff knew that defendant resided in a different county than that in which the action was brought, and knew that he could be found there, and that the matters involved in the action had been fully settled between the parties, and that a material witness had died in the meanwhile, it can not be held that the granting of the motion to dismiss involved an abuse of discretion.—*Witter v. Phelps*, 163 Cal. 655, 126 Pac. 593.

30. Filing of appearance.—This section does not require written notice of appearance by the defendant to be filed within three years. If the defendant gives to the plaintiff written notice of his appearance within the three years it is sufficient and equivalent to a service and return of the summons.—*Anglo-California Bank v. Griswold*, 153 Cal. 692, 696, 96 Pac. 353.

31. Justices' court—Not applicable to.—The provisions of this section do not apply to actions prosecuted in the justices' courts, as section 890 is upon the same subject-matter and applicable specially and only to justices' courts.—*Hubbard v. Superior Court*, 9 Cal. App. 166, 168, 98 Pac. 394.

32. Order of dismissal—Final judgment.—An order of dismissal under the provisions of the above section is a final judgment, in view of the provisions of section 581, ante.—*Boyer v. City of Long Beach*, — Cal. App. —, 191 Pac. 35, applying the doctrine in *Marks v. Keenan*, 140 Cal. 33, 73 Pac. 751.

33. Power of court to dismiss action—In general.—The trial court has power to dismiss for undue delay in issuing or serving summons even though the delay has been for a shorter period than that which gives the defendant an absolute right.—*Mori v. Mori*, 171 Cal. 79, 151 Pac. 1136.

See par. 59, this note.

34. In an action to cancel a lease which had some nine years to run when the complaint was filed, no abuse of discretion is committed in dismissing the action for a delay of something over twenty-one months in serving the summons, where the sole reason for the delay was the pendency of a criminal proceeding against one of the defendants and a desire not to prejudice him in his defense thereto by such service, but no explanation is given why the summons was not served before or after the termination of such proceeding, which in the former case consisted of four months and in the latter of seven months, and it is further made to appear that the defendants had made valuable improvements upon the leased land.—*Mori v. Mori*, 171 Cal. 79, 151 Pac. 1136.

35. Same—Inherent power of court.—It is settled in this state that, independently of the provisions of the above statute which are a warrant therefore, the courts may, in the exercise of a power inherent in courts of justice, dismiss an action for unreasonable delay in its prosecution.—*People v. Kings County Development Co.*, — Cal. App. —, 191 Pac. 1004, applying the doctrine in *Dupuy v. Shear*, 29 Cal. 238; *People v. Jeffers*, 126 Cal. 296, 58 Pac. 704; *Bernard v. Parmelee*, 6 Cal. App. 537, 92 Pac. 658.

See par. 60, this note.

36. Waiver of right to dismiss.—Under section 396, ante, providing that a defendant may procure a change of venue if at the time of demurring or answering he filed

the necessary affidavit, a defendant who appears and demurs and at the same time moves for a change of the place of trial does not thereby waive the right to object to any delay which had occurred prior thereto in the matter of the service of the summons.—*Witter v. Phelps*, 163 Cal. 655, 126 Pac. 593.

II. DECISIONS UNDER FORMER SUBDIVISION 7 OF SECTION 581.

37. Amendment of 1889—Legislative intent.—By enactment of amendment to section in 1889 it was intended to prevent indefinite extension of life of obligation in spite of statute of limitations by simply commencing action.—*Davis v. Hart*, 123 Cal. 384, 386, 55 Pac. 1060.

38. Same—Same—Amendment of 1889 is in no sense prohibitory of power of court to dismiss action for want of prosecution. It does not limit power of court, but enlarges same, and discretion of court to determine whether there has been excusable delay within term of three years still remains.—*Kreiss v. Hotaling*, 99 Cal. 383, 386, 33 Pac. 1125.

39. Same—Same—Before amendment of subdivision 7, power to dismiss action for causes named was wholly discretionary. Now it is compulsory where summons is not issued within one year and served within three years.—*Stanley v. Gillen*, 119 Cal. 176, 177, 51 Pac. 183.

40. Same—Same—Declaration that "no further proceedings shall be had therein" is statutory prohibition against any further proceedings, and if court should assume to act in disregard of this prohibition of statute, it will be acting without any jurisdiction.—*Modoc L. & W. Co. v. Superior Court*, 128 Cal. 255, 256, 60 Pac. 848. See *White v. Superior Court*, 126 Cal. 245, 247, 58 Pac. 450.

41. Same—Legislative will in amendment of 1889 is comprehensively expressed, and prohibition of such amendment is absolutely imperative.—*Davis v. Hart*, 123 Cal. 384, 386, 55 Pac. 1060.

42. Same—Mandatory provision of statute.—Before amendment of this section, which now makes it compulsory for court to dismiss action if summons is not issued within one year and served within three years, it was within discretion of court to refuse to dismiss action no matter how long summons had remained without service. It is now compulsory on court to dismiss action when summons is not served within three years. In other cases there is no fixed rule as to dismissal for want of prosecution, and power to dismiss action on ground of unnecessary delay in serving summons is still in discretion of superior court, subject to reversal for apparent abuse of such discretion.—*Ferris v. Wood*, 144 Cal. 426, 428, 77 Pac. 1037. See *First Nat. Bank*

v. Nason, 115 Cal. 626, 47 Pac. 595; *Stanley v. Gillen*, 119 Cal. 176, 51 Pac. 183.

43. Same—Pending suits.—This section, as amended March, 1889 (Stats. 1889, p. 398), by adding subdivision 7, is very sweeping, and is expressly made applicable to pending suits, and is mandatory and absolute.—*Vrooman v. Li Po Tai*, 113 Cal. 302, 305, 45 Pac. 470; *White v. Superior Court*, 126 Cal. 245, 247, 58 Pac. 450; *Swortfiguer v. White*, 141 Cal. 576, 578, 75 Pac. 172.

44. Same—Provision contained in subdivision 7, as added to this section by Statutes 1889, page 398, is constitutional and valid in its applicability to pending suits.—*Vrooman v. Li Po Tai*, 113 Cal. 302, 305, 45 Pac. 470; *White v. Superior Court*, 126 Cal. 245, 247, 58 Pac. 450. See *Grant v. McArthur*, 137 Cal. 270, 272, 70 Pac. 88.

45. Authority to dismiss for laches—In general.—Court has authority to dismiss action for laches, and only question where there is no counter showing except as may be derived from pleadings, is as to whether discretion was abused.—*Davis v. Clark*, 126 Cal. 232, 235, 58 Pac. 542; *Mowry v. Weisenborn*, 137 Cal. 110, 115, 69 Pac. 971.

46. Same—Code does not mean that plaintiff may have full time mentioned in subdivision 7 in all cases. It is still discretionary with court to dismiss, even though summons be issued and served within time.—*Stanley v. Gillen*, 119 Cal. 176, 178, 51 Pac. 183. See *First Nat. Bank v. Nason*, 115 Cal. 626, 47 Pac. 595.

47. Death of party within year—And before summons served, is immaterial circumstance, unless statute provides that such circumstance shall prevent running of statute.—*Davis v. Hart*, 123 Cal. 384, 386, 55 Pac. 1060.

48. Defendant's right to dismissal of action—Absolute when summons is not served and return thereon made within three years after commencement of action, and where no appearance is made, except appearance for purposes of motion to dismiss.—*Sharpstein v. Eells*, 132 Cal. 507, 508, 64 Pac. 1080.

49. Delay in serving summons—Discretion of court.—Court has power to dismiss, where there has been inexcusable delay in serving summons, although service is had within three years after complaint was filed.—*Castro v. City, etc., San Francisco*, 4 Cal. Unrep. 500, 35 Pac. 1035.

50. Same—Delay reasonably accounted for.—In those cases in which the delay in serving summons reasonably accounted for as an excuse, the delay will not be ground for dismissing action for unreasonable delay in obtaining service, and where court dismisses action in its discretion under such circumstances, judgment of dismissal will be reversed.—*Ferris v. Wood*, 144 Cal. 426, 428, 77 Pac. 1037.

51. Same—Discretion of court—Determined upon circumstances.—The discretion of court to determine whether there has been excusable delay within term of three years still remains, and each case must be determined upon its own peculiar circumstances.—*Castro v. City, etc., San Francisco*, 4 Cal. Unrep. 500, 35 Pac. 1035. See *Kreiss v. Hotaling*, 99 Cal. 383, 386, 33 Pac. 1125; *Murray v. Gleeson*, 100 Cal. 511, 513, 35 Pac. 88.

52. Same—Same—Dismissal of action held proper where no attempt was made to serve summons until nearly four years after filing of complaint, and no summons issued within year, and none being authorized to be issued after expiration of year.—*Reynolds v. Page*, 35 Cal. 296, 300 (*Rhodes, J., dissenting*).

53. Same—Same—Not capricious or arbitrary.—Discretion of court in dismissing action on any ground other than where summons is not served within three years, in which case court is without discretion, is not capricious or arbitrary discretion, but impartial discretion guided and controlled in its exercise by fixed legal discretion, to be exercised in conformity with spirit of law, and in manner to subserve and not to impede or defeat the ends of substantial justice.—*Bailey v. Taaffe*, 29 Cal. 422, 423; *First Nat. Bank v. Nason*, 115 Cal. 626, 47 Pac. 595; *Ferris v. Wood*, 144 Cal. 426, 428, 77 Pac. 1037.

54. Same—Ground not mentioned in statute.—Court has general discretion in exercising power to dismiss under this section, and section 582, post, although ground of dismissal be not mentioned in statute.—*San Jose L. & W. Co. v. Allen*, 129 Cal. 247, 250, 61 Pac. 1083; *People ex rel. Stone v. Jeffers*, 126 Cal. 296, 58 Pac. 704.

55. Same—Inquiry as to abuse of discretion in dismissing action for want of prosecution, appellate court will not go beyond inquiry whether or not discretion of trial court in dismissing action has been abused.—*Hassey v. South San Francisco H. & R. Assoc.*, 102 Cal. 611, 614, 39 Pac. 945; *People ex rel. Stone v. Jeffers*, 126 Cal. 296, 58 Pac. 704; *Nicol v. San Francisco*, 130 Cal. 288, 62 Pac. 513; *Martin v. San Francisco*, 131 Cal. 575, 576, 63 Pac. 913; *Kennedy v. Mulligan*, 136 Cal. 556, 557, 69 Pac. 291. See *Grigsby v. Napa County*, 36 Cal. 585, 95 Am. Dec. 213; *Chipman v. Hibberd*, 47 Cal. 638; *Lander v. Flemming*, 47 Cal. 614; *Simmons v. Keller*, 50 Cal. 38; *Kornahrens v. His Creditors*, 64 Cal. 492, 3 Pac. 126; *Saville v. Frisbie*, 70 Cal. 87, 11 Pac. 502; *Pardy v. Montgomery*, 77 Cal. 326, 19 Pac. 530; *Kubli v. Hawckett*, 89 Cal. 638, 642, 27 Pac. 57.

56. Same—Leave to amend, effect of.—Court is not precluded from exercising its discretion on motion to dismiss, because it had, shortly before motion was made, given plaintiffs leave to amend. Rights of defendants could not be cut off by such leave

alone.—*San Jose L. & W. Co. v. Allen*, 129 Cal. 247, 250, 61 Pac. 1083.

57. Same—Service of summons prior to amendment of 1889 was required to be made within reasonable time, and if not so made, action might be dismissed for want of prosecution.—*Murray v. Gleeson*, 100 Cal. 511, 512, 35 Pac. 88. See *Carpentier v. Minturn*, 39 Cal. 450; *Eldridge v. Kay*, 45 Cal. 49; *Lander v. Flemming*, 47 Cal. 614; *Diggins v. Thornton*, 96 Cal. 417, 31 Pac. 289.

58. Same—Same—Imperative duty.—The section makes it imperative duty of court to dismiss action unless summons be served, and return thereon made within three years.—*Sharpstein v. Eells*, 132 Cal. 507, 509, 64 Pac. 1080.

59. Same—Want of prosecution—Power of court to dismiss.—The trial court has power to dismiss action for want of prosecution.—*Pardy v. Montgomery*, 77 Cal. 326, 327, 19 Pac. 530.

See pars. 33, 34, this note.

60. Same—Same—Independent of statute.—And such power is independent of provisions of this section.—*Hassey v. South San Francisco H. & R. Assoc.*, 102 Cal. 611, 614, 36 Pac. 945.

See par. 35, this note.

61. Dismissal of action—As to defendants not appearing.—Subdivision 7 does not prevent dismissal, when some of defendants have appeared, as to those who have not appeared, nor does it require an appearance by each of defendants in order to deprive court of all power of dismissal, but it is to be construed as authorizing dismissal as to those defendants who have not appeared, and prosecution of action against those who have made such appearance, whenever court shall be authorized to render judgment against them in absence of other defendants.—*Peck v. Agnew*, 126 Cal. 607, 609, 59 Pac. 125.

62. Entry of appearance—Not filed within three years—Dismissal error, when.—In a suit to foreclose a mortgage of realty, where the defendants, within three months after the filing of the complaint, gave to the plaintiff their written entry of appearance and consent to judgment, directed to the clerk of the court, and thereafter the cause was brought to a hearing, evidence introduced, the appearance filed, and a minute of a judgment directed by the court to be prepared, one of the defendants having died and the consent of the survivor as his executrix obtained and filed, it was error to dismiss the action on the motion of a second mortgagee, even though the written entry of appearance was not filed within the statutory three years after commencement of suit.—*Anglo-Californian Bank v. Griswold*, 153 Cal. 696, 96 Pac. 353.

63. A notice of appearance, and a consent to judgment, directed to the clerk of the court, and signed by the defendant in a suit to foreclose a mortgage, given to the

plaintiff within three months after the filing of the complaint, need not be filed within the statutory three years, in order to constitute the "appearance" herein contemplated.—*Anglo-Californian Bank v. Griswold*, 153 Cal. 693, 96 Pac. 353.

64. Same—Same—Excusable delay.—A request by defendants, after appearance and consent to judgment given, that the filing of the latter be delayed, in the hope that the property would increase in value, with authority to plaintiff to make sales at any time of portions of the property, is sufficient to excuse the filing of the consent for judgment for more than three years.—*Anglo-California Bank v. Griswold*, 153 Cal. 696, 96 Pac. 353.

65. Same—Same—Mandatory provision.—Even conceding that the terms of this section are mandatory, dismissal against the protest of the defendant, in all cases, would not be justified (dictum).—*Anglo-California Bank v. Griswold*, 153 Cal. 697, 96 Pac. 353.

66. Express waiver of benefit of provisions of section, subdivision 7, may be made by defendant.—*Cooper v. Gordon*, 125 Cal. 296, 302, 57 Pac. 1006. See *Pacific Pav. Co. v. Vizelich*, 141 Cal. 4, 9, 74 Pac. 352.

67. Foreclosure—Against heirs of deceased mortgageor—Administrator subsequently appointed may be served more than a year after commencement of action.—*Churchill v. Woodworth*, 148 Cal. 768, 113 Am. St. Rep. 324, 84 Pac. 155.

68. Judgment of dismissal—Modified on appeal, when.—A judgment of dismissal will be modified on appeal, where defendants who have appeared in action are included, and order of dismissal as to such defendants will be vacated.—*Peck v. Agnew*, 126 Cal. 607, 610, 59 Pac. 125.

69. Jurisdiction—Appearance by personal representative in action within three years obviates necessity of service of summons, and by this voluntary appearance court exercises jurisdiction, with same effect as if party had been brought in by service of summons.—*Union S. Bank v. Barrett*, 132 Cal. 453, 455, 64 Pac. 713, 1071.

70. Same—Stipulation for appearance not within three years after commencement of action, can not be considered as an appearance within meaning of this section.—*Grant v. McArthur*, 137 Cal. 270, 271, 70 Pac. 88.

71. Same—Voluntary appearance.—Jurisdiction of persons may be acquired by voluntary appearance at any time within three years of commencement of action, under provisions of this section, or by service of summons under provisions of sections 408, 416, ante.—*Hibernia S. & L. Soc. v. Cochran*, 141 Cal. 653, 657, 75 Pac. 315.

72. Neglect of clerk—To register order of dismissal in his register of actions, does not destroy effectiveness of provisions of

section.—*Marks v. Keenan*, 140 Cal. 33, 34, 73 Pac. 751.

73. Order—Dismissing action—Is final judgment within meaning of provisions of code touching appeals.—*Marks v. Keenan*, 140 Cal. 33, 34, 73 Pac. 751.

See, ante, § 581, note par. 150.

74. Same—Vacating judgment of dismissal—When proper.—An order vacating judgment of dismissal held proper in action where summons had not been returned, and no appearance had been made within three years, where it appeared that stipulation was entered into between parties in lieu of an answer containing consent to entry of appearance of defendant and entry of judgment.—*Cooper v. Gordon*, 125 Cal. 296, 302, 57 Pac. 1006. See *Pacific P. Co. v. Vizelich*, 141 Cal. 4, 9, 74 Pac. 352.

75. Presumptions—Are in favor of correctness of court's action, and burden in all cases is upon appellant to make it appear that this discretion was abused in granting motion to dismiss for want of prosecution, or in setting aside order of dismissal.—*Moore v. Thompson*, 138 Cal. 23, 26, 70 Pac. 930.

76. Dismissal of action by trial court, for want of prosecution, must, in absence of showing to contrary, be presumed to be brought within rules prescribed by law.—*Pardy v. Montgomery*, 77 Cal. 326, 327, 19 Pac. 530.

77. Statute—Imposes penalty of dismissal in all cases when return is made more than three years after commencement of action; and court is deprived of jurisdiction to take any other action than to dismiss cause, whether one day or many years elapse before its attention is called to subject.—*Modoc L. & W. Co. v. Superior Court*, 128 Cal. 255, 256, 60 Pac. 848.

78. Stipulation—As to delay, when filed, binds the parties, and may then be used to show that party has violated such stipulation, and is basis of relief to person who has been injured by trusting to it.—*Cooper v. Gordon*, 125 Cal. 296, 302, 57 Pac. 1006.

79. Same—As to judgment.—A stipulation entered into between parties one day after suit was commenced, to effect that plaintiff could enter judgment at any time, in action, for stipulated amount, but was to grant a stay of execution upon certain payments being made by defendant, followed by a second stipulation, one about two years thereafter, between defendant and plaintiffs' assignee, and the second about ten years after commencement of action between defendant and second assignee, in which last-named stipulation the amount due was also stipulated, although stipulation was not filed within three years, nor at any time before action was actually dismissed, held that stipulation was in effect an answer admitting allegations of complaint, and that defendant was estopped by

such stipulations from urging objection that plaintiff had neglected to prosecute action with due diligence.—*Cooper v. Gordon*, 125 Cal. 296, 301, 57 Pac. 1006.

80. Same—Statute does not limit right.—The statute was not intended to limit right of parties to stipulate for delay, and where defendant entered into stipulation with plaintiff and his successors in interest, in effect admitting all allegations of complaint, he is estopped by stipulation from urging objection that plaintiff has neglected to prosecute the action with due diligence.—*Cooper v. Gordon*, 125 Cal. 296, 301, 57 Pac. 1006.

81. Same—Virtual appearance.—A stipulation signed by attorneys for defendant in action, held to be virtual appearance, and none the less so because it was not filed, sufficient to preclude defendant, upon application for writ of prohibition, from restraining court from further proceedings.—*Roth v. Superior Court*, 147 Cal. 604, 82 Pac. 246. See *Cooper v. Gordon*, 125 Cal. 296, 57 Pac. 1006.

82. Successor in interest of deceased defendant, upon whom summons was served as successor in interest of such defendant, has such an interest as authorizes him to make motion to set aside void decree entered upon such service, and for dismissal of action for want of prosecution.—*Fanning v. Foley*, 99 Cal. 336, 339, 23 Pac. 1098.

83. Validity of judgment—Affidavit of publication of summons.—Where judgment was attacked in collateral proceeding, upon ground that it was invalid, contention being made that it appeared upon face of record that return upon summons was not made within three years after commencement of action, and that therefore court was without jurisdiction to render judgment, assuming, for purposes of decision, where service is had by publication, that affidavit showing publication was not filed within three years after commencement of action, and that court loses jurisdiction to proceed further; held that where record affirmatively shows that summons was regularly served by publication within three years, jurisdictional recitals in judgment

must be taken on collateral attack as true unless record affirmatively shows that facts upon which they are based are insufficient to sustain them.—*Sacramento Bank v. Montgomery*, 146 Cal. 745, 751, 81 Pac. 138.

84. Verbal solicitations for continuance—Verbal authority to "take judgment at any time"—Not an appearance.—A verbal solicitation for continuances, and a verbal authority of defendant that plaintiff "could at any time take judgment in said case," held not to constitute appearance in action, nor power of attorney to confess judgment.—*Siskiyou Co. Bank v. Hoyt*, 132 Cal. 81, 83, 64 Pac. 118.

85. Distinguished from Cooper v. Gordon, 125 Cal. 296, 57 Pac. 1006, where written stipulations were entered into that judgment could be entered at any time for sum stated.

86. Words "and served and return thereon made" refer to summons, and words in statute as amended in March, 1895, "and all such actions shall be in like manner dismissed unless the summons shall be served and return thereon made," refer to summons and also to the action.—*Sharpstein v. Eells*, 132 Cal. 507, 509, 64 Pac. 1080.

87. Same—Same—Amendment of 1895—Intended to make legislative intent free from ambiguity in reference to duty of court to dismiss action where summons was not served and return thereon made within three years after commencement of action.—*Sharpstein v. Eells*, 132 Cal. 507, 509, 64 Pac. 1080. See *Vrooman v. Li Po Tai*, 113 Cal. 302, 305, 45 Pac. 470; *Davis v. Hart*, 123 Cal. 384, 385, 55 Pac. 1060; *Cooper v. Gordon*, 125 Cal. 296, 297, 57 Pac. 1006; *White v. Superior Court*, 126 Cal. 245, 247, 58 Pac. 450; *Modoc L. & W. Co. v. Superior Court*, 128 Cal. 255, 60 Pac. 848.

88. Writ of prohibition—When granted.—A writ of prohibition will be granted to restrain superior court from proceeding with trial of cause after three years subsequent to commencement of action, and where motion to dismiss had been made.—*Modoc L. & W. Co. v. Superior Court*, 128 Cal. 255, 256, 60 Pac. 848.

§ 581b. DISMISSAL OF ACTION AFTER TRANSFER. No action heretofore or hereafter commenced, where the same was not originally commenced in the proper county, shall be further prosecuted, and no further proceedings shall be had therein, and all such actions heretofore or hereafter commenced must be dismissed by the court to which the same shall have been transferred, on its own motion, or on the motion of any party interested therein, whether named in the complaint as a party or not, where the costs and fees of transmission of the pleadings and papers therein to the clerk or justice of the court to which it is transferred, or of filing the papers anew, have not been paid by the plaintiff for one year after the time when such pleadings or papers shall have arrived in the custody of such clerk or justice. The clerk of such court,

or such justice shall, where such court or justice desires to dismiss an action under the provisions of this section, file anew such transferred pleadings and papers without fee.

History: Enactment approved May 24, 1913, Stats. and Amdts. 1913, p. 244. In effect August 10, 1913.

DISMISSAL AFTER TRANSFER.

1. Claim and delivery—Failure to pay fees within year.
2. Construction of section—As mandatory.

As to dismissal by part of plaintiffs, after findings and judgment; see, ante, § 581, note Part II.

1. **Claim and delivery—Failure to pay fees within year.**—In those cases in which an action in claim and delivery has been transferred from another court and the plaintiff fails to pay the fees within one

year from the time of the reception of the papers by the clerk of the court to which the case is transferred, the court must dismiss the action under the provisions of the above section.—*Abraham v. King*, — Cal. App. —, 197 Pac. 659, following the doctrine in *Davis v. Superior Court*, 184 Cal. 691, 195 Pac. 390.

2. **Construction of section—As mandatory.**—The provisions of this section are mandatory, and are addressed not only to the parties but to the court.—*Davis v. Superior Court*, — Cal. —, 195 Pac. 390, 391.

§ 582. ALL OTHER JUDGMENTS ARE ON THE MERITS. In all cases other than those mentioned in the last two sections, judgment must be rendered on the merits.

History: Enacted March 11, 1872, re-enactment of § 149 of Practice Act; amendment approved March 20, 1907, Stats. and Amdts. 1907, p. 712, Kerr's Stats. and Amdts. 1906-7, p. 447.

JUDGMENTS ON MERITS.

- I. IN GENERAL—JUDGMENT ON MERITS, 1-12.
- II. JUDGMENT ON PLEADINGS, 13-25.

I. IN GENERAL—JUDGMENT ON MERITS.

1. Construction of section—As rule of procedure.
2. Same—Amendment of 1907—Did not repeal section 583, post—Construction of section.
3. Same—Amendment to section—Subsequent to section 83—Effect of.
4. Dismissal upon stipulation—A judgment on the merits.
5. Failure of court to render judgment on merits—Abuse of discretion.
6. Judgment—Of dismissal.
7. Same—On the pleadings.
8. Same—Rendered by consent.
9. Same—Presumed to be rendered pursuant to provisions of above section.
10. Same—Same—Court is presumed to have passed on all facts before it.
11. Same—Upon merits, defined.
12. Same—Though erroneous is conclusive as to parties.

II. JUDGMENT ON PLEADINGS.

13. Court of equity—Will never set aside judgment for mere error.
14. Defendant's right to move for judgment upon pleadings.
15. Denial upon information and belief—When sufficient.

16. Denials in original answer—When immaterial.

17-19. Judgment on pleadings—Proper where answer does not set up any defense.

20. Same—Matters outside of complaint not considered.

21. Same—Motion for judgment on pleadings is properly denied, when.

22. Same—Objection that facts are not definitely stated.

23. Same—Plaintiff is not entitled to judgment on pleadings, when.

24. Same—Pleadings are construed most strongly against pleader.

25. Same—Truth of facts alleged in complaint are admitted.

I. IN GENERAL—JUDGMENT ON MERITS.

1. **Construction of section—As rule of procedure.**—It is not fact that every judgment that is not rendered under provisions of section 581, ante, is rendered upon merits. This section is declaration of rule of procedure rather than principle of law (dis. op.).—*City of Oakland v. Oakland W. F. Co.*, 118 Cal. 160, 224, 50 Pac. 277.

2. **Same—Amendment of 1907—Did not repeal section 583, post—Construction of section.**—The amendment to this section must not be construed as a repeal of section 583; manifestly it was not so intended by the legislature but was rendered necessary by the shifting of the provisions contained in subdivision 7 of section 581, ante, to section 581a, ante.—*Johnston v. Baker*, 167 Cal. 260, 139 Pac. 86.

3. Same—Amendment to section—Subsequent to section 83—Effect of.—The amendment of above section subsequently to the enactment of section 83, ante, should not be construed as an implied repeal of the latter.—*Johnston v. Baker*, 167 Cal. 260, 139 Pac. 86.

4. Dismissal upon stipulation—A judgment on the merits.—In those cases in which the parties appear in open court and stipulate for a dismissal of the action, an order of dismissal entered thereon is a judgment on the merits within the provisions of the above section.—*McCord v. Martin*, — Cal. App. —, 191 Pac. 89.

5. Failure of court to render judgment on merits—Abuse of discretion.—Discretion of court improperly exercised in striking out answer not served in time, where it does not appear that any one was harmed by failure to serve within time fixed by law, and especially where it appears that plaintiff's attorney had copy of answer in his possession one month before motion to strike out was made; and error of court in rendering judgment by default in favor of plaintiff after such answer was in by which issues were joined, and when judgment should have been rendered after trial on merits.—See *Lybecker v. Murray*, 58 Cal. 186, 190.

6. Judgment—Of dismissal, not being for one of the causes provided in section 581, ante, must be held a judgment upon the merits under this section.—*Amestoy v. City of Los Angeles*, 5 Cal. App. 273, 275, 90 Pac. 42.

7. Same—On the pleadings is a judgment on the merits.—*Balley v. Aetna Indemnity Co.*, 5 Cal. App. 740, 747, 91 Pac. 416.

8. Same—Rendered by consent becomes res adjudicata between parties thereto, and where parties are competent to consent to such judgment, it may be pleaded in bar of another action between them with same effect as if rendered after litigation of merits of controversy (dis. op.).—*City of Oakland v. Oakland W. F. Co.*, 118 Cal. 160, 226, 50 Pac. 277.

9. Same—Presumed to be rendered pursuant to provisions of above section where nonsuit was not taken by plaintiff before or after verdict; nor was particular cause of action in question in any manner withdrawn from consideration of court at any stage of proceedings, nor was there judgment without prejudice.—*Gray v. Dougherty*, 25 Cal. 266, 277.

10. Same—Same—Court is presumed to have passed on all facts before it, and granted plaintiff all relief to which he was entitled, where, having all facts before it, judgment is rendered on merits; and under such circumstances, silence of court as to further relief demanded, but not granted, is held to be denial of such further relief.—*Gray v. Dougherty*, 25 Cal. 266, 277,

11. Same—Upon merits, defined.—A judgment upon merits is one which determines, either upon issue of law or fact, which party is right. Judgment that party can not be heard can only conclude as to that question. It can not determine merits of action which court refuses to consider at all.—*Rosenthal v. McMann*, 93 Cal. 505, 511, 29 Pac. 121. See dis. op. *Harrison, J., City of Oakland v. Oakland W. F. Co.*, 118 Cal. 160, 225, 50 Pac. 277.

12. Same—Though erroneous, is conclusive as to parties and privies, until reversed.—*Gray v. Dougherty*, 25 Cal. 266, 283.

II. JUDGMENT ON PLEADINGS.

13. Court of equity—Will never set aside judgment for mere error, whether of law or fact, committed in rendition of judgment.—*Wickersham v. Comerford*, 104 Cal. 494, 497, 38 Pac. 101.

14. Defendant's right to move for judgment upon pleadings, when complaint fails to state cause of action, is well settled in this state.—*Hibernia Sav. & L. Soc. v. Thornton*, 117 Cal. 481, 482, 49 Pac. 573. See *King v. Montgomery*, 50 Cal. 115; *Kelley v. Kriess*, 68 Cal. 210, 9 Pac. 129; *De Toro v. Robinson*, 91 Cal. 371, 27 Pac. 671.

15. Denials upon information and belief—When sufficient.—Court does not err in refusing to grant motion of plaintiff for judgment on pleadings where denials in answer are upon information and belief of matters not presumptively within knowledge of defendants.—*Wickersham v. Comerford*, 104 Cal. 494, 497, 38 Pac. 101.

16. Denials in original answer—When immaterial.—It is not necessary, in passing on motion for judgment on pleadings, to determine as to sufficiency of denials in original answer, where denials contained in amended answer are sufficient.—*Matteucci v. Whelan*, 123 Cal. 312, 313, 69 Am. St. Rep. 60, 55 Pac. 990.

17. Judgment on pleadings—Proper where answer does not set up any defense, for proof of averments in answer would have been immaterial, and denials in such case are merely matters of law.—*Heydenfeldt v. Jacobs*, 107 Cal. 373, 376, 40 Pac. 492.

18. Judgment on pleadings is proper in action where complaint is duly verified and defendant filed unverified answer containing general denial of all allegations in complaint, and setting up as counter-claim alleged cause of action against payee of two or three notes sued upon, and where after service of notice of motion for judgment on pleadings, amended answer, setting up no defense whatever to one of notes sued on, and counter-claim as only defenses to remaining two notes, which amended answer was filed among the papers without

leave of court to serve or file same.—Benham v. Connor, 113 Cal. 168, 171, 45 Pac. 258.

19. In an action brought to recover an alleged balance due on a promissory note, judgment on the pleadings is rightly entered, where the answer admits the allegations of the complaint as to the execution of the note, and then denies that the money had been paid thereon and alleges that the obligation of the note had been extinguished by the execution of a stipulation made in another answer, which stipulation is set out in full, and it appears therefrom that the defendant was in default under the stipulation at the time of the commencement of the action.—Scheeline v. Moshier, 172 Cal. 565, 158 Pac. 222.

20. Same—Matters outside of complaint not considered.—On motion for judgment on pleadings, where made by defendant, court can not consider any matter outside of complaint, or any defense thereto, in answer, but motion is to be determined upon same principles as demurrer to complaint upon same ground.—Hibernia Sav. & L. Soc. v. Thornton, 117 Cal. 481, 482, 49 Pac. 573.

21. Same—Motion for judgment on pleadings is properly denied in action brought against two defendants, upon two promissory notes, where one defendant, being an insolvent debtor, did not answer, and action proceeded against remaining defendant alone, whose answer consisted of general denial and special defense to effect that his name could be used for no other purpose than to make note good as collateral

security at bank, and that notes in suit were given in renewal thereof, and that as to him, they were without consideration.—Eppinger v. Kendrick, 114 Cal. 620, 621, 46 Pac. 613.

22. Same—Objection that facts are not definitely stated in complaint is unavailing on motion for judgment on pleadings, on ground that complaint fails to state cause of action. There must be entire absence of some fact or facts essential to constitute cause of action.—Hibernia Sav. & L. Soc. v. Thornton, 117 Cal. 481, 482, 49 Pac. 573.

23. Same—Plaintiff is not entitled to judgment on pleadings, when answer pleaded statute of limitations and estoppel by reason of former decision between same parties, and even if statute of limitations was not good plea, defendants were entitled to be heard on plea of estoppel by judgment in former appeal.—Brind v. Gregory, 122 Cal. 480, 481, 55 Pac. 250.

24. Same—Pleadings are construed most strongly against pleader in considering motion for judgment on pleadings.—Benham v. Connor, 113 Cal. 168, 45 Pac. 258. See Felch v. Beaudry, 40 Cal. 439; Hemme v. Hays, 55 Cal. 337; Loveland v. Garner, 74 Cal. 293, 15 Pac. 844; San Francisco v. Staude, 92 Cal. 560, 28 Pac. 778.

25. Same—Truth of facts alleged in complaint are admitted for purposes of motion of defendant for judgment upon pleadings.—Hibernia Sav. & L. Soc. v. Thornton, 117 Cal. 481, 482, 49 Pac. 573; Ward v. Flood, 48 Cal. 36, 46, 17 Am. Rep. 405; Fleming v. Wells, 65 Cal. 336, 339, 4 Pac. 197; McGowan v. Ford, 107 Cal. 177, 185, 40 Pac. 231.

§ 583. DISMISSAL OF ACTIONS. The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after answer filed to bring such action to trial. Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court on its own motion, unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended.

History: Enactment approved March 18, 1905, Stats. and Amdts. 1905, p. 244.

DISMISSAL—FAILURE TO BRING TO TRIAL.

1-3. Construction of section—As mandatory.

4. Same—As applying to what causes only.

5, 6. As not applying on appeals from justices' court.

7. Same—As to discretion of court to dismiss before expiration of time.

8. Same—As to intent and scope of section.

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9. Appeal from justices' court—Inherent jurisdiction.

10. "Brought to trial"—When cause is.

11. Dismissal for non-prosecution—Public policy.

12. Entry of judgment after default—Jurisdiction of clerk not affected by filing of demurrer.

13-19. Failure to bring action to trial—As to generally.

20. Same—As to scope of section.

21. Same—As to dismissal—Statutory provisions mandatory.
22. Same—Action to quiet title.
23. Same—Same—Death of defendant.
24. Same—Actual trial not required.
25. Same—Appeal—Effect of the provisions.
26. Same — Construction — The word "trial."
- 27-29. Same—Delay in bringing to trial.
30. Same—Discretion of court.
31. Same—Motion is addressed to discretion of trial court.
32. Same — Oral understanding — Not within the protection of the provisions.
- 33, 34. Same—Power of court.
35. Same—Presumptions of regularity of action of court.
36. Same—Right to dismissal.
37. Filing cross-complaint—Effect of.
38. Final judgment—Order dismissing action constitutes a.
39. Setting cause for trial—Date fixed beyond limitation of period—Effect of failure to object.
- 40, 41. Stipulation—For continuance of time of trial—Does not defeat right of dismissal.
42. Same—For dropping from calendar—To be reset on motion.
43. Same—Made in open court.
44. Same—Signing of — By attorneys of record.
45. Where answer is filed—No dismissal, when.
- 46, 47. Where no answer has been filed—Inherent power to dismiss.

As to nonsuit, see, ante, § 581, note Part VI.

1. Construction of section—As mandatory.—The above section and related sections providing for nonsuit or dismissal of actions under the circumstances provided are mandatory in character.—*Boyd v. Southern Pac. R. Co.*, 185 Cal. 344, 197 Pac. 58, following the doctrine in *Larkin v. Superior Court*, 171 Cal. 719, Ann. Cas. 1917D 670, 154 Pac. 841.

2. The dismissal of an action for failure to bring to trial within five years after answer filed, except where the parties have stipulated in writing that the time may be extended, is made mandatory by above section.—*Larkin v. Superior Court*, 171 Cal. 719, 154 Pac. 841.

3. The above section, which directs a dismissal where there has been a delay of nearly seven years, makes an exception of the cases where the parties have stipulated in writing that the time may be extended.—*Nathan v. Dierssen*, 164 Cal. 607, 130 Pac. 12, 14.

4. Same—As applying to what causes, only.—The above section applies only to causes where an answer, as distinguished from a demurrer has been filed.—*Barton v. City of Richmond*, 39 Cal. App. 564, 179 Pac. 522.

5. Same—As not applying on appeals from justices' court.—This section does not apply to actions pending in the superior court on appeal from the justices' court.—*Pistolesi v. Superior Court*, 26 Cal. App. 403, 147 Pac. 104.

6. This section does not apply to actions pending in the superior court on appeal from the justices' court, and while the court possesses inherent power in its discretion to make an order of dismissal it can not be compelled to do so.—*Long v. Superior Court*, 31 Cal. App. 34, 159 Pac. 734.

7. Same—As to discretion of court to dismiss before expiration of time.—The section merely fixes a limit beyond which the court's discretion ceases, and does not prohibit dismissal before the time fixed.—*Watterson v. Hillside Water Co.*, 42 Cal. App. 364, 183 Pac. 592.

8. Same—As to intent and scope of section.—This section evinces an intent to cover the entire subject of dismissals for failure to bring an action to trial after answer filed, and to fix: (1) a minimum period within which mere delay is not to be deemed sufficient cause; (2) an immediately ensuing interval of three years, during which the court, in its discretion, may adjudge it sufficient, and (3) a maximum period of five years, upon the expiration of which the delay is declared to be sufficient as a matter of law and the dismissal is made mandatory.—*Romero v. Snyder*, 167 Cal. 216, 138 Pac. 1002.

9. Appeal from justices' court—Inherent jurisdiction.—The superior court has inherent power to dismiss an action appealed from the justices' court on questions of law and fact, where not brought to trial within two years after the appeal was taken, regardless of whether such authority exists under the provisions of the above section or not.—*Kaster v. Superior Court*, 34 Cal. App. 88, 166 Pac. 852.

10. "Brought to trial"—When cause is.—In a case in which a cause of action which has been the issue for over a year and the trial thereof is continued indefinitely by stipulation and the plaintiff thereafter and a few days before the expiration of the five-year period of limitation, moved that the cause be set again for trial and this was done, but for a time after the expiration of the period of limitation; and thereafter the defendant upon the expiration of the period of limitation and before the trial date set, moved that the action be dismissed the trial order was properly overruled and the cause dismissed.—*Boyd v.*

Southern Pac. R. Co., 185 Cal. 344, 197 Pac. 58.

11. Dismissal for non-prosecution—Public policy.—The provisions of the above section preventing unlimited postponement of trials is one of public policy as well as of private concerns to litigants, ordinarily in matters effecting only the right of parties that are at least to enlarge or curtail the operations of the statute at their pleasure by stipulation, under the provisions of the Civil Code, 3513; but where the public is concerned the least of the statutes must be observed.—*City of Los Angeles v. Superior Court*, 185 Cal. 405, 197 Pac. 79.

12. Entry of judgment after default—Jurisdiction of clerk not affected by filing of demurrer.—Where the defendant fails to answer within the required time it is the duty of the clerk to enter his default, and the fact that defendant, subsequent to the entry of the default, filed a demurrer does not deprive the clerk of jurisdiction to enter judgment.—*Christenson v. French*, 180 Cal. 523, 182 Pac. 27.

13. Failure to bring action to trial—As to generally.—Prior to the enactment of above section, the courts were vested with discretionary power to dismiss an action at any time for unreasonable delay in its prosecution, notwithstanding an answer had been filed. But the effect of such section is to change this rule and restrict the exercise of the power of dismissal, where answer is filed, to two years after the date of such filing. The declaration that the court has power in its discretion to dismiss an action upon the conditions prescribed implies the negative of the power to dismiss unless such conditions exist.—*Johnston v. Baker*, 167 Cal. 260, 139 Pac. 86.

14. The superior court, without the aid of statutory authority, has power, as a court of general jurisdiction, to dismiss an action because of the failure of the plaintiff to prosecute it with reasonable diligence.—*Romero v. Snyder*, 167 Cal. 216, 138 Pac. 1002.

15. The above section, enacted in 1905, deprives the superior court of power to dismiss an action for neglect of the plaintiff to prosecute the same, in cases where an answer has been filed, unless the plaintiff fails to bring the action to trial within two years after the filing of the answer.—*Romero v. Snyder*, 167 Cal. 216, 138 Pac. 1002.

16. The situation existing at the time a motion to dismiss for want of diligence in prosecution was noticed is that which controls its determination.—*Romero v. Snyder*, 167 Cal. 216, 138 Pac. 1002.

17. Above section applies only to the particular instance of delay in bringing the case to trial after answer filed. Where an answer has not been filed, the court's power to dismiss an action for want of prosecution remains, as it was before, limited only by a sound discretion. For the purposes of

that section, the filing of a demurrer does not have the same effect as an answer.—*Romero v. Snyder*, 167 Cal. 216, 138 Pac. 1002.

18. It is held that it was not abuse of discretion for the court to dismiss the present action as against defendants who had not filed an answer, where there was an entirely unexplained and inexcusable delay for nearly two years in prosecuting the action at the time the motions to dismiss were noticed.—*Romero v. Snyder*, 167 Cal. 216, 138 Pac. 1002.

19. If the delay in prosecuting an action is due to the neglect of the attorneys of the plaintiff, such neglect is imputable to the plaintiff as her own neglect.—*Romero v. Snyder*, 167 Cal. 216, 138 Pac. 1002.

20. Same—As to scope of section.—This section evinces an attempt to cover the entire subject of dismissals for failure to bring an action to trial after answer filed, and to fix (1) a minimum period of two years within which mere delay is not to be deemed sufficient cause; (2) an immediately ensuing interval of three years, during which the court, in its discretion, may adjudge it sufficient; and (3), a maximum period of five years, upon the expiration of which, the delay is declared to be sufficient as a matter of law and the dismissal is made mandatory.—*Romero v. Snyder*, 167 Cal. 216, 138 Pac. 1002.

21. Same—As to dismissal—Statutory provisions mandatory.—The provisions of the above section requiring the court, on motion of defendant after notice to the plaintiff, or the court of its own motion to dismiss a cause which has not been brought to trial within the five-year period of limitations provided by the provisions of the above section except in those cases in which there have been stipulations in writing that the time may be extended beyond that period.—*Ravin v. Planz*, 37 Cal. App. 735, 174 Cal. 690.

22. Same—Action to quiet title.—The defendant's right to a dismissal of an action to quiet title for failure to bring it to trial within five years after answers were filed is not affected by the mere fact that the answers set up defendants' own alleged title and asked that they be adjudged the owners.—*Larkin v. Superior Court*, 171 Cal. 719, 154 Pac. 841.

23. Same—Same—Death of defendant.—A motion to dismiss an action not brought to trial within five years after answer filed is not affected by the death of the original defendant-administrator and the failure to appoint and substitute a new administrator for several months thereafter, where the death occurred after the expiration of the five-year period.—*Larkin v. Superior Court*, 171 Cal. 719, 154 Pac. 841.

24. Same—Actual trial not required.—Under the provisions of the above section it is not required that the cause shall actually

be tried within the five-year period and disposed of by the court; the plaintiff has performed all that is required of him when he has moved the case upon the calendar and caused it to be set for trial.—*Mazitelli v. Crane*, 35 Cal. App. 264, 169 Pac. 721.

25. Same—Appeal—Effect of the provisions of the above section are not operative in those cases in which a cause has been brought to trial after the five-year period of limitations and a judgment has been entered against the defendants from which an appeal has been taken and the court thereafter can not upon its own motion with the consent of the parties dismiss the cause.—*Kinard v. Jordan*, 175 Cal. 13, 164 Pac. 894.

26. Same — Construction — The word "trial" as used in the above section refers to the hearing and determination of the issues of fact involved in a trial of the case on its merits, and does not include the hearing on a demurrer, which does not constitute a trial.—*Perrin v. Miller*, 35 Cal. App. 129, 169 Pac. 426.

27. Same—Delay in bringing to trial.—The dismissal of an action for failure to bring to trial within two years after the filing of the answer is not an abuse of discretion, although notice of the motion to dismiss was given but a few days after the expiration of the two years and the plaintiff's attorney was ill for four months and during the remainder of the two years was engaged in other business matters.—*Goldman v. Palmtag*, 169 Cal. 170, 146 Pac. 429.

28. The superior court, without the aid of statutory authority, has power, as a court of general jurisdiction, to dismiss an action because of the failure of the plaintiff to prosecute it with reasonable diligence, where no answer has been filed. Above section applies only to dismissals after answers filed.—*Overaa v. Keeney*, 49 Cal. Dec. 407, 147 Pac. 466.

29. It is not an abuse of discretion to dismiss an action for damages for personal injuries for failure to prosecute with reasonable diligence, where the complaint was not filed until eleven days before the expiration of the period prescribed for the commencement of the action, and the summons not taken out until three weeks before the limitation of the time for its issuance, and not served until seven months before the expiration of the time allowed by law, both parties living in the same county and having frequent meetings, notwithstanding such failure was due to the plaintiff's crippled condition and his consequent inability to earn money to proceed with the litigation.—*Overaa v. Keeney*, 49 Cal. Dec. 407, 147 Pac. 466.

30. Same — Discretion of court.—In the case of an appeal to the superior court from the justices' court on the failure to bring the cause to trial within two years, it is not an abuse of discretion to dismiss

such appeal, taken on both questions of law and fact, such failure to bring to trial not being due to mistake or ignorance, but the plaintiff being content to let the matter rest because he was relying upon a bond given to release an attachment obtained by him, and the defendant had in the meantime removed to another state, the expenses incident to their personal attendance at the trial being nearly equal to the amount of the demand.—*Kaster v. Superior Court*, 34 Cal. App. 88, 166 Pac. 852.

31. Same—Motion is addressed to discretion of trial court, whose action will not be disturbed except for clear abuse.—*Vestal v. Young*, 147 Cal. 721, 82 Pac. 381.

32. Same—Oral understanding—Not within the protection of the provisions of the above statute in a case in which the cause is not brought to trial within the five-year period.—*Perrin v. Miller*, 35 Cal. App. 129, 169 Pac. 426.

33. Same—Power of court.—A court has power to dismiss an action for want of reasonable diligence in prosecuting it.—*Witter v. Phelps*, 163 Cal. 655, 126 Pac. 593.

34. That nisi prius courts possess inherent power to dismiss pending actions upon the ground that they have not been diligently prosecuted is a proposition repeatedly confirmed and well settled in this state. The only question is, did the court's order dismissing the action involve an abuse of discretion upon the facts of any particular case.—*Gray v. Times-Mirror Co.*, 11 Cal. App. 155, 160, 104 Pac. 481.

35. Same—Presumption of regularity of action of court.—In a case where it appears from the recitals of the findings and the judgments that the trial took place more than five years after the filing of the defendant's answer, regularity of proceeding in the lower court will be presumed by an appellate court in the absence of affirmative showing to the contrary.—*Richmond v. Julian Consol. Min. Co.*, 176 Cal. 600, 169 Pac. 356.

36. Same—Right to dismissal for failure to bring to trial within the time fixed, as extended by a written stipulation and the rights of the defendant will not be affected by the importance of the action or the equities between the parties on the merits.—*City of Los Angeles v. Superior Court*, 185 Cal. 405, 197 Pac. 79.

37. Filing cross-complaint — Effect of.—Jurisdiction of an action is not lost by reason of the failure to prosecute within five years after answer to the complaint where the delay is attributable in part to the action of the defendants in filing a cross-complaint when the plaintiff endeavored to have the cause placed on the calendar for trial within two and a half years after answer to the original complaint had been filed.—*Hickman v. Lynch*, 27 Cal. App. 354, 149 Pac. 997.

As to where answer is filed, see par. 45, this note.

38. Final judgment—Order dismissing action constitutes a final judgment within the meaning of the provisions of this code, touching appeals.—*Dempsey v. Underhill*, 156 Cal. 718, 719, 106 Pac. 73.

39. Setting cause for trial—Date fixed beyond limitation of period—Effect of failure to object.—In a case in which a cause of action has been at issue for a long time and the trial thereof has been continued indefinitely, under stipulation between the parties, and on motion of the plaintiff a few days before the expiration of the five-year period of limitations a date for the trial of the cause is fixed, but so far in the future that it is beyond the period of limitation prescribed by the code; a failure of the defendant to object that the trial date is after the expiration of the period of limitation prescribed by the code, does not constitute an acquiescence in the fixing of such date, or estop the defendant after the expiration of the period of limitation to move for the dismissal of the cause.—*Boyd v. Southern Pac. Co.*, 185 Cal. 344, 197 Pac. 58.

40. Stipulation—For continuance of time of trial—Does not defeat right of dismissal.—In the case in which by written stipulation of the parties the trial of a cause is extended beyond the five-year period of limitation this will not bar the defendant of his right to move for the dismissal of the cause after the five-year period of limitation has expired.—*City of Los Angeles v. Superior Court*, 185 Cal. 405, 197 Pac. 79.

41. A written stipulation extending the time of a party to plead, serve notice, or to perform any other act required by law, does not constitute a waiver of the right to the enforcement of the performance of the act required by law beyond the time expressly stipulated; such a stipulation does not waive the defendant's right to move for a dismissal because of a failure to prosecute it merely amounts to a stipulation as to the time within which the plaintiff may bring the cause to trial.—*City of Los Angeles v. Superior Court*, 185 Cal. 405, 197 Pac. 79.

42. Same—For dropping from calendar—To be reset on motion.—Where a cause had been at issue over seventeen years it is properly dismissed for failure to prosecute, and a stipulation that the action be dropped from the calendar to be reset on motion made sixteen years before dismissal does not take the case out of the operation of

this section.—*Central Pac. R. Co. v. Riley*, 31 Cal. App. 394, 160 Pac. 844.

43. Same—Made in open court.—A stipulation made in open court and entered in the minutes fixing as the time for trial a date within one year from the filing of the answer, and two stipulations continuing the trial, the later to a date within fifteen months after the filing of the answer, are not the stipulations extending the five-year period contemplated by such section.—*Larkin v. Superior Court*, 171 Cal. 719, 154 Pac. 841.

44. Same—Signing of—By attorneys of record.—It is not essential that the stipulation in writing mentioned in such section be signed personally by "the parties"; a stipulation by counsel is sufficient.—*Larkin v. Superior Court*, 171 Cal. 719, 154 Pac. 841.

45. Where an answer is filed—No dismissal, when.—In cases where an answer has been filed the court should not dismiss the action for want of prosecution unless the plaintiff has delayed for two years thereafter to bring the action to trial.—*Romero v. Snyder*, 167 Cal. 216, 138 Pac. 1002.

As to filing cross-complaint and effect of, see par. 37, this note.

46. Where no answer has been filed—Inherent power to dismiss.—Where no answer has been filed the court has inherent power to dismiss an action for want of prosecution. The limitations on the court's power to dismiss under this section apply to the particular instance of delay in bringing the case to trial after answer has been filed.—*Overaa v. Keeney*, 169 Cal. 628, 147 Pac. 466.

47. It is not an abuse of discretion to dismiss an action for damages for personal injuries for failure to prosecute with reasonable diligence, where the complaint was not filed until eleven days before the expiration of the period prescribed for the commencement of the action, and the summons not taken out until three weeks before the limitation of the time for its issuance, and not served until seven months before the expiration of the time allowed by law, both parties living in the same county and having frequent meetings, notwithstanding such failure was due to the plaintiff's crippled condition and his consequent inability to earn money to proceed with the litigation.—*Overaa v. Keeney*, 169 Cal. 628, 147 Pac. 466.

CHAPTER II.

JUDGMENT UPON FAILURE TO ANSWER.

§ 585. In what cases judgment may be had upon the failure of the defendant to answer.

§ 585. IN WHAT CASES JUDGMENT MAY BE HAD UPON THE FAILURE OF THE DEFENDANT TO ANSWER. Judgment may be had, if the defendant fails to answer the complaint, as follows:

1. In an action arising upon contract for the recovery of money or damages only, if the defendant has been personally served and no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk, upon application of the plaintiff, must enter the default of the defendant, and immediately thereafter enter judgment for the amount demanded in the complaint, including the costs, against the defendant, or against one or more of several defendants, in the cases provided for in section four hundred and fourteen.

2. In other actions, if the defendant has been personally served and no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk must enter the default of the defendant; and thereafter the plaintiff may apply to the court for the relief demanded in the complaint. If the taking of an account, or the proof of any fact, is necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose. And where the action is for the recovery of damages, in whole or in part, the court may order the damages to be assessed by a jury; or if, to determine the amount of damages, the examination of a long account is involved, by a reference as above provided.

3. In all actions where the service of the summons was by publication, the plaintiff, upon the expiration of the time for answering, may, upon proof of the publication, and that no answer has been filed, apply for judgment; and the court must thereupon require proof to be made of the allegations of the complaint; and if the defendant is not a resident of the state, must require the plaintiff, or his agent, to be examined, on oath, respecting any payments that have been made to the plaintiff, or to any one for his use, on account of any demand mentioned in the complaint, and may render judgment for the amount which he is entitled to recover; provided, that, in all cases affecting the title to or possession of real property, where the service of the summons was by publication and the defendant has failed to answer, no judgment shall be rendered upon proof of mere occupancy, unless such occupancy shall have continued for the time and shall have been of the character necessary to confer title by prescription, and in all cases where the plaintiff bases his claim upon a paper title, the court shall require evidence establishing plaintiff's equitable right to judgment before rendering such judgment; provided, further, however, that in actions involving merely the possession of real property where the complaint is verified and shows by proper allegations that no party to the action claims title to the real property involved, either by prescription, accession,

transfer, will or succession but only the possession thereof, the court may render judgment upon proof of occupancy by plaintiff and ouster by defendant.

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DEFAULT JUDGMENT.

I. IN GENERAL, 1-18.

II. DEFAULT — ENTRY OF JUDGMENT BY CLERK—SUBDIVISION 1, 19-48.

III. SAME—RELIEF GRANTED BY COURT—SUBDIVISION 2, 49-59.

IV. SAME—PUBLICATION OF SUMMONS—SUBDIVISION 3, 60-64.

I. IN GENERAL.

1. Affidavit—Failing to show service of summons.
2. Action to recover possession of land—As to relief granted on.
3. Same—Against corporation—Is not void on its face, when.
4. Same—Evidence not required.
5. Same—Waiver of right to entry of—In action to quiet title.
6. Amendment as to parties—Complaint in foreclosure.
7. Default judgment—Authorized, when.
8. Defendant does not "appear and demur," when.
9. Demurrer is answer.
10. Formal entry of default.
11. Fraud—Application to court for relief.
12. Judgment—As to defaulting defendant.
13. Same—Void upon its face.
14. Motion to set aside default rests largely in discretion of trial court.
15. Same—Discretion of court, in setting aside default.
16. Notice of overruling demurrer.
17. Regularity of judgment for divorce.
18. Waiver of findings—Default as a.

II. DEFAULT—ENTRY OF JUDGMENT BY CLERK—SUBDIVISION 1.

- 19, 20. As to construction of section—Subdivision 1—In general.
- 21, 22. Same—Same—Action to recover taxes paid under protest.
- 23, 24. Allowance of attorney's fees—Power of clerk to fix.
25. Authority of clerk to enter judgment.
- 26, 27. Clerk, authorized to enter default.
28. Same—Has no discretion—Plaintiff's right not prejudiced by failure to enter judgment.
29. Same—Must ascertain from complaint.
30. Same—Ministerial capacity, clerk in entering default acts in.

31. Same—Same—Clerk is minister or servant of law.

32. Same—Same—Clerk must conform strictly to provisions of statute.

33. Same—Same—No intendments are indulged in support of clerk's acts.

34. Default—Admits truth of matters pleaded.

35. Defendant who defaults—Out of court.

36. Entry of judgment—Against defaulting defendant.

37. Same—For an amount in excess.

38. Estimating attorney's fees—Authority of clerk.

39, 40. Joint liability of defendants—Authority of clerk.

41. Same—Same—"Money only," action for recovery of—Default.

42. Same—Same—"Recovery of damages only."

43. Same—Same—Under Practice Act clerk had no power, on default.

44. Same—Same—Unliquidated demand.

45. Pleading prepared for purpose of filing—Not pleading in fact.

46. Provision that clerk must enter judgment "immediately."

47. Service of summons vacating—Effect of.

48. Vacation of judgment—Subsequent party.

III. DEFAULT—RELIEF GRANTED BY COURT—SUBDIVISION 2.

49. Authority of court to grant relief—Cross-complaint not served—Court has no power.
- 50, 51. Construction of section—Subdivision 2.
52. Court acquires jurisdiction to enter default—By service of process.
53. Damages for trespass—Entry of judgment, when erroneous.
54. Entry of formal default—Not necessary.
55. Judgment void for excessive amount—Motion to vacate.
56. Notice—That plaintiff would "take judgment," etc.
57. Summons, with proof of service, not required to be filed.
58. Valid judgment by default—May be rendered by a court.
59. Variance—Between summons and judgment.

IV. DEFAULT—PUBLICATION OF SUMMONS—SUBDIVISION 3.

60. Publication of summons—Omission of affidavit.
61. Same—Publication of summons which omits notice.
- 62, 63. Same—Service upon nonresident by publication.
64. Personal judgment against nonresident.

I. IN GENERAL.

1. Affidavit—Failing to show service of summons is insufficient as proof of service in record to sustain judgment upon direct appeal therefrom.—*Linott v. Rowland*, 119 Cal. 452, 453, 51 Pac. 687. See *McMillan v. Reynolds*, 11 Cal. 372; *Schloss v. White*, 16 Cal. 65, 66; *McKinlay v. Tuttle*, 42 Cal. 570, 577; *People v. Bernal*, 43 Cal. 385.

2. Action to recover possession of land—As to relief granted on.—In an action for the recovery of possession of land, as well as for rents and profits, wherein the complaint contains every allegation necessary in an action of ejectment, even though there is no prayer for the restitution of the premises, the court may, under section 580, ante, grant the plaintiff any relief "consistent with the case made by the complaint and embraced within the issue."—*Nathan v. Dierssen*, 164 Cal. 607, 130 Pac. 12, 14.

3. Same—Against corporation—Is not void on its face if the complaint sufficiently states a cause of action, and the summons is duly served on the president of the corporation, and the default and judgment duly entered.—*Robinson v. Blood*, 151 Cal. 506, 91 Pac. 258.

4. Same—Evidence not required.—Evidence is no more required to validate a judgment by default, after personal service of summons, in an action under section 738, post, than in any other ordinary action.—*City of Los Angeles v. Los Angeles F. & M. Co.*, 150 Cal. 649, 89 Pac. 615.

5. Same—Waiver of right to entry of—in action to quiet title.—Where defendants file a cross-complaint, alleging title in themselves, and praying to have it quieted, to which plaintiff's default is entered, and thereafter plaintiff, with defendant's consent, filed an amended complaint setting up title, and asking the same relief, and trial is had upon the issue raised as to title, such action on defendant's part operates as a waiver of their right to have judgment entered upon plaintiff's default.—*Madison v. Octave Oil Co.*, 154 Cal. 770, 99 Pac. 176.

6. Amendment as to parties—Complaint in foreclosure.—Where judgment by default is entered against party, default is not opened and it is not required that party be first served with amendment after default so as to give opportunity to answer, where such amendment was for sole purpose of making husbands of certain defendants parties, alleging that they "claim or have

some interest in the mortgaged premises, . . . but that all of said claims are subordinate to . . . plaintiff's mortgage"; and where nothing in record showed that defaulting defendant was in any way interested or affected by appearance of new parties in case, and where amendment was not, therefore, as to such party, matter of substance.—*San Diego Sav. Bank v. Goodsell*, 137 Cal. 420, 425, 70 Pac. 299.

7. Default judgment—Authorized when.—A default judgment is authorized against a partnership defendant in an action, notwithstanding the return of service of summons falls affirmatively to declare that the individual defendant served was a member of the copartnership and served in that capacity, where the complaint, a copy of which was served with the summons, shows that he was sued individually, and alleges that he was a member of the partnership joined as defendant under the firm name.—*Colquhoun v. Pack*, 28 Cal. App. 319, 152 Pac. 319.

8. Defendant does not "appear and demur" to complaint until demurrer is filed.—*Fletcher v. Maginnis*, 136 Cal. 362, 363, 68 Pac. 1015.

9. Demurrer is answer within meaning of this section.—*Oliphant v. Whitney*, 34 Cal. 25, 27; *Fletcher v. Maginnis*, 136 Cal. 362, 363, 68 Pac. 1015.

10. Formal entry of default held under the circumstances of the case not to be essential to regularity of judgment.—*Wakefield v. Wakefield*, 16 Cal. App. 115, 116 Pac. 309.

11. Fraud—Application to court for relief.—Action to recover money obtained by fraud and deceit is one in which it is proper to apply to the court for relief.—*Nevin v. Gary*, 12 Cal. App. 1, 4, 106 Pac. 422.

12. Judgment—As to defaulting defendant will not be dismissed on appeal, upon contention that judgment so rendered is not final judgment, for reason that if legally within contemplation of this section and section 414, ante, then right of appeal exists; and if dismissal be declared illegal and void, right to appeal is not abridged by reason of fact that party might also move to have judgment vacated.—*Jameson v. Simmons S. Co.*, 144 Cal. 3, 4, 77 Pac. 662.

13. Same—Void upon its face is one that appears to be void upon inspection of judgment-roll.—*Crossman v. Vivlenda W. Co.*, 136 Cal. 571, 575, 69 Pac. 220. See *People v. Harrison*, 84 Cal. 607, 24 Pac. 311.

14. Motion to set aside default—Rests largely in discretion of trial court and its action thereon will very rarely be disturbed upon appeal.—*Langford v. Langford*, 136 Cal. 507, 508, 69 Pac. 235. See *Winchester v. Black*, 134 Cal. 125, 66 Pac. 197.

15. Same—Discretion of court, in setting aside default, is best exercised when it tends to bring about judgment upon merits

of controversy between parties.—*Winchester v. Black*, 134 Cal. 125, 127, 66 Pac. 197, approving *Nicol v. Weldon*, 130 Cal. 666, 63 Pac. 63.

16. Notice of overruling demurrer.—Defendant entitled to receive notice of order dismissing demurrer before any default can be taken under rule of court.—See *Winchester v. Black*, 134 Cal. 125, 127, 66 Pac. 197.

17. Regularity of judgment for divorce.—When plaintiff is present by attorney at the trial of the case, and does not offer evidence, or make answer to defendant's cross-complaint, he is not in a position to question the regularity of the judgment for divorce entered upon said cross-complaint, on the ground that no formal entry of his default was made.—*Wakefield v. Wakefield*, 16 Cal. App. 115, 116 Pac. 309.

18. Waiver of findings—Default as a.—Permitting default to be entered, and failing to appear at trial, constitute waiver of findings.—*Hibernia Sav. & L. Soc. v. Clarke*, 110 Cal. 27, 32, 42 Pac. 425.

II. DEFAULT—ENTRY OF JUDGMENT BY CLERK—SUBDIVISION 1.

19. As to construction of section—Subdivision 1—In general.—The clerk can not enter a default unless no answer has been filed "within the time specified in the summons or such further time as may have been granted." A default can not be entered for failure to file an answer when such answer is on file at the time the attempt is made to enter the default.—*Reher v. Reed*, 166 Cal. 525, Ann. Cas. 1915C, 737, 137 Pac. 263.

20. In the performance of the functions devolved upon him by this subdivision the clerk acts ministerially. He exercises no judicial functions, but is only an agent by whom the judgment is written out and placed upon the record. Consequently, he must conform strictly to the provisions of the statute or his proceedings will be void. It follows that he has no authority, under this subdivision, to enter a judgment, except in cases of the kind mentioned therein. He has no such authority in an action not of the character therein described. The subdivision gives him no authority except in "actions arising upon contract for the recovery of money or damages only." There may be reason to doubt whether a cross-complaint comes within the scope of the subdivision. It limits the authority of the clerk to cases where no answer has been filed "within the time specified in the summons, or such further time as may have been granted."—*Farrar v. Steenbergh*, 173 Cal. 94, 159 Pac. 707.

21. Same—Same—Action to recover taxes paid under protest is in the nature of an action in assumpsit, and does not come within the provisions of subdivision 1 of the above section, but is controlled by the second subdivision of the section, requiring

upon default an application for relief, implying more than a motion for judgment.—*Aalwyn's Law Institute v. City, etc., San Francisco*, 39 Cal. App. 414, 179 Pac. 220.

22. An action for the recovery of taxes paid under protest, while in the nature of an action for money had and received, is one which takes the place of an ordinary action on assumpsit, and does not come within subdivision 1, but is controlled by subdivision 2, of the above section.—*Aalwyn's Law Institute v. City, etc., San Francisco*, 39 Cal. App. 414, 179 Pac. 220.

23. Allowance of attorney's fees—Power of clerk to fix.—In a case in which an action is brought upon a promissory note which authorizes the recovery of attorney's fees and the petition asks for an allowance of attorney's fees on default of the defendant the clerk of the court, in entering up a default judgment, is powerless to make an allowance for attorney's fees under the provisions of the above section; the clerk's power must be conferred by the statute and in exercising it he must conform strictly to the provisions of the section, or any judgment entered by him will be void.—*Landwehr v. Gillette*, 174 Cal. 654, 163 Pac. 1018, following the doctrine in *Kelley v. Van Austin*, 17 Cal. 564, *Wharton v. Harlan*, 68 Cal. 425, 9 Pac. 727; *Crossman v. Vivienda Water Co.*, 136 Cal. 574, 69 Pac. 220; *Farrar v. Steenbergh*, 173 Cal. 94, 159 Pac. 707.

As to clerk's power to estimate attorney's fees, see par. 38, this note.

24. The duties of the clerk being purely ministerial, his power can only be exercised and properly applied in the case of a contract such as is mentioned in subdivision 1 of the above section, and is limited thereto; and it must appear from the contract sued on, or from its terms as set forth in the complaint or from the allegations in the latter respecting it, that a definite or liquidated sum of money is to be paid as damages; and the power of the clerk does not exist in those cases in which the reasonableness of the amount of damages claimed is to be determined by the court under the provisions of subdivision 2 of the above section.—*Landwehr v. Gillette*, 174 Cal. 654, 163 Pac. 1018.

25. Authority of clerk to enter judgment, if defendant fails to answer complaint, is limited to actions "arising upon contract for the recovery of money or damages only," and in such actions he is authorized to enter judgment "for the amount specified in the summons."—*Shay v. Chicago C. Co.*, 111 Cal. 549, 551, 44 Pac. 237. See *People v. Weil*, 53 Cal. 253, 254; *Rauer's Law & Collection Co. v. Standley*, 3 Cal. App. 44, 84 Pac. 214 (on plaintiff's application).

26. Clerk—Authorized to enter default only in cases provided for in first subdivision of this section, that is, where defendant has failed to appear within time specified in summons, or within such further

time as may have been granted by court.—*Kennedy v. Mulligan*, 136 Cal. 556, 557, 69 Pac. 291. See *People v. Well*, 53 Cal. 253, 254; *Wharton v. Harlan*, 68 Cal. 422, 425, 9 Pac. 727.

27. Clerk can not enter default except under express provisions of statute.—*Kennedy v. Mulligan*, 136 Cal. 556, 557, 69 Pac. 291; *Crossman v. Vivienda W. Co.*, 136 Cal. 571, 574, 69 Pac. 220. See *Oliphant v. Whitney*, 34 Cal. 25, 27.

28. Same.—Has no discretion.—Plaintiff's rights not prejudiced by failure to enter judgment.—The clerk has no discretion, but is bound to enter judgment immediately entry of default having been made, and his failure to do so can not prejudice plaintiff's rights in the matter.—*Christenson v. French*, 180 Cal. 523, 182 Pac. 27.

29. Same.—Must ascertain from complaint that action is of kind mentioned in first subdivision of section; and further he must ascertain when and where summons served, and whether defendant be in default. These acts of clerk, performed in cases falling within letter and spirit of statute, are ministerial as contradistinguished from acts judicial in their capacity.—*Providence T. Co. v. Prader*, 32 Cal. 634, 636, 91 Am. Dec. 598. See *Wallace v. Eldredge*, 27 Cal. 495, 497; *Glidden v. Packard*, 28 Cal. 649, 651; *Bond v. Pacheco*, 30 Cal. 530, 533.

30. Same.—Ministerial capacity, clerk in entering default acts in, and exercises no judicial functions in proceedings under this section.—*Crossman v. Vivienda W. Co.*, 136 Cal. 571, 574, 69 Pac. 220. See *Kelly v. Van Austin*, 17 Cal. 564, 566; *Providence T. Co. v. Prader*, 32 Cal. 634, 635, 91 Am. Dec. 598; *Wharton v. Harlan*, 68 Cal. 422, 427, 9 Pac. 727.

31. Same.—Same.—Clerk is minister or servant of law to act in that state of case in which law orders him to act. Then only is his action valid.—*Junkans v. Bergin*, 64 Cal. 203, 204, 30 Pac. 627.

32. Same.—Same.—Clerk must conform strictly to provisions of statute, or his proceedings will be without any binding force.—*Kelly v. Van Austin*, 17 Cal. 564, 565.

33. Same.—Same.—No intendments are indulged in support of clerk's acts, but in each case it must appear that what he did was within authority conferred upon him by statute.—*Providence T. Co. v. Prader*, 32 Cal. 634, 636, 91 Am. Dec. 598.

34. Default.—Admits truth of matters pleaded, and must therefore be construed to admit that amount claimed as attorney's fees by complaint is both reasonable and due, and no evidence is required to be taken for purpose of fixing such amount, where ascertainable from complaint by simple mathematical calculation.—*Alexander v. McDow*, 108 Cal. 25, 30, 41 Pac. 24.

35. Defendant who defaults.—Out of court.—A defendant against whom default

is entered, is out of court, is not entitled to take any further steps in the case affecting plaintiff's right of action.—*Christenson v. French*, 180 Cal. 523, 182 Pac. 27.

36. Entry of judgment.—Against defaulting defendant, without at same time entering judgment against co-defendant who had not been served, is proper under statute.—*Edwards v. Hellings*, 103 Cal. 204, 207, 37 Pac. 218.

37. Same.—For an amount in excess of that called for by summons is error.—*Alexander v. McDow*, 108 Cal. 25, 31, 41 Pac. 24.

38. Estimating attorney's fees.—Authority of clerk.—Action of clerk in estimating and adding amount of attorney's fees to judgment, in action arising upon contract for recovery of money or damages only, where default is entered for failure of defendant to answer, is as properly ministerial as is his calculation of interest upon principal sum of note in accordance with terms and averments of complaint, where, however, sum asked as attorney's fees is susceptible of exact determination from complaint by simple mathematical calculation.—*Alexander v. McDow*, 108 Cal. 25, 30, 41 Pac. 24.

As to power of clerk to allow attorney's fees, see pars. 23, 24, this note.

39. Joint liability of defendants.—Authority of clerk.—Clerk has authority to enter judgment by default in joint action against defendants only when all defendants have been served and have failed to answer.—*Junkans v. Bergin*, 64 Cal. 203, 204, 30 Pac. 627.

40. Clerk has power under this section and section 414, ante, to enter joint judgment against defendants served, and defaulting, although other defendants named in complaint have not been served.—*Wharton v. Harlan*, 68 Cal. 422, 428, 9 Pac. 727.

41. Same.—Same.—"Money only," action for recovery of.—Default.—Clerk, in action upon note for recovery of money of a particular kind, to wit, gold coin, etc., has power to enter judgment without judicial direction for amount stated in complaint.—*Harding v. Cowing*, 28 Cal. 212, 214.

As to "gold coin" judgment, see, post, § 667 and note.

42. Same.—Same.—"Recovery of damages only."—Since adoption of code, clerk is authorized to enter default and judgment against those of defendants served with process where others have not been served, where all defendants are jointly liable upon contract "for the recovery of damages only."—*Wharton v. Harlan*, 68 Cal. 422, 426, 9 Pac. 727. See *Junkans v. Bergin*, 64 Cal. 203, 30 Pac. 627.

43. Same.—Same.—Under Practice Act clerk had no power, on default, to enter any other judgment in action on joint obligation of two defendants than that pro-

vided for in section 32 of such former act.—*Wharton v. Harlan*, 68 Cal. 422, 427, 9 Pac. 727. See *Stearns v. Aguirre*, 7 Cal. 443, 449, 450; *Kelly v. Van Austin*, 17 Cal. 564, 566.

44. Same—Same—Unliquidated demand.—Under section 150 of Practice Act, judgment, final by default, could be rendered properly upon unliquidated demand where summons notifies defendant of amount.—*Hartman v. Williams*, 4 Cal. 254, 256.

45. Pleading prepared for purpose of filing—Not pleading in fact until it is in fact filed and made part of record of case as provided by statute.—Notwithstanding service, if pleading had not been filed, as directed by statute, within time allowed to answer, it is duty of clerk, upon application of plaintiff, to enter default of defendant.—*Fletcher v. Maginnis*, 136 Cal. 362, 363, 68 Pac. 1015.

46. Provision that clerk must enter judgment "immediately" after entering default, is merely directory. His failure to do so does not render void judgment subsequently entered upon such default, nor can defendant, against whom judgment is entered, invoke such failure for purpose of annulling judgment to which he has no other defense.—*Edwards v. Hellings*, 103 Cal. 204, 207, 37 Pac. 218.

47. Service of summons vacated—Effect of.—Clerk has no authority to enter default against defendant, where court has, by its order, set aside and vacated service of summons.—*Elder v. Grunsky*, 127 Cal. 67, 69, 59 Pac. 300.

48. Vacation of judgment—Subsequent party.—One who succeeds to property that is subject to void judgment may appear to have judgment vacated though he was not party to judgment.—*Crossman v. Vivienda W. Co.*, 136 Cal. 571, 576, 69 Pac. 220. See *People v. Mullan*, 65 Cal. 396, 4 Pac. 348; *Dorland v. Smith*, 93 Cal. 120, 28 Pac. 812; *Malone v. Big Flat G. M. Co.*, 93 Cal. 384, 28 Pac. 1063.

III. DEFAULT—RELIEF GRANTED BY COURT—SUBDIVISION 2.

49. Authority of court to grant relief—Cross-complaint not served—Court has no power or authority to grant cross-complainants affirmative relief where record does not show service of cross-complaint, and where uncontradicted affidavits of parties, filed and used on hearing of motion, stated positively that said pleadings were not served on them.—*Hibernia S. & L. Soc. v. Clarke*, 110 Cal. 27, 33, 42 Pac. 425.

50. Construction of section—Subdivision 2.—It is not essential to the entry of a valid judgment against a defendant that its default should have been actually entered by the clerk; a valid judgment by default may be rendered by the court, though no formal default has been entered.—*Crouch v. Miller*, 169 Cal. 341, 146 Pac. 880.

51. Where the plaintiff has filed a verified complaint, he is entitled to have an unverified answer stricken out on motion and a judgment by default thereupon entered, or, in the absence of an order striking the answer out, to a judgment for want of an answer.—*Johnson v. Dixon Farms Co.*, 29 Cal. App. 52, 155 Pac. 134.

52. Court acquires jurisdiction to enter default—By service of process, and does not lose jurisdiction by neglecting to make proof of such service matter of record.—*Hibernia Sav. & L. Soc. v. Matthal*, 116 Cal. 424, 426, 48 Pac. 370; *Sichler v. Look*, 93 Cal. 600, 29 Pac. 220.

53. Damages for trespass—Entry of judgment, when erroneous.—Judgment entered by clerk, without any authority from court, is erroneous in action not upon contract, but for damages for trespass, where summons issued upon complaint does not specify any sum for which judgment will be entered, but states that "plaintiff will apply to court for the relief in said complaint demanded."—*Shay v. Chicago C. Co.*, 11 Cal. 549, 552, 44 Pac. 237.

54. Entry of formal default—Not necessary.—Court acquires jurisdiction of defendant upon service of summons, and failure to appear, and may enter judgment of default without necessity for formal entry of default by clerk.—*Hibernia Sav. & L. Soc. v. Matthal*, 116 Cal. 424, 426, 48 Pac. 370. See *Drake v. Duvenick*, 45 Cal. 455.

55. Judgment void for excessive amount—Motion to vacate.—Excess of power exercised by clerk, in entering judgment by default for an amount which is not ascertainable absolutely except by accounting, appears on face of record and renders judgment void, where necessity for such accounting is revealed by complaint, and, so appearing, may be reached by motion.—*Crossman v. Vivienda W. Co.*, 136 Cal. 571, 575, 69 Pac. 220.

56. Notice—That plaintiff would "take judgment . . . for relief demanded in his complaint" was in substance notice that he would "apply to court" for that relief—this being only lawful mode by which plaintiff can take judgment.—*Clark v. Palmer*, 90 Cal. 504, 506, 27 Pac. 375.

57. Summons, with proof of service, not required to be filed as necessary prerequisite to exercise by court of jurisdiction to enter judgment of default.—*Hibernia Sav. & L. Soc. v. Matthal*, 116 Cal. 424, 426, 48 Pac. 370. See *Herman v. Santee*, 103 Cal. 519, 42 Am. St. Rep. 145, 37 Pac. 509; *Reinhart v. Lugo*, 86 Cal. 395, 21 Am. St. Rep. 52, 24 Pac. 1089.

58. Valid judgment by default—May be rendered by a court, though no formal default has been entered. Default limits time during which defendant may file his answer, and that time never extends beyond trial and judgment.—*Herman v. Santee*, 103 Cal. 519, 522, 42 Am. St. Rep. 145, 37 Pac. 509.

59. Variance—Between summons and judgment.—Defendant could not have been misled or injured by variance of summons from form of words prescribed by code, where plaintiff applied to court for his relief, court granted such relief as was given, and relief given did not differ from or exceed that demanded in complaint.—*Clark v. Palmer*, 90 Cal. 504, 507, 27 Pac. 375.

IV. DEFAULT—PUBLICATION OF SUMMONS—SUBDIVISION 3.

60. Publication of summons—Omission of affidavit.—Judgment is not absolutely void upon ground of insufficiency of affidavit of publication made before entry and attached to judgment in judgment-roll, which insufficiency consisted in omission in enumeration of days of publication of one regular day of issuance of newspaper in which summons was published—this omission being afterwards supplied by second affidavit which showed that publication was made on that day.—*Howard v. McChesney*, 103 Cal. 536, 537, 37 Pac. 523.

61. Same—Publication of summons which omits notice that unless defendant appears and answers, plaintiff will apply to court for relief demanded in complaint, does not authorize clerk to enter default of defendant.—*People v. Weil*, 53 Cal. 253, 254.

62. Same—Service upon nonresident by publication.—Judgment by default against defendant so served has no validity or effect where he is not shown to possess property within the jurisdiction of the court upon which such judgment may operate.—*Merchants' Natl. Union v. Buisseret*, 15 Cal. App. 447, 115 Pac. 58.

63. Service of summons by publication against a nonresident, can support a default judgment in rem alone, and not a personal judgment.—*Merchants' Natl. Union v. Buisseret*, 15 Cal. App. 447, 115 Pac. 58.

64. Personal judgment against a nonresident upon whom service of summons by publication was made, who has no property within the jurisdiction of the court, and who did not appear or defend, can have no validity or effect at all.—*Merchants' Natl. Union v. Buisseret*, 15 Cal. App. 447, 115 Pac. 58. See *Anderson v. Goff*, 72 Cal. 72, 1 Am. St. Rep. 34, 13 Pac. 73; *Blanc v. Paymaster Min. Co.*, 95 Cal. 530, 29 Am. St. Rep. 149, 30 Pac. 765; *Brown v. Campbell*, 100 Cal. 641, 38 Am. St. Rep. 314, 35 Pac. 433; *De La Montanya v. De La Montanya*, 112 Cal. 101, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac. 345; *Boring v. Penniman*, 134 Cal. 514, 66 Pac. 739; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565, affirming, 3 Sawy. 274, Fed. Cas. No. 10,083.

CHAPTER III.

ISSUES—THE MODE OF TRIAL AND POSTPONEMENTS.

§ 588. Issue defined, and the different kinds.

§ 589. Issue of law, how raised.

§ 590. Issue of fact, how raised.

§ 591. Issue of law, how tried.

§ 592. Issue of fact, how tried. When issues both of law and fact, the former to be first disposed of.

§ 593. Clerk must enter causes on the calendar, to remain until disposed of.

§ 594. Parties may bring issue to trial.

§ 595. Motion to postpone a trial for absence of testimony, requisites of.

§ 596. In cases of adjournment a party may have the testimony of any witness taken.

§ 588. ISSUE DEFINED, AND THE DIFFERENT KINDS. Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party and is controverted by the other. They are of two kinds:

1. Of law; and,
2. Of fact.

History: Enacted March 11, 1872, founded upon § 151 of Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 144, held unconstitutional, see history, § 5 ante.

ISSUES—DEFINITION AND KINDS.

1. Construction of section—With sections 656 and 657, post.

2. Court can not dispense with provisions of section.

3. Issue—Arises, when.

4. Same—By implication of law.

5. Issue of fact—As to generally.

6. Same—Agreed statement—Construction.

7-9. Same—Stipulation as to evidence.

10, 11. Issue raised by pleadings—In general.

12. Orders ex parte.

As to issues of fact and how raised, see, post, § 590 and note.

1. Construction of section—With sections 656 and 657, post.—Operation of this section and sections 656, 657, post, should be confined "to those cases in which the code has expressly authorized issues of

fact to be framed."—*Leach v. Pierce*, 93 Cal. 614, 619, 29 Pac. 235. See *In matter of Herteman*, 73 Cal. 545, 15 Pac. 121.

2. Court can not dispense with provisions of section and sections 589, 590, post, within its discretion, yet such provisions are not violated by decision of appellate court that party, by his conduct at trial, is estopped from asserting on appeal for first time that facts found by trial court are not within issues made by pleading.—*Ortega v. Cordero*, 88 Cal. 221, 228, 26 Pac. 80.

3. Issue—Arises when fact or conclusion of law is maintained by one party and is controverted by the other.—*Harris v. San Francisco S. R. Co.*, 41 Cal. 393, 404.

4. Same—By implication of law, upon new matter in the answer deemed controverted by opposite party.—*Rogers v. Riverside L. & I. Co.*, 132 Cal. 9, 11, 64 Pac. 95.

5. Issue of fact—As to generally.—Such an issue arises only where a material averment of fact is made on one side and is controverted upon the other, and the re-examination referred to in section 656, post, as a new trial, is where there has been a trial of such an issue, and not where there was a default, even in an action for divorce where, under section 130 Civil Code, proof of the facts alleged is required before granting the relief sought.—*Crackel v. Crackel*, 17 Cal. App. 602, 121 Pac. 295.

6. Same—Agreed statement—Construction.—Although it is declared in the agreed statement of facts that plaintiff has never been a resident of California, the fact that one is not a resident of a place is in nowise inconsistent with his physical presence there, Political Code, section 52. To bring the plaintiff within the exception of section 351, ante, it would have been necessary, to show that he was not in fact within the state for periods aggregating two years, between the accrual of a cause of action against him and the commencement of the action. The section does not assume to deprive nonresidents of the benefits of the statute of limitations. What it does, is to exclude from computation the time during which any defendant, resident or nonresident, may have been out of the state.—*Foster v. Butler*, 164 Cal. 623, 130 Pac. 6, 7.

7. Same—Stipulation as to evidence.—Where the defendant agreed, that the evidence adduced in the trial of the unlawful detainer case should, in so far as the court deemed it pertinent and applicable, constitute the evidence in the case to quiet title—the parties being the same in both cases—the fact that it also constituted a statement on motion for a new trial in the other case did not affect its validity or use as a statement in the case at bar.—*McCann v. McCann*, 20 Cal. App. 564, 129 Pac. 966, 967.

8. The effect of a stipulation is to eliminate from the controversy the evidence as

to all the material facts but the single one to which it relates. It therefore follows that the specifications of the insufficiency of the evidence to support other material findings than the one deduced from the evidence resulting from such stipulation, can not be considered or reviewed on appeal from an order granting a motion for a new trial.—*Conwell v. Varain*, 20 Cal. App. 521, 130 Pac. 23, 25.

9. When opinion testimony is relied upon or becomes necessary in the proof of a fact which goes to the very gist of the main point of controversy in an action at law, it should never make its appearance in the record in the highest garb known to the law and under such circumstances as that it may not be rebutted, if it can be, or its accuracy tested by the methods usually invoked for that purpose. Therefore, no such stipulation or agreement by counsel as one placing a litigant's rights in a trial at the mercy of the ex parte opinion of any person, should be tolerated in any case, much less one involving valuable property rights, or, as here, a large sum of money.—*Conwell v. Varain*, 20 Cal. App. 521, 130 Pac. 23, 26.

10. Issue raised by pleadings—In general.—Where such an action is tried upon the theory that no issue was raised by the pleadings as to the sufficiency and proper execution by the parties of the plans and specifications, it can not be urged for the first time on appeal that the court erred in the receipt of evidence and in its finding that the building was constructed and completed in accordance with such plans and specifications.—*Cavanaugh v. Carpenter*, 28 Cal. App. 276, 152 Pac. 57.

11. An allegation in the answer, as one of the defendant's two separate defenses to the action, that before the plaintiff was ejected from the car he "wilfully and without provocation assaulted, struck and beat the conductor," and that the injuries received were sustained during the assault upon the conductor and were inflicted in reasonable and necessary self-defense, and without the use of excessive force in resisting that assault, does not raise the issue as to whether the conductor employed unnecessary force in the ejection, and no finding thereon is required. The question under such allegation is as to whether or not the conductor inflicted the injuries in the reasonable and necessary defense of his person and without excessive force in that behalf.—*Eylenfeldt v. United Railroads*, 28 Cal. App. 56, 151 Pac. 293.

12. Orders ex parte.—Provisions of this section and sections 656, 657, post, do not apply to every order which may be made ex parte, or by court on its own motion, simply because court has permitted written objections to be filed.—*Leach v. Pierce*, 93 Cal. 614, 619, 29 Pac. 235.

§ 589. ISSUE OF LAW, HOW RAISED. An issue of law arises upon a demurrer to the complaint or answer, or to some part thereof.

History: Enacted March 11, 1872, re-enactment of § 152 of Practice Act as amended in 1854.

As to issues, when and how arise, see, ante, § 588 and note; and, post, § 590 and note.

§ 590. ISSUE OF FACT, HOW RAISED. An issue of fact arises:

1. Upon a material allegation in the complaint controverted by the answer; and,
2. Upon new matters in the answer, except an issue of law is joined thereon.

History: Enacted March 11, 1872, re-enactment of § 153 of Practice Act as amended in 1854.

ISSUES OF FACT—HOW RAISED.

1. Allegation not controverted.
2. Construction as to facts admitted.
3. Determination of issue of fact—Verdict or decision.
4. Findings—Made only upon issues joined.
5. Same—Finding is erroneous, when.
- 6, 7. Issues of fact—As to upon which findings are permitted.
8. Same—In divorce cause—Not raised by default.
9. Same—In probate proceeding.
10. Same—Manner in which accounts of executor or administrator are usually made up.
11. Mode of reviewing action of court.

As to issues and when arise, see, ante, § 588 and note.

1. **Allegation not controverted.**—Where allegation of complaint is not controverted in answer, there is no issue of fact as to such allegation.—*Yaeger v. Southern Cal. R. Co.*, 5 Cal. Unrep. 870, 51 Pac. 190, 193.

2. **Construction as to facts admitted.**—Instruction may be asked as to facts admitted by pleadings.—*Yaeger v. Southern Cal. R. Co.*, 5 Cal. Unrep. 870, 51 Pac. 190, 193.

3. **Determination of issue of fact—Is verdict or decision which is sought to be set aside when new trial is asked under the code.**—*Harris v. San Francisco S. R. Co.*, 41 Cal. 393, 404.

4. **Findings—Made only upon issues joined.**—Findings of fact and conclusions of law have no proper place in action to foreclose mortgage, where defendant failed to answer, and judgment was taken against him and decree of foreclosure entered, as it is contemplated by our law that findings shall be made only upon issues joined by pleadings under this section, where decision of court, following findings, is judgment.—*Waller v. Weston*, 125 Cal. 204, 57 Pac. 892.

5. **Same—Finding is erroneous when no issue is presented in case on which finding is required, and where it is to material allegation, and against admissions contained**

in the pleading, and judgment following conclusion of law from such erroneous finding will be reversed.—*Moynihan v. Drobaz*, 124 Cal. 212, 215, 71 Am. St. Rep. 46, 56 Pac. 1026.

6. **Issues of fact—As to upon which findings are permitted or required, are only those specified in this section.**—*Waller v. Weston*, 125 Cal. 201, 204, 57 Pac. 892.

7. **Issue of fact arises only where material averment of fact is made on one side and is controverted upon the other.**—*Foley v. Foley*, 120 Cal. 33, 37, 65 Am. St. Rep. 147, 52 Pac. 122.

8. **Same—In divorce cause—Not raised by default.**—Effect of section 130 of Civil Code, providing that no divorce can be granted upon mere default of defendant, but that court shall, in all cases, require proof of facts alleged before granting relief, does not have effect of raising "issues of fact."—*Foley v. Foley*, 120 Cal. 33, 37, 65 Am. St. Rep. 147, 52 Pac. 122.

9. **Same—In probate proceeding raised where party files written opposition to appointment of petitioner for letters testamentary, setting forth therein certain facts alleging incompetency of petitioner to receive such appointment, to which petitioner filed written answer, denying facts so alleged, regarding incompetency, and upon issues thus presented trial was had before court.**—In matter of *Bauquier*, 88 Cal. 302, 315, 26 Pac. 178, 532.

10. **Same—Manner in which accounts of executor or administrator are usually made up, and manner in which objections thereto are usually presented, do not conduce to development of issues such as arise upon pleadings in civil actions, and to which findings are required to be responsive.**—In matter of *Levinson*, 108 Cal. 450, 465, 41 Pac. 483, 42 Pac. 479. See *Miller v. Lux*, 106 Cal. 609, 35 Pac. 345, 639.

11. **Mode of reviewing action of court upon issue of fact is same, whether case is at law or in equity—there must be motion for new trial.**—*Harris v. San Francisco S. R. Co.*, 41 Cal. 393, 404.

As to new trial, see, post, § 656 and note.

§ 591. ISSUE OF LAW, HOW TRIED. An issue of law must be tried by the court, unless it is referred upon consent.

History: Enacted March 11, 1872, re-enactment of § 154 of Practice Act.

TRIAL OF ISSUES OF LAW.

1. Hearing on demurrer—Constitutes trial of issue of law.
2. Trial—Is examination before competent tribunal.

1. **Hearing on demurrer**—Constitutes trial of issue of law, and plaintiff is not entitled to dismiss action as to alleged causes of action stated in amended complaint, where such hearing on demurrer is had and demurrer sustained, on ground that facts were insufficient to constitute cause of action, where such dismissal is sought under statute providing for dismissal of cause be-

fore trial.—*Goldtree v. Spreckels*, 135 Cal. 666, 672, 67 Pac. 1091.

As to dismissal of action before trial, generally, see, ante, § 581 and note.

2. **Trial**—Is examination before competent tribunal, according to law of land, of the facts or law put in issue in case, for purpose of determining such issue. When court hears and determines any issue of fact or of law, for purpose of determining rights of parties, it may be considered trial.—*Goldtree v. Spreckels*, 135 Cal. 666, 669, 67 Pac. 1091; quoting from *Tregambo v. Comanche M. & M. Co.*, 57 Cal. 501.

§ 592. ISSUE OF FACT, HOW TRIED. WHEN ISSUES BOTH OF LAW AND FACT, THE FORMER TO BE FIRST DISPOSED OF. In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this code. Where in these cases there are issues both of law and fact, the issue of law must be first disposed of. In other cases, issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this code.

History: Enacted March 11, 1872, re-enactment of § 155 of Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, pp. 309, 310.

TRIAL OF ISSUES OF FACT.

- I. IN GENERAL, 1, 2.
- II. CAUSES TRIABLE BY COURT—ADVISORY VERDICT, 3-21.
- III. CAUSES TRIABLE BY JURY, 22-43.

I IN GENERAL.

1. Construction of section—As limiting right of trial by jury.
2. Same—As to amendment of 1874.

II. CAUSES TRIABLE BY COURT—ADVISORY VERDICT.

3. Causes of equitable cognizance—Falls solely within provisions of last clause.
4. Same—Action to reform contract.
- 5, 6. Same—Proceedings to enjoin interference with flow of water.
7. Same—Special issues—Submission to jury in discretion of court.
8. Discretion of court in equitable actions—Demand for jury.
- 9, 10. Eminent domain proceeding—Jury to assess damages and fix compensation.

- 11, 12. Equitable and legal causes joined—Right to trial by jury.

13. Equitable action—For foreclosure of lien of assessment.

14. Fraud—Right to jury trial.

15. General verdict of jury—Equity cause.

16. Same—Effect of when adopted.

17. Same—Where verdict of jury in equity case does not respond to all issues.

18. Issues in action in equity—Should be tried by court.

19. Nuisance, abatement of—Constitution does not guarantee right to jury.

20. Same—Prayer for damages is but incident to relief sought.

21. Verdict—Findings on issues not covered by.

III. CAUSES TRIABLE BY JURY.

22. Action in ejectment.

23. Action to quiet title—Right to jury.

24. Action to recover for damages—For personal injuries—Right to trial by jury.

25. Same—For past trespass.

26. Cause can not be considered as tried until decision.
27. Condemnation suits—Jury to assess injuries and fix compensation.
28. Demand for jury — Not necessary, when.
29. General verdict of jury—Is conclusive on court.
30. Injury is not presumed—In consequence of trial by jury.
31. Issue of law—Raised by filing demurrer to complaint.
32. Joinder of legal and equitable rights—Right to jury trial.
33. Mode of reviving action of court—Upon an issue of fact.
34. Order dismissing demurrer—Effect of.
35. Party—Bound to know rules of trial court.
36. Plaintiff — Entitled, as of right, to jury.
37. Right of eminent domain—Disregarding verdict of jury error, when.
38. Right to jury trial—Not determined entirely by form of action.
39. Striking demurrer from record—Effect of.
40. Stipulation for jury.
41. Waiver of right by both parties—Discretion of court.
42. Written demand for jury.
43. Same—Party not required to repeat demand.

I. IN GENERAL.

1. **Construction of section—As limiting right of trial by jury.**—This section limits the right to a jury trial to common law actions. A condemnation suit is a special proceeding and not within the classes enumerated.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

As to right to trial by jury secured being common-law right, see par. 12, this note.

2. **Same—As to amendment of 1874 to above section changed the effect of the section as applied to condemnation suits,** so that a jury trial is imperative, if not waived, only with respect to the issue of compensation.—*Vallejo & Northern R. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

II. CAUSES TRIABLE BY COURT—ADVISORY VERDICT.

3. **Causes of equitable cognizance—Fall solely within provisions of last clause of this section.**—*Warring v. Freear*, 64 Cal. 54, 56, 28 Pac. 115; *Learned v. Castle*, 67 Cal. 41, 7 Pac. 34; *Bell v. Marsh*, 80 Cal. 411, 22 Pac. 170. See *Reiner v. Schroeder*, 146 Cal. 411, 420, 80 Pac. 516.

4. **Same—Action to reform contract.**—Court does not err in refusing plaintiff jury trial in equity proceeding to reform

contract, etc.—*Loftus v. Fischer*, 113 Cal. 286, 288, 45 Pac. 328. See *La Societe Francaise v. Selheimer*, 57 Cal. 623; *Fish v. Benson*, 71 Cal. 428, 12 Pac. 454.

5. **Same—Proceedings to enjoin interference with flow of water in stream,** court may direct proper issues to be framed upon pleadings and submitted to jury; verdict of jury must respond to all issues submitted. General verdict is insufficient; special verdict is only advisory, and may be set aside, disregarded, or adopted.—*Warring v. Freear*, 64 Cal. 54, 56, 28 Pac. 115.

6. **Granting or refusing demand for jury trial, in equity case,** is entirely within discretion of court.—*Curnow v. Happy Valley B. G. & H. Co.*, 68 Cal. 262, 264, 9 Pac. 149. See *La Societe Francaise v. Selheimer*, 57 Cal. 623.

7. **Same—Special issues—Submission to jury in discretion of court.**—Whether court submits special issues to jury is matter within its own discretion.—*Schultz v. McLean*, 109 Cal. 437, 444, 42 Pac. 557.

8. **Discretion of court in equitable actions—Demand for jury in equitable action may be denied, and denial thereof does not constitute error.**—*Ashton v. Heggerty*, 130 Cal. 516, 521, 62 Pac. 934.

9. **Eminent domain proceeding—Jury to assess damages and fix compensation.**—The rule is that, in cases of eminent domain all questions, except those necessary to determine the compensation to be made to the owner for his property taken or damaged, are to be determined by the court.—*San Joaquin & Kings River Canal & Irr. Co. v. Stevenson* (Sup. Ct.), 26 Cal. App. 285, 147 Pac. 258.

See, also, pars. 27, 37, this note.

10. This necessarily includes among the questions triable by the court without a jury the question whether the plaintiff's canal will unreasonably waste the water to be condemned, and the quantity necessary for the use, after allowing for unavoidable waste; also the question whether the water which the plaintiff already has acquired the right to take would be sufficient for its public use, if carried and distributed without unreasonable waste.—*San Joaquin & Kings River Canal & Irr. Co. v. Stevenson* (Sup. Ct.) 26 Cal. App. 285, 147 Pac. 258.

11. **Equitable and legal causes joined—Right to trial by jury.**—In a case in which the plaintiff charges the defendants with having constructed a certain ditch and culvert, the effect of which was to divert storm waters upon the plaintiff's land to their injury, in view of the provisions of the above section and of section 7 of Article I of the constitution the plaintiffs were entitled to a trial by jury for the ascertainment and fixing of the damages which plaintiffs had sustained, and the verdict of the jury respecting the same is binding, and can be attacked for the pur-

pose of having it set aside only under proceedings properly instituted for a new trial.—*Farrell v. City of Ontario*, 39 Cal. App. 351, 178 Pac. 740.

See, also, par. 32, this note.

12. The right of trial by jury in such cases guaranteed by the constitution, section 7 of Article I is the common-law right existing in this state prior to 1850.—*Farrell v. City of Ontario*, 39 Cal. App. 351, 178 Pac. 740, following the doctrine in *Koppikus v. State Capital Commission*, 16 Cal. 248, 253; *Cauhape v. Security Sav. Bank*, 127 Cal. 197, 202, 59 Pac. 589.

See, also, par. 1, this note.

13. **Equitable action—For foreclosure of lien of assessment.**—Court does not err in refusing demand for jury trial where action is in equity for foreclosure of lien of assessment, and is not upon any contract made by defendant upon which there is any personal liability; and in such action neither the constitution nor the statute requires submission of issues to jury.—*Santa Cruz R. P. Co. v. Bowie*, 104 Cal. 286, 288, 37 Pac. 934. See *Emery v. Bradford*, 29 Cal. 75; *Taylor v. Palmer*, 31 Cal. 240, 241; *Cassidy v. Sullivan*, 64 Cal. 266, 28 Pac. 234.

14. **Fraud—Right to jury trial.**—Courts of law and of equity both have, in proper cases, jurisdiction in cases of fraud, and when facts constituting fraud and relief sought as such are cognizable in court of law, parties are entitled to jury trial, but where case, as made by pleadings, involves application of doctrine of equity and granting of relief, which can be obtained in courts of equity, and not elsewhere, parties are not entitled to jury trial.—*Fish v. Benson*, 71 Cal. 428, 435, 12 Pac. 454. See *La Societe Francaise v. Selheimer*, 57 Cal. 623; *Jones v. Gardner*, 57 Cal. 641; *Lorenz v. Jacobs*, 59 Cal. 262.

15. **General verdict of jury—In equity cause,** if insufficient, should be disregarded, and even special verdict is only advisory to court; it might set aside or disregard or adopt it.—*Warring v. Freear*, 64 Cal. 54, 56, 28 Pac. 115; *Brandt v. Wheaton*, 52 Cal. 430; *Stockman v. Riverside L. & I. Co.*, 64 Cal. 57, 58, 28 Pac. 116.

As to findings on issues not covered by the verdict of the jury, see par. 21, this note.

16. **Same—Effect of when adopted.**—Verdict of jury, in equity case, becomes equivalent of finding by court, when adopted.—*Warring v. Freear*, 64 Cal. 54, 56, 28 Pac. 115.

17. **Same—Where verdict of jury in equity case does not respond to all issues,** it becomes duty of court, if it adopts verdict so far as it is responsive to issue, to proceed and find upon evidence which has been given, and any other which may be offered by parties, as to other issues not

covered by verdict.—*Warring v. Freear*, 64 Cal. 54, 56, 28 Pac. 115.

18. **Issues in action in equity—Should be tried by court** unless court sees fit to order any or all issues to be submitted to jury.—*McLaughlin v. Del Re*, 64 Cal. 472, 473, 2 Pac. 244; *Churchill v. Baumann*, 104 Cal. 369, 372, 36 Pac. 93, 38 Pac. 43.

19. **Nuisance, abatement of—Constitution does not guarantee right to jury.**—Constitution does not give party right to have issues in action for abatement of nuisance, and to recover damages sustained from its maintenance, tried by jury, nor is such action within those in which legislature has authorized jury trial.—*McCarthy v. Gaston R. M. & M. Co.*, 144 Cal. 542, 546, 78 Pac. 7.

20. **Same—Prayer for damages is but incident to relief sought in action for abatement of nuisance,** and such action is properly brought in court of equity, and court will determine all issues in case, except where it may call in jury and ask for its judgment upon one or more issues of fact, but verdict of jury is merely advisory in such case, and may be disregarded by court.—*McCarthy v. Gaston R. M. & M. Co.*, 144 Cal. 542, 546, 78 Pac. 7. See *Hudson v. Doyle*, 6 Cal. 101, 102; *Courtwright v. Bear River & A. W. & M. Co.*, 30 Cal. 573, 576; *McLaughlin v. Del Re*, 64 Cal. 472, 474, 2 Pac. 244; *Sweetser v. Dobbins*, 65 Cal. 529, 4 Pac. 540.

21. **Verdict—Findings on issues not covered by.**—Where verdict of jury in equity case does not respond to all issues, it becomes duty of court, if it adopts verdict, so far as it is responsive to issues, to proceed and find upon evidence which has been given, and any other which may be offered by parties as to other issues not covered by verdict.—*Warring v. Freear*, 64 Cal. 54, 56, 28 Pac. 115. See *Bates v. Gage*, 49 Cal. 126; *Wingate v. Ferris*, 50 Cal. 105.

As to general verdict of jury in equity causes, see pars. 15-17, this note.

III. CAUSES TRIABLE BY JURY.

22. **Action in ejectment.**—Right to trial by jury is expressly given by this section, in case where defendant was in possession, claiming adversely to plaintiff, and where obviously proper action to have been brought was what is termed action in ejectment—that is, action “for recovery of specific real property.” Nor can plaintiff, by simply framing his complaint in particular way, by seeking restitution of possession in form of statutory action, under section 738, post, deprive defendant of jury trial of issues raised by his answer.—*Newman v. Duane*, 89 Cal. 597, 598, 27 Pac. 66.

23. **Action to quiet title—Right to jury.**—As to right of jury trial in action to quiet title, see notes to section 738, post; also *Davis v. Judson*, 159 Cal. 121, 113 Pac. 147.

24. Action to recover damages—For personal injuries—Right to trial by jury.—In an action for damages for personal injuries sustained by being ejected from a street-car, the above section gives the plaintiff primarily the right to a jury trial.—*Baird v. Pacific Electric Ry. Co.*, 39 Cal. App. 512, 179 Pac. 449.

25. Same—For past trespass is as clearly legal remedy as any that could be named, and it is action in which party can not be deprived of jury trial, and fact that plaintiff also prays for injunction does not take away from defendant right to have real issues of fact tried by jury, if he so elects.—*Hughes v. Dunlap*, 91 Cal. 385, 388, 389, 27 Pac. 642.

26. Cause can not be considered as tried until decision has been made and filed, unless filing of decision has been waived.—*Warring v. Freear*, 64 Cal. 54, 56, 28 Pac. 115. See *Hastings v. Hastings*, 31 Cal. 95.

27. Condemnation suits—Jury to assess injuries and fix compensation.—The right to a trial by jury in condemnation suits is limited to the issue of compensation, and all other issues are to be tried by the court, and if the court submits them to a jury, it is nevertheless required to make findings either by adopting the verdict thereon or by making findings in its own language.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

See, also, pars. 9, 10, 37, this note.

28. Demand for jury—Not necessary when.—It is not necessary that defendant make demand for jury, in action for recovery of possession of certain personal property; this right is secured under provisions of this section, unless jury trial should be waived in one of modes prescribed in section 631, post.—*Swasey v. Adair*, 88 Cal. 179, 183, 25 Pac. 1119.

As to refusal to waive jury constituting written demand for jury, see par. 42, this note.

29. General verdict of jury—Is conclusive on court, save only power to set it aside and grant new trial, and no finding of court can add to or take from force of verdict upon principal issues in case.—*Reiner v. Schroeder*, 146 Cal. 411, 420, 80 Pac. 517.

As to general verdict of jury in equity causes, see pars. 15-17, this note.

30. Injury is not presumed—In consequence of trial by jury instead of by court.—*Doll v. Anderson*, 27 Cal. 248, 249; *Bullock v. Consumers' Lumber Co.*, 3 Cal. Unrep. 609, 31 Pac. 367.

31. Issue of law—Raised by filing demurrer to complaint, which court is required to decide, and before any judgment can be rendered against defendant, he has right to have this issue of law decided, just as defendant has right to have issue of fact raised in his answer to complaint determined before any judgment can be ren-

dered against him.—*Winchester v. Black*, 134 Cal. 125, 127, 66 Pac. 197.

32. Joinder of legal and equitable rights—Right to jury trial.—It is always for judge, sitting as chancellor, to determine whether, when certain rights are established, he will grant equitable remedy prayed for, or compel party to be satisfied with his legal remedy; but when asserted rights, upon which any remedy must rest, are legal rights, and cognizable in court of law, such rights must be determined according to methods of common-law courts, and in such case party can not be deprived of his constitutional privilege of jury.—*Hughes v. Dunlap*, 91 Cal. 385, 389, 27 Pac. 642.

See, also, pars. 11, 12, this note.

33. Mode of reviewing action of court—Upon an issue of fact is the same in this state whether case is at law or in equity—there must be motion for new trial.—*Thompson v. White*, 63 Cal. 505, 509.

As to new trial, in general, see, post, §§ 656 et seq. and notes.

34. Order dismissing demurrer—Effect of.—An order dismissing demurrer must be regarded with same effect as equivalent to order overruling it.—*Winchester v. Black*, 134 Cal. 125, 127, 66 Pac. 197. See *Voll v. Hollis*, 60 Cal. 569; *Davis v. Hurgren*, 125 Cal. 48, 57 Pac. 684.

See par. 39, this note.

35. Party—Bound to know rules of trial court relating to calling of calendar and setting causes for trial.—*Dusy v. Prudom*, 95 Cal. 646, 648, 30 Pac. 798.

36. Plaintiff—Entitled, as of right, to jury to try issue of ownership where in action he alleges ownership and right of possession, and that defendant wrongfully ousted him of such possession, and wrongfully withholds possession; and where defendant met these averments by denial and by assertion of title and right of possession in himself.—*Reiner v. Schroeder*, 146 Cal. 411, 420, 80 Pac. 517. See *Donahue v. Melster*, 88 Cal. 121, 22 Am. St. Rep. 283, 25 Pac. 1096.

37. Right of eminent domain—Disregarding verdict of jury error, when.—Where action was brought to condemn lands for purpose of building reservoir, etc., and question as to whether taking was necessary for public use was submitted to jury, who found that at time of commencement of action it was not necessary to take such land, and where court afterwards disregarded verdict and found as fact that it was necessary to take part of land; held that there is no provision in this section, and section 1256, post, inconsistent with sections relating to eminent domain, and that therefore court erred in disregarding and setting aside verdict and rendering judgment on its own findings.—*Wilmington C. & R. Co. v. Dominguez*, 50 Cal. 505, 506.

As to right to and function of jury in condemnation proceedings under power of eminent domain, see pars. 9, 10, 27, this note.

38. Right to jury trial—Not determined entirely by form of action which plaintiff chooses to adopt.—*Hughes v. Dunlap*, 91 Cal. 385, 389, 27 Pac. 642.

39. Striking demurrer from record—Effect of.—Court has no more authority to strike demurrer from record for want of appearance to sustain it, or to deprive defendant of right to have it considered, than it would be authorized to strike answer from files and disregard issues raised by it in case there should be no appearance on part of defendant at time set for trial of cause.—*Winchester v. Black*, 134 Cal. 125, 127, 66 Pac. 197.

See par. 34, this note.

40. Stipulation for jury.—Where parties in action to quiet title expressly stipulated that jury should try legal issues tendered by answer, and that these issues should be determined by a general verdict "in favor of the plaintiff or in favor of the defendant"; held that this was legitimate stipulation, and parties, having so submitted their case to jury, losing party could not repudiate verdict; and where verdict was returned and disposed of legal issues raised by answer, and as there were no issues, either legal or equitable, other than those raised by answer, verdict was conclusive in favor of party in whose behalf it was rendered,

and further findings of court were, under circumstances, unnecessary.—*Johnson v. Mina Rica G. M. Co.*, 128 Cal. 521, 522, 61 Pac. 76.

41. Waiver of right by both parties—Discretion of court.—Where both parties waived jury trial, but court, against protest and objection of defendant, called jury, and defendant assigned action of court as error, held that right of trial by jury does not extend so far as to oblige judge to try issues of fact in case at law, although requested to do so by both parties, if he should deem it a proper case for trial by jury; and where court submits questions of fact to jury, there is no abuse of discretion, as he is not bound to determine facts, and is not bound to disclose his reasons for calling in aid of jury.—*Bullock v. Consumers' Lumber Co.*, 3 Cal. Unrep. 609, 31 Pac. 367.

42. Written demand for jury must be held to be continued refusal to waive right thereto.—*Swasey v. Adair*, 88 Cal. 179, 183, 25 Pac. 1119.

As to when demand for jury not necessary, see par. 28, this note.

43. Same—Party is not required to repeat demand for jury after court has once denied application, and action of court after such application in proceeding to try case for recovery of possession of certain personal property, without jury, is reversible error.—*Swasey v. Adair*, 88 Cal. 179, 183, 25 Pac. 1119.

§ 593. CLERK MUST ENTER CAUSES ON THE CALENDAR, TO REMAIN UNTIL DISPOSED OF. The clerk must enter causes upon the calendar of the court according to the date of issue. Causes once placed on the calendar must remain upon the calendar until finally disposed of; provided, that causes may be dropped from the calendar by consent of parties, and may be again restored upon notice.

History: Enacted March 11, 1872, re-enactment of § 156 of Practice Act; amendment approved March 9, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 5.

1. Position of cause on calendar will not be changed to different day from that on which set by clerk, whether upon stipula-

tion of parties, or on motion of either party, except upon good cause shown.—*Wetmore v. San Francisco*, 43 Cal. 37, 38.

§ 594. PARTIES MAY BRING ISSUE TO TRIAL. Either party may bring an issue to trial or to a hearing, and in the absence of the adverse party, unless the court, for good cause, otherwise direct, may proceed with his case, and take a dismissal of the action, or a verdict or judgment, as the case may require; provided, however, if the issue to be tried is an issue of fact, proof must first be made to the satisfaction of the court that the adverse party has had five days' notice of such trial.

History: Enacted March 11, 1872, re-enactment of § 157 of Practice Act; amendment approved February 14, 1899, Stats. and Amdts. 1899, p. 5.

BRINGING ISSUES TO TRIAL.

1. Absence of plaintiff at trial—Judgment.
2. Appearance—When deemed waiver.
3. Consequences of dismissal of action—Because of absence of plaintiff.
- 4-7. Construction of section—In general.
- 8, 9. Same—The purpose of section, is what.
10. Default of defendant—Notice of trial to.
11. Failure to comply with rule of court.
12. Injury—Necessary to entitle party to relief upon ground of surprise.
13. Interveners entitled to notice.
14. No notice of trial—Judgment erroneous—Not void.
- 15, 16. Notice of trial—In general.
17. Same—Right of—Waiver.
18. Party—Duty of to appear at trial.
19. Proceedings against party in his absence.
20. Provisions of code are complied with—Upon subject of notice, when.
21. Prior to amendment of section—No notice of setting case for trial was required by statute.
22. Recital in judgment.
23. Rule of trial court.
24. Telegram to judge—Demanding jury trial.

1. Absence of plaintiff at trial—Judgment.—Where plaintiff fails to appear at trial, it is right of defendant, under provision of this section, to proceed with case, and to have judgment entered finally disposing of case, and court does not err where no proofs are offered by plaintiff, to enter judgment, finally disposing of case.—*Clune v. Quitzow*, 125 Cal. 213, 214, 57 Pac. 886.

2. Appearance—When deemed waiver.—Appearance of guardian on day to which trial had been postponed, and objection to then going to trial, at which time court made order continuing trial for three days, to which later day no objection was made by guardian, constituted waiver of five days of setting case, required by this section.—*Granger v. Sheriff*, 133 Cal. 416, 419, 65 Pac. 873.

3. Consequences of dismissal of action—Because of absence of plaintiff, should always be considered, especially where any reasonable excuse is shown for absence, as where plea of statute of limitations could be interposed to new action; in such case dismissal is absolute destruction of plaintiff's right, and so serious penalty should not be imposed unless due administration of justice clearly requires it.—*Jaffe v. Lillenthal*, 101 Cal. 175, 178, 35 Pac. 636.

4. Construction of section—In general.—Where the attorney knew long in advance that the cause was in fact set for trial for a certain date there is no necessity for giv-

ing any formal notice such as is contemplated in this section. It is the attorney's neglect if the client fails to receive timely notice.—*Canty v. Pierce*, 173 Cal. 205, 159 Pac. 582.

5. Where an action is transferred to another department of the court before the same judge, an order in that department placing the cause on the calendar for trial on a specified date is in effect a resetting of the cause for trial, and if made without the knowledge of an intervener, a further trial can not be had in his absence without giving him the five days' notice required for section 594 of the Code of Civil Procedure.—*Hagenkamp v. Equitable Life Assur. Co.*, 29 Cal. App. 713, 156 Pac. 520.

6. The provision of section 594 of the Code of Civil Procedure that either party may bring an issue to trial provided that if the issue tried is an issue of fact, proof must first be made to the satisfaction of the court that the adverse party has had five days' notice of such trial, has reference only to proceedings taken against a party in his absence, and has no application to a case in which both parties are represented and present when the case is called for trial.—*Handy v. Handy*, 31 Cal. App. 590, 161 Pac. 21.

7. The defendant in an action is not entitled to a postponement of the trial on the ground that he had not received a full five days' notice of the time fixed for the trial, where he is present in court when the case is called and fails to file an affidavit setting forth the reasons why he is unable to proceed, or why his witnesses were not present, or who they were, or what they would testify to if present.—*Handy v. Handy*, 31 Cal. App. 590, 161 Pac. 21.

8. Same—The purpose of section is to prevent the possibility of a default being taken against one who by reason of insufficient notice or no notice at all has been unable to appear.—*Sheldon v. Laudwehr*, 159 Cal. 782, 116 Pac. 44.

9. This section does not require that a party intending to apply to the court to have a day fixed for trial should give notice of his intended application to the adverse party. It only requires that a five days' notice of the time set for trial shall be given.—*McNeill v. Doe*, 163 Cal. 338, 341, 125 Pac. 345.

10. Default of defendant—Notice of trial to, not required by the above section.—*Uplinger v. Yonkin*, — Cal. App. —, 190 Pac. 822.

11. Failure to comply with rule of court requiring five days' notice of hearing does not affect the jurisdiction, and judgment will not be reversed therefor where it is clear that the appellant's rights were not prejudiced thereby.—*In re Los Angeles Trust Co.*, 158 Cal. 603, 112 Pac. 56.

As to duty of party to known rules of court, see pars. 18, 23, this note.

12. Injury—Necessary to entitle party to relief upon ground of surprise, where trial is had in his absence.—*McGuire v. Drew*, 83 Cal. 225, 230, 23 Pac. 312. See *Patterson v. Ely*, 19 Cal. 28; *Cook v. De la Guerra*, 24 Cal. 237, 238; *Brooks v. Douglass*, 32 Cal. 208.

13. Interveners entitled to notice.—This section applies, and the notice prescribed must be given to interveners as well as the original parties to the action.—*Townsend v. Driver*, 5 Cal. App. 581, 585, 90 Pac. 1061. See, also, pars. 15, 16, this note.

14. No notice of trial—Judgment erroneous—Not void.—Where the requirements of the above section are not complied with by giving notice of the date of the trial, a judgment rendered upon such a trial is merely erroneous but not void, and is not in excess of the court's jurisdiction.—*Uplinger v. Yonkin*, — Cal. App. —, 190 Pac. 822, following the doctrine in *Estate of Dean*, 149 Cal. 492, 87 Pac. 13.

15. Notice of trial—In general.—An order requiring nonresident contestants of the probate of a will to file a bond for costs under the provisions of sections 1036 and 1037, post, stays all proceedings under the contest, including trial pursuant to notice given, requiring a new notice of trial, and in the absence of proof of such new notice, as herein required, dismissal of the contest upon the date originally fixed for failure of such nonresident plaintiffs to appear and prosecute the contest is erroneous and must be reversed.—*Estate of Dean*, 149 Cal. 491, 87 Pac. 13.

As to notice of intervener, see par. 13, this note.

16. Where both parties are present by counsel and take part in trial it will be presumed that notice of trial was duly given, or that trial was by consent.—*Wakefield v. Wakefield*, 16 Cal. App. 115, 116 Pac. 309.

17. Same—Right of—Waiver.—The notice of trial required by the above section is waived by consent to the setting of the trial at a period less than the number of days notice the section requires to be given.—*Estate of Wempe*, 185 Cal. 557, 197 Pac. 494, following the doctrine in *Sheldon v. Laudwehr*, 159 Cal. 778, 116 Pac. 44.

18. Party—Duty of to appear at trial.—Where party had actual notice before day of trial that case was set for that date,

and also knew on day before that no further postponement of trial would be agreed to by opposing counsel, it was his duty to have either appear in person, or by counsel, at opening of court on day of trial, and failing to so appear in person or by attorney, he must have known that probable consequences of such failure would be trial of case in his absence.—*McGuire v. Drew*, 83 Cal. 225, 230, 23 Pac. 312.

19. Proceedings against party in his absence.—This section has reference only to proceedings against an absent party, and not where both parties are present or represented when the case is called for trial.—*Sheldon v. Laudwehr*, 159 Cal. 782, 116 Pac. 44.

20. Provisions of code are complied with—Upon subject of notice, when judgment recites that satisfactory evidence was before court that defendant was notified more than five days prior to trial of cause that same was set for trial on day mentioned.—*Johnston v. Collins*, 146 Cal. 212, 214, 79 Pac. 870.

21. Prior to amendment of section—No notice of setting case for trial was required by statute.—Parties to action, and their attorneys, whether residents or nonresidents of county where case was pending, must watch its progress, and were charged with notice of time set for its trial.—*Dusy v. Prudom*, 95 Cal. 646, 648, 30 Pac. 798; *Bell v. Peck*, 104 Cal. 35, 38, 37 Pac. 766. See *Eltzroth v. Ryan*, 91 Cal. 584, 587, 27 Pac. 932.

22. Recital in judgment that motion to dissolve attachment was heard on certain day, and that counsel for both parties agreed on that day, in open court, that case should be peremptorily set for trial, upon decision of motion to dissolve attachment, and was so set, is conclusive as against counsel's statement conflicting therewith, as to whether full notice required by statute was given.—*Rodley v. Lyons*, 129 Cal. 681, 686, 62 Pac. 313.

23. Rule of trial court as to reasonable notice of time fixed for trial can not be considered by appellate court, where the same is no part of record in case.—*Johnston v. Collins*, 146 Cal. 212, 214, 79 Pac. 870.

24. Telegram to judge—Demanding jury trial, sent day before trial, would not prevent court from dispensing with jury, where party making such demand fails to appear in person or by counsel at trial.—*McGuire v. Drew*, 83 Cal. 225, 231, 23 Pac. 312.

§ 595. MOTION TO POSTPONE TRIAL FOR ABSENCE OF TESTIMONY, REQUISITES OF. A motion to postpone a trial on the ground of the absence of evidence can only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it.

A trial shall be postponed when it appears to the court that the attorney of record, party, or principal witness is actually engaged in attendance upon a session of the legislature of this state as a member thereof.

The court may require the moving party, where application is made on account of the absence of a material witness, to state upon affidavit the evidence which he expects to obtain; and if the adverse party thereupon admits that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed.

In actions involving the title to mining claims, or involving trespass for damage upon mining claims, if it be made to appear to the satisfaction of the court that, in order that justice may be done and the action fairly tried on its merits, it is necessary that further developments should be made, underground or upon the surface of the mining claims involved in said action, the court shall grant the postponement of the trial of the action, giving the party a reasonable time in which to prepare for trial and to do said development work.

History: Enacted March 11, 1872; amendment approved March 2, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 1; May 1, 1911, Stats. and Amdts. 1911, p. 1448.

MOTION FOR POSTPONEMENT.

1. Absence of counsel—Granting or refusing continuance.
2. Same—Same—Associate counsel.
3. Absence of defendant—As ground of continuance.
4. Same—Sufficiency of showing.
5. Same—When properly denied.
6. Absence of witness as ground—In general.
- 7-10. Same—Affidavit to procure—Sufficiency of.
- 11, 12. Same—Continuance can be made on ground of absence of evidence.
13. Same—No abuse of discretion.
- 14, 15. Same—Provision in statute not imperative, when.
16. Applicability of section—To criminal proceedings.
17. Continuance—As to generally.
18. Same—Absence of party.
19. Same—Same—Absence of party who is also witness.
- 20-22. Same—Absence of witnesses.
23. Same—Same—Condition.
- 24, 25. Same—Abuse of discretion.
26. Same—To permit amendment to complaint.
27. Same—To procure evidence.
- 28, 29. Same—Same—Of insanity of accused.
30. Costs—May be imposed as condition for continuance.
31. Granting or refusing continuance—Discretion of court.
32. Illness of defendant—Motion made for continuance on ground of.
33. Intention of code.
34. Jurisdiction to hear and determine cause.
35. Merits of defense—Affidavit used on application for continuance.
36. Refusal of continuance—Held proper, when.
37. Service of process—On parties to cross-complaint.

1. Absence of counsel—Granting or refusing continuance on ground of counsel being absent, is a matter which rests largely, if not wholly, in the discretion of the trial court.—*Kern Valley Bank v. Chester*, 55 Cal. 4951.

2. Same—Same—Associate counsel.—Same rule applies as to absence of associate counsel.—*Peachy v. Witter*, 131 Cal. 316, 319, 63 Pac. 468.

3. Absence of defendant—As ground of continuance.—It was not error to refuse to postpone the trial because of absence of a defendant through illness when no relief was asked against such defendant and counsel had stated to the court that the purpose of her being present was to give evidence upon the question of fraud, which

was not before the court on the issues raised by the pleadings.—*Greenlee v. Los Angeles Trust etc. Bank*, 171 Cal. 371, 153 Pac. 383.

4. **Same—Sufficiency of showing.**—It is an abuse of discretion to refuse a continuance on the ground of the absence of the defendant, where it is shown by the statement of the plaintiff's counsel that no previous continuance has been requested and that the cause has been on the calendar for two years, and by the uncontradicted affidavit of counsel for the defendant that the defendant, who is the only witness to prove his defense, is ill, and, in search of health, has journeyed to Europe, from whence he will return in two months; there being no intimation that the motion is not made in good faith, nor any showing that the plaintiff will be injured or prejudiced by the delay.—*Betts Spring Co. v. Jardine Machinery Co.*, 23 Cal. App. 705, 139 Pac. 657.

5. **Same—When properly denied.**—The court committed no abuse of its discretion in denying the defendant's last application for a continuance of the hearing of his motion for a new trial, where it had already granted three continuances of the motion, the last of which took the matter up to within one day of the time which the court could have granted the defendant under the provisions of section 1191 of the Penal Code without nullifying the verdict.—*People v. Wing*, 23 Cal. App. 50, 53, 137 Pac. 47, 48.

6. **Absence of witness as ground.**—In general.—Where the attorney for the defendant in an action agreed with the plaintiff's attorney that the case should be set down for trial on the second day following, upon the express condition that the trial should not proceed at that time unless he was able to procure the attendance of a certain witness, and on the date set it is shown that by reason of distance and the means of travel, and because of business engagements, it is impossible to have the witness present, and that the plaintiff's counsel on the day previous was informed of such fact and consented to a continuance to a later date, which, however, was not approved by the court, it is an abuse of discretion to refuse the application of the defendant for a postponement of the trial.—*Swayne v. Wells-Russell & Co.*, 169 Cal. 204, 146 Pac. 686.

As to postponement of trial for absence of witness from state where the constitutional guaranty of a speedy trial is in question, see *Kerr's Cyc. Penal Code*, 2d ed., § 1382 and note.

7. **Same—Affidavit to procure—Sufficiency of.**—Affidavit for continuance on ground of absence of witness, must show what is expected to be proved by such witness.—*Kern Valley Bank v. Chester*, 55 Cal. 49, 51.

8. Insufficient where it does not show materiality of evidence which defendant expected to obtain, or that due diligence had been used to procure it.—*Kern Valley Bank v. Chester*, 55 Cal. 49, 51.

9. A court does not abuse its discretion in refusing to postpone a trial on the ground that the defendant's principal witness has been misinformed as to the date of the trial, and his present whereabouts are unknown, if the only showing in support of the application for postponement is the affidavit of the defendant's attorney, which does not show that any effort has been made to have the witness correctly informed, or how or why he was misinformed, or what he will testify to if present, or that his testimony will be material, or that any effort has been made to secure his presence or to take his deposition, or that his presence can be secured if the trial is postponed.—*Watson v. Columbia Basin Dev. Co.*, 22 Cal. App. 556, 135 Pac. 511.

10. It is not sufficient for the defendant to aver in his affidavit that he used due diligence, or that the witness in question is the only witness that the defendant has to support the denial of the claim of the plaintiff; facts should be set out from which the court may draw the conclusion that defendant has brought himself within the reasonable requirement of the law.—*Watson v. Columbia Basin Dev. Co.*, 22 Cal. App. 556, 135 Pac. 511.

11. **Same—Continuance can be made on ground of absence of evidence only upon affidavit showing materiality of evidence expected to be obtained, and that due diligence has been made to obtain it.**—*Storch v. McCain*, 85 Cal. 304, 307, 24 Pac. 639.

As to continuance, see pars. 17-29, this note.

12. For circumstances excusing absence of defendant and his witnesses, sufficient to entitle to continuance, see *Light v. Richardson*, 3 Cal. Unrep. 475, 31 Pac. 1123, 1124.

13. **Same—No abuse of discretion is committed in denying the motion of the defendant for a continuance for the purpose of procuring evidence, where the affidavits on which the motion is based do not state facts which furnish any definite and satisfactory assurance that the witnesses named therein could or would be procured at a later time if the continuance were granted.**—*People v. Kilfoil*, 20 Cal. App. Dec. 508, 148 Pac. 812.

As to applicability of section to criminal trials, see pars. 16, 27-29, this note.

14. **Same—Provision in statute not imperative, when.**—Requirement that court may require moving party, where application is made on account of absence of material witness, to state upon affidavit, evidence which he expects to obtain, is not imperative, and should not be required of counsel in making affidavit for continuance,

when he can not have aid of his client, if absence of client is excusable.—*Light v. Richardson*, 3 Cal. Unrep. 475, 31 Pac. 1123, 1124.

15. Refusal of continuance on account of absence of plaintiff's witnesses is not erroneous where defendant makes admission as to evidence of absent witnesses which is contemplated by this section, and affidavit containing all that was proposed to be proved by them was admitted in evidence at trial, upon plaintiff's offer.—*Loftus v. Fischer*, 113 Cal. 286, 287, 45 Pac. 328.

16. Applicability of section.—To criminal proceedings and continuances of trials therein, doubted, in view of section 1052, Penal Code.—*People v. Goldenson*, 76 Cal. 328, 342, 19 Pac. 161.

See par. 13, this note.

17. Continuance.—As to generally.—The granting or refusing of a continuance is usually a matter largely within the discretion of the trial court.—*Marcucci v. Vowinckel*, 164 Cal. 693, 130 Pac. 430, 431.

18. Same.—Absence of party.—It is not an abuse of discretion to refuse to postpone the trial on account of the absence of the plaintiff, where there is nothing in the affidavits in support of the motion, indicating that he would be able to appear at a later date.—*Beckman v. Waters*, 161 Cal. 588, 119 Pac. 922.

19. Same.—Same.—Absence of party who is also witness.—Strengthens the showing in support of application, but does not compel the court to grant the same.—*Sheldon v. Laudwehr*, 159 Cal. 780, 116 Pac. 44.

20. Same.—Absence of witnesses.—Application addressed to discretion of court and order will not be reversed except for abuse.—*Sheldon v. Laudwehr*, 159 Cal. 780, 116 Pac. 44.

21. Good or bad faith of application is one of the circumstances affecting the court's action.—*Sheldon v. Laudwehr*, 159 Cal. 780, 116 Pac. 44.

22. Where counsel knew before entering upon the trial that the witness was absent and "had suspicions" that he would not be present at the trial, it was not error to refuse a continuance on that account, particularly as it appeared that the evidence, if the witness were present and testifying, would be cumulative.—*Hawley v. Los Angeles Creamery Co.*, 16 Cal. App. 54, 116 Pac. 84.

23. Same.—Same.—Condition.—Where it appeared that the security of the plaintiff would be endangered by postponement on motion of defendant, it was not abuse of discretion to refuse the motion except upon condition which would meet the objection.—*Sheldon v. Laudwehr*, 159 Cal. 780, 116 Pac. 44.

24. Same.—Abuse of discretion in the denial of a continuance must be shown, to

justify a reversal of the judgment because of a ruling on such matters.—*Marcucci v. Vowinckel*, 164 Cal. 693, 130 Pac. 430, 431.

25. Where plaintiff asked the court to continue the trial from the afternoon of the last day thereof until the following morning, to give the plaintiffs an opportunity to procure the attendance of three additional witnesses to testify on behalf of the plaintiffs, but the record does not show at what time in the afternoon this refusal occurred, nor was any showing of any diligence whatever made in support of the application for the continuance, no affidavit was made, or proposed to be made, it was not shown that any subpoena had been issued or served on the proposed witnesses, or that they had promised to attend then, or at any other time, or that they would, if examined, testify to any material fact, or that they knew anything about the facts of the case, or what counsel expected to prove by them, their names were not stated, but even then the court offered to delay the proceedings half an hour to enable plaintiffs to procure their attendance, but their counsel stated that the office hours of the witnesses were such that he could not procure their presence on that day, but he did not state where they resided, it can not be held that it was an abuse of discretion to refuse such continuance.—*Marcucci v. Vowinckel*, 164 Cal. 693, 130 Pac. 430, 431.

26. Same.—To permit amendment to complaint.—Where motion for continuance was made, on day set for trial, on ground that it would be required to file amended complaint, and that until such amended complaint was filed and issue joined thereon, case could not be tried; held that court was justified in refusing continuance, in view of fact that case had been twice tried, and that at time motion was made court was not informed of nature of amendment that plaintiff desired to make to complaint, or that he was unable to establish under pleadings on file, averments that they might include in such amended complaint.—*Schultz v. McLean*, 109 Cal. 437, 443, 42 Pac. 557.

27. Same.—To procure evidence.—No Abuse of discretion is committed in denying the motion of the defendant for a continuance for the purpose of procuring evidence, where the affidavits on which the motion is based do not state facts which furnish any definite and satisfactory assurance that the witnesses named therein could or would be procured at a later time if the continuance were granted.—*People v. Kilfoil*, 27 Cal. App. 29, 148 Pac. 812.

28. Same.—Same.—Of insanity of accused.—An application for the postponement of a criminal trial to enable the defendant to obtain evidence relating to his alleged insanity is properly denied, in the absence of any showing of the exercise of any diligence in searching for evidence, or the ability to

procure it if the continuance were granted.—*People v. Loomis*, 170 Cal. 347, 149 Pac. 581.

29. The question as to whether or not the statements contained in the affidavit offered in support of the motion for a continuance are of such a character as to raise a doubt of the defendant's sanity at the time of trial, and to cause the court to suspend the proceedings and call a jury to determine the present sanity of the defendant, is a matter addressed to the discretion of the trial court, whose decision must be upheld in the absence of a showing that such discretion has been abused.—*People v. Loomis*, 170 Cal. 347, 149 Pac. 581.

30. Costs—May be imposed as condition for continuance of trial of action.—*Pomeroy v. Bell*, 118 Cal. 635, 638, 50 Pac. 683.

31. Granting or refusing continuance—Discretion of court.—Granting or refusing continuance on account of absence of counsel is matter which rests largely, if not wholly, in discretion of court.—*Kern Valley Bank v. Chester*, 55 Cal. 49, 51.

32. Illness of defendant—Motion made for continuance on ground of illness of defendant and consequent neglect to attend trial, held under circumstances of case sufficient to entitle to continuance, and that court erred in refusing such continuance—there being nothing in affidavits filed on behalf of plaintiff tending to contradict statements of defendant, or to raise suspicion as to its good faith, or as to good faith of application for continuance.—*Morehouse v. Morehouse*, 136 Cal. 332, 334, 68 Pac. 976. See *Jaffe v. Lillenthal*, 101 Cal. 175, 178, 35 Pac. 636.

33. Intention of code, while protecting court from imposition and unnecessary delays, is to secure reasonable opportunity to litigants to try their cases on merits, to end that justice may be done; and while no definite rule can be laid down, embracing all different circumstances under which continuances should be granted, spirit and intention of code should always be borne in mind.—*Light v. Richardson*, 3 Cal. Unrep. 475, 31 Pac. 1123, 1124.

34. Jurisdiction to hear and determine cause or proceeding involves power to postpone hearing, for good cause, unless prohibited by positive law.—*Curtis v. Underwood*, 101 Cal. 661, 669, 36 Pac. 110.

35. Merits of defense—Affidavit used on application for continuance is insufficient which entirely fails to show diligence and merits of defense.—*Harloe v. Lambie*, 132 Cal. 133, 136, 64 Pac. 88.

36. Refusal of continuance—Held proper when application was made on day set for trial on ground of absence of witness, where statement in affidavit showed that address of witness was unknown, it appearing that cause had been set for more than two months previously, and that defendant had not made any effort to secure testimony of such witness.—*Tompkins v. Montgomery*, 123 Cal. 219, 222, 55 Pac. 997.

37. Service of process—On parties to cross-complaint.—Where continuance is asked on ground that necessary parties to cross-complaint have not been served with process, held properly refused for reason that where such parties had already been served with summons, there was no necessity for serving process upon cross-complaint.—*Rodgers v. Parker*, 136 Cal. 313, 315, 68 Pac. 975.

§ 596. IN CASES OF ADJOURNMENT A PARTY MAY HAVE THE TESTIMONY OF ANY WITNESS TAKEN. The party obtaining a postponement of a trial in any court of record must, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, be then taken by deposition before a judge or clerk of the court in which the case is pending, or before such notary public as the court may indicate, which must accordingly be done; and the testimony so taken may be read on the trial, with the same effect, and subject to the same objections, as if the witnesses were produced.

History: Enacted March 11, 1872, re-enactment of § 664 of Practice Act.

ADJOURNMENT TO TAKE DEPOSITION.

1. Deposition—How required to be taken.
2. Transcript of testimony—When insufficient as deposition.

1. Deposition—How required to be taken.—A deposition must be taken in manner prescribed by code, when made valid condition to continuance.—*Thomas v. Black*, 84 Cal. 221, 225, 23 Pac. 1037.

2. Transcript of testimony—When insufficient as deposition.—The transcript of testimony lacks essential elements of deposition as defined in code, where not certified or authenticated in any way whatever, and witnesses had no opportunity to correct it.—*Thomas v. Black*, 84 Cal. 221, 225, 23 Pac. 1037.

CHARTER IV.

TRIAL BY JURY.

Article I. FORMATION OF JURY, §§ 600-604.

II. CONDUCT OF THE TRIAL, §§ 607-610.

III. THE VERDICT, §§ 624-628.

ARTICLE I.

FORMATION OF JURY.

§ 600. Jury, how drawn.

§ 601. Challenges. Each party entitled to four peremptory challenges.

§ 602. Grounds of challenge.

§ 603. Challenges, how tried.

§ 604. Jury to be sworn.

§ 600. JURY, HOW DRAWN. When the action is called for trial by jury, the clerk must draw from the trial-jury box of the court the ballots containing the names of the jurors, until the jury is completed, or the ballots are exhausted.

History: Enacted March 11, 1872, founded upon § 159 of Practice Act.

THE JURY.

- 1, 2. A case for when.
- 3-5. Bias or prejudice.
- 6, 7. Demand and deposit—Necessity of to secure jury—Sufficiency of complaint.
8. Same—Ground of justification for rule.
9. Same—Liberal construction favored.
10. Same—Repetition of demand unnecessary.
11. Disqualification of juror.
- 12-14. Examination on voir dire—As to generally.
15. Same—As to extent of examination.
16. Same—Challenges.
17. Infringement of right to jury trial—Juror asleep.
- 18, 19. Misconduct of juror—Intoxication.
- 20, 21. Same—Visiting scene of crime.
- 22, 23. Peremptory challenge—As to generally.
24. Same—Definition of.
25. Same—Examination not allowed.
26. Qualification of juror—Effect of previous opinion.
27. Same—Ruling of trial court conclusive.
- 28-30. Right of trial by jury—Waiver.
31. Same—Entry of waiver in minutes—Necessity.
32. Selection of jury—Special venire.

As to drawing jurors, see, ante, §§ 214-220 and notes.

Jury trial—As to conduct of, see, post, § 607 and note.

Same—Exemptions and excuses, see, ante, §§ 200-202 and notes.

Same—Impanelling of, see, ante, § 246 and note.

Same—Jury-box, see, ante, § 246 and note.

Same—Right to trial by, see, ante, § 592 and note.

Same—Selecting and returning jurors, see, ante, §§ 204-211 and notes.

Same—Summoning jurors, see, ante, §§ 225-228 and notes.

Same—Time of exercising peremptory challenge to jurors, see, post, § 601 and note.

Same—Verdict of, see post, §§ 644, etc., and notes.

Same—Waiver of, see, post, § 631 and note.

Same—What constitutes a jury, see, ante, §§ 190-195 and notes.

Same—Who are competent to serve as jurors, see, ante, §§ 198, 199 and notes.

1. A case for when.—Where reasonable men may differ as to the proper inference to be drawn from the facts, a case is presented for the determination of the jury, as to the question of contributory negligence.—*Petersen v. California Cotton Mills Co.*, 20 Cal. App. 755, 130 Pac. 169, 172.

As to province of jury, see, post, § 607, note par. 38.

As to taking issues of fact from jury, see, post, § 607, note pars. 62, 63.

2. To ask a jury what was the proximate cause of an injury to an employee would be to ask them to answer a question of law which would be contrary to the statute.—*Petersen v. California Cotton Mills Co.*, 20 Cal. App. 755, 130 Pac. 169, 174.

3. **Bias or prejudice.**—The question as to bias of a proposed juror is one of mixed fact and law, and where there is a conflict of evidence touching the question, the conclusion of the court, thereon, like the determination of any other fact found upon conflicting evidence, is final.—*Eaton v. Southern Pacific Co.*, 22 Cal. App. 461, 134 Pac. 801.

4. It was not reversible error for the court to deny a challenge to a juror on the ground of bias because of his familiarity with the railroad crossing, when he stated that he would reach a verdict upon the evidence adduced and be guided by the instructions of the court in his consideration thereof.—*Eaton v. Southern Pacific Co.*, 22 Cal. App. 461, 134 Pac. 801.

5. In a prosecution for placing and attempting to explode dynamite with intent to injure and terrify certain persons, it is not improper for the district attorney in examining jurors to ask whether they believe in the doctrine of a certain political party known as "direct action," which signifies that physical force is approved as a means to secure desired ends; it not being shown that the defendant belongs to the political party referred to.—*People v. Warr*, 22 Cal. App. 663, 136 Pac. 304.

6. **Demand and deposit—Necessity of to secure jury—Sufficiency of complaint.**—Under a fair construction of a rule of court providing that: "Trial by jury is deemed waived by a party who does not demand the same, either before or at the time when the cause is set down upon the trial calendar, and also does not, within five days after such demand, deposit with the clerk the fees for twelve jurors for one day," where it appears that a proper demand for a jury was made and entered in the minutes of the court, when the case was originally set for trial, and where, when it was reset, no demand or deposit was made, but it was continued, and when reset a second time, both a demand and the requisite deposit were made, it was error for the court to refuse to consider such demand and deposit, and to deny a jury trial, because it was absolutely waived by non-compliance with the rule at the previous setting.—*Wendling L. Co. v. Glenwood L. Co.*, 19 Cal. App. 1, 124 Pac. 734.

7. It is held that no purpose of the rule could have been thwarted or imperiled if plaintiff's demand and deposit of the jury fee had been allowed under the circumstances appearing; that the demand and deposit, when the case was set for retrial the second time, presented a situation exactly the same as when the original order was

made; and it is sufficient that on the very day that the cause was set for trial plaintiff made a demand and deposit as required by the rule. The court should have reconsidered its ruling as to waiver, and have granted the request, upon the demand and deposit before the court, which were still operative, and need not be renewed.—*Wendling L. Co. v. Glenwood L. Co.*, 19 Cal. App. 1, 124 Pac. 734.

8. **Same—Ground of justification for rule.**—Granting, for the sake of the argument, that such rule is within the power of the court to adopt it, it could be justified as a reasonable regulation, as to the demand for a jury, only on the ground that the orderly business of the court may proceed, and causes tried at the time they are set, and as to the deposit for the reason that it affords, as stated by the supreme court, "a reasonable precaution to prevent the jury from being defrauded by unscrupulous parties, and to prevent the demand for the jury from being used as a pretext to obtain continuances, and thus trifle with justice."—*Wendling L. Co. v. Glenwood L. Co.*, 19 Cal. App. 1, 124 Pac. 734.

9. **Same—Liberal construction favored.**—It is held that if the rule of the court is to be given the exceedingly technical application contended for, it should be declared without hesitation unreasonable and invalid; and that it should be construed liberally in favor of the person demanding a jury in such a case as this.—*Wendling L. Co. v. Glenwood L. Co.*, 19 Cal. App. 1, 124 Pac. 734.

10. **Same—Repetition of demand unnecessary.**—The demand must be considered as a continuous refusal to waive the right to a jury; and it was not necessary to repeat the demand and deposit, in order to secure the constitutional right of the plaintiff to a jury trial.—*Wendling L. Co. v. Glenwood L. Co.*, 19 Cal. App. 1, 124 Pac. 734.

11. **Disqualification of juror.**—It is not an abuse of discretion to refuse a challenge to certain jurors, made after a trial has proceeded five days, on the ground that it has been discovered that they are members of the grand jury, where no reason is offered for failure to ascertain such fact before the jury was sworn.—*Estate of Jones*, 166 Cal. 108, 135 Pac. 288.

12. **Examination on voir dire.**—As to generally.—In an action for damages for death from being run over by a street-car while engaged in spreading gravel over the street, questions addressed to jurors on their voir dire examination as to whether or not they would follow an instruction, if given, to the effect that it was the duty of the motor-man to have prevented the accident, if he could have done so by the exercise of ordinary care, notwithstanding the deceased was guilty of carelessness and neglect, do not call for an unqualified statement of what their verdict would be in advance of

the taking of the testimony.—*Kramm v. Stockton Elec. R. R. Co.*, 22 Cal. App. 737, 761, 136 Pac. 523, 534.

As to examination on voir dire, see notes 109 Am. St. Rep. 563; 23 Am. Dec. 128.

13. Error in the ruling of the court in disallowing answers to certain questions propounded to a juror on his voir dire examination is without prejudice, where the defendant exhausts but seven of the peremptory challenges to which he is entitled, and that the juror is accepted and constitutes one of the panel who try the cause.—*People v. Perry*, 25 Cal. App. 337, 143 Pac. 798.

14. A question addressed to a juror as to how, in the absence of evidence on the subject, he would determine how much the plaintiff could afford to pay for the land to be taken is properly excluded.—*Vallejo & Northern R. R. Co. v. Reed Orchard Co.*, 147 Pac. 238.

15. **Same—As to extent of examination.**—Although, in the examination of jurors, many of the questions asked them, to which the trial judge declined to permit answers to be made, might well have been allowed as proper questions, but sufficient appears by the record to show that the defendant was allowed ample latitude by other questions which he was permitted to ask of them, and the answers to which were said to have illustrated the condition of the mind of such jurors as to their bias and prejudice, since it was not incumbent upon the court to permit the examination to be unduly protracted for such purpose of enabling defendant to decide as to whether he might desire to challenge peremptorily any of the jurors offered, it can not be held that the defendant was unduly restricted in his examination of the jurors while interrogating them as to their state of mind.—*People v. Hill* (Cal. App.), 129 Pac. 475, 476.

16. **Same—Challenges.**—Where in an action to condemn land for railroad purposes it is admitted by a juror on his voir dire that the fact of his employment by another company might influence his verdict, he is properly excused on the challenge of the plaintiff, notwithstanding he contradicted such admission in other parts of his examination.—*Vallejo & Northern R. R. Co. v. Reed Orchard Co.*, 147 Pac. 238.

17. **Infringement of right to jury trial—Juror asleep.**—Where, during the trial of accused for murder, one of the jurors went to sleep, but the court admonished the juror and declared a recess of court, it can not be said that the defendant's right of trial by jury was impaired, where such juror was not asked whether he heard the testimony, nor given an opportunity to explain, nor was the duration of his condition shown to have been of sufficient length to prevent his understanding the testimony given.—*People v. Roselle* (Cal. App.), 129 Pac. 477, 478.

As to what conditions and restrictions the legislature may impose on the right of trial by jury, see note 98 Am. St. Rep. 538.

18. **Misconduct of juror—Intoxication.**—Where the intoxication of a juror is urged as ground for a new trial, and the affidavits respecting his alleged intoxication are conflicting, the matter is removed from consideration on appeal.—*People v. Williams*, 24 Cal. App. 646, 142 Pac. 124.

19. If the defendant has knowledge of the intoxication of a juror during the trial and makes no objection thereto, he can not thereafter, in case of an unfavorable verdict, take advantage of such misconduct on appeal.—*People v. Williams*, 24 Cal. App. 646, 142 Pac. 124.

20. **Same—Visiting scene of crime.**—The fact that two jurors in a homicide case visit alone the scene of the crime during the progress of the trial does not warrant a new trial, if it is not made to appear that they saw or heard at the place of the homicide anything different from or contradictory of the evidence adduced at the trial, or that their inspection resulted in an understanding of the evidence or any fact in the case in anywise different from that conveyed to them by the testimony of sworn witnesses and the details of the scene of the crime as depicted upon the diagram, already in evidence at the trial.—*People v. Yee King*, 24 Cal. App. 509, 141 Pac. 1047.

21. Such misconduct is not per se sufficient to warrant the granting of a new trial; but prejudice must be shown to have followed, and in the absence of an affirmative showing of resultant injury to the defendant, a verdict of guilty must stand.—*People v. Yee King*, 24 Cal. App. 509, 141 Pac. 1047.

22. **Peremptory challenge—As to generally.**—The correct practice in exercising peremptory challenges in the formation of a jury is to have twelve jurors in the box before requiring the parties to exercise their peremptory challenges, and then to call another juror whenever a peremptory challenge shall have been exercised, and the parties must challenge alternately as provided by section 601, post.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 18 Cal. App. Dec. 235, 367, 140 Pac. 955 (advance sheets appealed to supreme court and withdrawn from permanent Pac.).

23. It is within the discretion of the court to permit the plaintiff to exercise its remaining peremptory challenge after the panel is filled and all the jurors have been examined and passed for cause by both parties.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 147 Pac. 238.

24. **Same—Definition of.**—A peremptory challenge is defined as "an objection to a juror for which no reason need be given, but upon which the court must excuse him."—*People v. Edwards*, 163 Cal. 752, 127 Pac. 58.

See, also, Kerr's Cyc. Pen. Code, 2d ed., § 1069 and note.

25. Same—Examination not allowed.—There is no statutory authority for the examination of jurors solely for the purpose of a peremptory challenge, or for the allowance of questions which do not tend to prove some fact material to a challenge for cause.—*People v. Edwards*, 163 Cal. 752, 127 Pac. 58.

26. Qualification of juror—Effect of previous opinion.—The statement of a juror that he had talked with other persons, not witnesses, about the merits of the case, and that from what he had heard he had formed an opinion as to the guilt or innocence of the defendant; that the opinion was so fixed that it would require evidence to remove it, and that it was founded entirely upon public rumor and what he had read; and that, notwithstanding such opinion, he could, and would, if sworn as a juror in the case, set aside the opinion and act entirely upon the evidence as introduced, and act fairly and impartially as a juror upon the evidence given, was sufficient to qualify him as a juror, under section 1076 of the Penal Code. The fact that some parts of his examination contained statements by him inconsistent with the above statement merely raised a conflict of evidence as to his state of mind. Upon such conflict the decision of the trial court is conclusive.—*People v. Edwards*, 163 Cal. 752, 127 Pac. 58.

As to bias or prejudice or interest which disqualifies, see note 9 Am. St. Rep. 744.

As to challenge of juror on account of preconceived opinion, see note 36 Am. Dec. 521.

As to legislative regulation of qualifications of jurors as violating constitutional guaranty of right of trial by jury, see note Ann. Cas. 1912C, 784.

As to the disqualification of a juror as ground for a new trial, see note Ann. Cas. 1913A, 892.

27. Same—Ruling of trial court conclusive.—While the answers of the proposed jurors in some instances disclosed a state of mind closely bordering upon prejudice, yet where they each assert that they could try the defendant fairly, it was for the trial judge to determine that question, and, under such a state of facts, his rulings ought not to be disturbed.—*People v. Hill* (Cal. App.), 129 Pac. 475, 476, citing *Graybill v. De Young*, 146 Cal. 421, 80 Pac. 618.

28. Right of trial by jury—Waiver.—The constitution (art. I, § 7), after declaring the

inviolability of the right of trial by jury, provides that such trial may be waived in civil cases "by the consent of the parties, signified in such manner as may be prescribed by law." The legislature is thus given the sole power of declaring what shall constitute a waiver of trial by jury, and has exercised its power by the enactment of section 631, post, which provides that "trial by jury may be waived . . . in actions arising on contract" in certain specified cases.—*People v. Metropolitan Surety Co.*, 164 Cal. 174, 128 Pac. 324, 325.

29. It has been held, notwithstanding the provisions of section 631, post, that the court may make reasonable rules regulating the right of a party to claim a jury trial, and that such trial may properly be refused when there has been a failure to comply with such rules, but a rule of court providing that a failure to demand a jury when the cause is answered "Ready," upon the calling of the trial calendar, shall be deemed a waiver, is not authorized.—*People v. Metropolitan Surety Co.*, 164 Cal. 174, 128 Pac. 324, 325.

30. Where all that is stated in the bill of exceptions is that both parties were present by counsel, and that the defendant moved for a continuance, which was granted, even if the rule of court that a failure to demand a jury when the cause is answered "Ready," upon the calling of the trial calendar, shall be deemed a waiver of a jury trial, be regarded as valid and effective, the terms of the rule are not shown, and the right to a jury trial will not be held as waived by implication.—*People v. Metropolitan Surety Co.*, 164 Cal. 174, 128 Pac. 324.

31. Same—Entry of waiver in minutes—Necessity.—Since under section 631, subdivision 3, post, entry in the minutes of a waiver of jury trial is necessary in the case of an oral waiver, such entry will be necessary under a rule of court, and the mere failure to demand a jury not entered in the minutes would not constitute a waiver.—*People v. Metropolitan Surety Co.*, 164 Cal. 174, 128 Pac. 324.

32. Selection of jury—Special venire.—In an action for damages for an alleged negligence; it was proper for the court, in impaneling a jury to try the issues of fact, to take the names of the jurors from a special venire, summoned by the sheriff, instead of the supervisor's list, the sheriff not being shown to be disqualified.—*Perkins v. Sunset T. & T. Co.*, 155 Cal. 712, 715, 103 Pac. 190.

§ 601. CHALLENGES TO JURY—JOINDER IN—PEREMPTORY CHALLENGES. Either party may challenge the jurors, but where there are several parties on either side, they must join in the challenge before it can be made. The challenges are to individual jurors, and are either peremptory or for cause. Each party is entitled to four peremptory challenges. If no per-

emptory challenges are taken until the panel is full, they must be taken by the parties alternately, commencing with the plaintiff, and each party shall be entitled to have the panel full before exercising any peremptory challenge.

History: Enacted March 11, 1872, re-enactment of § 161 of Practice Act; amendment approved March 24, § 1874, Code Amdts. 1873-4, p. 310; April 24, 1919, Stats. and Amdts. 1919, p. 131. In effect July 22, 1919.

CHALLENGING JURY.

1. Constitutionality of section.
- 2, 3. Each party's right—To examine twelve jurors before exercising peremptory challenge.
- 4, 5. Passing jury once—including the juror afterwards sought to be challenged.
6. Right to challenge jurors peremptorily.
7. Separate trials having been refused.

1. **Constitutionality of section.**—Provision that several parties on each side must join in challenge construed not unconstitutional as violating the fourteenth amendment of the constitution of the United States in denying persons equal protection of the law, since it applies to all parties to the action where they are united with others either as plaintiffs or defendants.—*Muller v. Hale*, 138 Cal. 163, 165, 71 Pac. 81.

2. **Each party's right—To examine twelve jurors before exercising peremptory challenge.**—Each party has right to examine whole twelve jurors before exercising peremptory challenge as to any, and if some are excused for cause, the deficiency must be supplied with other names who may in like manner be examined until there shall be found in the box twelve competent and qualified jurors, and thereupon each party may exercise his right to peremptory challenge, but can not be required to exercise it prior to this time.—*People v. Scoggins*, 37

Cal. 676, 679; *Taylor v. Western Pac. R. Co.*, 45 Cal. 323, 330.

3. **Proper practice in selection of jury in a civil case is to fill the panel, and, upon one of the jurors being challenged for any cause or without cause, to immediately call another to take his place, so that party in determining whether to challenge or not may do so with full panel before him.**—*Silcox v. Lang*, 78 Cal. 118, 120, 123, 20 Pac. 297; *Vance v. Richardson*, 110 Cal. 414, 416, 42 Pac. 909.

4. **Passing jury once—including the juror afterwards sought to be challenged, does not cut off this right.**—*Silcox v. Lang*, 78 Cal. 118, 120, 123, 20 Pac. 297.

5. **Refusal of defendant to exercise peremptory challenge and passing jury to plaintiff, who accepted the jury, amounts to an acceptance of the jury so that the refusal of the court to permit defendant thereafter to exercise a peremptory challenge was not error.**—*Vance v. Richardson*, 110 Cal. 414, 416, 42 Pac. 909.

6. **Right to challenge jurors peremptorily is absolute.**—*Silcox v. Lang*, 78 Cal. 118, 123, 20 Pac. 297.

7. **Separate trials having been refused, in action to condemn property for a highway, it was not error to restrict defendant to four peremptory challenges in which all must join.**—*San Luis Obispo County v. Simas*, 1 Cal. App. 175, 81 Pac. 972, 975.

§ 602. GROUNDS OF CHALLENGE. Challenges for cause may be taken on one or more of the following grounds:

1. A want of any of the qualifications prescribed by this code to render a person competent as a juror;
2. Consanguinity or affinity within the fourth degree to any party, or to an officer of a corporation, which is a party;
3. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent, or debtor and creditor, to either party, or to an officer of a corporation which is a party, or being a member of the family of either party; or a partner in business with either party; or surety on any bond or obligation for either party, or being the holder of bonds or shares of the capital stock of a corporation which is a party.
4. Having served as a juror in a civil action or been a witness on a previous trial between the same parties, for the same cause of action; or having served as a juror within one year previously in any civil action or proceeding in which either party was plaintiff or defendant.

5. Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his interest as a member or citizen or taxpayer of a county, city and county, incorporated city or town, or other political subdivision of a county, or municipal water district.

6. Having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or of some of them.

7. The existence of a state of mind in the juror evincing enmity against or bias to either party.

8. That he is a party to an action pending in the court for which he is drawn and which action is set for trial before the panel of which he is a member.

History: Enacted March 11, 1872, re-enactment of § 162 of Practice Act as amended in 1860; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 310; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 145, held unconstitutional, see history, § 5 ante; March 20, 1907, Stats. and Amdts. 1907, p. 713, Kerr's Stats. and Amdts. 1906-7, p. 448; April 23, 1909, Stats. and Amdts. 1909, p. 1090; May 19, 1913, Stats. and Amdts. 1913, p. 510. In effect August 10, 1913.

CHALLENGES TO JURORS—GROUNDS OF.

1. Challenge for cause—Grounds of—Bias of juror.
2. Same—Same—Latitude of trial court.
3. Conclusion on challenge of juror.
4. Designation of particular ground on which challenge is taken.
- 5, 6. Determination of challenge—In general.
7. Same—Mixed question of law and fact.
8. Subdivision 2 construed—Liberal construction.
9. Same—Not necessary party in interest should be party in name to litigation.
10. Same—Brother of officer employed to enforce license-ordinance.
11. Same—Tenant whose lease requires him to deliver as rent share of property.
12. Subdivision 3—Debtor and creditor.
13. Subdivision 4 construed—Not ground of challenge in criminal cause.
14. Same—Special venire—Sheriff's disqualification as witness—Summoning by coroner.
15. Subdivision 5 construed—Does not expressly remove disqualification of judge.
16. Subdivision 7 construed—Not qualified by any provision.
17. Same—Abstract bias.
18. Same—Declaration of juror that he was hostile to all landlords.
19. Same—Prejudice against suits to recover damages for personal injuries.
20. Same—Right to unbiased and unprejudiced jurors.
21. Same—Rule excluding jurors for actual bias in civil cases, not to be confounded with rule in criminal cases.

22. Same—Statement by juror that he regarded actions for libel in somewhat the same character as speculations.

23, 24. Same—Statement by juror that he would give benefit to plaintiff.

25. Same—Statement that juror would go for biggest verdict.

1. **Challenge for cause—Grounds of—Bias of juror.**—The mere acquaintance of the jurors with the plaintiffs in an action for damages for negligence does not imply bias in their favor, any more than it implies prejudice against the defendant.—*Perkins v. Sunset T. & T. Co.*, 155 Cal. 715, 103 Pac. 190.

As to disqualification of juror for bias, see note 9 Am. St. Rep. 744.

As to personal knowledge of facts to be proved as effecting competency of jurors, see note 63 L. R. A. 807.

As to preconceived opinion of juror as ground for challenge, see 49 Am. Dec. 345.

2. **Same—Same—Latitude of trial court** allowed to be considerable and unless abuse of discretion clearly appears and that complaining party has been prejudiced, appellate court will uphold the challenge.—*McKernan v. Los Angeles Gas & El. Corp.*, 16 Cal. App. 280, 282, 116 Pac. 677.

3. **Conclusion on challenge of juror** is to be drawn not from any particular answer which juror makes to question asked him, but from his whole testimony.—*Baker v. Borello*, 136 Cal. 160, 166, 68 Pac. 591.

4. **Designation of the particular ground on which challenge is taken** must be specified in order to entitle it to consideration by court. It is not sufficient to say "I challenge juror for cause."—*Paige v. O'Neal*, 12 Cal. 483, 492.

5. **Determination of challenge—In general.**—The determination of a challenge will be interfered with on appeal only when evi-

dence adduced is of such character that it can be said from it as matter of law that juror is so prejudiced thereby that he will not be fair juror.—County of Mono v. Flanigan, 130 Cal. 105, 107, 62 Pac. 293; Graybill v. De Young, 146 Cal. 421, 423, 80 Pac. 618.

6. Discretion of trial court in excusing juror when it thought purposes of justice were to be subserved by excusing him, will be interfered with on appeal with great reluctance.—Grady v. Early, 18 Cal. 108, 110; Lawlor v. Linforth, 72 Cal. 205, 206, 13 Pac. 496.

7. Same.—Mixed question of law and fact.—Whether prospective juror is fair and impartial and should be allowed to sit in case to be determined in first instance by trial judge.—Graybill v. De Young, 146 Cal. 421, 423, 80 Pac. 618.

8. Subdivision 2 construed.—Liberal construction to be given to.—County of Mono v. Flanigan, 130 Cal. 105, 107, 62 Pac. 293.

9. Same.—Not necessary party in interest should be party in name to litigation; it is sufficient if it be shown that he is immediately, directly, and beneficially interested in result of litigation.—County of Mono v. Flanigan, 130 Cal. 105, 108, 62 Pac. 293. See Quinebaug Bank v. Leavens, 20 Conn. 87, 50 Am. Dec. 272 and Georgia R. Co. v. Hart, 60 Ga. 550 (relationship to stockholder in corporation party to litigation); Hartford Bank v. Hart, 3 Day (Conn.) 491, 3 Am. Dec. 274 (interested in principle involved in action); Woodbridge v. Raymond Kirby (Conn.), 279 (relationship to one who may be called upon to pay any judgment that may be recovered).

10. Same.—Brother of officer employed by county to enforce license-ordinance, under contract, by which officer was to receive ten per cent of the license paid, and an additional ten per cent of proceeds of particular case, was properly excluded on challenge.—County of Mono v. Flanigan, 130 Cal. 105, 108, 62 Pac. 293.

11. Same.—Tenant whose lease requires him to deliver as rent share of property.—Tenant under lease requiring him to deliver as rent share of crop after harvest, after the crop for the year had been delivered, is neither partner nor agent of plaintiff within this provision, and hence challenge was properly denied.—Arnold v. Producers' F. Co., 141 Cal. 738, 742, 75 Pac. 326.

As to disqualification of jurors for interest, see note 49 L. R. A. 423.

12. Subdivision 3.—Debtor and creditor.—Where the relation of patron and customer is shown and the talesman is excused by the court, without any question by appellant as to the existence of the relation of debtor and creditor, prejudice held not shown.—McKernan v. Los Angeles Gas etc. Co., 16 Cal. App. 283, 116 Pac. 677.

13. Subdivision 4 construed.—Not ground of challenge in criminal cause.—People v. Slater, 119 Cal. 620, 621, 51 Pac. 957.

14. Same.—Special venire.—Sheriff's disqualification as witness.—Summoning by coroner.—Under the provisions of subdivision 4 of the above section in a case in which the sheriff is a witness for the prosecution of a criminal cause he becomes thereby disqualified from serving the process upon the jurors designated to form the special panel, and a challenge to the special venire selected by him should be sustained upon formal showing of such disqualification, under the provisions of section 1064 of the Penal Code; hence an action of the court in such an instance directing the coroner to summon the special venire without formal showing of disqualification of sheriff, is erroneous was favorable to the defendant, and he is estopped to object.—People v. Stennett, — Cal. App. —, 197 Pac. 372.

15. Subdivision 5 construed.—Does not expressly remove disqualification of judge because of his membership or citizenship in a municipal corporation which, alike with that of the juror, existed at common law.—Meyer v. San Diego, 121 Cal. 102, 107, 66 Am. St. Rep. 22, 41 L. R. A. 762, 53 Pac. 434.

16. Subdivision 7 construed.—Not qualified by any provision that if juror shall swear that he can impartially try the case, notwithstanding his bias or prejudice, challenge will be disallowed, and hence where it appears from testimony that juror is biased in favor of plaintiff error to disallow challenge.—Lombardi v. California St. R. Co., 124 Cal. 311, 314, 57 Pac. 66.

17. Same.—Abstract bias in favor of party in position of plaintiff, did not render denial of challenge error where juror was entirely unacquainted with plaintiff or any party to suit.—Baker v. Borello, 136 Cal. 160, 166, 68 Pac. 591.

18. Same.—Declaration of juror that he was hostile to all landlords, one of whom was plaintiff, after having been accepted and informed of the nature of the action, rendered him incompetent.—Lawlor v. Linforth, 72 Cal. 205, 206, 13 Pac. 496.

19. Same.—Prejudice against suits to recover damages for personal injuries, under belief that many such were brought without merit, and that number was constantly increasing, so that the evidence of negligence would have to be clear before jurors would render verdict for plaintiff, renders such jurors disqualified on the ground of bias and hence it was error to deny challenge.—Quill v. Southern Pac. Co., 140 Cal. 268, 270, 73 Pac. 991.

20. Same.—Right to unbiased and unprejudiced jurors is inseparable and unalienable part of right to trial by jury guaranteed by constitution.—Lombardi v. California St. R. Co., 124 Cal. 311, 317, 57 Pac. 66,

21. **Same**—Rule excluding jurors for actual bias in civil cases, not to be confounded with the rule in criminal cases in relation to opinions founded or based on public rumor, statements in journals or common notoriety, which permits acceptance of juror provided it appears to court on his declaration that he can and will, notwithstanding such opinion, act impartially and fairly on matters to be submitted to him.—*Lombardi v. California St. R. Co.*, 124 Cal. 311, 317, 57 Pac. 66.

22. **Same**—Statement by juror that he regarded actions for libel in somewhat same character as speculations; that he felt in many instances they were unwarranted by facts, and that his being newspaper man, and his averse opinion of damage suits, might create prejudice in his mind and make him unfit to act as juror, did not render disallowance of challenge reversible error where he said that he would try case upon evidence and upon law given by the

court, it appearing he had no acquaintance with parties to suit and had no knowledge of facts involved in the case.—*Graybill v. De Young*, 146 Cal. 421, 422, 423, 80 Pac. 618.

23. **Same**—Statement by juror that he would give benefit to plaintiff if testimony was evenly balanced and would decide for him, shows bias in favor of plaintiff, though he stated that he would not give plaintiff verdict who did not show cause of action.—*Lombardi v. California St. R. Co.*, 124 Cal. 311, 317, 57 Pac. 66.

24. **Compare**: *McFadden v. Wallace*, 38 Cal. 51, 59.

25. **Same**—Statement that juror would go for biggest verdict if jury should find that plaintiff was entitled to recover in action for personal injuries, shows such bias in favor of plaintiff as renders disallowance of challenge error.—*Lombardi v. California St. R. Co.*, 124 Cal. 311, 314, 57 Pac. 66.

§ 603. CHALLENGES, HOW TRIED. Challenges for cause must be tried by the court. The juror challenged and any other person may be examined as a witness on the trial of the challenge.

History: Enacted March 11, 1872, re-enactment of § 163 of Practice Act.

As to trial of challenges, see *Kerr's Cyc. Pen. Code*, 2d ed., §§ 1078, 1082 and notes; also note 23 Am. Dec. 128.

§ 604. JURY TO BE SWORN. As soon as the jury is completed, an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between —, the plaintiff, and —, defendant, and a true verdict render according to the evidence.

History: Enacted March 11, 1872, re-enactment of § 160 of Practice Act.

1. **Jury—Presumption as to verdict.**—Under the provisions of the above section in an action for damages where the jury are instructed that they were to be guided by the evidence in determining the amount of damages to be awarded to the plaintiff and further instructed that it was not necessary, in order for them to estimate for

the damages, that any witness should testify thereto, and the jury were regularly sworn to render a verdict "according to the evidence" under the provisions of the above section, on appeal it will be presumed that they do so.—*Campbell v. Bradbury*, 179 Cal. 364, 374, 176 Pac. 685.

ARTICLE II.

CONDUCT OF THE TRIAL.

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| § 607. Order of proceedings on trial. | § 614. May come into court for further instructions. |
| § 608. Charge to the jury. Court must furnish, in writing, upon request, the points of law contained therein. | § 615. Proceedings in case a juror becomes sick. |
| § 609. Special instructions. | § 616. When prevented from giving verdict, the cause may be again tried. |
| § 610. View by jury of the premises. | § 617. While jury are absent, court may adjourn from time to time. Sealed verdict. |
| § 611. Admonition when jury permitted to separate. | § 618. Verdict, how declared. Form of. Polling the jury. |
| § 612. Jury may take with them certain papers. | § 619. Proceedings when verdict is informal. |
| § 613. Deliberation of jury, how conducted. | |

§ 607. ORDER OF PROCEEDINGS ON TRIAL. When the jury has been sworn, the trial must proceed in the following order, unless the judge, for special reasons, otherwise directs:

1. **The plaintiff**, after stating the issue and his case, must produce the evidence on his part;
2. **The defendant** may then open his defense, and offer his evidence in support thereof;
3. **The parties** may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case;
4. **When the evidence is concluded**, unless the case is submitted to the jury on either side or on both sides without argument, the plaintiff must commence and may conclude the argument;
5. **If several defendants, having separate defenses**, appear by different counsel, the court must determine their relative order in the evidence and argument;
6. **The court** may then charge the jury.

History: Enacted March 11, 1872.

CONTINUANCE OF TRIAL.

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| 1. As to "trial"—Definition of. | 15. Construction of section—Contestants against probate of will. |
| 2. Same—Proceedings on—Statutory regulations. | 16. Decision of court—Entry in minutes. |
| 3. Argument and conduct of counsel—Court has control of. | 17. Discretion of court. |
| 4. Same—Characterizing assault as felony. | 18. Demonstrative evidence—Exhibition of injured arm to jury. |
| 5. Same—Comments on excluded evidence. | 19. Exclusion of witness. |
| 6. Same—Reading instructions to jury. | 20, 21. Introduction of evidence—Waiver of objection. |
| 7. Same—Reading law-books to jury. | 22, 23. Misconduct of counsel—In general. |
| 8. Same—Reading pleadings. | 24, 25. Motion to strike out evidence—As to generally. |
| 9. Same—Reading sections of Civil Code to jury. | 26. Same—Effect of failure to object. |
| 10. Same—Referring to matters in former trial. | 27. Same—Requisites of motion. |
| 11. Same—Referring to matters not in evidence. | 28. Objection to form of question. |
| 12. Same—Right to address jury. | 29. Omnibus question—Right of court to reject. |
| 13, 14. Conduct of court toward witness. | 30, 31. Opening statement of counsel—In general. |

32. Order in which evidence is introduced—
Very much in discretion of the court.
33. Same—Denial of absolute transfer of policy.
34. Same—Error, if any, admitting copy of deed cured, how.
35. Same—Evidence on part of plaintiff to anticipate affirmative defense.
36. Same—Introduction of agreement set up in affirmative answer by means of plaintiff's witness.
37. Same—Proof of due execution of agreement, important to defense, by plaintiff's witness.
38. Province of the jury.
- 39, 40. Questions for court or jury.
- 41-43. Reopening cause for further evidence—After submission.
44. Same—Allowing plaintiff to show dismissal of action which had been pleaded as pending.
45. Same—Cumulative evidence.
46. Same—Discretion of trial court.
47. Same—Refusal of motion to permit supplying proof of steps leading up to tax-deed.
48. Same—Where amended complaint was permitted.
49. Same—Where no issue was raised by pleading to which evidence offered was relevant.
50. Rebuttal—In general.
51. Same—Admission of defendant.
52. Same—Contradiction of evidence of witness for defendant.
53. Same—Credibility of witnesses.
54. Same—Entering upon original cause and again proving same facts.
55. Same—Evidence of deraignment of title.
56. Same—Evidence that plaintiff was bona fide purchaser in good faith.
57. Same—Explanation of telegram introduced by defendant.
58. Same—Testimony on material point can not be kept back.
59. Same—Where matter was thoroughly gone into on presentation of main cause.
60. Setting cause for trial—Notice of application.
61. Submission of special issues to jury.
- 62, 63. Taking issues of fact away from jury.
64. Variance—To be taken advantage of at trial.
65. Withdrawal of evidence cures error, when.

1. As to "trial"—Definition of.—Except where there is a trial de novo after appeal, as in certain appeals from justices' courts, the word "trial," as commonly understood in our practice, includes nothing beyond

proceedings in the court in which the case originated. In criminal cases it embraces steps tending to and culminating in a judgment of conviction or acquittal. But an appeal is no part of a trial; it is a means for remedying errors which have occurred at a precedent trial.—*People v. McKamy*, 168 Cal. 530, 143 Cal. 752.

2. Same—Proceedings on—Statutory regulations.—In a proceeding under section 1664, post, to determine the rights of all persons claiming to be heirs, or entitled to distribution in a case in which the decedent left the bulk of his property to a charity and there were several persons claiming as legal heirs, the fact that the charity claimant failed to show that the testator left no heirs, did not constitute such a failure to establish its rights to the residue of the property so as to require a nonsuit of the action because the parties claiming as next of kin were, in effect plaintiffs, in so far as their own claims were concerned and could not be injured in their rights by the failure of any other claimant to establish his claim and especially where such failing claimant was a charity and a beneficiary under the will to property over and above that claimed by persons representing themselves to be heirs, and the only effect of the denial of a motion for a nonsuit was to regulate the order of the procedure which was within the discretion of the court, under the provisions of the above section.—*Estate of Freedman*, 178 Cal. 127, 172 Pac. 140.

3. Argument and conduct of counsel—Court has control of, and extraneous matters should not be brought in and commented upon.—*Knight v. Russ*, 77 Cal. 410, 414, 19 Pac. 698.

As to argument and conduct of counsel in a criminal case, see *Kerr's Cyc. Pen. Code*, 2d ed., §§ 1093 et seq. and notes.

As to argument on trial of issues by the court, see, post, § 631 and note.

As to comment by counsel on fact that one party to the action is a corporation being improper argument, see note *Ann. Cas.* 1912A, 1292.

As to instruction to jury to pay no attention to remarks of counsel being reversible error, see note *Ann. Cas.* 1912C, 817.

As to limitation on argument of counsel, see note 46 *Am. St. Rep.* 23.

As to misconduct of counsel, see pars. 22, 23, this note.

As to opening statement of counsel, see pars. 30, 31, this note.

4. Same—Characterizing assault as felony.—In an action to recover damages for personal injuries to the plaintiff as the result of an assault with a hammer, it was not improper for counsel for the plaintiff, in arguing to the jury, to state that if the assault was admitted, and was not justified

or in self-defense, the defendant would be liable to be prosecuted for a felony.—Hardy v. Schirmer, 163 Cal. 272, 124 Pac. 993.

5. Same—Comments on excluded evidence in such a way as to cast discredit upon the testimony given by a witness, is improper argument.—Chicago City K. Co. v. Gregory, 221 Ill. 591, 77 N. E. 1112, 6 Ann. Cas. 220 and note 224, 230.

6. Same—Reading instructions to jury and comments on them may be permitted within discretion of court.—Boreham v. Byrne, 83 Cal. 23, 29, 23 Pac. 212.

7. Same—Reading law-books to jury is not commendable, and hence refusal to allow defendant's counsel to read extracts from decision of supreme court is not error.—People v. Godwin, 123 Cal. 374, 376, 55 Pac. 1059.

As to reading law-books to jury by counsel, see note 1 Am. St. Rep. 54.

As to reading medical or other books in evidence, see post, § 1936 and note.

8. Same—Reading pleadings or calling attention of jury to facts alleged therein during argument is not improper.—Knight v. Russ, 77 Cal. 410, 414, 19 Pac. 698.

9. Same—Reading sections of the Civil Code to jury by counsel in his argument is within the discretion of the court to refuse.—Meyer v. Foster, 147 Cal. 166, 81 Pac. 402, 404. See People v. Anderson, 44 Cal. 65, 70; People v. Forsythe, 65 Cal. 101, 104, 3 Pac. 402; People v. Treadwell, 69 Cal. 226, 238, 7 Am. Crim. Rep. 152, 10 Pac. 502; Sullivan v. Royer, 72 Cal. 248, 1 Am. St. Rep. 51, 13 Pac. 655.

10. Same—Reference to matters in former trial.—Counsel, in arguing to the jury, may refer to matters covered by findings in a former trial, when such findings are before the jury.—Gjurich v. Fleg, 164 Cal. 429, 129 Pac. 464, 466.

11. Same—Reference to matters not in evidence in argument to jury is highly improper, because it is seeking to place before the jury indirectly that which could not be produced directly in the proof.—Little Rock R. & El. Co. v. Goener, 80 Ark. 158, 10 Ann. Cas. 273, 95 S. W. 1007.

12. Same—Right to address jury.—While the court announced its decision, or, more properly speaking, the impressions produced upon the mind of the court by the evidence, before an opportunity was afforded counsel for argument, nevertheless, when its attention was called to the fact by defendant's counsel, the court said that it had merely indicated its conclusions, which were subject to change if subsequent argument should suggest their impropriety, and offered to hear argument; but counsel for defendant refused to make any argument. No prejudicial error resulted from such conduct.—Jones v. Lewis, 19 Cal. App. 575, 126 Pac. 853, 854.

13. Conduct of court toward witness.—It is not prejudicial misconduct for the trial judge to tell a witness for the defendant to shut up, or to threaten him with a jail sentence, for the use of profane language.—People v. Vukojevich, 25 Cal. App. 459, 143 Pac. 1058.

14. The degree of courtesy to be exercised by the court toward a witness is not a subject for judicial review, unless it clearly appears that the defendant's rights were prejudiced thereby.—People v. Vukojevich, 25 Cal. App. 459, 143 Pac. 1058.

15. Construction of section—Contestants against probate of a will denying due execution are plaintiffs and must go forward with the evidence.—In matter of Dalrymple, 67 Cal. 444, 445, 7 Pac. 906; In matter of Latour, 140 Cal. 414, 420, 73 Pac. 1070, 74 Pac. 441.

16. Decision of court—Entry in minutes.—The entry in the minutes that damages for one month's unlawful detainer was six hundred and fifty dollars does not constitute the decision of the cause, but the decision which, under section 632, post, is the basis of the final judgment in the written findings of the court, and the court properly estimated the damages as of the date of the findings, which accounts for the proper increase thereof to the sum of one thousand twenty dollars.—Delger v. Jacobs, 19 Cal. App. 197, 125 Pac. 258.

As to decision of court, see, post, § 632 and note.

17. Discretion of court.—Trial courts in the exercise of their discretion may depart from the orderly procedure prescribed by this section for the conduct of a trial, but error can not ordinarily be predicated upon their refusal to do so.—Watkins v. Glas, 5 Cal. App. 68, 76, 89 Pac. 840.

18. Demonstrative evidence—Exhibition of injured arm to jury.—It was not prejudicial error to permit one of the plaintiffs to exhibit his injured arm to the jury, although the injury had been admitted by the answer.—Eaton v. Southern Pacific Co., 22 Cal. App. 461, 134 Pac. 801.

19. Exclusion of witness.—An application that witnesses be excluded from the courtroom while not testifying is addressed largely to the discretion of the trial court.—People v. Rogers, 163 Cal. 476, 126 Pac. 143.

As to the effect of disobedience of a rule excluding witness from the courtroom during the trial, see note 9 Ann. Cas. 368.

As to right of the criminal court to exclude persons from the courtroom, see notes 9 Ann. Cas. 111; 20 Ann. Cas. 632.

20. Introduction of evidence—Waiver of objection.—Where in an action by an administrator for damages resulting from the death of his intestate, alleged to have been caused by the defendants' negligence, the

complaint is silent as to the existence of any heirs, and the trial is proceeded with in all respects as though the pleadings sufficiently presented the issue, and evidence is admitted upon the subject without objection, the defendant can not take advantage of such defect on appeal.—*Slaughter v. Goldberg, Bowen & Co.*, 26 Cal. App. 318, 147 Pac. 90.

21. A general demurrer to such a complaint is not sufficient to apprise the plaintiff of the defect and relieve the defendant from the necessity of objecting to the evidence.—*Slaughter v. Goldberg, Bowen & Co.*, 26 Cal. App. 318, 147 Pac. 90.

22. **Misconduct of counsel—In general.**—Where the answer alleges, in a condemnation suit, that the plaintiff did not intend to construct the proposed railroad or any railroad whatever, and that it had begun the action for the purpose of acquiring the defendant's land, not for any public use whatever, nor in good faith, it is not misconduct for the plaintiff's attorney to make reference in his opening statement to divers previous occurrences tending to show that the plaintiff had encountered opposition and difficulty in building its line to the land, but that it had persisted in its purpose nevertheless.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

As to argument and conduct of counsel, see pars. 3-12, this note.

As to misconduct of counsel in argument, see note 9 Am. St. Rep. 559.

23. Counsel for defendants is acting within his rights in demanding an investigation, during the course of the trial, of the result of an interview had by plaintiffs' counsel with one of the jurors; and alleged misconduct on his part in commenting upon this fact to the jury and offering to let plaintiffs have the property for forty per cent of defendants' equity was cured, where the court at the time instructed the jury to exclude from its consideration everything except that which bore directly upon the issues of the case.—*Hansbrough v. Mann*, 26 Cal. App. 261, 146 Pac. 896.

24. **Motion to strike out evidence—As to generally.**—Where no objection was made to the admission of evidence until after the witnesses had left the stand and the case was closed, a motion to strike out such evidence comes too late at such a time, and is properly denied.—*Perkins v. Blauth*, 163 Cal. 782, 127 Pac. 50.

25. Where a witness has testified to his opinion of the mental condition of the testatrix, and also to other matters, a motion to strike out the entire testimony of the witness on the ground that he was not an intimate acquaintance will not lie.—*Estate of Huston*, 163 Cal. 166, 124 Pac. 852.

26. **Same—Effect of failure to object.**—While evidence allowed may have been

hearsay, yet where it, went in without objection, and was not contradicted, either by evidence or by mathematical calculation, the trial court was justified in accepting it.—*Lucy v. Davis*, 163 Cal. 611, 126 Pac. 490, 492.

As to effect of failure to move to strike out evidence admitted over objection, see note Ann. Cas. 1912C, 711.

As to how far, and the circumstances under which a party may estop himself to object to incompetent evidence, see note 130 Am. St. Rep. 758.

27. **Same—Requisites of motion.**—A motion, to be available, must be directed with precision to the testimony which the moving party desires the court to eliminate.—*Lucy v. Davis*, 163 Cal. 611, 126 Pac. 490, 492, citing *Wadleigh v. Phelps*, 149 Cal. 644, 87 Pac. 93.

28. **Objection to form of question.**—As to time of reservation of exception, see, post, § 624 and note par. 22.

29. **Omnibus question—Right of court to reject.**—While it is, of course, the duty of the trial courts, as it is that of all courts, to give to all the cases tried or heard before them all the time they require or that may be necessary to a just and proper decision of all the important questions involved therein, and that the mere fact that a court might in its judgment have given sufficient of its time to a particular case is no excuse or justification for an erroneous ruling, or for refusing to hear further testimony where it is proper in a legal aspect and is designed to illuminate one or all the disputed questions of fact, still there is no rule of evidence which requires a trial court to allow a large amount of testimony involving, perhaps, various specific topics, to be given in response to an omnibus question.—*Doudell v. Shoo*, 20 Cal. App. 424, 129 Pac. 478, 489.

30. **Opening statement of counsel—In general.**—The practice of directing a verdict, in advance of the introduction of evidence, upon the opening statement of one or the other party is a dangerous one and an order granting such motion can be upheld only where it is clear that counsel has undertaken to state all of the facts which he expects to prove, and it is plainly evident that the facts thus to be proved will not constitute a cause of action or a defense, as the case may be. Where, however, these conditions are complied with, the court is authorized to accept the statements and admissions of counsel and to direct a verdict required by such statements or admissions.—*Bias v. Reed*, 169 Cal. 33, 145 Pac. 516.

As to argument and conduct of counsel, see pars. 3-12, 22, 23, this note.

31. Where, after counsel had first outlined the facts to be proved by defendants, plaintiff moved the court for a direct ver-

dict, and counsel for defendants declared his readiness "to argue that proposition right now," whereupon the court directed that the reporter read over the opening statement, suggesting that counsel for defendants might have omitted something, and in response to this suggestion defendants' counsel amplified his statement, and argument on the motion proceeded, on the completion of which the court directed a verdict in favor of plaintiff, under the circumstances, there is no ground for the claim that the statement was made without an understanding of the necessity for making it exhaustive or that any substantial fact intended to be proved was omitted therefrom by inadvertence.—*Blas v. Reed*, 169 Cal. 33, 145 Pac. 516.

32. Order in which evidence is introduced—Very much in discretion of the court, and will not be interfered with by appellate court except in cases of abuse of such discretion.—*Bates v. Tower*, 103 Cal. 404, 406, 37 Pac. 385. See *Crosett v. Whelan*, 44 Cal. 200; *People v. Shainwold*, 51 Cal. 468.

As to effect of admission to change burden of proof and right to open and close, see note 61 L. R. A. 513.

As to order of proof in general, see, post, § 2042 and note; also note 3 Am. St. Rep. 489.

As to right to open and close, see note 82 Am. Dec. 139; 96 Am. Dec. 111.

33. Same—Denial of absolute transfer of policy for actual value which had been held under mortgage being alleged in answer being deemed made throws burden of proof on defendant, and hence it was not error to require defendant to first introduce evidence in support of such affirmative defense.—*Clarke v. Fast*, 128 Cal. 422, 423, 61 Pac. 72.

34. Same—Error, if any, admitting copy of the deed cured by subsequent proof of loss of deed.—*Kenniff v. Caulfield*, 140 Cal. 34, 47, 73 Pac. 803.

35. Same—Evidence on part of plaintiff to anticipate affirmative defense was properly excluded where it was not responsive to any allegations of complaint.—*Turner v. Southern Pac. Co.*, 142 Cal. 580, 581, 76 Pac. 384.

36. Same—Introduction of agreement set up in affirmative answer by means of plaintiff's witness was improper.—*Haines v. Snedigar*, 110 Cal. 18, 21, 42 Pac. 462.

37. Same—Proof of due execution of agreement, important to defense, by plaintiff's witness was not open to objection.—*Haines v. Snedigar*, 110 Cal. 18, 21, 42 Pac. 462.

38. Province of jury.—The jury must decide all questions of fact arising from the evidence, at least where there is a substantial conflict. Where there is no such

conflict, the court may direct a judgment, but otherwise it may instruct only as to the law.—*Estate of Everts*, 163 Cal. 449, 125 Pac. 1058.

As to taking issue of fact from jury, see pars. 30 and 31, this note.

As to what is deemed to be invasion by the court of the province of the jury, see note 14 Am. St. Rep. 36.

39. Questions for court or jury.—Where the facts are undisputed the court may determine, as matter of law, that they are wholly insufficient to give rise to any legal liability.—*Hill v. Pacific Gas & Elec. Corp.*, 22 Cal. App. 788, 136 Pac. 492.

40. The discretion of jurors in considering the effect of evidence as proof is not absolute. It is their duty to avoid fanciful theories and unreasonable inferences and not to resort to imagination or suspicion. If the trial court is satisfied that a verdict is supported by these alone, it should set it aside, even if there is a substantial conflict of the evidence. If there is no substantial conflict, and these are its only foundations, an appellate court should reverse the judgment.—*People v. Elmore*, 167 Cal. 205, 138 Pac. 989.

41. Reopening cause for further evidence—After submission.—Reopening case after submission for introduction of additional evidence is within discretion of court.—*Miller v. Sharp*, 49 Cal. 233; *Briswalter v. Palomares*, 66 Cal. 259, 5 Pac. 226; *Consolidated Nat. Bank v. Pacific Coast S. S. Co.*, 95 Cal. 1, 29 Am. St. Rep. 85, 88, 30 Pac. 96; *San Francisco Breweries v. Schurtz*, 104 Cal. 420, 423, 38 Pac. 92; *Douglass v. Willard*, 129 Cal. 38, 40, 61 Pac. 572; *Estate of Walker*, 148 Cal. 162, 82 Pac. 770, 771.

As to recalling witness, see, post, § 2050 and note.

42. And only in cases of abuse of discretion will the order of the lower court allowing such testimony to be introduced be interfered with.—*Douglass v. Willard*, 129 Cal. 38, 40, 61 Pac. 572.

43. A motion to reopen the case in order that the plaintiff may offer additional evidence is properly denied, where not supported by affidavit or other evidence justifying his omission to offer the evidence before the submission of the case, and where the evidence, if received, could not produce a different result.—*Pfoh v. Porter*, 23 Cal. App. 59, 137 Pac. 44.

44. Same—Allowing plaintiff to show dismissal of action which had been pleaded as pending in reference to the same cause, by clerk's register in proper form by reopening submission, was not error or even abuse of discretion.—*Loewenthal v. Coonan*, 135 Cal. 381, 384, 87 Am. St. Rep. 115, 67 Pac. 324.

43. **Same—Cumulative evidence** which would not have affected the result is not such evidence as would render refusal to reopen case after submission to permit its introduction an abuse of discretion.—*Estate of Walker*, 148 Cal. 162, 82 Pac. 770, 771.

46. **Same—Discretion of trial court.**—It is within the discretion of a trial court to reopen a case after the close of the evidence.—*Phenegar v. Paolini*, 27 Cal. App. 381, 149 Pac. 1008.

47. **Same—Refusal of motion to permit supplying proof of steps leading up to tax-deed** after submission of cause on the ground of inadvertence was not abuse of discretion where plaintiff purposely took chances of sufficiency of deed admitted by court in proof of his title after full objection and warning from defendant's counsel that proof of steps preceding deed was necessary to be made.—*Haines v. Young*, 132 Cal. 512, 514, 64 Pac. 1079.

48. **Same—Where amended complaint was permitted to be filed**, based on affidavit setting up facts learned since the case was tried and submitted and permission was given to take further testimony, it is within discretion of court as to what further relevant testimony to allow.—*Lee v. Murphy*, 119 Cal. 364, 367, 51 Pac. 549, 955.

49. **Same—Where no issue was raised by pleadings to which evidence offered was relevant**, permission to introduce evidence after the submission of case was properly denied.—*San Francisco Breweries v. Schurtz*, 104 Cal. 420, 426, 38 Pac. 92.

50. **Rebuttal—In general.**—It is within discretion of court to allow for good cause shown admission of evidence in rebuttal, which should have been presented in presenting main case.—*Patterson v. San Francisco & S. M. Elec. R. Co.*, 147 Cal. 178, 81 Pac. 531, 532. See *Lisman v. Early*, 15 Cal. 199; *Yankee Jim's U. W. Co. v. Crary*, 25 Cal. 504, 509, 85 Am. Dec. 145; *Kohler v. Wells F. & Co.*, 26 Cal. 606, 613.

51. **Same—Admissions of defendant** were properly excluded in rebuttal where plaintiff did not ask permission to reopen his case for the purpose of introducing such evidence.—*Young v. Brady*, 94 Cal. 128, 130, 29 Pac. 489.

52. **Same—Contradiction of evidence of witness for defendant**, so far as such evidence was in conflict with testimony already given by witness by recalling such witness.—*Phelps v. McGloan*, 42 Cal. 298, 303.

53. **Same—Credibility of witnesses** may be shown by rebutting evidence when it has been attacked by evidence of the opposite party.—*Wade v. Thayer*, 40 Cal. 578, 585.

54. **Same—Entering upon original cause and again proving same facts** that were proved by plaintiff in making his prima

facie case, is not authorized.—*Yankee Jim's U. W. Co. v. Crary*, 25 Cal. 504, 509, 85 Am. Dec. 145.

55. **Same—Evidence of deraignment of title** was properly admitted in rebuttal where defendant relied on adverse possession, plaintiff being entitled to rely on prima facie evidence of title in first case.—*Abbey H. Assoc. v. Willard*, 48 Cal. 614, 618.

56. **Same—Evidence that plaintiff was bona fide purchaser in good faith**, and without notice and for valuable consideration, was properly admitted on the part of plaintiff after he had rested in action to quiet title where defendant had introduced in evidence deed prior to date of plaintiff's deed.—*Douglass v. Willard*, 129 Cal. 38, 40, 61 Pac. 572.

57. **Same—Explanation of telegram introduced by defendant to contradict testimony of plaintiff** was properly permitted in rebuttal.—*Bradford v. Woodworth*, 108 Cal. 684, 687, 41 Pac. 797.

58. **Same—Testimony on material point can not be kept back until testimony of other party is drawn out and then introduced by way of rebuttal.**—*Kohler v. Wells F. & Co.*, 26 Cal. 606, 613.

59. **Same—Where matter was thoroughly gone into on presentation of main cause by plaintiff**, it was not error to permit further evidence as to such matters in rebuttal.—*Patterson v. San Francisco & S. M. Elec. R. Co.*, 147 Cal. 178, 81 Pac. 531, 532.

60. **Setting cause for trial—Notice of application.**—Section 594, post, does not require that a party intending to apply to the court to have a day fixed for the trial should give notice of his intended application to the adverse party. The section only requires that a five days' notice of the time set for the trial shall be given.—*McNeill & Co. v. John Doe*, 163 Cal. 338, 125 Pac. 345.

61. **Submission of special issues to jury.**—As to generally.—See, post, § 624 and note.

62. **Taking issues of fact away from jury.**—The rule is elementary and thoroughly settled that, in order to justify a trial judge in taking the issues of fact in suit away from a jury, the condition of evidence must be such that it may be said that plaintiff's case finds no substantial support in it. If there is any evidence at all of the substantial nature supporting the essential feature of the cause of action alleged in the complaint, then and in that case the motion for judgment of non-suit should not be granted.—*McEwen v. Occidental Life Ins. Co.*, 20 Cal. App. 477, 129 Pac. 598, 599.

63. Where it is clear that if the case had been allowed to go to the jury and the jury had found in favor of plaintiff, the court would have been compelled, on motion to that effect, to set aside the verdict and grant a new trial on the ground of insuffi-

clency of evidence to sustain the verdict, the trial court did not err in directing a verdict for defendant.—*Champion Gold Mining Co. v. Champion Mines*, 164 Cal. 205, 128 Pac. 315, 321.

64. Variance—To be taken advantage of at the trial.—Any variance between the allegations and the proof existing it must be taken advantage of at the trial; it can not be raised for the first time on appeal.—*Mercantile Trust Co. v. Doe*, 26 Cal. App. 246, 146 Pac. 692.

65. Withdrawal of evidence — Cures error, when—If evidence that has been taken in the course of a trial is withdrawn from the consideration of the jury by the direction of the court, such direction cures any error which may have been committed by its introduction, unless the court can see that such a strong impression has been made by the testimony upon the mind of the jury that its subsequent withdrawal will not remove the effect caused by its admission.—*Balaklala Consol. Copper Co. v. Reardon*, 220 Fed. 584.

§ 608. CHARGE TO THE JURY. COURT MUST FURNISH, IN WRITING, UPON REQUEST, THE POINTS OF LAW CONTAINED THEREIN. In charging the jury the court may state to them all matters of law which it thinks necessary for their information in giving their verdict; and, if it state the testimony of the case, it must inform the jury that they are the exclusive judges of all questions of fact. The court must furnish to either party, at the time, upon request, a statement in writing of the points of law contained in the charge, or sign, at the time, a statement of such points prepared and submitted by the counsel of either party.

History: Enacted March 11, 1872, re-enactment of § 165 of Practice Act; amended by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 145, held unconstitutional, see history, § 5 ante.

INSTRUCTION TO JURY.

- 1, 2. Right to instruction—In general.
- 3-6. Same—Based upon his theory of cause.
7. Same—Error in refusing to give instruction cured, when.
8. Same—Neglect to instruct jury on commonplace matter.
- 9, 10. Same—Refusal to give correct and pertinent instructions asked.
11. Same—Same—In equity cause.
12. Abstract instructions.
13. Same—Abstract, hypothetical, and inapplicable instructions.
14. Action for negligence—Rights of parties and duty of court.
- 15-18. Argumentative instructions.
19. Assumption by judge as to facts.
20. Burden of proof—Instructions as to.
21. Caution as to undue sympathy.
22. Conflicting instructions.
23. Confusing and contradictory statements.
24. Constitutional provision.
- 25-33. Construction of instructions—As a whole.
34. Same—Authorizing jury to find verdict for less than amount, as by admissions.
- 35, 36. Same—Instruction as to admissions in pleadings.
37. Same—Repetition of words.
38. Same—Same—Omission of “perponderance.”
39. Same—Submitting question as to facts which were admitted by pleadings.
- 40-42. Contradictory and inconsistent instructions.
- 43, 44. Same—Error in one of contradictory instructions not cured, how.
45. Same—Contradictory instructions where at request of appellant, is not material.
46. Court stating matters of law.
- 47-50. Direction of verdict—Is proper, when.
- 51, 52. Same—Instruction asking for verdict on one matter and entirely ignoring other considerations.
53. Same—Instruction that jury should find facts as admitted by pleadings.
54. Duty of court—In giving instruction.
- 55, 56. Same—Refusal to give, not prejudicial, when.
- 57-59. Error—Cured by other instructions.
60. Same—Stating at whose request given, not error.
61. Erroneous instruction—Disregarded by jury—Effect on appeal.
62. Exceptions to instructions—Must be taken prior to the retirement of jury.
63. Failure to instruct—Necessity for request.

64. Failure to request any further or more explicit instruction.
65. Inapplicable instructions.
- 66, 67. Inconsistent or contradictory instructions.
68. Incorrect instruction.
69. Instruction—As to “alleged defects.”
70. Same—As to form of verdict.
- 71, 72. Same—As to force and effect of evidence.
73. Same—As to policy of law.
74. Same—As to what plaintiff’s claim is.
- 75-77. Same—Erroneous in part.
- 78, 79. Same—Fully covered by other instructions.
- 80, 81. Same—Merely applying law to hypothetical facts.
82. Same—Not containing any rule of law.
- 83-85. Same—On abstract principle as to which there was no evidence.
- 86, 87. Same—On point not in issue.
- 88, 89. Same—On questions of fact.
- 90-92. Same—Same—Assuming a fact as to which there was no evidence.
93. Same—Same—Assuming facts favorable to appellant.
94. Same—Same—Assuming fact which was not productive of injury.
95. Same—Same—Where there was no conflict in evidence.
96. Same—Stating testimony as “tending to prove.”
- 97, 98. Same—Taking from jury principal issue of fact.
- 99, 100. Same—That if jury find by preponderance of evidence that certain enumerated facts existed.
101. Same—Where there is no conflict in evidence.
102. Same—Which could not have aided jury.
103. Invasion of province of jury.
104. Irrelevant instructions.
- 105, 106. Jury is bound by instructions.
- 107, 108. Misleading and erroneous instruction.
109. Same—Mere inadvertence in use of “plaintiff” instead of “defendant.”
110. Use of word “testimony” instead of “evidence.”
- 111-113. Modification of instruction by court.
114. Naming witnesses in instruction.
115. Omission in one instruction—Inclusion in another—Effect of.
116. Practice of loading down case with many instructions.
117. Presumption of knowledge—Instruction as to.
118. Quoting from decisions of courts in other causes.
119. Refusal of instruction permitting jury to find for greater sum than demanded in complaint.
- 120, 121. Refusal to use precise language contained in requested instructions.
122. Repetition of instruction.
123. Requested instruction—Already covered.
- 124, 125. Same—Improperly refused—Issue ignored.
126. Same—Part wrong.
127. Same—Properly refused, when.
128. Rule of ordinary prudence—Instruction as to.
129. Special instructions.
- 130, 131. Test of vicious instruction—Must be misleading.
132. Verbose instruction.

As to instructions to jury in criminal trials, see Kerr’s Cyc. Pen. Code, 2d ed., § 1127 and note.

1. As to right to instruction—In general.
—A litigant is entitled to proper instructions bearing upon any legitimate legal inference which may be drawn from evidence given; he is not limited in this right to instructions addressed only to the positive evidence in the case.—*Thomas v. Visalia Elec. R. Co.*, 169 Cal. 658, 147 Pac. 972.

2. A litigant is entitled to proper instructions bearing upon any legitimate legal inference which may be drawn from evidence given; he is not limited in this right to instructions addressed only to the positive evidence in the case.—*Thomas v. Visalia Elec. R. Co.*, 169 Cal. 568, 147 Pac. 972.

3. Same—Based upon his theory of cause.
—Each party is entitled to have instructions given based on his theory of case and the testimony of his witnesses.—*Renton v. Monnier*, 77 Cal. 449, 455, 19 Pac. 820; *Hunt v. Elliott*, 77 Cal. 588, 592, 20 Pac. 132; *Davis v. Russell*, 52 Cal. 611, 615, 28 Am. Rep. 647; *Buckley v. Silverberg*, 113 Cal. 673, 682, 45 Pac. 804; *Eppinger v. Kendrick*, 114 Cal. 620, 627, 46 Pac. 613.

4. Each party is entitled to have jury instructed on law of case on theory that they would regard all his testimony as true.—*Sperry v. Spaulding*, 45 Cal. 544, 549.

5. And judgment will not be reversed because evidence was insufficient to justify verdict upon that theory, if it appears that upon other facts covered by proper instructions verdict was right.—*Buckley v. Silverberg*, 113 Cal. 673, 682, 45 Pac. 804.

6. Either party has the right to have an instruction given to the jury based upon his theory of the case, if there is any evidence to support it.—*Klamath Lumber Co. v. Co-operative Land & Trust Co.*, 25 Cal. App. 678, 145 Pac. 159.

7. **Same—Error in refusing to give instruction cured when instruction was subsequently given covering same point.**—*Manning v. Dallas*, 73 Cal. 420, 422, 15 Pac. 34.

8. **Same—Neglect to instruct jury on commonplace matter, not ground for reversal, jurors being assumed to have ordinary intelligence and good sense.**—*Davis v. McNear*, 101 Cal. 606, 607, 36 Pac. 105; *Estate of Keegan*, 139 Cal. 123, 127, 72 Pac. 828.

9. **Same—Refusal to give correct and pertinent instructions asked is error.**—*Sukeforth v. Lord*, 87 Cal. 399, 408, 25 Pac. 497; *Mabb v. Stewart*, 133 Cal. 556, 565, 65 Pac. 1085.

10. But refusal to give instruction purporting to be statement of what plaintiff alleged in complaint, and what defendant denied, no error where such facts had been correctly stated to jury by counsel in their statement, under section 607, ante.—*Cody v. Market St. R. Co.*, 148 Cal. 90, 82 Pac. 666, 668.

11. **Same—Same—In equity cause, refusal to give instructions is not cause for reversal where court proceeded at length to find on all issues submitted to jury.**—*Hewlett v. Pilcher*, 85 Cal. 542, 545; *Riley v. Martinelli*, 97 Cal. 575, 578, 33 Am. St. Rep. 209, 21 L. R. A. 83, 32 Pac. 579. See *Branger v. Chevallier*, 9 Cal. 353, 360.

12. **Abstract instructions.**—Requested instructions which are inapplicable to any evidence adduced are properly rejected.—*Courteney v. Standard Box Co.*, 16 Cal. App. 616, 117 Pac. 778.

13. **Same—Abstract, hypothetical, and inapplicable instructions.**—Requested instructions that have no application to the evidence adduced are properly refused.—*Shaw v. Shaw*, 160 Cal. 739, 117 Pac. 1048.

As to inapplicable instructions, see par. 63, this note.

14. **Action for negligence—Rights of parties and duty of court.**—Each party is entitled to have an instruction based upon his theory of the case, if there is evidence to support it; and where, in an action for negligence, the defense is contributory negligence of plaintiff such defense is a question of fact, and, if the theory of the plaintiff in reference thereto is sanctioned by law and supported by substantial evidence, it was the duty of the court to instruct the jury as to what should be their conclusion if they found the facts to be as recited in the instruction.—*Wanlorek v. United Railroads*, 117 Cal. App. 128, 118 Pac. 947.

15. **Argumentative instructions** are improper.—*Morris v. Lachman*, 68 Cal. 109, 8 Pac. 799; *Mabb v. Stewart*, 133 Cal. 556, 565, 65 Pac. 1085. See *People v. McNamara*, 94 Cal. 509, 29 Pac. 953; *People v. Verenesneckcockhoff*, 129 Cal. 497, 58 Pac. 156, 62 Pac. 111.

16. While objectionable, will not be held error where was not prejudicial to appellant's right.—*People v. Stanton*, 106 Cal. 139, 142, 39 Pac. 525.

17. **Argumentative instructions to a jury** are not permissible and should never be given.—*People v. Horn*, 25 Cal. App. 583, 144 Pac. 641.

18. **Argumentative instructions to a jury** are not permissible and should never be given.—*People v. Horn*, 25 Cal. App. 583, 144 Pac. 641.

19. **Assumption by judge as to facts.**—In an action for injuries to a servant, the jury was instructed as follows: "If you find that the task at which the plaintiff was working when the accident occurred was, under all the circumstances of the case, one of special danger, then I charge you that such knowledge of danger as plaintiff may have acquired at the usual tasks of his employment does not necessarily raise the presumption that he knew of such special danger. A servant directed to undertake work outside of that which he is engaged to do is not presumed to be aware of its peculiar risks, and therefore, if the master does not fully explain them to the servant before putting him at such new work, the servant is entitled to assume that it has no greater risk than those which attach to his regular work." This manifestly does not assume that there was any special danger, as the instruction is hypothetical in that respect. It does not assume that plaintiff's only source of knowledge was that acquired from his usual tasks, nor does it imply that the employer was called upon to fully explain the danger regardless of any knowledge that the plaintiff may have had.—*Petersen v. California Cotton Mills Co.*, 20 Cal. App. 751, 130 Pac. 169, 175.

See, also, pars. 90-94, this note.

20. **Burden of proof—Instructions as to.**—The burden of proof is satisfied by the weight of the evidence or preponderance of probability, and an instruction that "the burden of proof of such contributory negligence rests upon the defendant; unless it proves the same to your satisfaction by a preponderance of evidence," is erroneous as to the phrase in black type.—*Hutson v. Southern Calif. R. Co.*, 150 Cal. 705, 89 Pac. 1093.

21. **Caution as to undue sympathy.**—Instruction on this subject held to be in the discretion of the court.—*Spear v. United Railroads*, 16 Cal. App. 652, 117 Pac. 956.

22. **Conflicting instructions.**—Where the instructions given were substantially conflicting, so that correct instructions are in direct conflict with other instructions given, so as to render the charge of the court in its entirety so hopelessly contradictory and inconsistent in the application of the law to the vital issues of the case as to make it impossible to determine which of the trial

court's views of the law the jury adopted as the basis for this verdict, such conflicting instructions require a reversal, since a material error in any of them must be deemed prejudicial.—*Guthrie v. Carney*, 19 Cal. App. 144, 124 Pac. 1045.

See, also, pars. 23, 40-45, this note.

23. Confusing and contradictory statements will not cure error in giving instructions and refusing instructions which correctly stated the law.—*Vallens v. Tillmann*, 103 Cal. 187, 193, 37 Pac. 213.

24. Constitutional provision.—Under the provisions of the constitution prohibiting judges from charging juries as to the facts, an instruction in a will contest calculated to discredit the subscribing witness in comparison with that of other witnesses, was properly refused.—*Huyck v. Rennie*, 151 Cal. 417, 90 Pac. 929.

25. Construction of instructions—As a whole.—Instructions to be read and considered as whole, and fact that when taken separately some of them failed to enunciate in precise terms and with legal accuracy, propositions of law does not necessarily render them erroneous. It is sufficient if all instructions taken together and not being inconsistent with each other or confusing shall give jury a fair and just notion of law upon point discussed.—*Stephenson v. Southern Pac. Co.*, 102 Cal. 143, 150, 34 Pac. 618, 36 Pac. 407. See *People v. McDowell*, 64 Cal. 467, 469, 3 Pac. 124; *People v. Turcott*, 65 Cal. 126, 3 Pac. 461; *Davis v. Button*, 78 Cal. 247, 20 Pac. 545, 18 Pac. 133; *People v. Lee Chuck*, 78 Cal. 317, 339, 8 Am. Cr. Rep. 434, 20 Pac. 719; *Monaghan v. Pacific R. M. Co.*, 81 Cal. 190, 22 Pac. 590; *Murray v. White*, 82 Cal. 119; *Doty v. O'Neill*, 95 Cal. 244, 245, 30 Pac. 526; *Hanscom v. Drullard*, 79 Cal. 234, 238, 21 Pac. 736; *Nichol v. Lau-meister*, 102 Cal. 658, 661, 36 Pac. 925; *People v. Anderson*, 105 Cal. 32, 35, 38 Pac. 513.

26. Instructions given to jury are to be considered as whole, and if when so considered law is correctly stated as applicable to case before court, jury will be deemed to have properly applied law as thus stated. It is not to be assumed that jury will have disregarded one part of instruction any more than another, but they will be assumed to have given full consideration to each and every proposition of law that court has laid before them.—*Feliz v. Feliz*, 105 Cal. 1, 6, 38 Pac. 521.

27. Instruction which taken in connection with other instructions could not have misled jury will not be held erroneous.—*Thomas v. Gates*, 126 Cal. 1, 9, 58 Pac. 315; *Wilson v. Southern Pacific R. R. Co.*, 62 Cal. 164, 176.

28. Where jury, taking instructions as whole, understood words "safe and suitable" as meaning "reasonably safe and suitable," an instruction that employer is bound to furnish his employees with "safe and suit-

able" appliances was not erroneous.—*Wall v. Marshutz*, 138 Cal. 522, 526, 71 Pac. 692.

29. Instructions must be considered as whole and if it appears therefrom that jury was fairly and fully instructed on all law applicable to facts in case, judgment will not be reversed because particular instructions taken alone may not have embodied all law applicable.—*Anderson v. Seropian*, 147 Cal. 201, 81 Pac. 521, 527. See *People v. Jackson*, 138 Cal. 462, 465, 71 Pac. 566.

30. All law applicable to case need not be stated in single instruction.—*Anderson v. Seropian*, 147 Cal. 201, 81 Pac. 521, 527. See *Bradley v. Lee*, 38 Cal. 362, 365.

31. Construed as a whole, and if not contradictory, and if supplemented by each other, they fairly state the law, a case will not be reversed because one particular instruction does not state all the rule with its modifications.—*Kearney v. Bell*, 160 Cal. 665, 117 Pac. 925.

32. Instructions are to be construed as a whole, and it is not a proper test to take into consideration excerpts or particular instructions; but if, taken as a whole, they lay down the correct rule of law applicable to the facts, they meet all essential requirements.—*Peters v. Southern Pac. Co.*, 160 Cal. 69, 116 Pac. 400.

33. Instructions are to be read and considered as a whole, and the fact that, when taken separately, some of them may fail to enunciate in precise terms, and with legal accuracy, propositions of law, does not necessarily render them erroneous. It is sufficient if all the instructions taken together, and not being inconsistent with each other or confusing, shall give to the jury a fair and just notion of the law upon the point discussed.—*Ingalls v. Monte Cristo Oil & Dev. Co.*, 23 Cal. App. 652, 139 Pac. 97.

34. Same—Authorizing jury to find verdict for less than amount, as fixed by admissions in pleading, erroneous.—*Sukeforth v. Lord*, 87 Cal. 399, 408, 25 Pac. 497.

35. Same—Instruction as to admissions in pleadings is not erroneous.—*Dyas v. Southern Pac. Co.*, 140 Cal. 296, 307, 73 Pac. 972.

36. Instruction leaving to the jury to determine whether or not answer denies allegations of the complaint, was error, construction of the pleadings being for the court.—*Taylor v. Middleton*, 67 Cal. 656, 657, 8 Pac. 594.

37. Same—Repetition of words.—Where in action against dentist for malpractice, instruction informed jury that respondent could not recover unless such acts were carelessly or unskillfully done, every instruction need not repeat such words.—*Mernin v. Corey*, 145 Cal. 573, 79 Pac. 174, 175.

38. Same—Same—Omission of "preponderance" in instruction was not error where law relating to burden of proof was fully

and repeatedly called to attention of the jury.—*Humphrey v. Pope*, 1 Cal. App. 374, 82 Pac. 223, 224. See *People v. Morine*, 61 Cal. 372.

39. Same — Submitting question as to facts which were admitted by pleadings, properly refused, as to give it would be error.—*Tevis v. Hicks*, 41 Cal. 123, 127; *Taylor v. Middleton*, 67 Cal. 656, 657, 8 Pac. 954.

40. Contradictory and inconsistent instructions are erroneous. — *McCreery v. Everding*, 44 Cal. 246; *Bank of Stockton v. Bliven*, 53 Cal. 708, 709; *Harrison v. Spring Valley H. G. Co.*, 65 Cal. 376, 378, 4 Pac. 381; *Haight v. Vallet*, 89 Cal. 245, 249, 23 Am. St. Rep. 465, 26 Pac. 897.

As to conflicting instructions, see par. 22, this note.

41. And can not be harmonized by declarations that one meant same thing as the other.—*Harrison v. Spring Valley H. G. Co.*, 65 Cal. 376, 378, 4 Pac. 381.

42. Inconsistent instructions which do not lay down two different propositions of law so repugnant to each other that in determination of the material facts in issue jury might be misled thereby, and which are not so contradictory that it was impossible for jury in considering their verdict to know by which instruction they should be guided, is not prejudicial error.—*James v. E. G. Lyons Co.*, 147 Cal. 69, 81 Pac. 275.

43. Same—Error in one of contradictory instructions not cured by other instruction, because it is impossible to determine on which of them the jury acted.—*Chidester v. Consolidated P. D. Co.*, 53 Cal. 56, 58; *Sappenfeld v. Main St. A. P. R. Co.*, 91 Cal. 48, 59, 27 Pac. 590.

As to curing erroneous instructions by fact that correct instructions accompany them, see note 41 Am. Dec. 649.

44. Where instructions on a material point are contradictory, it is impossible for jury to decide which should prevail and equally impossible after verdict to know that jury was not influenced by instruction which was erroneous, as one or other must be where two are repugnant to each other.—*Brown v. McAllister*, 39 Cal. 573, 577; *Agulre v. Alexander*, 58 Cal. 21, 27; *Sappenfeld v. Main St. & A. P. R. Co.*, 91 Cal. 48, 59, 27 Pac. 590.

45. Same — Contradictory instructions where at request of appellant is not material.—*Wall v. Marshutz*, 138 Cal. 522, 526, 71 Pac. 692. See *Williams v. Southern Pac. R. Co.*, 110 Cal. 457, 462, 42 Pac. 974.

This ruling contravenes rule that one inviting error will not be heard to complaint.—See *Kerr's California Digest*, p. 524, § 1111.

46. Court stating matters of law in instructions.—See, post, §§ 657, subd. 7, 2061, 2102 and notes; Const. 1879, art. VI, § 19, *I Henning's General Laws*, 3d ed., p. lv.

As to instructions assuming facts as proved, see pars. 19, 90-94, this note.

47. Direction of verdict—is proper when there is no conflict in the evidence.—*Martin v. Ward*, 69 Cal. 129, 132, 10 Pac. 276; *Chenery v. Palmer*, 6 Cal. 122; *Page v. Tucker*, 54 Cal. 121.

As to direction of verdict, see notes 2 L. R. A. 340; 4 L. R. A. 776.

48. Direction of verdict is justified not merely where there is no conflict in evidence, but where evidence is such that it is clearly insufficient to support verdict in favor of party against whom direction is given, unless circumstances of case indicate that upon another trial evidence may be materially different, in which case facts should be submitted to jury in order that new trial may be had.—*Lacey v. Porter*, 103 Cal. 597, 606, 37 Pac. 635.

49. Correctness of direction of verdict depends on whether there was any evidence before jury which would have authorized different verdict. If upon trial of issue there is any conflict in evidence or if different inferences of fact may be drawn from evidence, it is function of jury to determine issue, but if upon all evidence of case only one conclusion or finding can be made it is immaterial whether jury make that conclusion or finding by direction of court or upon their own deliberation.—*Los Angeles F. & M. Co. v. Thompson*, 117 Cal. 594, 600, 49 Pac. 714. See *Levitzy v. Canning*, 33 Cal. 299, 305; *O'Connor v. Witherby*, 111 Cal. 523, 528, 44 Pac. 227. See *Wilson v. Alcatraz A. Co.*, 142 Cal. 182, 189, 75 Pac. 787.

50. Instruction that "if there is some evidence in favor of plaintiff's side of case whether it be little or great, it is your duty to find in her favor," would be erroneous in any conceivable case.—*Bunting v. Saltz*, 84 Cal. 168, 172, 24 Pac. 167.

51. Same—Instruction asking for verdict on one matter and entirely ignoring other considerations and facts in case, properly refused.—*Anderson v. Seropian*, 147 Cal. 204, 81 Pac. 521, 527.

52. Instruction directing jury to find verdict for plaintiff without considering defense of statute of limitations set up in answer and to support which evidence has been introduced, error.—*Heilbron v. Heinen*, 72 Cal. 376, 378, 14 Pac. 24.

53. Same—Instruction that jury should find facts as admitted by pleadings in favor of plaintiff was not instruction to find verdict in favor of plaintiff.—*Blood v. Light*, 31 Cal. 115, 117.

54. Duty of court—In giving instruction.—The court is not under any duty to model its instructions solely upon the evidence given on behalf of plaintiff; its duty is to give instructions expounding the law upon any reasonable theory of the case finding support in the evidence.—*Raymond v. Hill*, 168 Cal. 473, 143 Pac. 743.

55. Same—Refusal to give, not prejudicial, when.—Where the principle declared in a rejected instruction was in substance given in the court's charge, the refusal to allow such instruction was not prejudicial. —*Teale v. Southern Pac. R. Co.*, 20 Cal. App. 570, 129 Pac. 949, 955.

56. Where the court properly instructed the jury upon all of the material issues involved in the case, it is held that there was no prejudicial error in refusing instructions, which were either substantially embodied in the charge, or which were rendered immaterial by the special findings of the jury to the contrary, or which called for the erroneous assumption that the motorman was merely a fellow-servant of the plaintiff, and not a vice-principal. —*O'Connell v. United Railroads*, 19 Cal. App. 36, 124 Pac. 1022.

57. Error—Cured by other instructions. —Although, in a personal injury case, an instruction as to the measure of damages should properly adhere to the statutory form declaring that a plaintiff is entitled to damages for "detriment resulting after the commencement thereof and certain to result in the future" (Civil Code, § 3283), the use of the phrase "reasonably probable" will not be considered erroneous where the instruction ends with a correct declaration of the law. —*Lonnergan v. Stansbury*, 164 Cal. 488, 129 Pac. 770, 772.

58. While, in an action for damages for personal injuries, an instruction that the duty of a master is "to furnish suitable appliances by which the service is to be performed and to keep them in repair and order, and to make such provisions for the safety of the employees as will reasonably protect them from the dangers incident to their employment," might be considered erroneous if standing alone, since it fails to state that a master has performed his duty if he has exercised ordinary care and diligence in securing proper appliances, yet, if, when taken in connection with the other instructions given in the case, there could have been no misunderstanding of the jury, such instruction will not be held erroneous. —*Lonnergan v. Stansbury*, 164 Cal. 488, 129 Pac. 770, 772.

59. Where the court improperly refused an instruction to the effect that if the jury should find that the contractor for the foundation carelessly did the work in an unworkmanlike manner, and not in conformity with the specifications, and that plaintiff carelessly failed properly to inspect or test the work, and carelessly certified that the work was done properly and as specified, and that if this negligence of the plaintiff caused damage to defendant, the damage should be deducted from the value of the plaintiff's services, such error is not cured by an instruction directing the jury that "the mere fact that some of the work was negligently done does not defeat the plaintiff's right of compensation.

He is still entitled to compensation for the reasonable value of his services; and in determining such reasonable value of his services, you may take into consideration the actual amount of damages, if any, which defendant has proved that he had suffered by reason of such negligence." This instruction does not properly cover the point. —*Hart v. Buckley*, 164 Cal. 160, 128 Pac. 29, 31.

60. Same — Stating at whose request given, not error.—In giving instructions to the jury the court does not err in prefacing them with a statement as to the party requesting them. The jury must know that when adopted the instructions become those of the court without regard to their authorship. —*Wilmarth v. Pacific Mutual Life Ins. Co.*, 168 Cal. 536, 143 Pac. 780.

61. Erroneous instruction — Disregarded by jury—Effect on appeal.—While the jury should conform to the instructions of the court upon matters of law, if it appear to the appellate tribunal that an instruction was erroneous, it will not disregard a verdict contrary to the instruction. —*Tousley v. Pacific Elec. R. Co.*, 166 Cal. 457, 137 Pac. 31.

62. Exceptions to instructions—Must be taken prior to the retirement of the jury for the consideration of the case or they will not be considered. —*Miller v. Petrocelli*, 236 Fed. 846.

63. Failure to instruct—Necessity for request.—The failure of the trial court to instruct the jury as to what constituted a preponderance of evidence can not be taken advantage of on appeal by the defendant, in the absence of a request for such an instruction on the trial. —*Hardy v. Schirmer*, 163 Cal. 272, 124 Pac. 993.

64. Failure to request any further or more explicit instruction in regard to point involved will prevent plaintiff from complaining that it was not given. —*Rice v. Whitmore*, 74 Cal. 619, 624, 5 Am. St. Rep. 479, 16 Pac. 501; *Nichol v. Laumeister*, 102 Cal. 658, 660, 36 Pac. 925.

65. Inapplicable instruction, no evidence having been introduced in relation to the matter, properly refused. —*Ward Land & Stock Co. v. Mapes*, 147 Cal. 751, 82 Pac. 426.

As to abstract, hypothetical and inapplicable instructions, see par. 13, this note.

66. Inconsistent or contradictory instructions.—Where in one part of its charge the court in effect declared it to be the duty of a railroad company to maintain sufficient light at its stations, while in another part thereof it said that the company was required to keep its stations properly lighted, the contention that the court thus gave to the jury two different standards of the duty which the company was required to observe in that particular is devoid of merit. The jury, as men of intelligence, and keeping in

mind and considering the charge of the court in its entry, must be assumed to have understood the terms, "properly lighted," "sufficiently lighted," and "insufficient light," as used in the court's charge, to mean such light or a want thereof "as an ordinarily careful and prudent person in the same relation and under the same conditions and circumstances would have furnished."—*Teale v. Southern Pac. R. Co.*, 20 Cal. App. 570, 129 Pac. 949, 955.

67. Inconsistent instructions must be plainly misleading or confusing to make them prejudicial.—*Parkin v. Grayson-Owen Co.*, 25 Cal. App. 269, 143 Pac. 257.

68. Incorrect instructions were properly refused.—*Silva v. Bair*, 141 Cal. 599, 604, 75 Pac. 162.

69. Instruction—As to "alleged defects" in action for personal injuries does not constitute instruction on matter of fact.—*Anderson v. Seroplan*, 147 Cal. 201, 81 Pac. 521, 527.

70. Same—As to form of verdict may properly be given and where instruction was that if jury found for defendant form of verdict should be: "We, the jury, find for the defendant," and if for plaintiff: "We, the jury, find for the plaintiff" for recovery of possession of premises first described in complaint and for the sum of \$—— damages, does not amount to instruction on matter of fact in requiring jury to give their verdict for whole of premises.—*Feliz v. Feliz*, 105 Cal. 1, 6, 38 Pac. 521.

71. Same—As to force and effect of evidence on question of fraudulent intent which is made question of fact, erroneous.—*Miller v. Stewart*, 24 Cal. 502, 504.

72. Instruction on matter of fact involved in weight of evidence, erroneous.—*McNeill v. Barney*, 51 Cal. 603, 605.

As to instructions as to preponderance of evidence, see, post, § 2061 and note.

As to instructions as to weight of evidence, see, post, § 2061 and note.

73. Same—As to policy of law in reference to any particular question were properly refused, this being a question for court and not for the jury.—*Ward Land & Stock Co. v. Mapes*, 147 Cal. 747, 82 Pac. 426, 428.

74. Same—As to what plaintiff's claim is, in general terms, and not stating facts as being proved, does not invade province of jury.—*Jarman v. Rea*, 137 Cal. 339, 348, 70 Pac. 216. See *Carragher v. San Francisco B. Co.*, 81 Cal. 98, 99, 22 Pac. 480.

75. Same—Erroneous in part was properly refused.—*Marriner v. Dennison*, 78 Cal. 202, 216, 20 Pac. 386; *Smith v. Richmond*, 19 Cal. 476, 485; *Preston v. Keyes*, 23 Cal. 194; *Williamson v. Tobey*, 86 Cal. 497, 498, 25 Pac. 65; *Williams v. Casebeer*, 126 Cal. 77, 88, 58 Pac. 380.

76. Instructions which could not be given without modification were properly refused.

—*Garlick v. Bowers*, 66 Cal. 122, 4 Pac. 1138.

77. If party asks instruction on abstract proposition he must take risk of its being correct in all its parts and where there was no testimony as to part of facts on which instruction was predicated its refusal is not error.—*Thompson v. Paige*, 16 Cal. 77, 79.

78. Same—Fully covered by other instructions, properly refused though it was correct.—*Fairchild v. California S. Co.*, 13 Cal. 599, 605; *Witherby v. Thomas*, 55 Cal. 9, 13; *Sharp v. Blankenship*, 79 Cal. 411, 414, 21 Pac. 842; *De Noon v. Morrison*, 83 Cal. 163, 166, 23 Pac. 374; *Fox v. Stockton C. H. & A. Wks.*, 83 Cal. 333, 343, 23 Pac. 295; *Haas v. Whittier*, 97 Cal. 411, 420, 32 Pac. 449; *Stevens v. San Francisco & N. P. R. Co.*, 100 Cal. 554, 568, 35 Pac. 165; *Nichol v. Laumeister*, 102 Cal. 658, 660, 36 Pac. 925; *Merguire v. O'Donnell*, 103 Cal. 50, 52, 36 Pac. 1033; *Higgins v. Williams*, 114 Cal. 176, 185, 45 Pac. 1041; *Tonini v. Cevasco*, 114 Cal. 266, 274, 46 Pac. 103; *Verdell v. Gray's Harbor C. Co.*, 115 Cal. 517, 528, 47 Pac. 364; *Estrella V. Co. v. Butler*, 125 Cal. 232, 239, 57 Pac. 890; *Thomas v. Gates*, 126 Cal. 1, 7, 58 Pac. 315; *Silveira v. Iverson*, 128 Cal. 187, 191, 60 Pac. 687; *Wahlgreen v. Market St. R. Co.*, 132 Cal. 656, 660, 62 Pac. 308, 64 Pac. 993; *Cook v. Los Angeles P. E. R. Co.*, 134 Cal. 279, 281, 66 Pac. 306; In matter of *Keegan*, 139 Cal. 123, 127, 72 Pac. 828; *Trabing v. California N. & I. Co.*, 6 Cal. Unrep. 696, 65 Pac. 478, 479; *Doolin v. Omnibus C. Co.*, 140 Cal. 369, 373, 73 Pac. 1060; *Davis v. Diamond C. & L. Co.*, 146 Cal. 59, 79 Pac. 596, 597.

79. Instruction that plaintiff is entitled to no sympathy from jury was properly refused in action to recover money from an agent to whom it was intrusted to buy mining stock on margin where court did tell them that there are no equities between parties and their rights are to be determined by strict rules of law.—*Parker v. Otis*, 130 Cal. 322, 332, 92 Am. St. Rep. 56, 62 Pac. 571, 927.

80. Same—Merely applying law to hypothetical facts and submitting to jury question whether facts hypothetically stated are true, is not instruction as to questions of fact, and hence improperly refused.—*Baddeley v. Shea*, 114 Cal. 1, 6, 55 Am. St. Rep. 56, 33 L. R. A. 747, 45 Pac. 990.

As to hypothetical statement of evidence, see brief 38 L. R. A. 427.

81. In action for personal injuries instruction that there had been considerable evidence as to whether track was wet or not, and "If you find in consequence of wet rails or wet street that wheels of defendant's vehicle slipped, such slipping would not conclusively repel any imputation of negligence," not erroneous as violating constitutional provision against charging jury in respect to matter of fact.—*Roche v. Redington*, 125 Cal. 174, 176, 57 Pac. 890.

82. Same—Not containing any rule of law, properly refused.—*Higgins v. Williams*, 114 Cal. 176, 185, 45 Pac. 1041.

83. Same—On abstract principle as to which there was no evidence, erroneous as tending to mislead jury.—*People v. Juarez*, 28 Cal. 380, 382; *Thompkins v. Mahoney*, 32 Cal. 231, 232; *Mecham v. McKay*, 37 Cal. 154, 166; *Bowers v. Cherokee Bob*, 45 Cal. 495, 508; *Perkins v. Eckert*, 55 Cal. 400, 405; *Estate of Holbert*, 57 Cal. 257, 259; *Comptoir D'Escompte v. Dresbach*, 78 Cal. 15, 26, 20 Pac. 28; *Estate of Carpenter*, 94 Cal. 406, 419, 29 Pac. 1101; *In re Calkins*, 112 Cal. 296, 305, 44 Pac. 577; *Nofsinger v. Goldman*, 122 Cal. 609, 618, 55 Pac. 425; *Tompkins v. Montgomery*, 123 Cal. 219, 221, 55 Pac. 997; *Gately v. Campbell*, 124 Cal. 520, 524, 57 Pac. 567; *Thomas v. Gates*, 126 Cal. 1, 6, 58 Pac. 315; *Lemasters v. Southern Pac. Co.*, 131 Cal. 105, 108, 63 Pac. 128; *Cahill v. Baird*, 138 Cal. 691, 693, 72 Pac. 342; *Estate of Keegan*, 139 Cal. 123, 127, 72 Pac. 828; *Jones v. Goldtree Bros. Co.*, 142 Cal. 383, 386, 77 Pac. 939; *Meyer v. Foster*, 147 Cal. 166, 81 Pac. 402, 404; *Ward L. & S. Co. v. Mapes*, 147 Cal. 747, 82 Pac. 426, 428.

84. Instruction based on hypothesis in support of which there is no evidence, error.—*Hanks v. Naglee*, 54 Cal. 51, 53, 35 Am. Rep. 67.

85. Reference in instruction to matters on which there was no evidence, not erroneous where instruction did not assume existence of such fact and statement did not tend to prejudice defendant.—*Bosqui v. Sutro R. Co.*, 131 Cal. 390, 401, 63 Pac. 682.

86. Same—On point not in issue, properly refused.—*Branger v. Chevalier*, 9 Cal. 353, 360; *Conlin v. San Francisco & S. J. R. Co.*, 36 Cal. 404, 410; *Marriner v. Dennison*, 78 Cal. 202, 214, 20 Pac. 386; *Stevens v. San Francisco & N. P. R. Co.*, 100 Cal. 554, 569, 31 Pac. 165; *De Baker v. Southern Cal. R. Co.*, 106 Cal. 257, 286, 46 Am. St. Rep. 237, 39 Pac. 610; *Nofsinger v. Goldman*, 122 Cal. 609, 617, 55 Pac. 411; *Wahlgreen v. Market St. R. Co.*, 132 Cal. 656, 664, 62 Pac. 308, 64 Pac. 993; *Cahill v. Baird*, 138 Cal. 691, 693, 72 Pac. 342; *Silva v. Balr*, 141 Cal. 599, 604, 75 Pac. 162.

87. Refusal of instruction enunciating doctrine of caveat emptor proper where it has no application to case.—*Merguire v. O'Donnell*, 103 Cal. 50, 52, 36 Pac. 1033.

88. Same—On questions of fact were properly refused, it being invasion of the prerogative of the jury.—*Estrella V. Co. v. Butler*, 125 Cal. 232, 239, 57 Pac. 980.

As to direction of verdict, see pars. 47-52, this note.

As to instructions as to reception of oral admission of parties, see, post, § 2061 and note.

As to instructions on evidence as invading province of jury, see note 14 Am. St. Rep. 36.

As to instructions on what has been proved, see note 71 Am. Dec. 348.

As to instructions that jury is bound by rules of evidence, see, post, § 2061 and note.

As to instructions that witness false in one part of his testimony is to be distrusted in others, see, post, § 2061 and note.

As to jury as judges of law and fact, see note 42 Am. St. Rep. 290.

As to right of court to express opinion on controverted facts, see note 39 Am. Dec. 657.

As to right to instructions on part of evidence, see note 39 Am. Dec. 656.

89. Instruction that if before the commencement of action plaintiff with consent of his brother wrote across back of note firm name with intent to assign same to himself and this constituted sufficient assignment and indorsement of note, did not take from jury question as to whether note was in fact assigned and delivered to plaintiff but merely stated law applicable to facts proved.—*Low v. Warden*, 77 Cal. 94, 96, 19 Pac. 235.

90. Same—Same—Assuming a fact as to which there was no evidence was erroneous as invading province of jury.—*Preston v. Keys*, 23 Cal. 193, 195; *Caldwell v. Center*, 30 Cal. 539, 544, 89 Am. Dec. 131; *Crawford v. Roberts*, 50 Cal. 235, 242; *Vullicevich v. Skinner*, 77 Cal. 239, 241, 13 Pac. 424; *Dean v. Ross*, 105 Cal. 227, 230, 38 Pac. 912; *Williams v. Casebeer*, 126 Cal. 77, 88, 58 Pac. 380; *Roche v. Baldwin*, 135 Cal. 522, 528, 65 Pac. 459, 67 Pac. 903; *Estate of Keegan*, 139 Cal. 123, 127, 72 Pac. 828.

As to assumption by judge as to facts, see par. 19, this note.

91. Instruction assuming fact to be true and then submitting question to jury as to whether such fact were true or not, erroneous.—*Cahoon v. Marshall*, 25 Cal. 197, 200.

92. Instruction as to account stated between parties, properly refused where evidence shows that plaintiff did not consent to account rendered by defendant.—*Ah Tong v. Earle F. Co.*, 112 Cal. 679, 682, 45 Pac. 7.

93. Same—Same—Assuming facts favorable to appellant can not be complained of by him.—*Hill v. Finigan*, 77 Cal. 267, 278, 11 Am. St. Rep. 279, 19 Pac. 494.

94. Same—Same—Assuming fact which was not productive of injury was not error.—*Bradley v. Lee*, 38 Cal. 362, 367.

95. Same—Same—Where there was no conflict in evidence as to such fact, instruction assuming fact nor erroneous.—*De Baker v. Southern Cal. R. Co.*, 106 Cal. 257, 286, 46 Am. St. Rep. 237, 39 Pac. 610.

96. Same—Stating testimony as "tending to prove" matter not erroneous as instruc-

tion of fact.—*Morris v. Lachman*, 68 Cal. 109, 113, 8 Pac. 799. See *People v. Vasquez*, 49 Cal. 560; *People v. Perry*, 65 Cal. 568, 4 Pac. 572.

97. **Same.—Taking from jury principal issue of fact** in case, erroneous.—*Levitzky v. Canning*, 33 Cal. 299, 305. See *People v. King*, 27 Cal. 507, 513, 87 Am. Dec. 95; *Perkins v. Eckert*, 55 Cal. 400, 404.

98. It is only where fact is admitted, or there is no shadow of conflict of evidence with respect to it, court is justified in taking such fact from consideration of jury.—*Dean v. Ross*, 105 Cal. 227, 231, 38 Pac. 912. See *People v. Phillips*, 70 Cal. 61, 68, 11 Pac. 493.

99. **Same.—That if jury find by preponderance of evidence that certain enumerated facts existed**, they should find for plaintiff, but if plaintiff failed to prove any of such facts verdict should be for defendant, not improper as being charged in respect to matters of fact where enumerated facts were within issues and as to which evidence had been given, no reference being made to evidence as sustaining or tending to sustain any fact.—*Ryan v. Los Angeles I. & C. S. Co.*, 112 Cal. 244, 254, 32 L. R. A. 524, 44 Pac. 471.

100. Instruction that "if you are satisfied this testimony is true you can find verdict in favor of defendant, if not, you will find for such damages as you think proper to allow," leaves it sufficiently plain to jury that they were exclusive judges of fact, as required by this section.—*Gately v. Campbell*, 124 Cal. 520, 523, 57 Pac. 567. See *Jones v. Chalfant*, 3 Cal. Unrep. 585, 31 Pac. 257.

101. **Same.—Where there is no conflict in evidence as to fact referred to instruction on facts is not erroneous.**—*Watson v. Damon*, 54 Cal. 278, 279.

As to direction of verdict, see pars. 47-52, this note.

102. **Same.—Which could not have aided jury and might have misled them**, properly refused.—*Estrella V. Co. v. Butler*, 125 Cal. 232, 239, 57 Pac. 980.

103. **Invasion of province of jury.**—Where the evidence is conflicting as to whether the master furnished appliances to lash the poles, it was error to instruct the jury in an action for negligence that the sending of the poles into the mine unlashd constituted negligence per se on the part of the defendant. Such instruction assumed the determination of the very question at issue.—*Manning v. App Consol. Gold Min. Co.*, 149 Cal. 39, 84 Pac. 657.

104. **Irrelevant instructions are not erroneous unless it appears that they have tended to mislead jury.**—*George v. Los Angeles R. Co.*, 126 Cal. 357, 361, 77 Am. St. Rep. 184, 46 L. R. A. 829, 58 Pac. 819.

As to instruction as to point not in issue, see pars. 86, 87, this note.

105. **Jury is bound by instructions** whether correct or not.—*Loveland v. Gardner*, 79 Cal. 317, 321, 4 L. R. A. 395, 21 Pac. 766. See *Emerson v. County of Santa Clara*, 40 Cal. 543; *Sappenfield v. Main St. & A. P. R. Co.*, 91 Cal. 48, 59, 27 Pac. 590.

As to whether jury is bound by erroneous instructions, see note 20 Am. Dec. 134.

106. Instructions are law of case so far as jurors are concerned, and they are bound to follow them whether they deemed them correct or not.—*Lind v. Closs*, 88 Cal. 6, 11, 25 Pac. 972.

107. **Misleading and erroneous instruction is properly refused.**—*Low v. Warden*, 77 Cal. 94, 99, 19 Pac. 235.

108. Instruction as to warranty where the evidence tended to show much broader and particular warranty was properly refused as granting it would have tended to confuse and mislead jury by diverting their attention from other evidence in case.—*Fox v. Stockton C. H. & A. W.*, 83 Cal. 333, 343, 23 Pac. 295.

109. **Same.—Mere inadvertence in use of "plaintiff" instead of "decedent"** which could not have misled jury, was not prejudicial error.—*O'Callaghan v. Bode*, 84 Cal. 489, 497, 24 Pac. 269.

110. **Same.—Use of word "testimony" instead of "evidence"** in instruction on preponderance of evidence is not so misleading as to be reversible error.—*Mann v. Higgins*, 83 Cal. 66, 69, 23 Pac. 206.

111. **Modification of instruction by court so as to correctly state law, is proper.**—*Nichol v. Laumeister*, 102 Cal. 658, 660, 36 Pac. 925. See *Boyce v. California S. Co.*, 25 Cal. 460, 470; *King v. Davis*, 34 Cal. 100, 108.

As to modification of instructions, see note 50 Am. Dec. 419.

112. Modification of instruction by court offered by defendant can not be objected to by him where instruction itself was not proper.—*Harington v. Los Angeles R. Co.*, 140 Cal. 514, 527, 98 Am. St. Rep. 85, 74 Pac. 15.

113. Modifying instruction beginning "if you find from evidence" followed by clause "and from your general knowledge," taken in consideration of evidence by striking out this latter clause, is not error, as jury took into consideration their knowledge whether instructed to do so or not.—*Baker v. Borrello*, 136 Cal. 160, 167, 68 Pac. 591, following doctrine in *Beveridge v. Lewis*, 137 Cal. 619, 92 Am. St. Rep. 188, 59 L. R. A. 581, 67 Pac. 1040, 70 Pac. 1083. See *Cederberg v. Robison*, 100 Cal. 93, 34 Pac. 625; *Butler v. Ashworth*, 102 Cal. 663, 36 Pac. 922.

114. **Naming witnesses in instruction** would not harm party where no other witnesses but those named testified on subject and no evidence was introduced to con-

trary.—*Dyas v. Southern Pac. Co.*, 140 Cal. 296, 305, 73 Pac. 972.

115. Omission in one instruction—Inclusion in another—Effect of.—The fact that particular instructions omit matters presented in others is not error, for no one instruction can declare all the law.—*Slaughter v. Goldberg, Bowen & Co.*, 26 Cal. App. 318, 147 Pac. 90.

116. Practice of loading down case with many instructions, disapproved.—In matter of *Keithley*, 134 Cal. 9, 13, 66 Pac. 5.

117. Presumption of knowledge—Instruction as to.—Presumption of knowledge, by an ordinary man, of the powers, dangers, and potentialities of electricity and electric power, in an action for negligence arising from the use thereof, held not only opposed to the facts, but to be an invasion of the province of the jury, and prejudicially erroneous.—*Foley v. Northern Cal. Power Co.*, 14 Cal. App. 412, 112 Pac. 467.

118. Quoting from the decisions of courts in other causes is not error, provided quotations correctly state law.—*Cousins v. Partidge*, 79 Cal. 224, 227, 21 Pac. 745; In re *Spencer*, 96 Cal. 448, 454, 31 Pac. 453. See *People v. McNabb*, 79 Cal. 419, 420, 21 Pac. 843; *Etchepare v. Aguirre*, 91 Cal. 288, 294, 25 Am. St. Rep. 180, 27 Pac. 668.

119. Refusal of instruction permitting jury to find for greater sum than demanded in complaint was proper where amendment of the complaint had been conditionally granted and plaintiff had refused to comply with condition.—*Wise v. Wakefield*, 118 Cal. 107, 111, 50 Pac. 310.

120. Refusal to use precise language contained in requested instructions, not error where law substantially given in instructions.—*Clark v. Bennett*, 123 Cal. 275, 281, 55 Pac. 908; *Cook v. Los Angeles & P. E. Co.*, 134 Cal. 279, 281, 66 Pac. 306.

121. It is not material that instruction given is not in as accurate and precise language as that asked where it is substantially same.—*Kahn v. Trieste-Rosenberg C. Co.*, 139 Cal. 340, 349, 73 Pac. 164.

122. Repetition of instruction.—The better course is for the court to give a proposed instruction where there is no valid objection to it; but where the substance of an instruction refused is fairly embraced and expressed in those given no injury is presumed to have resulted.—*Waniorek v. United Railroads*, 17 Cal. App. 128, 118 Pac. 947.

123. Requested instruction — Already covered by instructions as given is properly refused.—*Hayes v. Western Fuel Co.*, 19 Cal. App. 634, 127 Pac. 518.

As to duty of court, see pars. 54-56, this note.

124. Same — Improperly refused — Issue ignored.—In an action by an architect for C. C. P.—96

the reasonable value of his services, an instruction to the effect that if the jury should find that the contractor for the foundation carelessly did the work in an unworkmanlike manner, and not in conformity with the specifications, and that plaintiff carelessly failed properly to inspect or test the work, and carelessly certified that the work was done properly and as specified, and that this negligence of the plaintiff caused damage to defendant, the damage should be deducted from the value of the plaintiff's services, was improperly refused.—*Hart v. Buckley*, 164 Cal. 160, 128 Pac. 29, 30.

125. The introduction of contradictory evidence would merely raise a question of fact to be submitted to the jury. It would not authorize the court to refuse the instruction.—*Hart v. Buckley*, 164 Cal. 160, 128 Pac. 29, 31.

126. Same—Part wrong.—Where an instruction is so framed as to be inseverable as to its parts, it is properly refused, although, if severed, a portion may have been properly given.—*Ward Land & S. Co. v. Mapes*, 147 Cal. 747, 752, 82 Pac. 426.

127. Same—Properly refused when.—An instruction that "you have a right to disregard entirely the testimony of any witness whom you believe to have wilfully testified falsely," is properly refused, as failing to use the necessary qualifying words "In a material matter."—*People v. Ford*, 25 Cal. App. 388, 143 Pac. 1075.

128. Rule of ordinary prudence—Instruction as to.—An instruction as to rule of ordinary prudence and reasonable apprehension in contributory negligence, held not to be covered by other general instructions as to contributory negligence in the abstract, or as to effect of all the conditions and circumstances upon the mind of a prudent and reasonable person, or as to defendant's theory of the case.—*Waniorek v. United Railroads*, 17 Cal. App. 129, 118 Pac. 947.

129. Special instructions.—It is not reversible error to refuse a requested instruction that is not applicable to the evidence or that presents an erroneous theory of the case.—*Shelton v. Michael*, 31 Cal. App. 328, 160 Pac. 578.

130. Test of vicious instruction — Must be misleading.—The test of an instruction is not whether it is erroneous, but whether it is misleading.—*Briggs v. Hall*, 20 Cal. App. 372, 129 Pac. 288, 289.

131. If instructions, correct as abstract propositions, may have misled the jury, a new trial may be granted.—*Briggs v. Hall*, 20 Cal. App. 372, 129 Pac. 288, 289.

132. Verbose instruction.—Where all instructions taken together correctly gave law subject to jury, appellants are not prejudiced by verbose instruction.—In matter of *Black*, 132 Cal. 392, 395, 64 Pac. 695.

§ 609. SPECIAL INSTRUCTIONS. Where either party asks special instructions to be given to the jury, the court must either give such instruction, as requested, or refuse to do so, or give the instruction with a modification, in such manner that it may distinctly appear what instructions were given in whole or in part.

History: Enacted March 11, 1872.

1. Instructions requested by party—Record should show facts.—It is important for the record to show whether or not instructions complained of were given at the request of the party complaining, and this should be made clear by the judge at the time the instruction is given, under the provisions of the above section; in default of such explanation a party complaining of

such an instruction may find the objections precluded in favor of the rule respecting the presumption as to the regularity of the proceedings of the trial court.—*Sutter Butte Canal Co. v. American Rice & Alfalfa Co.*, 182 Cal. 549, 182 Pac. 277, following the doctrine in *Gray v. Eschen*, 125 Cal. 5, 57 Pac. 664.

§ 610. VIEW BY JURY OF THE PREMISES. When, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted, in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person, other than the person so appointed, shall speak to them on any subject connected with the trial.

History: Enacted March 11, 1872.

VIEW BY JURY.

1. Purpose of statute—Not to convert jurors into silent witnesses.
2. Result of examination of land—Can not be taken into consideration.
3. View of premises—Change in condition.
4. Same—Discretion of trial court.
5. Same—Exercise of power of trial court to permit.
6. Same—Personal injury case—Discretion of court.
7. View of other property.

1. Purpose of statute—Not to convert jurors into silent witnesses who act on their own inspection of land viewed, but only to enable them more clearly to understand and apply the evidence.—*Wright v. Carpenter*, 49 Cal. 607, 609.

2. Result of examination of land—Can not be taken into consideration by jury as independent evidence in the case.—*Wright v. Carpenter*, 50 Cal. 556, 557; *Wright v. Carpenter*, 49 Cal. 607, 609.

3. View of premises—Change in condition.—After the jury in a homicide case, pursuant to a request joined in by the defendant, has viewed the premises where the crime was committed, the prosecution may be allowed to account for any change in their condition, between their state as shown by the evidence and their appearance at the time the jury inspected them.—*People v. Cramley*, 23 Cal. App. 340, 138 Pac. 113.

4. Same—Discretion of trial court.—The

statute vests in the trial court a discretion of allowing or disallowing a "view of the premises," or other physical objects relevant to the case, which it is impracticable to bring into court, and the burden on appeal is upon the party moving to permit such view to show that the denial thereof is an abuse of such discretion.—*People v. Sampo*, 17 Cal. App. 151, 118 Pac. 957.

5. Same—Exercise of power of trial court to permit.—The power vested in trial courts by this section is one that should be exercised, if at all, with great caution and circumspection, lest more harm than good result by thus receiving evidence out of the courtroom or perhaps on the public street.—*People v. Sampo*, 17 Cal. App. 151, 118 Pac. 957.

6. Same—Personal injury case—Discretion of court.—In an action for damages for the death of an employee alleged to have been caused by the negligence of the defendant where an application was made by the defendant to have the jury visit the scene of the accident, which application was refused, an appellate court can not say that such refusal was error, because under the provisions of the above section a view by the jury is committed to the discretion of the trial court, and its decision in the matter can not be disturbed on appeal except for an abuse of the courts discretion.—*Brown v. Lemon Co. Ditch Co.*, 36 Cal. App. 94, 171 Pac. 705.

7. View of other property than that which is in litigation is not authorized.—*Wright v. Carpenter*, 50 Cal. 556, 557.

§ 611. ADMONITION WHEN JURY PERMITTED TO SEPARATE. If the jury are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with, or suffer themselves to be addressed by any other person, on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

History: Enacted March 11, 1872.

§ 612. JURY MAY TAKE WITH THEM CERTAIN PAPERS. Upon retiring for deliberation the jury may take with them all papers which have been received as evidence in the cause, except depositions, or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession; and they may also take with them notes of the testimony or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person.

History: Enacted March 11, 1872, re-enactment of § 167 of Practice Act; amended by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 145, held unconstitutional, see history, § 5 ante.

PAPERS THAT MAY BE TAKEN TO JURY-ROOM.

1. Construed — Papers received in evidence.
2. Same—Discretion of court.
3. Claim as presented to administrator.
- 4, 5. Exhibits—Taking to jury-room.
- 6, 7. Instructions to jury — In writing — Sending to jury-room.
8. Notes put in evidence.
9. Papers in evidence, only.
- 10, 11. Pleadings—Practice of allowing—To be taken to jury-room.
12. Sworn statement of plaintiff—As to his losses.

1. **Construed—Papers “received in evidence in case”** which seem to imply that papers were not received in evidence should not go to jury on their retirement.—*Powley v. Swensen*, 146 Cal. 471, 483, 80 Pac. 722.

2. **Same—Discretion of court.**—Permitting jury to take papers to jury-room is matter of discretion with trial court.—*McLean v. Crow*, 88 Cal. 644, 648, 26 Pac. 596.

3. **Claim as presented to administrator** and on which suit was based was properly permitted to be taken to jury-room by jury where besides constituting portion of complaint it was paper which had been received in evidence.—*McLean v. Crow*, 88 Cal. 644, 648, 26 Pac. 596.

4. **Exhibits—Taking to jury-room.**—The above section and section 1137 of Penal Code are almost identical. There is nothing in either of these sections which limits the discretionary power of the court to allow exhibits to the jury-room; e. g., an overcoat, a revolver, and a piece of flooring used in evidence. The court may permit

the jury to take such exhibits to the jury-room with them and use in their deliberations any exhibit, where the circumstances call for it.—*People v. Barrett*, 22 Cal. 780, 785, 136 Pac. 520, following *Higgins v. Los Angeles Gas & Elec. Corp.*, 159 Cal. 651, 34 L. R. A. (N. S.) 717, 115 Pac. 313.

5. The taking of exhibits by the jury with them to the jury-room to use in their deliberations is not erroneous.—*People v. Barrett*, 22 Cal. App. 780, 136 Pac. 520.

6. **Instructions to jury—In writing—Sending to jury-room.**—There is no law expressly authorizing the court to send the written instructions to the jury-room in civil cases, the above statute specifically states what papers or documents may or may not be taken to the jury-room by the jury but it does not say that the instructions given may be so taken, nor does it say that they may not be taken by the jury; hence it can not be said that prejudices resulted to either party from the fact that after the jury had retired and deliberated, on the request from the jury, without directly informing complaint, the court sent the written instructions to the jury-room, and the fact that the jurors were thus given an opportunity to read and did read the instructions which had been read to them by the court.—*Fererira v. Silvey*, 38 Cal. App. 346, 176 Pac. 371.

7. The court conceded that the manner in which the written instructions were given to the jury was irregular but held that it was an irregularity from which injury will not be presumed, under the provisions of section 4½ of Article VI, of the constitution.—*Fererira v. Silvey*, 38 Cal. App. 346, 176 Pac. 371, applying the doctrine in *Vallejo & N. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

8. Notes put in evidence, one of which was offered separately from deposition and all of which were glued to deposition, were not parts of deposition so as to be evidence, and hence render it error to permit jury to take them to jury-room.—*Cockrill v. Hall*, 76 Cal. 192, 196, 18 Pac. 318.

9. Papers in evidence, only, under the authority of this section, be used by juries in their deliberations.—*Higgins v. Los Angeles Gas & Elec. Corp.* 159 Cal. 651, 655, 115 Pac. 313.

10. Pleadings—Practice of allowing to be taken to jury-room is not safe one, but where no prejudice or injury was caused it is not ground for reversal.—*Powley v. Swensen*, 146 Cal. 471, 481, 80 Pac. 722.

11. Refusal to permit pleadings to be taken to jury-room was not error because such pleadings contained admissions on part of plaintiff, for if defendant was entitled to have admissions considered by jury he should have requested court to have given instruction to jury setting forth facts so admitted, and it would be vicious practice to permit jury to determine as to what matters were admitted and what were not.—*Spaulding v. Saltiel*, 18 Colo. 86, 31 Pac. 486.

12. Sworn statement of plaintiff—As to his losses and certificate of justice of peace are documentary evidence within meaning of this section in action on insurance policy and hence jury was properly allowed to take them to jury-room.—*Clark v. Phoenix Ins. Co.*, 36 Cal. 168, 176.

§ 613. DELIBERATION OF JURY, HOW CONDUCTED. When the case is finally submitted to the jury, they may decide in court or retire for deliberation; if they retire, they must be kept together, in some convenient place, under charge of an officer, until at least three fourths of them agree upon a verdict or are discharged by the court. Unless by order of the court, the officer having them under his charge must not suffer any communication to be made to them, or make any himself, except to ask them if they or three fourths of them are agreed upon a verdict, and he must not, before the verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon.

History: Enacted March 11, 1872, founded upon § 166 of Practice Act; amendment approved March 10, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 10.

1. Special oath to officer—Not required to be administered when the jury is placed in his charge.—*Boreham v. Byrne*, 83 Cal. 23, 29, 23 Pac. 212.

As to deliberations of jury in criminal prosecution, see *Kerr's Cyc. Pen. Code*, 2d ed., § 1128 and note.

As to determination of verdict by resort to chance as ground for new trial, see, post, § 657 and note.

As to misconduct of jury as ground for new trial, see, post, § 657 and note.

As to separation of jury, see notes 15 Am. Dec. 339, 31 Am. Dec. 576, 35 Am. Dec. 258, 43 Am. Dec. 75.

As to separation of jurors in criminal prosecution, see *Kerr's Cyc. Pen. Code*, 2d ed., § 1121 and note.

§ 614. MAY COME INTO COURT FOR FURTHER INSTRUCTIONS. After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the parties or counsel.

History: Enacted March 11, 1872, re-enactment of § 168 of Practice Act.

FURTHER INSTRUCTIONS TO JURY.

1. Allowing jury to receive further instructions—In absence of parties or their counsel.
2. Refusal to reread to jury portion of instructions.
3. Remarks of judge to jury.

As to coming into court for further instructions in criminal prosecutions, see *Kerr's Cyc. Pen. Code*, 2d ed., § 1138 and note.

As to necessity that further instructions requested by a jury be given in open court, see note 14 Ann. Cas. 532.

1. Allowing the jury to receive further instructions—In absence of parties or their counsel was error.—*Redman v. Gulnac*, 5 Cal. 148.

2. Refusal to reread to jury portion of instructions touching a special point was not error where the court informed the jury, if he desired he would read to them all instructions.—*Cockrill v. Hall*, 76 Cal. 192, 196, 18 Pac. 318.

3. Remarks of judge to jury which had been called into court after having been unable to agree whereby he intimated that as jury stood eight to three in favor of plaintiff that plaintiff required nine jurors, and tried to ascertain why three could not agree with rest, was erroneous since eight disagreed with three as well as the three with the eight.—*Mahoney v. San Francisco & S. M. R. Co.*, 110 Cal. 471, 479, 42 Pac. 968.

§ 615. PROCEEDINGS IN CASE A JUROR BECOMES SICK. If, after the impaneling of the jury, and before verdict, a juror becomes sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case the trial may proceed with the other jurors with the consent of the parties, or another juror may be sworn and the trial begin anew; or the jury may be discharged and a new jury then or afterwards impaneled.

History: Enacted March 11, 1872, re-enactment of § 164 of Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 146, held unconstitutional, see history, § 5 ante; amendment approved March 20, 1907, Stats. and Amdts. 1907, p. 714, Kerr's Stats. and Amdts. 1906-7, p. 448.

§ 616. WHEN PREVENTED FROM GIVING VERDICT, THE CAUSE MAY BE AGAIN TRIED. In all cases where the jury are discharged, or prevented from giving a verdict, by reason of accident or other cause, during the progress of the trial, or after the cause is submitted to them, the action may be again tried immediately, or at a future time, as the court may direct.

History: Enacted March 11, 1872, re-enactment of § 169 of Practice Act.

§ 617. WHILE JURY ARE ABSENT, COURT MAY ADJOURN FROM TIME TO TIME. SEALED VERDICT. While the jury are absent the court may adjourn from time to time, in respect to other business; but it is nevertheless open for every purpose connected with the cause submitted to the jury until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict, at the opening of the court, in case of an agreement during a recess or adjournment for the day.

History: Enacted March 11, 1872, re-enactment of § 170 of Practice Act; amendment approved March 10, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 10.

§ 618. VERDICT, HOW DECLARED. FORM OF. POLLING THE JURY. When the jury, or three fourths of them, have agreed upon a verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreman; the verdict must be in writing, signed by the foreman, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which is done by the court or clerk asking each juror if it is his verdict; if upon such inquiry or polling, more than one fourth of the jurors disagree thereto, the

jury must be sent out again, but if no such disagreement be expressed, the verdict is complete and the jury discharged from the case.

History: Enacted March 11, 1872, founded upon § 171 of Practice Act; amendment approved March 10, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 10.

VERDICT—HOW DELIVERED.

1. Assent of jury may be expressed by foreman.
2. Failure to sign answers to special interrogatory.
3. Failure of foreman to sign verdict—Appeal on judgment-roll—Review.
4. Libel—Compensatory and punitive damages—Jurors to support.
5. Polling jury—After verdict has been recorded.
6. Provision requiring clerk to immediately record verdict.

1. Assent of jury may be expressed by foreman and his assent is conclusive upon all, unless disagreement is expressed at time.—Blum v. Pate, 20 Cal. 69, 71.

2. Failure to sign answers to special interrogatories either on part of the jury as whole or by their foreman renders them ineffective to any purpose, and whether such failure was an oversight or not makes no difference, nor does it make any difference that plaintiff made no objection to answer being received without signing. It was duty of defendant, if he expected to rely on findings, to see that they were in the proper form.—Greenberg v. Hoff, 80 Cal. 81, 82, 22 Pac. 69.

3. Failure of foreman to sign verdict—Appeal on judgment-roll—Review.—Under the provisions of the above section the foreman of a jury is required to sign the verdict but in those cases in which the verdict is not certified as a part of the judgment-roll, the objection that the verdict is not

signed is not properly before an appellate court and the allegation of discrepancy between the verdict and the copy thereof contained in the findings can not be considered.—Pearl v. Pearl, 177 Cal. 303, 177 Pac. 846.

4. Libel—Compensatory and punitive damages—Jurors to support.—In an action for libel where a verdict was rendered for compensatory damages and also for punitive damages, where on a poll of the jury by the court, pursuant to the provisions of the above section, it was ascertained that nine jurors were in favor of the compensatory damages and that ten jurors were in favor of punitive damages; but that three of the jurors who voted for the punitive damages did not concur in the judgment for the compensatory damages, and that two of the jurors who did not concur in the verdict for the punitive damages were in favor of the compensatory damages, and on appeal the court held that the verdict would have to be set aside because not concurred in by a sufficient number of jurors, nine jurors having agreed to the compensatory damages and only seven in the verdict awarding plaintiff punitive damages in addition to the compensatory damages.—Earl v. Times-Mirror Co., 185 Cal. 165, 196 Pac. 57.

5. Polling jury—After verdict has been recorded can not be required.—Blum v. Pate, 20 Cal. 69, 71.

6. Provision requiring clerk to immediately record verdict of jury in full in the minutes renders it matter of record and hence unnecessary to insert it in statement of facts.—Reynolds v. Harris, 8 Cal. 617, 618.

§ 619. PROCEEDINGS WHEN VERDICT IS INFORMAL. When the verdict is announced, if it is informal or insufficient, in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out.

History: Enacted March 11, 1872, re-enactment of § 172 of Practice Act.

VERDICT INFORMAL—PROCEEDINGS ON.

1. Amendment of verdict—Properly allowed, when.
2. Court—May instruct jury to amend their verdict.
3. Cross-complaint—Bringing in third party—Failure to find on—Waiver of defect.
4. Disregarding part of verdict—Court may not.
5. Timely objection to general verdict—Necessity for.

6. Where verdict of jury did not cover all issues.

7. Same—Not in conformity with issue.

8. Same—Same—Verdict in replevin in favor of defendant for one-half of property.

1. Amendment of verdict—Properly allowed when.—In an action to recover damages for personal injury where the jury returned a verdict assessing the general compensatory damages also special damages in a given sum, and counsel for plaintiff fearing that the special damages were larger than were warranted by the evidence,

suggested to the court that it advise the jury to reconsider the verdict upon this item, which, under proper instruction from the court, was done, and on further deliberation the jury returned a second verdict reducing the special damages and adding the difference between the former special damages and the latter special damages to the compensatory damages, thus leaving the gross amount of the verdict the same as before; it was held that inasmuch as the verdict of the jury had not been recorded and the jury had not been discharged, the court was warranted in permitting the jury to thus amend the verdict, under the provisions of the above section.—*Logan v. Lewis*, 35 Cal. App. 663, 170 Pac. 851, following the doctrine in *McNutt v. Pabst*, 25 Cal. App. 177, 143 Pac. 77; *Connlin v. Lewis Investment Co.*, 26 Cal. App. 388, 147 Pac. 472.

As to power of court to amend verdict by adding interest, see note 25 L. R. A. (N. S.) 311.

2. Court—May instruct jury to amend their verdict as to form not affecting substance and in such manner as to be unexceptionable in law.—*Truebody v. Jacobson*, 2 Cal. 269, 284.

3. Cross-complaint—Bringing in third party—Failure to find on—Waiver of defect.—In an action for the purchase-price of a certain lot of cattle, the defendant by cross-complaint designated as a cross-complaint a third party, who, although not shown by the record to have been served with, or to have answered, the cross-complaint, appeared by counsel at the trial, and the jury found a verdict in favor of the plaintiff against the defendant without finding on any of the issues raised by the defendant's cross-complaint, if the verdict was defective in this respect, the defend-

ant waived such defect by failing to call the attention of the court to the same before the jury was discharged, in order that they might retire and correct their verdict as provided for in the above section.—*Asebez v. Bliss*, 178 Cal. 137, 172 Pac. 595, following the doctrine in *Benson v. Southern Pac. Co.*, 177 Cal. 177, 171 Pac. 948; *Vandamme v. McGillivray Stone Co.*, 22 Cal. App. 191, 133 Pac. 995.

4. Disregarding part of verdict—Court may not.—Where verdict in action to recover water fixes measurement different from that referred to in pleadings, and which is uncertain, court is not at liberty to disregard such measurement.—*Dougherty v. Haggin*, 56 Cal. 522, 523.

5. Timely objection to general verdict—Necessity for.—An objection to the general form of a verdict in a case, where there are different counts, should be made when the verdict is rendered.—*Schudel v. Helbing*, 26 Cal. App. 410, 147 Pac. 84.

6. Where verdict of jury did not cover all issues submitted to it, it was proper to call jury's attention to fact that verdict was incomplete and have remanded them to put it in proper form, but it was not error to set verdict aside.—*Garlick v. Bower*, 62 Cal. 65, 66.

7. Same—Not in conformity with issue submitted it was competent for court to send jury out again under its advice.—*Ross v. Austill*, 2 Cal. 183, 192.

8. Same—Same—Verdict in replevin in favor of defendant for one-half of property sued for which failed to respond to issues raised by pleadings was nullity. Jury should have been instructed by court of its own motion to retire and find as to other half of property sued for.—*Muller v. Jewell*, 66 Cal. 216, 217, 5 Pac. 84.

ARTICLE III.

THE VERDICT.

§ 624. General and special verdicts defined.

§ 625. When a general or special verdict may be rendered.

§ 626. Verdict in actions for recovery of money or on establishing counter-claim.

§ 627. Verdict in actions for the recovery of specific personal property.

§ 628. Entry of verdict.

§ 624. **GENERAL AND SPECIAL VERDICTS DEFINED.** The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove

them; and those conclusions of fact must be so presented as that nothing shall remain to the court but to draw from them conclusions of law.

History: Enacted March 11, 1872, re-enactment of § 174 of Practice Act.

THE VERDICT.

- 1-4. As to verdict generally.
5. All issues in case not being submitted to jury.
6. Court—Can not substitute its judgment for verdict of jury.
7. Same—Making findings directly contrary to incomplete special verdict.
8. Each question submitted to jury—As basis for special verdict.
- 9-14. General and special verdicts—As to generally.
15. General verdict—As to implication of.
16. Same—All presumptions are in favor of.
17. Same—Is synthetic.
18. Same—Must be certain.
- 19, 20. Same—Where complaint sets out two elements of damage.
21. Office of trial jury—Is to find by their verdict, what.
22. Objection to form of questions—Time of reservation.
23. Practice in state—When special verdict is desired.
24. Questions of fact propounded to and answered by jury—Must be ultimate facts.
25. Special findings of jury—Construction.
- 26, 27. Same—Which do not dispose of all issues in case.
28. Special verdict—Must find facts expressly and specially.
29. Same—Must pass on all issues.
30. Same—Nature of—Finding of fact.
31. Same—Question of fact and not of law.
32. Submission of special issues.
33. Terms "verdict" and "decision"—Are oppositional.
34. Verdict against one of three defendants.

1. As to verdict generally.—The reading of the verdict of a jury by the clerk upon its return, instead of by the foreman of the jury, is not error fatal to the validity of the verdict.—*Kramm v. Stockton Elec. R. R. Co.*, 22 Cal. App. 737, 761, 136 Pac. 523, 534.

2. The word "rendered," as used in section 618 of the Code of Civil Procedure, does not mean that it is the duty of the foreman to read the verdict, but it is declared by such section that the clerk must read the verdict after it has been "rendered" or returned into court by the foreman.—*Kramm v. Stockton Elec. R. R. Co.*, 22 Cal. App. 737, 761, 136 Pac. 523, 534.

3. While the jury should conform to the instructions of the court upon matters of law, if it appears to the appellate tribunal that an instruction was erroneous, it will not disregard a verdict contrary to such erroneous instruction.—*Lucas v. Walker*, 23 Cal. App. 296, 134 Pac. 374.

4. If three different juries, upon practically the same evidence, reach the same conclusion, this is a significant fact; and under such circumstances, if there is any substantial evidence tending in any material degree to support the verdict, it should not be disturbed.—*Eaton v. Southern Pacific Co.*, 22 Cal. App. 461, 134 Pac. 801.

5. All issues in case not being submitted to jury, for that reason verdict may be termed an incomplete and imperfect special verdict.—*Montgomery v. Sayre*, 91 Cal. 206, 210, 27 Pac. 648.

6. Court—Can not substitute its judgment for verdict of jury and assume power to decide issues of fact once submitted to jury.—*Montgomery v. Sayre*, 91 Cal. 206, 213, 27 Pac. 648.

7. Same—Making findings directly contrary to incomplete special verdict was in effect to vacate and set it aside. It is immaterial whether such action was had by reason of defects or informalities in verdict, or whether evidence was such as to indicate that it was rendered through passion or prejudice; result would be the same. Court should have ordered new trial. It had no power to proceed to determine cause.—*Montgomery v. Sayre*, 91 Cal. 206, 212, 27 Pac. 648.

8. Each question submitted to jury—As basis for special verdict should relate only to one fact; and grouping together several facts is very objectionable.—*Phoenix v. Fletcher*, 23 Cal. 481, 487.

9. General and special verdicts—As to generally.—Where several issues are tried and submitted to the jury, the general verdict must stand, if the evidence upon one issue alone is sufficient to sustain the verdict.—*Estate of Hellier*, 169 Cal. 77, 145 Pac. 1008.

10. The question whether judgment shall be pronounced upon the verdict or set aside is "strictly of legal cognizance," which must be determined by the trial court, and in the determination thereof the verdict should be set aside if, in that court's opinion, it is not supported by sufficient evidence; and this is equally true whether there is an absence of evidence, or that the evidence received, in the individual judgment of the trial judge, is lacking in probative force to

establish the proposition of fact to which it is addressed.—*Estate of Bainbridge*, 169 Cal. 151, 146 Pac. 427.

11. A general verdict for the plaintiff and against the defendants imports a finding in favor of the plaintiff on all the averments of the complaint material to his recovery.—*Koskela v. Albion Lumber Co.*, 25 Cal. App. 12, 142 Pac. 851.

12. All presumptions are in favor of a general verdict for the plaintiff, and it must control if a special verdict is not absolutely irreconcilable therewith. On the other hand, answers to interrogatories can not be aided by intendment, as all intendments are in favor of the general verdict.—*Koskela v. Albion Lumber Co.*, 25 Cal. App. 12, 142 Pac. 851.

13. The contention of the defendants in this case that the special verdict of the jury necessitates a judgment in their favor, inasmuch as it affirmatively appears therefrom that the plaintiff did not prove to the satisfaction of the jury that the defendants' negligence caused the stevedore's death, is not tenable.—*Koskela v. Albion Lumber Co.*, 25 Cal. App. 12, 142 Pac. 851.

14. An objection to the general form of a verdict in a case, where there are different counts, should be made when the verdict is rendered.—*Schudel v. Helbing*, 26 Cal. App. 410, 147 Pac. 89.

15. General verdict—As to implication of.—Implies a finding in favor of the prevailing party of every fact essential to the support of his action or defense.—*Plyer v. Pacific Portland Cement Co.*, 152 Cal. 125, 130, 92 Pac. 56.

16. Same—All presumptions are in favor of the general verdict for the plaintiff, which determines all issues in his favor, including the question of contributory negligence, where there is evidence to support it; and it must control, if the special verdict is not absolutely irreconcilable therewith.—*Petersen v. California Cotton Mills Co.*, 20 Cal. App. 751, 130 Pac. 169, 174.

17. Same—Is synthetic, a compound of law and fact. Special verdict is analytic; it finds the facts and submits the law to the court.—*Murphy v. Bennett*, 68 Cal. 528, 532, 9 Pac. 738 (dis. op. by Thornton, J.).

18. Same—Must be certain.—An uncertain verdict will not support judgment upon appeal.—*Diggs v. Porteus*, 5 Cal. Unrep. 753, 33 Pac. 447.

19. Same—Where complaint sets out two elements of damage.—Where a complaint sets out two elements of damage, one for failure to issue stock to plaintiff, the other for failure to employ him at a certain stipulated salary for an agreed length of time, and the jury returned a general verdict in a sum equal to one of the amounts sued for, it can not be said from the face of the verdict whether it is based on only one or both

of these items. The fact that the total sum awarded was equal to the claim for non-delivery of the stock alone does not justify an inference that the damages were fixed with reference to this item alone.—*Peek v. Steinberg*, 163 Cal. 127, 124 Pac. 834, 835.

20. In such a case, the jury is not bound to find that the plaintiff was entitled to the full amount claimed in his behalf, and the verdict is entirely consistent with the view that something less than the amount claimed for failure to issue the stock to the plaintiff was allowed on this account, and the balance for failure to carry out the contract of employment.—*Peek v. Steinberg*, 163 Cal. 127, 124 Pac. 834, 835.

21. Office of trial jury—Is to find by their verdict, whether general or special, the facts in issue between the parties; with the legal effect of those facts, as resulting in judgment in favor of one party or the other, they have no concern whatever.—*Fitzpatrick v. Himmelmann*, 48 Cal. 588, 589.

22. Objection to form of questions—Time of reservation.—Objections to phraseology of question in special verdict must be made at the time of their submission to the jury; and unless exceptions to rulings thereon are reserved such objections can not be considered on appeal.—*Napa Valley Packing Co. v. San Francisco Relief & Red Cross Funds*, 16 Cal. App. 469, 118 Pac. 469.

23. Practice in this state—When special verdict is desired is to cause to be prepared and submitted to jury special issues in form of questions, and it would seem that this practice is recognized by legislature by words "issues submitted to them by court."—In matter of Sanderson, 74 Cal. 199, 208, 15 Pac. 753.

24. Questions of fact propounded to and answered by jury—Must be ultimate facts to be found, and must cover issues growing out of contest, and together they form special verdict.—In matter of Keithley, 134 Cal. 9, 11, 66 Pac. 5.

25. Special findings of jury—Construction.—Where in an action by an attorney to recover for services rendered to the defendant in and about the prosecution of a certain action, it is found in answer to a special interrogatory submitted to the jury, that the plaintiff was to charge a reasonable fee only and that it should be left to the defendant to fix the amount thereof, an answer to a further interrogatory that the defendant in fixing such fee did not "act in good faith, and upon and after full consideration, and on advice of those persons whom he had a right to believe and expect were qualified to advise him in said matter," is not subject to the interpretation that the defendant in fixing the fee did not act in good faith, in that he did not seek the counsel of qualified advisers, but is to be interpreted as an unqualified finding that

in fixing the fee the defendant acted in bad faith.—*Foster v. Young*, 172 Cal. 317, 156 Pac. 476.

26. Same—Which do not dispose of all issues in case, for instance, defense of payment and the like, is not special verdict. It is special finding, regularly to be accompanied by general verdict. Not so accompanied, it is of no legal effect, and no judgment, except by consent of litigants, could be entered on it. It was nullity to which no validity could be imputed.—*Montgomery v. Sayre*, 3 Cal. Unrep. 365, 25 Pac. 552.

27. Compare: *Montgomery v. Sayre*, 91 Cal. 206, 210, 27 Pac. 648.

28. Special verdict—Must find facts expressly and specially, not generally or impliedly. It must present facts so distinctly as to refer court clearly to questions of law arising upon them.—*Breeze v. Doyle*, 19 Cal. 101, 105.

As to special verdict, generally, see, post, § 625 and note.

29. Same—Must pass on all issues by presenting conclusions of facts bearing on all.—In matter of *Sanderson*, 74 Cal. 199, 208, 15 Pac. 753.

30. Same—Nature of—Finding of fact.—Finding of jury held to be a special verdict under the provisions of this section.—*Napa Valley Packing Co. v. San Francisco Relief & Red Cross Funds*, 16 Cal. App. 465, 118 Pac. 469. Citing *Plyer v. Pacific etc. Cement Co.*, 152 Cal. 125, 92 Pac. 56, and *Wil-*

liams v. San Francisco etc. Ry. Co., 6 Cal. App. 715, 93 Pac. 122.

31. Same—Question of fact and not of law.—A special verdict or finding must be as to a question of fact and not of law.—*Napa Valley Packing Co. v. San Francisco Relief & Red Cross Funds*, 16 Cal. App. 461, 468, 118 Pac. 469.

32. Submission of special issues.—It is not error to refuse to submit a special issue to the jury where it is fully covered by another special issue already submitted to them.—*Diehl v. Swett-Davenport Co.*, 14 Cal. App. 501, 112 Pac. 561.

33. Terms "verdict" and "decision"—Are oppositional, what is predicated of one is also of the other. Verdict is decision of jury reported to court on matters lawfully submitted to them in course of trial of cause. It may be of two kinds—general and special. It is general when it finds facts and law. It is special when it finds facts only, leaving law applicable to them to be decided by court.—*Simmons v. Hamilton*, 56 Cal. 493, 495.

34. Verdict against one of three defendants and in favor of another, but omitting all reference to third, can not be reversed at instance of defendant against whom judgment was rendered where record shows verdict properly omitted reference to him, he having defaulted and there being no issue as to him.—*Golden Gate M. & M. Co. v. Joshua Hendy M. Wks.*, 82 Cal. 184, 185, 28 Pac. 45.

§ 625. WHEN A GENERAL OR SPECIAL VERDICT MAY BE RENDERED. In an action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict in writing, upon all, or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding must be filed with the clerk and entered upon the minutes. Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly.

History: Enacted March 11, 1872, re-enactment of § 175 of Practice Act as amended in 1854; amendment approved March 6, 1905, Stats. and Amdts. 1905, p. 56; March 6, 1909, Stats. and Amdts. 1909, p. 193.

RENDERING VERDICT—SPECIAL VERDICT—SPECIAL ISSUES.

1. All questions of fact raised by pleadings.
2. Charging jury—Bringing in general verdict and special findings, that they should make them harmonize.
3. Construction of section—Amendment of 1905.
4. Same—Same—Conditional request.
- 5, 6. Same—Same—Effect of.

7. Same—Same—Interrogatories not required to be categorical in form.
8. Same—Same—Special verdict upon request.
9. Same—Same—Submission of interrogatories to opposing counsel.
10. Same—Same—Sufficiency of request.
11. Same—Amendment of 1909.
- 12, 13. Same—Test as to interrogatories.
14. Court—Can not give judgment contrary to general verdict.

15. Same—Discharges functions of jury in passing upon facts.
 16. Same—Erred in withdrawing special issues from consideration of jury, when.
 17. Same—May submit special issues.
 18. Definition—Meaning of term “special verdict,” as herein used.
 19. Same—Scope of phrase.
 20. Direct answer.
 - 21, 22. Discretion of court—As to submitting special questions—In action for recovery of money only.
 23. Same—Material facts.
 24. Same—Party failing to make his proof.
 25. Same—Request of defendant that special issues be submitted.
 - 26, 27. Same—Submission of special findings to jury.
 28. Same—When issues not complicated.
 - 29, 30. Effect of general verdict.
 31. Evidentiary matter—And not ultimate facts, being called for.
 32. Exceptions to account of executor—Do not create issues of fact joined.
 33. Failure to object to return of special findings.
 34. Finding of jury—Being susceptible of two interpretations.
 35. Findings on special issues—Which expressly negative all negligence.
 36. Framing interrogatories.
 37. Framing and settling material issues of fact.
 38. Frivolous and immaterial questions.
 39. General finding—In favor of defendants—Equivalent to what.
 40. General purpose of special verdict.
 - 41, 42. General verdict—Is controlling.
 43. Same—Is not overcome by special finding.
 44. Same—Or judgment, operates as an estoppel.
 45. Immaterial error.
 - 46-48. Inconsistent general and special verdicts.
 49. Issues of fact—Other than those arising on contest of will.
 50. Same—Submitted, should be.
 51. Judgment—According to special verdict.
 52. Jury has discretion—To find general or special verdict.
 53. Leading and suggestive special interrogatories.
 54. Same—Leading special interrogatories may be propounded.
 - 55, 56. Mandatory provisions.
 57. Materiality of issue.
 58. Necessity of special issues—Complicated causes.
 59. Objections to instructions by plaintiff—Need not be specially noticed.
 60. Party submitting question to jury—Is bound by answer.
 61. Presumption—In support of judgment.
 62. Presumptions of law—May be indulged in.
 63. Provisions as to instruction—To find on fact.
 64. Refusal of court—To compel jury to make further answers.
 65. Same—To present special interrogatories—Not error, when.
 66. Same—To require jury to answer material questions.
 67. Same—To submit questions of fact within issues.
 68. Rendition of verdict—Is sometimes different from filing.
 69. Rule is that enough must be found by special verdict.
 70. Special interrogatories—Submitted to jury, should be carefully drawn.
 71. Same—Which relate to issues on which cause turns.
 72. Special issues—Discretion of court.
 73. Same—Submitted to jury—Not including an issue made by pleadings.
 74. Special verdict—Upon a single point may often determine whole cause.
 75. Same—When not inconsistent with general verdict.
 76. Special “verdicts” and “findings”—“Questions” and “issues” of fact.
 77. Sufficiency of verdict—To support judgment.
 78. Support of general verdict.
 79. Verdict of “nominal damages” to plaintiff—Will not be set aside, when.
 80. Whether plaintiff was a corporation or not—Was properly submitted to jury.
 81. Withdrawal of special questions of fact—After their submission.
 82. Wording of special question of fact.
- As to special verdict, see, also, ante, § 624, note pars. 28-31.**
1. All questions of fact raised by pleadings and necessary to determination of case should be included in special issues submitted to jury, and they should be separately and distinctly stated.—*Phoenix v. Fletcher*, 23 Cal. 481, 489.
 2. Charging jury—Bringing in general verdict and special findings, that they should make them harmonize, and sending them out for that purpose, is reversible error under statute authorizing court to correct verdict only where defective in form.—*Southwestern M. R. Co. v. Kennedy*, 8 Kan. App. 490, 58 Pac. 516.
- As to instruction of jury, see, ante, § 603 and note.**

3. Construction of section—Amendment of 1905.—Is to be liberally construed and applied; but must be enforced by the courts without regard to the supposed inconveniences that are supposed to flow from such enforcement.—*Plyer v. Pacific Portland Cement Co.*, 152 Cal. 131, 92 Pac. 56.

4. Same—Same—Conditional request.—The court should make it plain, in giving its direction to the jury, that special findings upon particular questions of fact are not required unless they have agreed upon a general verdict, but the failure of the party asking special findings to make his request thus conditional is not ground for its denial.—*Plyer v. Pacific Portland Cement Co.*, 152 Cal. 132, 92 Pac. 56.

5. Same—Same—Effect of.—Held to be that, upon the proper request of either party to an action the court must direct the jury, if they return a general verdict, to give answers to any material question, or questions of fact, which will enable the court, in the exercise of its proper function, to apply the law to the real facts of the case as they have been actually found, instead of recording a judgment wholly unsupported by the facts.—*Plyer v. Pacific Portland Cement Co.*, 152 Cal. 131, 92 Pac. 56.

6. Angellotti, J., dissenting, is of the opinion that, while conceding it to be the duty of the court to construe the provision liberally with a view to accomplishing the object of its enactment, it should not be construed so as to deprive the trial court of the power to refuse interrogatories which, under the circumstances, may be misleading or confusing, such as certain interrogatories allowed in this case; and that, so far as the opinion of the court disagrees with or is inconsistent with the view expressed as to these interrogatories, he believes it to be incorrect.—*Plyer v. Pacific Portland Cement Co.*, 152 Cal. 137, 92 Pac. 56.

7. Same—Same—Interrogatories not required to be categorical in form.—The interrogatories are not required to be so framed as that the jury may answer the same by simply "yes" or "no." The omission of this requirement evinces an intention to leave something to the discretion of the court; but the court should refuse to allow a confusing and unmeaning question, just as it should refuse an unmeaning and confusing instruction.—*Plyer v. Pacific Portland Cement Co.*, 152 Cal. 135, 92 Pac. 56.

8. Same—Same—Special verdict upon request of either party to the action was essential under this amendment.—*California Wine Assoc. v. Commercial Union Fire Ins. Co. of New York*, 159 Cal. 52, 112 Pac. 858.

9. Same—Same—Submission of interrogatories to opposing counsel.—There is no requirement, express or implied, in our law that the interrogatories shall be submitted to opposing counsel, any more than that a

request for a special instruction shall be so submitted; but the court may do so before making its ruling, if it appears desirable.—*Plyer v. Pacific Portland Cement Co.*, 152 Cal. 135, 92 Pac. 56.

10. Same—Same—Sufficiency of request.—Whether the party presenting the request has a right to demand the submission of the questions or issues of fact to the jury in the form presented depends upon two conditions: 1. Is the question so framed as to admit of a plain and direct answer? and 2. Would an answer favorable to the party preferring the request be inconsistent with a general verdict for his adversary? If these conditions are satisfied, the request should be granted by the court, whether an issue is called a question of fact or a question of fact an issue, or whether the request relates to one or several questions or issues, or to one or more of each kind, with the qualification that the court is not required to repeat the same question in different forms.—*Plyer v. Pacific Portland Cement Co.*, 152 Cal. 134, 92 Pac. 56.

11. Same—Amendment of 1909.—Though since the amendment of 1909 to this section it is discretionary whether the court shall submit special issues to the jury in certain cases; and though prior thereto, under the amendment of 1905, it was compulsory upon the court to submit such special issues as would have the effect to test the validity of the general verdict, it is the general rule whether special issues are discretionary or compulsory, that it is the duty of the court to require such answers as will support the general verdict, or, if not made, to reject that verdict. But when distinct issues are made, although the special findings upon one of them may not support the general verdict, it must nevertheless stand, if the special findings upon another distinct issue will support it.—*O'Connell v. United Railroads*, 19 Cal. App. 36, 45, 57, 124 Pac. 1022.

12. Same—Test as to interrogatories.—The test whether or not a special interrogatory shall be submitted to the jury depends upon two conditions: 1. Is the question so framed as to admit of a plain and direct answer? and 2. Would an answer favorable to the party preferring the request be inconsistent with the general verdict for his adversary? If either of these queries can be answered in the negative, the court is justified in refusing to submit the issue.—*Pigeon v. Fuller*, 156 Cal. 691, 697, 105 Pac. 976.

13. As this section read and was interpreted prior to amendment, special findings were not the special verdict of the common-law practice which must be sufficient to support a judgment, but their primary purpose was to determine whether the general verdict was or was not against law. They were addressed to matters relevant to the essential issues impliedly found by the jury in reaching a general verdict and were

subject to two conditions: 1. Is the question so framed as to admit of a plain and direct answer? and 2. Would an answer favorable to the party preferring the request be inconsistent with a general verdict for his adversary?—*Fujise v. Los Angeles R. Co.*, 12 Cal. App. 207, 214, 107 Pac. 317.

14. Court—Can not give judgment contrary to general verdict except in single instances where special verdict is inconsistent with general verdict. Finding by jury for plaintiff in lesser sum than amount claimed by him under insurance policy is not proof of fraud such as would make general verdict inconsistent with special verdict.—*Obersteller v. Commercial A. Co.*, 96 Cal. 645, 648, 31 Pac. 587; *Portland C. Co. v. Murphy*, 130 Cal. 649, 652, 63 Pac. 70.

15. Same—Discharges functions of jury in passing upon facts, besides performing its peculiar and appropriate duty of deciding law in cases where jury is waived. So far as it acts as jury, it is subject to same rules and entitled to same privileges with exception of mode of rendering its decision. It must in all cases find the facts—in other words, its verdict must in all cases be special. It has not discretion in this particular which is allowed in some actions to juries.—*Breeze v. Doyle*, 19 Cal. 101, 104.

16. Same—Erred in withdrawing special issues from consideration of jury and accepting general verdict rendered in favor of plaintiff in case where jury returned special verdict upon issues which called for judgment in favor of defendant and at the same time found a general verdict in favor of plaintiff, and upon objection of jury to judgment going for defendant, jury was sent out for further deliberation and subsequently reported to court that while it adhered to its general verdict in favor of plaintiff, it was unable to render any verdict upon special issues.—*Fitzpatrick v. Himmelmann*, 48 Cal. 588, 589.

17. Same—May submit special issues.—The court may on its own motion, and without the request of either party, submit special issues to the jury.—*Wiencke v. Bibby*, 15 Cal. App. 50, 113 Pac. 876.

18. Definition—Meaning of term "special verdict," as herein used.—Term not used in common-law sense, its function being, not a finding upon a material issue, as a means of determining what judgment shall be entered, but a finding upon one or more particular issues or questions of fact, primarily and principally for the purpose of determining whether the general verdict is or is not against law.—*Plyer v. Pacific Portland Cement Co.*, 152 Cal. 134, 92 Pac. 56.

See par. 76, this note.

19. Same—Scope of phrase.—A special verdict as here understood is not the special verdict of the common law, viz., a finding upon every material issue, but consists of a finding upon any one or more of the issues or particular questions of fact, not

for the purpose of determining what judgment shall be entered, but primarily and principally for the purpose of determining whether the general verdict is or is not against law.—*Napa Valley Packing Co. v. San Francisco Relief & Red Cross Funds*, 16 Cal. App. 467, 118 Pac. 469.

20. Direct answer.—It is duty of jury to answer each interrogatory by direct answer if they can agree, and if they can not agree no answer should be given.—*Winfield Nat. Bank v. McWilliams*, 9 Okla. 493, 60 Pac. 229.

21. Discretion of court—As to submitting special questions—In action for recovery of money only it is optional with court to submit or refuse to submit particular questions of fact to jury. Exercise of power and extent of its exercise are left to discretion of court, and error can not be maintained without at least a clear showing of abuse of such discretion.—*Olmstead v. Dauphiny*, 104 Cal. 635, 641, 38 Pac. 505.

As to mandatory provision, see pars. 55 and 56, this note.

22. There is a discretion vested in the court with regard to submitting special issues. If the issue proposed be irrelevant, ambiguous, or unintelligible or a repetition of another issue it is proper for the court to exclude it.—*Miller v. Fireman's Fund Ins. Co.*, 6 Cal. App. 395, 401, 92 Pac. 332.

23. Same—Material facts.—Party has right to have answer returned to specific questions as to material facts in a jury trial, and a denial of this right is error. What is a material fact is a question to be determined by the court.—*City of Weir v. Herbert*, 6 Kan. App. 596, 51 Pac. 582.

24. Same—Party failing to make his proof, request for special findings of jury is properly refused by the court.—*Solomon v. Yrisarri*, 9 N. M. 480, 54 Pac. 752.

25. Same—Request of defendant that special issues be submitted to jury was addressed to discretion of court, and refusal of court to grant request was not subject of an exception.—*Smith v. Occidental & O. S. Co.*, 99 Cal. 462, 472, 34 Pac. 84; *Schultz v. McLean*, 109 Cal. 437, 444, 42 Pac. 557; *George v. Los Angeles R. Co.*, 126 Cal. 357, 365, 77 Am. St. Rep. 184, 46 L. R. A. 829, 58 Pac. 819.

26. Same—Submission of special findings to jury is within discretion of trial court, and a refusal to submit special findings is not error.—*Genter v. Conglomerate M. Co.*, 23 Utah 165, 64 Pac. 362.

27. Submitting special interrogatories to the jury is entirely discretionary with the trial court.—*Walker v. McNeill*, 17 Wash. 582, 50 Pac. 518.

28. Same—When issues not complicated.—Refusing to submit special interrogatories in a cause is no abuse of discretion.—*Giffen v. City of Lewiston*, 6 Idaho 231, 55 Pac. 545.

29. Effect of general verdict.—A complaint that the court reversed the requirements of this section (as it existed at the time of the trial) by requiring answers to the special issues whether the jury found a general verdict or not is immaterial, and the error harmless where the jury found a general verdict and also answered the special interrogatories. — *Law v. Northern Assur. Co.*, 165 Cal. 394, 132 Pac. 590.

30. Where a verdict is general in its terms, and consequently covers every issue in the case, it must be upheld if it finds support in the evidence adduced upon the whole case.—*Merrill v. Kohlberg*, 29 Cal. App. 382, 155 Pac. 824.

31. Evidentiary matter—And not ultimate facts, being called for by special interrogatories, they are properly refused.—*Riley v. Wolfley*, 60 Kan. 855, 55 Pac. 461.

32. Exceptions to account of executor—Do not create issues of fact joined, in a contest of such account, such as must be submitted to jury on demand of party in interest.—In *matter of Sanderson*, 74 Cal. 199, 209, 15 Pac. 753.

33. Failure to object to return of special findings of fact and to permit jury to be discharged without specifically answering inquiries, which they had neglected or failed to answer or had overlooked, is waiver of right to an answer, and it is too late to object to it after jury is discharged.—*City of Guthrie v. Thistle*, 5 Okla. 517, 49 Pac. 1003.

34. Finding of jury—Being susceptible of two interpretations, court will, if possible, adopt the one which will harmonize them and sustain the general verdict.—*MacElree v. Wolfersberger*, 59 Kan. 105, 52 Pac. 69.

35. Findings on special issues—Which expressly negative all negligence on part of any person at time of accident and exonerates defendant railroad from any want of care in selecting its employees, leaves nothing to warrant general verdict for plaintiff for damages for injuries received.—*Vaughn v. California Cen. R. Co.*, 83 Cal. 18, 22, 23 Pac. 215.

36. Framing interrogatories.—In framing special interrogatories the court in the interest of simplicity should prevent the possibility of long, argumentative and possibly irresponsible answers, and this may sometimes be done by framing the questions so that they may be answered "yes" or "no." —*Law v. Northern Assur. Co.*, 165 Cal. 394, 132 Pac. 590.

37. Framing and settling material issues of fact before proceeding to submit case to jury is proper, and court itself may direct special issues to be prepared and submitted to jury, and matter of time is immaterial, except that for greater certainty and convenience it would serve the ends of justice that particular issues upon which verdict is to be so rendered should be sub-

mitted and settled before trial rather than after.—*Smith v. Rowe*, 4 Cal. 6, 8.

As to special issues being submitted after argument and after giving instructions to jury, see par. 80, this note.

38. Frivolous and immaterial questions which run to minor and subdivided facts into which principal fact may be resolved and which can not be fully and fairly answered without confusing jury, it is duty of trial court to refuse to submit them.—*Burr v. Honeywell*, 6 Kan. App. 783, 51 Pac. 235.

39. General finding—In favor of defendants—Equivalent to finding that alleged agency did not exist, in action where question arose whether there was an agency on part of plaintiff in transaction which defendants set up as releasing them from liability to plaintiff, and it was the substantial issue.—*Frayner v. Holtom*, 8 Kan. App. 718, 54 Pac. 918.

40. General purpose of special verdict.—Is to test the validity of the general verdict, by ascertaining whether or not it may have been the result of a misapplication of the law to actual findings in material conflict with the findings which in their absence would be implied from the general verdict.—*Plyer v. Pacific Portland Cement Co.*, 152 Cal. 130, 92 Pac. 56.

41. General verdict—Is controlling.—Unless the special verdict is absolutely irreconcilable with the general verdict which determines all issues in favor of a party where there is evidence to support it, the latter must control.—*Antonian v. Southern Pac. Co.*, 9 Cal. App. 718, 732, 100 Pac. 877.

As to special verdict supporting general verdict, see par. 78, this note.

42. Where the general verdict gave the items constituting the damage and the special verdict purported to and did give the amount for "all the detriment" or damages caused by defendant to plaintiff, the latter being the exact sum of the items mentioned in the general verdict, it can not be said there was conflict or inconsistency between the two verdicts; one gave the items, the other the amount of those items, so that the special verdict would control the general, and where it appears that certain improper items were included as shown by the specified items in the general verdict, the judgment must be modified to that extent.—*Irrgang v. Ott*, 9 Cal. App. 440, 445, 99 Pac. 528.

43. Same—Is not overcome by special finding unless such special finding be upon a substantial, material issue and inconsistent with such general verdict.—*City of Topeka v. Noble*, 9 Kan. App. 171, 58 Pac. 1015.

44. Same—Or judgment, operates as an estoppel as to such matters as were necessarily considered and determined, but it is never conclusive upon immaterial or collateral issues.—*Chapman v. Hughes* (Cal. Sept. 7, 1899), 58 Pac. 293.

45. Immaterial error.—Where a special issue has been given to the jury, a failure to answer it will not be deemed prejudicial, if an answer would not be favorable to the party requesting it or be inconsistent with the general verdict for his adversary.—*Pigeon v. Fuller*, 156 Cal. 691, 697, 105 Pac. 976.

46. Inconsistent general and special verdicts.—In an action for goods sold and delivered to defendants other than defendant corporation at the special instance and request of the former, with the usual allegations as to promise of payment and assumption of obligation and liability by the latter a special verdict of "no" in answer to question, "Did the plaintiff sell and deliver the goods . . . to the original defendants other than" defendant corporation? held inconsistent with general verdict against the defendant corporation, and that a judgment should have been rendered in favor of such defendant corporation.—*Napa Valley Packing Co. v. San Francisco Relief & Red Cross Funds*, 16 Cal. App. 465, 118 Pac. 469.

47. A general verdict for the plaintiff is inconsistent with a special verdict that a tenant was not in possession under the lease for one year at a monthly rental, in an action for damages, or misrepresentation that a lease created a tenancy from month to month at a monthly rental, but in truth created a tenancy for one year at a monthly rental.—*Di Vecchio v. Luchsinger*, 12 Cal. App. 219, 221, 222, 107 Pac. 315.

48. The court should not strain the language of a findings in a verdict to make out a case of conflict. If possible and it can reasonably be done they should be so construed ut res magis valeat quam pereat—i. e., that the end may be promoted rather than destroyed.—*Antonian v. Southern Pac. Co.*, 9 Cal. App. 718, 731, 100 Pac. 877.

49. Issues of fact—Other than those arising on contest of will, even conceding that there are any such issues, which, on demand, must be submitted to jury in conformity to requirements of code as to such contests, must at least be of same kind as those joined in contests of wills.—In matter of *Sanderson*, 74 Cal. 199, 209, 15 Pac. 753.

50. Same—Submitted, should be such that verdict thereon would be determinative of an order or judgment to be entered by court, and not merely determinative of subordinate facts which may be considered by court in connection with other facts in making its order or judgment.—In matter of *Sanderson*, 74 Cal. 199, 209, 15 Pac. 753.

51. Judgment—According to special verdict.—Jury returning general and special verdict, one must be consistent with the other, for special verdict controls general verdict; and if it appears to court that jury have, by their general verdict, drawn a

conclusion not warranted by law, the court should disregard it and order judgment according to special verdict.—*Simmons v. Hamilton*, 56 Cal. 493, 496.

52. Jury has discretion—To find a general or a special verdict in an action for the recovery of money only.—*Shaw L. Co. v. Manville*, 4 Idaho 369, 39 Pac. 559.

53. Leading and suggestive special interrogatories are properly refused.—*Riley v. Wolfley*, 60 Kan. 855, 55 Pac. 461.

54. Same—Leading special interrogatories may be propounded to the jury.—*Denver & R. G. R. Co. v. Sipes*, 26 Colo. 17, 55 Pac. 1093.

55. Mandatory provision.—A party has a statutory right to have such questions as are authorized by this section answered by the jury, and to permit them to be evaded is to deprive the party of such right.—*Larsen v. Leonardt*, 8 Cal. App. 226, 228, 96 Pac. 395.

As to discretion of court in submission of special issues, see pars. 21, 22, this note.

56. Under the amendment of 1905 it is mandatory upon a trial court to submit special issues of particular questions of fact to the jury in all cases when requested to do so by either of the parties.—*Williams v. San Francisco & N. R. Co.*, 6 Cal. App. 715, 727, 93 Pac. 122.

57. Materiality of issue.—Even when the law made it compulsory upon the court, upon the written request of a party to direct the jury to find in writing upon all or any of the issues, it was still for the court to determine whether or not a question propounded was proper for submission.—*Pigeon v. Fuller*, 156 Cal. 691, 696, 105 Pac. 976.

58. Necessity of special issues—Complicated causes make it next to impossible to find a jury capable of passing understandingly upon the various questions of fact involved without aid of special issues, and statute contemplates in all such cases special issues should be framed under directions of court according to long-established rules of chancery practice.—*Brewster v. Bours*, 8 Cal. 501, 505.

59. Objections to instructions by plaintiff—Need not be specially noticed on appeal from judgment in favor of defendant for reason that, if erroneous, and if general verdict had been found in favor of plaintiff, it would have been controlled by facts specially found by jury; upon which facts it would have been duty of court to have entered judgment in favor of defendant, notwithstanding such general verdict in favor of plaintiff.—*Los Angeles C. Assoc. v. Los Angeles*, 103 Cal. 461, 471, 37 Pac. 375.

60. Party submitting question to jury—Is bound by answer in so far as it affects general verdict in his favor.—*Mitchell v. Matheson*, 28 Wash. 723, 63 Pac. 564.

61. Presumption.—In support of judgment is that all issues presented by pleading were, by consent of parties, submitted to jury under proper instructions of court and were passed upon in arriving at their verdict.—*Horwege v. Sage*, 137 Cal. 539, 541, 70 Pac. 621.

62. Presumptions of law.—May be indulged in, but indulgence in inferences of fact as to matters bearing upon issues presented to jury are denied to it. If ultimate fact of fraud or mental incompetency or undue influence be found by jury in contest over probate of will, then court is bound to declare that certain particular judgment follows as matter of law. So must court be able to declare from probative facts found.—In matter of *Benton*, 131 Cal. 472, 476, 63 Pac. 775.

63. Provisions as to instruction.—To find on fact.—Provision that court may in all cases instruct jury to find on a particular question of fact, submitted in writing, if they return general verdict, means that special interrogatory shall call for material and pertinent fact, and, in general, ultimate fact rather than evidentiary one.—*White v. White*, 34 Ore. 141, 55 Pac. 645.

64. Refusal of court.—To compel jury to make further answers to questions submitted after jury had said it was impossible for them to answer, was in effect withdrawal of questions from jury, and is same as though court had refused to submit them in first instance.—*Burr v. Honeywell*, 6 Kan. App. 783, 51 Pac. 235. See *City of Wyandotte v. Gibson*, 25 Kan. 236.

65. Same.—To present special interrogatories.—Not error, when.—Error can not be predicated on the court's refusal to submit requested interrogatories for a special verdict.—*McEwen v. New York Life Ins. Co.*, 42 Cal. App. 133, 183 Pac. 373.

66. Same.—To require jury to answer material questions presented by plaintiff is error on part of court.—*Stephens v. Gardner C. Co.*, 9 Kan. App. 883, 57 Pac. 1058.

67. Same.—To submit questions of fact within issues.—Refusing to submit, on request, special questions of fact within the issues, is reversible error.—*City of Oklahoma v. Hill*, 4 Okla. 521, 46 Pac. 568.

68. Rendition of verdict.—Is something different from filing or entry and must precede both.—*Gray v. Palmer*, 28 Cal. 416, 418.

69. Rule is that enough must be found by special verdict, when that is relied on as basis of a judgment to show in and of itself a legal conclusion of liability.—*Garfield v. Knights Ferry & T. Co.*, 17 Cal. 510, 512.

70. Special interrogatories.—Submitted to jury, should be carefully drawn, and call for direct answer, and although they might be leading if propounded to witness, that is not objectionable feature when propounded to jury, for they are disinterested and would not be controlled in their answer

for same reason that witness might, if asked leading question.—*Denver & R. G. R. Co. v. Sipes*, 26 Colo. 17, 55 Pac. 1093.

71. Same.—Which relate to issues on which cause turns, and which call for answers of either "yes" or "no," are not objectionable because they are so framed that no other answers could be given.—*Denver & R. G. R. Co. v. Sipes*, 26 Colo. 17, 55 Pac. 1093.

72. Special issues.—Discretion of court.—Under the provisions of the above section, as amended by the legislature in 1909 the submission of special issues to the jury is discretionary with the trial court, and such discretion will not be interfered with on appeal unless an abuse of discretion is shown.—*Oberholzer v. Hubbell*, 36 Cal. App. 17, 171 Pac. 436.

As to discretion of court to submit special issues to jury, see pars. 21, 22, this note.

73. Same.—Submitted to jury.—Not including an issue made by pleadings as to whether plaintiff was holder and owner of note sued on, and verdict responding only to special issues submitted, there being no general verdict, result is mistrial. Until issues of fact are decided, no final judgment can be entered.—*Kiel v. Reay*, 50 Cal. 61, 63.

74. Special verdict.—Upon a single point may often determine whole cause, either for defendant or plaintiff, and in such case special verdict would control any verdict to contrary, but where special findings do not have such controlling effect—if they do not include issues which, if found for defendant, would sustain general verdict in his favor, special verdict can not properly be deemed inconsistent with general verdict.—*McDermott v. Higby*, 23 Cal. 489, 490.

75. Same.—When not inconsistent with general verdict.—None of special findings being upon issue of abandonment, if jury found their general verdict in favor of defendant upon that one issue alone, special verdict is not inconsistent with general verdict.—*McDermott v. Higby*, 23 Cal. 489, 490.

76. Special "verdicts" and "findings."—"Questions" and "issues" of fact.—While there is undoubtedly a distinction between issues and particular questions of fact, and there may be special questions arising in a case as important and as vital as the issues in which they are involved, so far as this section is concerned special verdicts and special findings are identical in everything except the name, and it is wholly immaterial that the request of the party is wrongly labeled.—*Plyer v. Pacific Portland Cement Co.*, 152 Cal. 134, 92 Pac. 56.

See pars. 18, 19, this note.

77. Sufficiency of verdict.—To support judgment, whether treated as verdict or as finding, can not be considered on appeal from order denying new trial, but only on appeal from judgment.—*Morse v. Wilson*,

138 Cal. 558, 559, 71 Pac. 801. See *Brison v. Brison*, 90 Cal. 323, 327, 27 Pac. 186; *Riverside W. Co. v. Gage*, 108 Cal. 240, 243, 41 Pac. 299.

78. Support of general verdict.—Where the general verdict is supported by one of several special verdicts, and not by the others, it is nevertheless sufficient and unobjectionable, unless the special verdicts themselves are inconsistent. — *California Wine Assoc. v. Commercial Union Fire Ins. Co. of New York*, 159 Cal. 52, 112 Pac. 858.

As to general verdict controlling, see pars. 41 and 42, this note.

79. Verdict of "nominal damages" to plaintiff—Will not be set aside nor judgment thereon reversed on ground that term is not definite or certain, for defendant could not be injured by judgment in other respects proper which awarded such damages against him in case where plaintiff was entitled to nominal damages:—*Davidson v. Devine*, 70 Cal. 519, 520, 11 Pac. 664.

80. Whether plaintiff was a corporation or not—Was properly submitted to jury in action to recover money. That this was done after argument and after giving of instructions to jury is not material.—*Fresno C. & I. Co. v. Warner*, 72 Cal. 379, 381, 14 Pac. 37.

81. Withdrawal of special questions of fact—After their submission to jury may be properly allowed where defendant has not framed special questions submitted by him with reference to such questions withdrawn by plaintiff, and where it does not appear that defendant has been otherwise prejudiced by such withdrawal.—*Missouri Pac. R. Co. v. Moffatt*, 60 Kan. 113, 72 Am. St. Rep. 343, 55 Pac. 837.

82. Wording of special question of fact submitted to a jury should be clear and concise and of such form that it can give direct answer thereto.—*City of Guthrie v. Shaffer*, 7 Okla. 459, 54 Pac. 698.

§ 626. VERDICT IN ACTIONS FOR RECOVERY OF MONEY OR ON ESTABLISHING COUNTERCLAIM. When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant, when a counterclaim for the recovery of money is established, exceeding the amount of the plaintiff's claim as established, the jury must also find the amount of the recovery.

History: Enacted March 11, 1872, re-enactment of § 176 of Practice Act.

VERDICT FOR MONEY OR ON COUNTERCLAIM.

- 1, 2. Amount of money due—Is not found by jury, when.
3. Finding for defendant for cost—Effect of.
4. General verdict for plaintiff—When responsive to issues.
5. Jury have nothing to do with matters not in issue.
6. "Miners' measurement" — Having no fixed meaning—Verdict of jury based on, effect of.
7. No controversy as to amount existing—What verdict sufficient.
8. Uncertain verdict—Can not be made certain.
9. Verdict in justices' court action—How made certain.

1. Amount of money due—Is not found by jury by the following verdict: "We, the jury, find for plaintiff in the amount of contract, two thousand, two hundred fifty dollars, with interest at ten per cent per annum from August 1, 1876, to November 15, 1877, less the amount of notes of the value of nine hundred fifty dollars, with interest on said notes." Such verdict is insufficient, for it specifies certain amount less another amount with interest, interest being indefinite and uncertain; this in case in which

amount of interest can not be ascertained from pleadings.—*Watson v. Damon*, 54 Cal. 278, 279, 280. See *Dougherty v. Hagglin*, 56 Cal. 522, 523; *Diggs v. Porteus*, 5 Cal. Unrep. 753, 33 Pac. 447.

2. Compare: *Electric Imp. Co. v. San Jose & S. C. R. Co.*, 3 Cal. Unrep. 618, 31 Pac. 455.

3. Finding for defendant for costs—Effect of.—Finding for defendant for its costs, in action for recovery on contract, in which defendant sets up counter-claim for damages for breach of contract, is sufficient. If jury found nothing in favor of plaintiff, and did not find in favor of defendant upon its counter-claim an amount exceeding amount established by plaintiff, verdict must necessarily be for defendant, and defendant by such verdict would be entitled to costs. In such case jury could not specify amount, if any recovery, for there could be no recovery by either party. Addition of words "for its costs" was harmless surplusage.—*Electric Imp. Co. v. San Jose & S. C. R. Co.*, 3 Cal. Unrep. 618, 31 Pac. 455.

4. General verdict for plaintiff—When responsive to issues.—A general verdict for plaintiff in action on promissory note where there was no issue between parties as to execution, terms, or amount of such note, and only defense being that such note was without consideration, is responsive to issues raised and is sufficiently certain to

serve as basis for judgment to which plaintiff is entitled. — *Hutchinson v. Superior Court*, 61 Cal. 119, 121.

5. **Jury have nothing to do with matters not in issue** and a verdict referring to such matters is, so far, surplusage.—*Pierce v. Schaden*, 62 Cal. 283, 285.

6. **"Miners' measurement"**—Having no fixed meaning—Verdict of jury based on that plaintiff is entitled to forty inches, "miners' measurement," is uncertain. Complaint averring that plaintiff is entitled to five hundred inches under four-inch pressure, but making no reference to "miners' measurement," can not help out such plaintiff, and the words "miners' measurement" used by jury in its verdict and the court in its decree, can not be treated as surplusage.—*Dougherty v. Haggin*, 56 Cal. 522, 523.

7. **No controversy as to amount existing—What verdict sufficient.**—When no controversy as to amount claimed by plaintiff existing and only issue being whether plaintiff contracted with defendant, finding of

verdict by jury for plaintiff embraces all there is in dispute in the cause, and covers all issues and is sufficient.—*Redmond v. Weismann*, 77 Cal. 423, 426, 20 Pac. 544.

8. **Uncertain verdict—Can not be made certain.**—An uncertain verdict of jury can not be made certain by findings of fact and conclusions of law by court. Action being one at law, and defense being equitable, findings and conclusions of law as to plaintiff's cause of action (case being tried by jury) must be regarded as surplusage.—*Diggs v. Porteus*, 5 Cal. Unrep. 753, 33 Pac. 447.

9. **Verdict in justices' court action—How made certain.**—A verdict of jury in justices' court action, though irregular, when it is only necessary to refer to pleadings to make it certain, and, taken together, record and verdict show exact amount which jury means to find for plaintiff, judgment entered under such circumstances is not void.—*Hutchinson v. Superior Court*, 61 Cal. 119, 121.

§ 627. VERDICT IN ACTIONS FOR THE RECOVERY OF SPECIFIC PERSONAL PROPERTY. In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant, by his answer, claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or, if being in favor of the defendant, they also find that he is entitled to a return thereof, must find the value of the property, and, if so instructed, the value of specific portions thereof, and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property.

History: Enacted March 11, 1872, re-enactment of § 177 of Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 311.

VERDICT IN REPLEVIN.

1. Action for specific personal property—Affirmative relief for defendant—Not sustained, when.
2. Same—Redelivery possible—Payment not permissible.
3. Change of possession of property from defendant to plaintiff—Effect of.
4. Character or value of articles which could not be returned.
- 5, 6. Damages for detention of property—When may be recovered.
- 7, 8. Defendant can not complain that recovery of value is not adjudged, when.
9. Defendant having right to possession of property when suit commenced.
10. Delivery of property need not be provided for by verdict, when.
11. Error occurs in findings of jury, when.
12. Form of verdict not being satisfactory—How corrected.
- 13, 14. Judgment for return of property or value—When not justified.
15. No difference in principle between judgment.
16. Nonsuit—Above section does not apply to.
17. Same—Dismissal stands upon same footing as nonsuit.
18. Party can not object to verdict for first time on appeal.
19. Plaintiff being entitled to possession—What jury must find.
20. Property having been delivered to plaintiff—Effect of.
21. Provision for case where plaintiff has not claimed delivery before action.
22. Recovery of property—Where primary object of suit—How alleged.
23. Special verdict as to value—Statutory requirement.
24. Value of specific portions of property.
25. Value of property may be found by jury, when.

26. Value of property may be required by party to be found.
- 27, 28. Verdict for portion of property only—Judgment can not be entered on verdict.
- 29, 30. Same—Plaintiff is precluded from any further litigation.

As to necessity that verdict in replevin give separate valuation of several articles involved, see Ann. Cas. 1912D, 849-852.

1. **Action for specific personal property—Affirmative relief for defendant—Not sustained when.**—A judgment of affirmative relief for the defendant in a case in which the pleadings or findings do not indicate that the property was delivered to the plaintiff, or that it was not at all times held in possession by the defendant, can not be sustained except as a judgment for costs under the provisions of the above section and of section 667, post.—*Imperial Valley Auto Co. v. Toney*, — Cal. App. —, 190 Pac. 1043, following the doctrine in *Banning v. Marleau*, 101 Cal. 238, 35 Pac. 772.

2. **Same—Redelivery possible—Payment not permissible.**—The section in so far as it entitles the prevailing party in claim and delivery to an alternative judgment for the value of the property in case it can not be returned, is solely for his benefit, and if the property may be redelivered, the plaintiff does not have the privilege of paying for it and keeping it.—*Griffith v. Reddick*, 41 Cal. App. 458, 182 Pac. 984.

3. **Change of possession of property from defendant to plaintiff—Effect of.**—Change of possession of property from defendant to plaintiff not being alleged in answer of defendant nor in any prayer in respect thereto, judgment in favor of defendant for value is erroneous. Judgment of return is in nature of cross-judgment, and there must be some appropriate averment in pleadings to put in issue the facts upon which the relief is given.—*Gould v. Scannell*, 13 Cal. 430, 431; *Pico v. Pico*, 56 Cal. 453, 459; *Banning v. Marleau*, 101 Cal. 238, 239, 35 Pac. 772.

4. **Character or value of articles which could not be returned** are not necessary to be found by court when such fact appears at trial, nor is court bound to enter judgment in alternative.—*Burke v. Koch*, 75 Cal. 356, 359, 17 Pac. 328. See *Brown v. Johnson*, 45 Cal. 76; *Whetmore v. Rupe*, 65 Cal. 237, 238, 3 Pac. 851.

5. **Damages for detention of property—When may be recovered.**—Damages for detention of property are entitled to be recovered by plaintiff, but not money expended by him in pursuit of and endeavoring to regain it.—*Kelly v. McKibben*, 54 Cal. 192, 194.

6. **Compare:** *Arzaga v. Villalba*, 85 Cal. 191, 192, 193, 24 Pac. 656.

7. **Defendant can not complain that recovery of value is not adjudged, when.**—The defendant can not complain that judgment as rendered does not also authorize recovery

from him of value of property where judgment for possession has been rendered in favor of plaintiff and where delivery was obtained by plaintiff before trial.—*Claudius v. Aguirre*, 89 Cal. 501, 506, 26 Pac. 1077.

8. **Compare:** *Berson v. Nunan*, 63 Cal. 550, 552; *Brichman v. Ross*, 67 Cal. 601, 606, 8 Pac. 316.

9. **Defendant having right to possession of property when suit commenced**, but such right having passed to plaintiff before trial, court should not decree return of property to defendant merely that it might again be replevied by plaintiff, but will leave property in possession of plaintiff, where it belongs, and give defendant judgment for costs only.—*O'Connor v. Blake*, 29 Cal. 312, 317; *Flinn v. Ferry*, 127 Cal. 648, 653, 60 Pac. 434.

10. **Delivery of property need not be provided for by verdict, when.**—When jury found right of possession to be in plaintiff, then conclusion of law followed that he was entitled to delivery if it could be had; and if not to value of property as found by jury, in the alternative. This the judgment must contain, but not the verdict. No finding as to delivery at all is required.—*Ryan v. Fitzgerald*, 87 Cal. 345, 346, 347, 25 Pac. 546.

11. **Error occurs where jury finds value of property and damages and returns verdict for plaintiff for such value and damages**, but does not find for plaintiff for property, in case where court instructed jury to render verdict for plaintiff for property and to find value of property and damages. Under such verdict and judgment thereon plaintiff could not have elected as to delivery of property.—*Norcross v. Nunan*, 61 Cal. 640, 643.

12. **Form of verdict not being satisfactory—How corrected.**—The form of verdict not being satisfactory to defendant, he should have asked at time of its announcement that it be made formal and certain; otherwise it was duty of court to construe it so as to give it effect intended by jury, if intended effect could be ascertained from its language considered in connection with pleadings and evidence; provided, however, that intended effect was not unlawful and not irrelevant to pleadings.—*Johnson v. Visher*, 96 Cal. 310, 314, 31 Pac. 106.

13. **Judgment for return of property or value—When not justified.**—A judgment for return of property or for value thereof in case delivery can not be had is justified by following verdict: "We, the jury, etc., find for defendant and fix the value of property at fifteen hundred dollars."—*Etchepare v. Aguirre*, 91 Cal. 288, 291, 292, 25 Am. St. Rep. 180, 27 Pac. 668.

14. Can not be had by defendant unless he has claimed a return in his answer. It is arbitrarily made duty of defendant to assert his formal claim for return as prerequisite of judgment for return of

property or its value.—*Pico v. Pico*, 56 Cal. 453, 459; *Banning v. Marleau*, 101 Cal. 238, 239, 35 Pac. 772.

15. No difference in principle between judgment for value of property sued for, without alternative for its delivery, and judgment for delivery of property without an alternative for its value. If former is free from error, latter must be equally so.—*Burke v. Koch*, 75 Cal. 356, 359, 17 Pac. 328; *Claudius v. Aguirre*, 89 Cal. 501, 505, 26 Pac. 1077.

16. Nonsuit—Above section does not apply to.—The above section applies only where issues in case have been submitted and passed upon by jury. It does not apply to case of judgment of nonsuit.—*Ginaca v. Atwood*, 8 Cal. 446, 448. See *Clary v. Rolland*, 24 Cal. 147, 151.

17. Same—Dismissal stands upon same footing as nonsuit, leaving parties to settle, in action upon undertaking, those matters which, if original suit were prosecuted, it would be necessary to determine in first instance. Such matters include right of defendant to return of property, and as opportunity to obtain judgment for its return is taken away by its failure to prosecute, he is entitled to compensation in damage.—*Mills v. Gleason*, 21 Cal. 274, 280.

18. Party can not object to verdict for first time on appeal.—A party will not be heard to object to verdict for first time on appeal from judgment. It is susceptible of construction which might have lawful and relevant effect.—*Johnson v. Visser*, 96 Cal. 310, 314, 31 Pac. 106.

19. Plaintiff being entitled to possession—What jury must find.—The plaintiff being entitled to possession, jury is not required to find value of property if it has been delivered to plaintiff, and unless value has been found, there is no basis upon which to render alternative judgment for its value.—*Caruthers v. Hensley*, 90 Cal. 559, 560, 27 Pac. 411; *Seligman v. Armando*, 94 Cal. 314, 316, 29 Pac. 710; *Erreca v. Meyer*, 142 Cal. 308, 310, 75 Pac. 326.

20. Property having been delivered to plaintiff—Effect of.—The property having been delivered to plaintiff, defendant who recovers judgment is entitled to judgment for return of property; and if property—all of it—can not be returned, then to judgment for value of whole.—*Whetmore v. Rupe*, 65 Cal. 237, 238, 3 Pac. 851.

21. Provision for case where plaintiff has not claimed delivery before action.—Provision for case where plaintiff has not claimed delivery before filing of answer by defendant is made by statute, in terms, in declaring what verdict shall be. Plaintiff has privilege to claim delivery at any time before filing of answer, but it is not compulsory for him to do so.—*Wellman v. English*, 38 Cal. 583, 584.

22. Recovery of property—Where primary object of suit—How alleged.—In those cases in which recovery of property is the primary object of suit, and when damages will not compensate plaintiff, then injured party should frame his bill in equity, specifying reasons for seeking recovery of property itself, and then decree can be so framed as to compel specific delivery.—*Nickerson v. Chatterton*, 7 Cal. 568, 572.

23. Special verdict as to value—Statutory requirement for alternative judgment in favor of defendant, for return of property "or the value thereof," is proper where the owner "claims" a return of the property, and the court, jury, or referee finds the value of the property and that defendant is entitled to a return.—*Pico v. Pico*, 56 Cal. 453, 460.

24. Value of any specific portion of property is to be found by jury only "if so instructed." Error can only arise in case where such instruction would be pertinent and proper, and instruction was asked and refused.—*Whetmore v. Rupe*, 65 Cal. 237, 238, 3 Pac. 851; *Brenot v. Robinson*, 108 Cal. 143, 145, 41 Pac. 37; *Kellogg v. Burr*, 126 Cal. 38, 40, 58 Pac. 306.

25. Value of property may be found by jury, if their verdict be in favor of plaintiff, only "if property has not been delivered to plaintiff," and adversely, if property has been delivered to plaintiff, they are not required to find value; and in absence of such finding there is no verdict upon which to base an alternative judgment.—*Claudius v. Aguirre*, 89 Cal. 501, 504, 26 Pac. 1077.

26. Value of property may be required by party to be found by jury, and he may insist as a right upon alternative judgment.—*Mills v. Gleason*, 21 Cal. 274, 280; *Clary v. Rolland*, 24 Cal. 147, 153.

27. Verdict for portion of property only—Judgment can not be entered on verdict in finding in favor of defendants for one-half of certain cattle, for the recovery of which plaintiff has sued defendants. Jury should have been directed by court, on its own motion, to retire and find as to other half of cattle sued for.—*Muller v. Jewell*, 66 Cal. 216, 217, 5 Pac. 84.

28. Compare: *Ryan v. Fitzgerald*, 87 Cal. 345, 347, 25 Pac. 546.

29. Plaintiff is precluded from any further litigation with defendant as to balance of property, where portion of property only was granted plaintiff by verdict. It being silent as to balance of property, it must be held that plaintiff was denied any further relief than he had obtained.—*Ryan v. Fitzgerald*, 87 Cal. 345, 347, 348, 25 Pac. 546.

30. Compare: *Muller v. Jewell*, 66 Cal. 216, 217, 5 Pac. 84.

§ 628. ENTRY OF VERDICT. Upon receiving a verdict, an entry must be made by the clerk in the minutes of the court, specifying the time of trial, the names of the jurors, and witnesses, and setting out the verdict at length; and where special verdict is found, either the judgment rendered thereon, or if the case be reserved for argument or further consideration, the order thus reserving it.

History: Enacted March 11, 1872, re-enactment of § 178 of Practice Act.

ENTRY OF VERDICT.

1. Court acts upon verdict as it is.
2. Court can not enter verdict contrary to will of jury.
3. Entry of judgment—On special verdict—Necessity of request for.
4. Entry of verdict by clerk—Matter which forms proper connection.
5. Judgment—Not always rendered immediately after rendition of verdict.
6. Motion for judgment on special verdict—Time of.
7. No question as to proper judgment existing—Entry should be made immediately.
8. Question as to what judgment shall be rendered—On special verdict.
9. Specifying judgment in gold coin—When complaint did not demand gold coin.
10. Verdict not being satisfactory—How corrected.
11. Verdict of jury—Is part of judgment-roll.

1. **Court acts upon verdict as it is, not as it should be.**—People ex rel. Allen v. Hill, 16 Cal. 113, 118.

2. **Court can not enter verdict contrary to the will of jury.**—Montgomery v. Sayre, 91 Cal. 206, 213, 27 Pac. 648.

3. **Entry of judgment—On special verdict—Necessity of request for.**—A motion or request for entry of judgment on a special verdict on the ground of inconsistency between such verdict and the general verdict, is necessary, and failure to make such motion leaves the court free to enter judgment on the general verdict.—Napa Valley Packing Co. v. San Francisco Relief & Red Cross Funds, 16 Cal. App. 471, 118 Pac. 469.

4. **Entry of verdict by clerk—Matter which forms proper connection** between pleadings and judgment, and as it is digression in progress of trial from general course of procedure designated for obtaining judgment upon issues presented by pleadings, legislature has deemed it proper that it should be evidenced by permanent memorandum thereof.—Von Schmidt v. Widber, 99 Cal. 511, 515, 34 Pac. 109.

5. **Judgment—Not always rendered immediately after rendition of verdict, or even after findings of fact, by judge or referee.**

have been filed.—Gray v. Palmer, 28 Cal. 416, 420.

6. **Motion for judgment on special verdict—Time of.**—Motion for judgment on the special verdict on the ground that it is inconsistent with the general verdict must be made before judgment is entered on the general verdict.—Napa Valley Packing Co. v. San Francisco Relief & Red Cross Funds, 16 Cal. App. 471, 118 Pac. 469.

7. **No question as to proper judgment existing—Entry should be made immediately.**—It is better for court to direct judgment to be entered at once without waiting for motion for new trial or any proceedings to set aside verdict.—Hutchinson v. Bours, 13 Cal. 50, 51.

8. **Question as to what judgment shall be rendered—On special verdict** is often reserved for argument or further consideration. It thus not infrequently happens that judgment is not rendered for several months after rendition of verdict.—Gray v. Palmer, 28 Cal. 416, 420.

9. **Specifying judgment in gold coin—When complaint did not demand gold coin** is of no legal consequence in the verdict of the jury, and it is error for court to send jury back to correct such judgment. If verdict goes beyond issues raised by pleadings and passes upon extrinsic fact not embraced therein, it is void pro tanto and surplus matter may be disregarded in entering judgment.—Marquard v. Wheeler, 52 Cal. 445, 446. See Watson v. San Francisco & H. B. R. Co., 50 Cal. 523, 525.

10. **Verdict not being satisfactory—How corrected.**—The right to correct verdict does not depend upon judgment, but steps for that purpose should be taken within time limited by statute. Better practice in such cases would be to settle all questions of this character in advance of final action of court.—People ex rel. Allen v. Hill, 16 Cal. 113, 117.

11. **Verdict of jury—Is part of judgment-roll, and where clerk properly certifies transcript on appeal as being authentic copy of such judgment-roll and verdict of jury appears therein, it will be presumed that such verdict was properly recorded and entered by clerk in minutes of court as required by above section.**—Goldman v. Roger, 85 Cal. 574, 579, 24 Pac. 782.

CHAPTER V.

TRIAL BY THE COURT.

- § 631. When and how trial by jury may be waived.
 § 632. Upon trial by court, decision to be in writing and filed within twenty days.
 § 633. Facts found and conclusions of law must be separately stated. Judgment on.
 § 634. Findings may be waived, how.
 § 635. Findings, how prepared. [Repealed.]
 § 636. Proceedings after determination of issue of law.

§ 631. WHEN AND HOW TRIAL BY JURY MAY BE WAIVED. Trial by jury may be waived by the several parties to an issue of fact in actions arising on contract, or for the recovery of specific real or personal property, with or without damages, and with the assent of the court in other actions, in manner following:

1. **By failing to appear at the trial.**
2. **By written consent** filed with the clerk.
3. **By oral consent**, in open court, entered in the minutes.
4. **By failing to announce that a jury is required**, at the time the cause is first set upon the trial calendar if it be set upon notice or stipulation, or within five days after notice of setting if it be set without notice or stipulation.
5. **[By failure to make daily deposits of jury fees.]** By failing, at the beginning of each day's session, to deposit with the clerk the jury fees and, if there be any, the mileage for such day.

History: Enacted March 11, 1872, re-enactment of § 179 of Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 311; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 146 held unconstitutional, see history, § 5 ante; amendment approved May 20, 1915, Stats. and Amdts. 1915, p. 649. In effect August 8, 1915.

WAIVER OF TRIAL BY JURY.

1. Absence of adverse party — Waives right to jury.
2. Argument—Not provided for.
3. Appearing and trying cause before court without objection—Waiver.
4. Case being wrongfully on equity calendar.
5. Condemnation of land for street purposes—Jury trial—Waiver of.
6. Demand for jury being general—When denial proper.
7. Demand for jury by telegram—Sent to judge.
8. Demanding jury not necessary, when.
9. Demanding jury is necessary — Party may have been entitled to jury trial.
10. Divorce action—Requiring deposit of jury fees.
11. Failing to appear at trial—Is consent.
12. Failing to request setting of cause—Code amendment constitutional.
13. Filing an answer—Not appearance.
14. Legal issues in equitable action.
15. Object of statute — Can not be defeated by private stipulation.
16. Oral agreement made in open court—To waive trial by jury.
17. Party should be relieved from stipulation, when.
18. Party to suit in equity—Not entitled to jury.
- 19, 20. Proceeding with trial after discharge of jury, effect of.
21. Provision of constitution securing right.
22. Record on appeal silent as to waiver—Presumption.
- 23, 24. Record showing—Merely demand made on day of trial.
25. Same—That cause came on regularly for trial.
26. Repeating demand for jury — Is not necessary.
27. Rules of court—As to demand and waiver of jury—Court has no power to declare.
28. Same—Same—Failure to demand jury on law-day.

29. Same—Same—Imposing limitations and requirements.

30, 31. Same—Same—Requiring deposit of jury fees.

32. Same—Same—Requiring deposit of twenty-four dollars.

33. Same—Same—Requiring jury fee to be deposited by party demanding jury.

34. Same—Same—Time of collecting jury fees.

35. Stipulation of attorneys—When not a waiver.

36. Trial of cause when not commenced—As to waiver.

1. Absence of adverse party—Waives right to jury trial, but is not consent to trial by jury of less number than twelve.—*Zane v. Crowe*, 4 Cal. 112, 113.

2. Argument—Not provided for.—Above section and following sections do not expressly provide for argument in the case of a trial by the court, and there would seem to be reason for leaving it to the wise discretion of the judge; but, where there is room for argument, it would certainly be the better practice to permit it. If the trial judge at the close of the evidence, is entirely satisfied as to his decision, argument would generally be of no avail; but even then counsel might be able to make suggestions that would influence the judicial mind.—*Center v. Kelton*, 20 Cal. App. 611, 129 Pac. 960, 961.

3. Appearing and trying cause before court without objection on day set by consent for trial of cause, is waiver of trial by jury.—*Boston T. Co. v. McKenzie*, 67 Cal. 485, 490, 8 Pac. 22.

4. Case being wrongfully on equity calendar, and defendant having no notice thereof, failure to appear at trial was no waiver of right to trial by jury.—*Sweeney v. Stanford*, 60 Cal. 362, 366.

5. Condemnation of land for street purposes—Jury trial—Waiver of.—In an action by a municipality to condemn for street purposes ground used as right of way by street railway company and the appellants holding the land by fee-simple title the proceedings being under section 8 of the Vrooman Act as amended by the legislature of 1909 (II Henning's General Laws, 3d ed. 3077), where the parties appeal and go to trial without objection, they will be deemed to have waived a trial by jury.—*City of Los Angeles v. Zeller*, 176 Cal. 194, 167 Pac. 849.

6. Demand for jury being general—When denial proper.—In a case where the demand for jury being general and embracing whole case, was properly denied in action to annul contracts of sale on ground of fraud.—*Mesenburg v. Dunn*, 125 Cal. 222, 223, 57 Pac. 887.

7. Demand for jury trial made by telegram—Sent to judge day before trial, even if judge upon receipt thereof orders jury, is not sufficient to compel trial by jury, when party fails to appear in person or by counsel at trial.—*McGuire v. Drew*, 83 Cal. 225, 231, 23 Pac. 342.

8. Demanding jury is not necessary, for party is entitled to jury trial unless it is waived in one of the modes prescribed by above section.—*Swasey v. Adair*, 88 Cal. 179, 183, 25 Pac. 1119.

9. Demanding jury is necessary—Party may have been entitled to jury trial, but he did not ask for it, and by not asking for it it was waived.—*Pfister v. Dasey*, 65 Cal. 403, 405, 4 Pac. 393; *Ferrea v. Chabot*, 121 Cal. 233, 235, 53 Pac. 689, 1092.

10. Divorce action—Requiring deposit for jury fees with clerk of one day's per diem and mileage of the jury as condition for making order of trial by jury is not abuse of discretion of court in action for divorce. It was within discretion of court to refuse jury on any or all of issues and likewise to impose reasonable terms in case it granted jury at request of one party against wish of other.—*Hudson v. Hudson*, 129 Cal. 141, 142, 61 Pac. 773.

11. Failing to appear at trial—Is consent on part of party not appearing that issue should be tried by court without jury. Opposing party could have made this consent mutual by submitting case to court, but as he did not choose to take that course and called for jury, he was bound to take number required by law, and less number did not constitute legal jury without consent of adverse party.—*Gillespie v. Benson*, 18 Cal. 409, 411.

12. Failure to request the setting of cause—Code amendment constitutional.—The provisions of subdivision 4 of the above section providing that a right to trial by jury shall be waived by failing to announce that a jury is required, at the time the cause is first set upon the trial calendar is not constitutional, under the language of section 7 of article I of the California constitution providing in effect that a trial by jury may be waived in civil actions by the consent of the parties certified in such matter as may be permitted by law.—*Bennett v. Hillman*, 37 Cal. App. 486, 174 Pac. 362.

13. Filing answer—Not appearance.—The filing of an answer does not operate as an appearance at trial, and by failing to appear trial by jury is waived.—*Zane v. Crowe*, 4 Cal. 112, 113.

14. Legal issues in equitable action.—The fact that legal issues may be involved in an equitable action does not entitle the defendant to demand a jury trial thereof.—*Coghlan v. Quartararo*, 15 Cal. App. 666, 115 Pac. 664.

15. Object of statute—Can not be defeated by private stipulation, when such object is to promote great public interest, liberty, or morals.—*Griffith v. New York Life Ins. Co.*, 101 Cal. 627, 641, 40 Am. St. Rep. 96, 36 Pac. 113.

16. Oral agreement made in open court—To waive trial by jury upon counter-agreement of opposing counsel to transfer cause to another department of court so as to secure delay in trial, though not entered in minutes in writing, is good grounds for court to refuse trial by jury.—*Hawes v. Clark*, 84 Cal. 272, 274, 24 Pac. 116.

17. Party should be relieved from stipulation waiving jury where same can be done without injury to other side, and without disarranging orderly conduct of business of court. Such stipulation should not be looked upon as contract made upon valuable consideration. Court has some discretion in matter, and refusal of trial court to set aside such stipulation on sole ground that there had been material change in issues of case by reason of substitution of attorneys and filing an amended complaint, was not gross abuse of discretion.—*Ferrea v. Chabot*, 121 Cal. 233, 235, 236, 53 Pac. 689, 1092.

18. Party to suit in equity—Not entitled to jury trial.—*Walker v. Sedgwick*, 5 Cal. 192; *Hill v. Saunders*, 8 Cal. 281, 286.

As to trial by jury, generally, in equity cases, see, ante, § 526 and note Part XVI.

As to verdict of jury in equity cases being merely advisory to court, see, ante, § 526 and note pars. 346, 347.

19. Proceeding with trial after discharge of jury, and introducing further evidence in cause in which jury had rendered special verdict and incomplete findings in favor of defendant, is inconsistent with any demand or desire for jury trial, and should be held waiver of right.—*Montgomery v. Sayre*, 3 Cal. Unrep. 365, 25 Pac. 552.

20. Distinguished: In *Montgomery v. Sayre*, 91 Cal. 206, 211, 27 Pac. 648, which holds that question of waiver of jury trial was not involved and overruling former case on other points, viz., that verdict of jury was not set aside in regular way and was in full force at conclusion of trial, and court could not enter a verdict contrary to will of jury. When verdict is set aside, court must grant new trial; it has no power to proceed and determine cause.

21. Provision of constitution securing right of trial by jury refers generally to those cases in which such right existed at common law at time of adoption of constitution.—*Woods v. Varnum*, 85 Cal. 639, 644, 24 Pac. 843. See *Koppikus v. State Capitol Comrs.*, 16 Cal. 248, 254; *Grim v. Norris*, 19 Cal. 140, 142, 79 Am. Dec. 206; *Cassidy v. Sullivan*, 64 Cal. 266, 267, 28 Pac. 234.

22. Record on appeal silent as to waiver—Presumption.—The record on appeal being

silent on question as to whether defendant waived his right to trial by jury, and cause having been tried and determined by court, presumption is that defendant waived such right.—*Leadbetter v. Lake*, 118 Cal. 515, 516, 50 Pac. 686. See *Boston T. Co. v. McKenzie*, 67 Cal. 485, 490, 8 Pac. 22; *Montgomery v. Sayre*, 91 Cal. 206, 211, 27 Pac. 648.

23. Record showing—Merely demand made on day of trial.—In those cases where the record shows merely that appellants made demand for jury on day case came on for trial, and nothing further, and another part of record showing that there was rule of court that the party demanding jury shall, before commencement of trial, deposit with clerk of court fees necessary therefor, and parties not making or offering to make deposit under such circumstances, court did not err in denying demand for jury.—*Naphataly v. Rovengo*, 130 Cal. 639, 640, 63 Pac. 66, 621.

24. Compare: Dissenting opinion, by Beatty, C. J., *Naphataly v. Rovengo*, 130 Cal. 639, 641, 63 Pac. 66, 621.

25. Same—That cause came on regularly for trial before the court sitting without jury, both sides being represented by attorneys, whereupon defendants moved for judgment upon pleadings and motion being denied, defendants' counsel said: "Then, there being prayer that they may be put in possession, I ask upon that jury trial," court properly refused trial by jury, as this was waiver.—*Polack v. Gurnee*, 66 Cal. 266, 270, 5 Pac. 229, 610.

26. Repeating demand for jury—Is not necessary after court has once denied application, and action of court thereafter in proceeding to try cause without jury was under exception of party.—*Swasey v. Adair*, 88 Cal. 179, 183, 25 Pac. 1119.

27. Rules of court—As to demand and waiver of jury—Court has no power to declare by its rules what shall constitute waiver of constitutional right of trial by jury.—*Biggs v. Lloyd*, 70 Cal. 447, 448, 11 Pac. 831.

28. Same—Same—Failure to demand jury on law-day, as required by rules of court, does not constitute waiver of right to jury trial on day for which case was set for trial.—*Biggs v. Lloyd*, 70 Cal. 447, 448, 11 Pac. 831.

29. Same—Same—Imposing limitations and requirements as to right of trial by jury not imposed by statute regulating manner of demanding jury, under constitutional provision that jury shall be deemed waived in civil cases unless demanded, is null and void.—*State ex rel. Nichols v. Cherry*, 22 Utah 1, 60 Pac. 1103.

30. Same—Same—Requiring deposit of jury fees within five days after making demand for jury, is reasonable, and if not complied with court would not err in denying demand for jury.—*Adams v. Crawford*, 116 Cal. 495, 497, 48 Pac. 488.

31. Distinguished: In *Randall v. Kelsey*, 7 Idaho 168, 61 Pac. 515, on ground that they had no statute requiring deposit of jury fees with court as condition precedent to right of party to have jury in cases that come under justice court practice, nor any statute authorizing courts to make rule to such effect.

32. Same—Same—Requiring deposit of twenty-four dollars upon demand for jury as required by rule of the court, is proper. —*Bank of Lassen Co. v. Sherer*, 108 Cal. 513, 516, 41 Pac. 415.

33. Same—Same—Requiring jury fee to be deposited by party demanding jury before commencement of trial can have no operation if jury trial is denied in advance. Besides, party making demand has all time before commencement of trial to make his deposit, and if when demand was made there was no jury in attendance, trial by court to which defendants were forced began and ended before it was possible for jury trial to have commenced, and failure to deposit jury fee is no reason for denying right (dis. op., *Beatty, C. J.*).—*Naphtaly v. Rovegno*, 130 Cal. 639, 641, 63 Pac. 66, 621.

34. Same—Same—Time of collecting jury fees is not of such importance as to change character of rule that court has right to make parties pay jury fees. Rule requiring fee to be paid in advance is reasonable precaution to prevent jurors from being defrauded by unscrupulous parties, and to prevent demand for jury being used

as pretext to obtain continuances, and thus trifle with justice.—*Conneau v. Geis*, 73 Cal. 176, 177, 2 Am. St. Rep. 785, 14 Pac. 580.

As to various rules of court that have been adopted tending to exact good faith on part of litigants, see note 41 Am. St. Rep. 640.

35. Stipulation of attorneys—When not a waiver.—A stipulation of attorneys is not waiver of jury trial when such stipulation is entirely consistent with idea of trial, either with jury or by court, and it is only by ingrafting therein fact that there was no jury for that department of court, and that such fact was notorious. Only by ingrafting such facts would stipulation become of any force, and it is too vague and uncertain basis on which to found waiver. —*Platt v. Havens*, 119 Cal. 244, 248, 51 Pac. 342.

As to stipulation of attorney, see, ante, § 283 and note pars. 245-287.

36. Trial of cause when not commenced—As to waiver.—Trial of case was not commenced in morning, as far as waiving right to jury trial for non-appearance was concerned, where it was postponed until afternoon because attorney for defendant was actually engaged in trial of another cause and absent for such reason. Demand for jury trial was proper upon appearance in afternoon, for defendant was entitled to such trial unless he had waived it in one of the ways prescribed by law.—*Farwell v. Murray*, 104 Cal. 464, 467, 38 Pac. 199.

§ 632. UPON TRIAL BY COURT, DECISION TO BE IN WRITING AND FILED WITHIN THIRTY DAYS. Upon the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision.

History: Enacted March 11, 1872; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 312.

DECISION ON TRIAL BY COURT.

1. Action for partnership accounting and dissolution—Findings of fact—Discretion of court.
2. Adopting verdict—In equity cause.
3. Calling jury—Findings required, when.
4. Cause can not be considered as tried—Until decision has been made.
5. Construction of section—As to what includes.
- 6-8. Same—Directory merely.
9. Customary rule—Where court announces its decision.
10. Decision—As to requirement that it be in writing.
11. Same—As to necessity for.
12. Same—As what constitutes.
13. Dismissal.
14. Findings—Failure to file—Immaterial, when.

15. Same—Failure to make—Ground for new trial.
16. Same—Filing of findings—More than six months after cause was submitted.
17. Same—That several matters are not true.
18. Inconsistency between formal and oral findings—Effect of.
19. Judicial act of rendition—Signing and filing is.
20. Opinion of trial court—Can not be introduced.
21. Same—Forms no part of record on appeal.
22. Same—Informal views of trial court.
23. Same—Legal effect of.
24. Same—Must be construed with reference to the particular facts.
25. Same—No part of record.
26. Rights of parties—Are not to be prejudiced by delay of court.

27. Signing and filing provided for in section constitute what.

28. Transcript on appeal—Setting forth findings and conclusions.

1. **Action for partnership accounting and dissolution—Findings of fact—Discretion of court.**—In an action for the dissolution of an alleged partnership and for an accounting, the judge may file his findings of fact as to the existence of the partnership either before or after an accounting ordered, in his discretion within the provisions of the above section requiring findings to be filed within thirty days.—*Welch v. Alcott*, 185 Cal. 731, 198 Pac. 626.

2. **Adopting verdict—In equity cause** causes such verdict to become equivalent of finding by the court.—*Warring v. Freear*, 64 Cal. 54, 56, 28 Pac. 115.

3. **Calling jury—Findings required, when.**—In an action to recover damages alleged to have been sustained by plaintiff in connection with a real estate trade, through fraudulent representations of the defendant, where a jury is called and a verdict rendered, the judge will be required to file his findings in accordance with the requirements of the above section, for the reason that the calling of the jury is in an advisory capacity only, and necessitates a written decision by the court, in the same manner as findings of fact and conclusions of law are required by section 633, post.—*McKeever v. Locke Paddon Co.*, — Cal. App. —, 193 Pac. 258, applying the doctrine in *Vallejo & N. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238; *Holland v. Kelley*, 177 Cal. 43, 169 Pac. 1000, distinguishing *Johnson v. Mina Rica Gold Co.*, 128 Cal. 521, 61 Pac. 76.

4. **Cause can not be considered as tried—Until decision has been made and filed.**—*Warring v. Freear*, 64 Cal. 54, 56, 28 Pac. 115. See *Hastings v. Hastings*, 31 Cal. 95, 98.

5. **Construction of section—As to what includes.**—The above section refers to the trial of civil actions, and not to special proceedings.—*Lyons v. Marcher*, 119 Cal. 382, 383, 51 Pac. 559.

6. **Same—Directory merely.**—Above section is directory merely.—*McQuillan v. Donahue*, 49 Cal. 157, 158; *McLennan v. Bank of California*, 87 Cal. 569, 571, 25 Pac. 760.

7. **Provision requiring court to file its decision in writing within thirty days after submission of cause is directory merely, and court trying case without jury has jurisdiction to file its findings of fact and conclusions of law after time designated by statute.** There should, however, be no unnecessary delay in so doing.—*Lynch v. Coviglio*, 17 Utah 106, 108, 53 Pac. 983. Citing *Vermule v. Shaw*, 4 Cal. 214, 216; *Broad v. Murray*, 44 Cal. 228, 229; *McLennan v. Bank of California*, 87 Cal. 569, 571, 25 Pac. 760.

8. The provisions of the above section requiring findings to be filed within thirty days after the submission of the cause, are directory merely.—*Hutchinson Co. v. Marshall*, — Cal. App. —, 193 Pac. 164, following the doctrine in *Kepfler v. Kepfler*, 134 Cal. 215, 66 Pac. 208; *Eddy v. American Amusement Co.*, 121 Cal. App. 487, 132 Pac. 83.

9. **Customary rule—Where court announces its decision** is to enter brief minute order to that effect, but this is not ordinarily decision from which appeal is to be taken, and certainly it can not be so considered where court, after having made such entry, proceeds to file formal findings of fact and conclusions of law and thereupon enters judgment.—*Sullivan v. Washburn & M. M. Co.*, 139 Cal. 257, 259, 72 Pac. 992.

10. **Decision—As to requirement that it be in writing.**—The decision must be in writing, and filed within thirty days after submission.—*Cargnani v. Cargnani*, 16 Cal. App. 99, 116 Pac. 306.

As to decisions generally, see, post, § 633 and note.

11. **Same—As to necessity for.**—Until the decision has been entered on the minutes, or reduced to writing by the judge and signed by him, and filed with the clerk, the case has not been tried in legal intent.—*San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 30 Cal. App. 405, 158 Pac. 768.

12. **Same—As to what constitutes.**—The opinion of the court, expressed from the bench in deciding a case, is no part of the decision. In the formal findings of fact and conclusions of law are to be found the only legal expression of the views of the court.—*San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 30 Cal. App. 405, 158 Pac. 768.

13. **Dismissal.**—The dismissal of an action after evidence is in by the court of its own motion is not a nonsuit under section 581, ante, subdivision 5, but is a final judgment, and no findings and conclusions having been filed as prescribed herein, such judgment is unsupported and must be reversed.—*Saul v. Moscone*, 16 Cal. App. 511, 118 Pac. 452.

14. **Findings—Failure to file—Immaterial when.**—In those cases in which an appellant objecting because findings were not filed within thirty days as required by the above section, who has failed to show any detriment by reason of the delay or any abuse of discretion on the part of the trial court, or any error committed by said court, either upon the trial of the cause or in making the findings therein if there was error in the delay in filing the findings it was immaterial.—*Hutchinson Co. v. Marshall*, — Cal. App. —, 193 Pac. 164.

As to findings of court generally, see, post, § 633 and note.

As to inconsistency between formal and oral findings, see par. 18, this note.

15. **Same—Failure to make—Ground for new trial.**—The provisions of the above section requiring the judge to make written findings of fact is for the benefit of the court and the parties, and the failure of the trial court to make such finding constitutes judicial error for which a new trial may be ordered.—*Frascona v. Los Angeles R. Corp.*, — Cal. App. —, 191 Pac. 968, following the doctrine in *Polhemus v. Carpenter*, 42 Cal. 385; *Savings & Loan Soc. v. Burnett*, 106 Cal. 514, 29 Pac. 922; *Huntington v. Vavra*, 36 Cal. App. 355, 72 Pac. 168; approving *Hard v. Kleeb*, 1 Wash. 370, 25 Pac. 467, 27 Pac. 273.

16. **Same—Filing of findings.**—More than six months after cause was submitted for decision and court had ordered judgment for defendant, is not ground for new trial, nor can any such question be reviewed on appeal taken from order denying new trial.—*Kepfler v. Kepfler*, 134 Cal. 205, 206, 66 Pac. 208.

17. **Same—That several matters are not true**, and then proceeding to find that several allegations of complaint not in conflict with foregoing findings are true, is not in accordance with above section, which requires court to find facts.—*Goodnow v. Griswold*, 68 Cal. 599, 603, 9 Pac. 837.

18. **Inconsistency between formal and oral findings—Effect of.**—Where the court some six weeks after the submission of the case delivered an opinion wherein he summarized the important facts, and the formal findings, signed two or three months later, did not in all respects accord with the views of the first opinion, the formal findings can not be subordinated or controlled by the former opinion. No antecedent expression of the judge, whether casual or cast in the form of an opinion, can in any way restrict his absolute power to declare his final conclusion in the only manner authorized by law, which is under this and the following section.—*Scholle v. Finnell*, 173 Cal. 372, 159 Pac. 1179.

As to findings generally, see pars. 14-17, this note.

19. **Judicial act of rendition—Signing and filing is.**—There is no other judicial act required to be performed by the court to make the judgment effectual, beyond that of writing (and presumably signing) and filing as herein provided for.—*Hoover v. Lester*, 16 Cal. App. 153, 116 Pac. 382.

See, also, par. 27, this note.

20. **Opinion of trial court—Can not be introduced** for purpose of showing nature of action and issues submitted to court for its consideration.—*Keech v. Beatty*, 127 Cal. 177, 183, 59 Pac. 837; *Belger v. Sanchez*, 137 Cal. 614, 618, 70 Pac. 738.

21. **Same—Forms no part of record on appeal**, but is not prejudicial, and most that

can be said is that it will entail needless cost of printing. It is not unusual for counsel to embody opinion of lower court in briefs, better to enable appellate court to fully comprehend points involved and views of trial court. Whether appearing in briefs or in record, however, opinion can not be considered to affect or change facts as found.—*Churchill v. Flournoy*, 127 Cal. 355, 360, 361, 59 Pac. 791. See *Houston v. Williams*, 13 Cal. 24, 27, 73 Am. Dec. 565; *Hidden v. Jordan*, 28 Cal. 301, 304, 305; *McClary v. McClary*, 38 Cal. 575, 577; *Wixson v. Devine*, 67 Cal. 341, 342, 7 Pac. 776.

As to not being part of record, see par. 25, this note.

22. **Same—Informal views of trial court.**—The opinion of the trial court is nothing more than what is imports, the informal views of the court, subject to future modification after argument, and not the legal expression of those views, which can be found alone in the formal findings of fact and conclusions of law.—*Montecito Valley Co. v. Santa Barbara*, 144 Cal. 595, 77 Pac. 1113.

23. **Same—Legal effect of.**—A written opinion stating that each party should pay his own costs is no part of the decision and is without legal effect, being merely an informal statement of the views of the court which are subject to modification, and can not preclude findings that plaintiffs are entitled to recover their costs against the defendant.—*Wadleigh v. Phelps*, 149 Cal. 645, 87 Pac. 93.

24. **Same—Must be construed with reference to the particular facts** then before the court.—*Chapman v. State*, 104 Cal. 690, 697, 43 Am. St. Rep. 158, 38 Pac. 457; *Grant v. Murphy*, 116 Cal. 427, 432, 58 Am. St. Rep. 188, 48 Pac. 481.

25. **Same—No part of record.**—Written opinion, without even form of having been under oath, is not competent evidence for purpose of showing nature of action and issues involved.—*Keech v. Beatty*, 127 Cal. 177, 183, 59 Pac. 837.

As to forming no part of record on appeal, see par. 21, this note.

26. **Rights of parties—Are not to be prejudiced by delay of court** in respect to any of these acts or proceedings, and court is authorized to direct making or filing of its findings of facts and conclusions of law, as well as entry of judgment thereon *nunc pro tunc*, as of such date as will preserve these rights.—*Fox v. Hale & N. S. M. Co.*, 108 Cal. 478, 481, 482, 41 Pac. 328.

27. **Signing and filing provided for in section—Constitute what.**—The signing and filing provided in above section constitute the rendition of judgment by the court.—*Hoover v. Lester*, 16 Cal. App. 153, 116 Pac. 382.

See, also, par. 19, this note.

28. Transcript on appeal—Setting forth findings and conclusions, but not showing that they have been signed by judge, or filed with clerk; nor that there was any judgment entered thereon, does not show

that any judgment was ever rendered by the court, and is cause for dismissal of appeal.—Estate of De Leon, 4 Cal. Unrep. 388, 35 Pac. 309.

§ 633. FACTS FOUND AND CONCLUSIONS OF LAW MUST BE SEPARATELY STATED. JUDGMENT ON. In giving the decision, the facts found and the conclusions of law must be separately stated. Judgment upon the decision must be entered accordingly.

History: Enacted March 11, 1872.

FINDINGS OF FACT AND CONCLUSIONS OF LAW—DECISION.

- I. IN GENERAL, 1-123.
- II. AMENDMENTS TO FINDINGS, 124-138.
- III. CONSTRUCTION OF FINDINGS—A. IN GENERAL, 139-163.
- IV. SAME—B. ULTIMATE AND PROBATIVE FACTS IN FINDINGS—EFFECT OF, 164-184.
- V. FAILURE TO FIND UPON CERTAIN ISSUES—A. IN GENERAL, 185-205.
- VI. SAME—B. EVIDENCE ON ISSUE NECESSARY, 206-222.
- VII. SAME—C. MATERIAL ISSUES, 223-245.
- VIII. STIPULATION AS TO FACTS—FINDINGS NOT NECESSARY, 246-250.
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- 4. Same—Judgment being allowed to stand.
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- 256. Direction of court—As to the order of sale.
- 257. Examination on motion for new trial —Limited to consideration of sufficiency of evidence.
- 258. Facts found by court—Not sustaining judgment.
- 259. Failure to find upon issue—Will not be ground for reversing judgment, when.
- 260. Going to trial—Upon theory that there is a material issue.
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XI. OBJECTIONS TO FINDINGS—HOW PRESENTED—B. BY APPEAL FROM JUDGMENT.

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- 264, 265. Failure to find upon material facts—No ground for granting new trial, when.
- 266. Findings outside of issues—Effect of.
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XII. OBJECTIONS TO FINDINGS—HOW PRESENTED—C. BY MOTION FOR NEW TRIAL.

- 270. Decision is against law—Where there is failure to find upon material issue.
- 271. Decisions which may be vacated—On motion for new trial.
- 272. Duty of court is to find—Upon all material issues.
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- 276. All allegations of plaintiff's complaint—Sufficient.
- 277. All issues covered, when.
- 278. All issues of fact—Insufficient.
- 279. All other averments are not true—Insufficient.
- 280. Allegations of answer—Inconsistent with complaint—Insufficient.
- 281. Same—Consistent with facts—Insufficient.
- 282, 283. Denials in answer—Contradictory to complaint—Insufficient.
- 284. Facts set forth in complaint—Sufficient.
- 285. Finding—May refer to pleading for a specification of facts.
- 286. Material averments of complaint—Insufficient.
- 287. Nothing left undetermined—Sufficient.
- 288. Other findings immaterial.
- 289. Paragraphs by number—Sufficient.
- 290. Reference may be had to pleadings in findings.
- 291. Subdivisions by number—Sufficient.

I. IN GENERAL.

As to sufficiency of finding, see par. 60, this note.

As to waiver of finding and effect of, see, post, § 634, note par. 12.

As to want of finding in record on appeal, and effect of, see, post, § 634, note par. —.

1. **Editorial note.**—Section 180 of the Practice Act, as it was originally enacted, was practically identical with present sections 632 and 633 of this code. By the act to regulate appeals in this state, approved May 20, 1861 (Stats. 1861, p. 589), it was provided that no judgment should be reversed for want of a finding or for defective finding of fact, unless exceptions were made in court below to the finding, or to the want of it, and in cases of a defective finding the particular defect should be specifically and particularly designated; and upon failure of court below to remedy the alleged error, the party moving should be entitled to his exceptions and the same should be settled by the judge as in other cases, provided that such exceptions should be fixed in the court within five days after making the finding or decision excepted to. By an amendment to section 180 of the Practice Act, approved April 2, 1866 (Stats. 1865-6, p. 843), it was provided that no judgment should be reversed on appeal for want of a finding in writing at the instance of any party who, at the time of the submission of the cause, did not request a finding in writing and have such request entered in the minutes of the court. Said amendment also made provision for the taking of exceptions to defective findings and to lack of findings, and provided for the practice on such matters. These acts make the cases citing section 180 of the Practice Act, between 1861 and the date of the adoption of the Code of Civil Procedure, of practically no value, as far as present law and practice under the above sections is concerned, and justifies their omission.

2. **Additional findings—After entry of judgment, invalid.**—Entry of final judgment terminates jurisdiction of court over cause of parties, except as otherwise expressly provided by law. Additional finding, though material, can not be deemed to validate finding in case when made after entry of judgment. Court had no power to make it upon notice any more than without notice. Whether findings may be changed by consent of both parties not decided, but held that such change of findings would be act of parties, not of court.—*Los Angeles v. Lankershim*, 100 Cal. 525, 532, 35 Pac. 153, 556; *Ayres v. Burr*, 132 Cal. 125, 127, 64 Pac. 120.

As to amendment of findings, see Part II, this note.

3. **Same—Ex parte order by court inserting additional findings into its findings of fact,** on ground that it had inadvertently omitted them, is an unauthorized practice, and erroneous, but it does not follow that

judgment should be reversed on that ground if original findings support judgment.—*Richter v. Henningsan*, 110 Cal. 530, 537, 42 Pac. 1077.

4. **Same—Judgment being allowed to stand**, filing additional findings after judgment is improper.—*Clawson v. Wallace*, 16 Utah 300, 52 Pac. 9; *Kloppenstine v. Hays*, 20 Utah 45, 57 Pac. 712.

5. **Same—Though defective**, which does not render other findings defective, may be regarded merely as surplusage.—*Hopkins v. Warner*, 109 Cal. 133, 139, 41 Pac. 868.

6. **Adoption of findings of referee—Signature by judge constitutes judgment**.—Where a case is sent to a referee to find the facts, the report of the referee, although not drawn with the technical nicety of language which might be used, may be adopted by the trial judge as his findings of fact, and his signature thereof will constitute a judgment to that effect.—See *Terry v. Southwestern Building Co.*, — Cal. App. —, 185 Pac. 212.

7. **Affirmative case of plaintiff—Being wholly inconsistent** with truth of defendant's case, conclusive establishment of truth of former is necessarily the complete negative of case ascertained by defendant.—*Snelgrove v. Earl*, 17 Utah 321, 326, 53 Pac. 1017. See *Kisling v. Shaw*, 33 Cal. 425, 91 Am. Dec. 644; *Malone v. Del Norte*, 77 Cal. 217, 218, 19 Pac. 422; *Himmelman v. Henry*, 84 Cal. 104, 106, 23 Pac. 1098; *Diefendorff v. Hopkins*, 95 Cal. 343, 348, 28 Pac. 265, 30 Pac. 549.

8. **Affirmative finding of fact—Inconsistent with averment**, and from which it necessarily follows that averment is not true, is sufficient finding that averment is not true.—*Churchill v. Baumann*, 95 Cal. 541, 545, 30 Pac. 770.

9. **Allegations of complaint—When immaterial**.—Cause being properly decided by issues raised by special defenses, and decision not necessarily resting upon allegations of complaint, latter becomes immaterial, and it is of no consequence whether finding as to them was or was not contrary to evidence.—*Rauer v. Fay*, 128 Cal. 523, 526, 61 Pac. 90.

10. **Amendment of 1866—To section 180 of Practice Act—Had effect** that if losing party appealed without having moved for new trial or without having excepted to findings as defective, written findings were of no avail for any purpose to prevailing party, nor were they benefit to losing party unless they contained facts repugnant to or inconsistent with judgment. Previous to act of 1861, findings were required to support judgment. But under that act and section 180 Practice Act, where there was no exception on ground that finding was defective or wanting, it was only requisite that finding should not be repugnant to or inconsistent with judgment.—*Sears v. Dixon*, 33 Cal. 326, 330, 331.
C. C. P.—98

As to effect of amendment to section 180 of Practice Act and of act regulating appeals (Stats. 1861, p. 589), see par. 1, this note.

11. **Cause has not been tried—Until all issues have been disposed of**, and there is no decision until court has passed upon facts and drawn its conclusions of law therefrom.—*Reclamation Dist. v. Thisby*, 131 Cal. 572, 574, 63 Pac. 918.

12. **Conclusions of law—As to generally**.—The judgment itself controls and if the findings support the judgment, the mere absence or omission of a specific conclusion of law will not avail to defeat a judgment otherwise properly given. Indeed, it will be held that the conclusion of law is at once embraced and expressed in the mandate of the judgment.—*Takekawa v. Hole*, 170 Cal. 323, 149 Pac. 593.

13. **Same—Constitute findings of fact, when**.—In an action in the nature of an interpleader action, a conclusion of law to the effect "that said claimants are entitled to enforce mechanics' liens upon the real property described in the plaintiff's complaint for the payment of the several amounts found due to them respectively as hereinbefore set forth," amounts to a finding of fact that the amounts theretofore set forth were due, although included with the conclusions of law, and in such a case the judgment should not be reversed.—*Terry v. Southwestern Building Co.*, 43 Cal. App. 366, 185 Pac. 212, basing decision on doctrine in *Lange v. Waters*, 156 Cal. 142, 19 Ann. Cas. 1207, 103 Pac. 889.

14. **Same—Definition of**.—Conclusions of law are what in opinion of judge constitute law of cause, arising from and applicable to facts that are proved or admitted in the case.—*Sears v. Dixon*, 33 Cal. 326, 330.

15. **Same—Decision as**.—The findings of fact and conclusions of law end with the statement or direction that a judgment be entered in accordance therewith. Such statement alone has several times been held to be a sufficient conclusion of law. In *Rea v. Haffenden*, 116 Cal. 596, 48 Pac. 716, the court held that a mere direction of judgment following the findings of fact was a sufficient conclusion of law to support a judgment on appeal, where, as here, it is clear that any more specific conclusions of law must have been in favor of the plaintiff. Such being the case, the omission in the conclusions of law was merely as to a matter of form, and therefore would not warrant a reversal of the judgment.—*Anderson v. Blean*, 19 Cal. App. 581, 126 Pac. 859, 860.

16. **Same—Finding that cause of action of plaintiff is barred** by statute of limitations should properly be found as fact, and not as conclusion of law that action was barred.—*Spaulding v. Howard*, 121 Cal. 194, 198, 53 Pac. 563.

17. **Same—Finding that defendant did not at any time convert stock** would be regarded as ultimate fact in absence of any

special findings of fact, but where special facts found show conversion, such general finding is simply conclusion of law from special facts found.—*Niles v. Edwards*, 90 Cal. 10, 13, 27 Pac. 159, 296.

18. **Same**—"Let judgment and decree be entered accordingly," following findings of fact, must be held to be sufficient statement of conclusions of law. And where it is apparent that if more specific conclusions of law had been stated they would have been found in favor of plaintiff, and absence of any error or defect in this regard would not affect substantial rights of parties, there is no ground for reversal of judgment.—*Rea v. Haffenden*, 116 Cal. 596, 600, 48 Pac. 716.

19. **Same**—"That plaintiff have judgment 'as prayed for in complaint,'" and instead of following this direction, judgment directed that ditch be sold before sale of mining claims, upon appeal and upon showing to supreme court by affidavit that effect of this provision of judgment was inequitable, was reason for judgment being reversed on ground that decree was departure from usual form and not warranted by finding of court.—*Carmichael v. McGillivray*, 57 Cal. 8, 9.

20. **Compare**: *Bank of Ukiah v. Reed*, 131 Cal. 597, 601, 63 Pac. 921.

21. **Construction of section—As to object.**—See generally pars. 82-84, this note.

As to effect of section being directory, see par. 35, this note.

As to construction of findings, see Parts IV and V, this section.

22. **Court instructing itself—Reason does not exist** that court to whom a cause, upon law and fact, after hearing, has been submitted for decision and trial is practically ended, can be compelled, as court, to instruct itself as to propositions of law in advance of its decision, which is made by its findings of fact and conclusions of law. There is no statutory provision which prescribes any such course of action, and nothing whatever to recommend it.—*Wheatland M. Co. v. Pirrie*, 89 Cal. 459, 462, 26 Pac. 964.

As to presenting propositions of law which are in effect instructions to the court, in order to have court put itself on record as to its views, before findings are filed, being properly refused consideration by court, see par. 50, this note.

As to presenting findings to court and requesting court to find the same as facts in the case, not being proper practice, see par. 69, this note.

As to requesting court to find upon certain issues, and upon refusal of court so to do, taking exception and asking for review of same as an error at law, not being proper practice, see par. 79, this note.

23. **Same—Presenting certain propositions to court with request that court declare them legal principles, applicable to**

facts of case, and to render its decision in accordance therewith, and upon refusal of court so to rule, to take exceptions to bring matter before supreme court by bill of exceptions, is procedure not authorized since our codes went into operation.—*Lamb v. Harbaugh*, 105 Cal. 680, 692, 693, 39 Pac. 56. See *Touchard v. Crow*, 20 Cal. 150, 163, 81 Am. Dec. 108; In matter of Page, 57 Cal. 238, 239; *Wilson v. Wilson*, 64 Cal. 92, 94, 27 Pac. 861.

24. **Court subject to same rules as jury.**—Court is subject to same rules and entitled to same privileges as jury, in actions tried by court alone, with the exception of mode of rendering its decision. It must in all cases find facts—in other words, its verdict must in all cases be special. It has no discretion in this particular which is allowed in some actions to juries.—*Breeze v. Doyle*, 19 Cal. 101, 104.

25. **Court responsible for findings.**—The court is itself responsible for the findings.—(*Shaw, J.*, concurring.) *Estate of Friedman*, 171 Cal. 431, 153 Pac. 918.

26. **Decision—As to definition of.**—The decision consists of the facts and conclusions separately stated.—*Cargnani v. Cargnani*, 16 Cal. App. 99, 116 Pac. 306.

As to decision generally, see, ante, note to § 632 C. C. P. part.

27. **Same—Against law.**—Failure to find upon all material issues is a decision against law, and ground for a new trial.—*Cargnani v. Cargnani*, 16 Cal. App. 99, 116 Pac. 306.

28. **Same—Is findings of fact and conclusions of law signed by court and filed with the clerk as basis of judgment entered.**—*Porter v. Hopkins*, 63 Cal. 53, 55; *Sawyer v. Sargent*, 65 Cal. 259, 3 Pac. 872; *Donohoe v. Mariposa L. & M. Co.*, 66 Cal. 317, 318, 5 Pac. 495; *Hibernia Sav. & L. Soc. v. Moore*, 68 Cal. 156, 159, 8 Pac. 824; *Clifford v. Allman*, 84 Cal. 528, 532, 24 Pac. 292; *Crim v. Kessing*, 89 Cal. 478, 488, 23 Am. St. Rep. 491, 26 Pac. 1074; *San Joaquin L. & W. Co. v. West*, 99 Cal. 345, 347, 33 Pac. 928.

29. **Decision of court to which exception can be made on ground of insufficiency of evidence to sustain it, is statement of facts found and conclusions of law therefrom.**—*Coveny v. Hale*, 49 Cal. 552, 555.

30. **Decision upon which judgment is to be entered is that which by above section is to be given in writing and filed with clerk; and until so given and filed there is no decision upon which judgment can be entered, and consequently no authority for entering any judgment.**—*Crim v. Kessing*, 89 Cal. 478, 489, 23 Am. St. Rep. 491, 26 Pac. 1074.

31. **Findings constitute the decision and notice of motion for new trial directed against findings is sufficient.**—*Haight v. Tryon*, 5 Cal. Unrep. 761, 34 Pac. 712.

32. Decree of foreclosure—Findings of fact may be embodied in decree on foreclosure of mortgage.—Locke v. Klunker, 123 Cal. 231, 239, 55 Pac. 993.

33. Same—Recitals in decree of foreclosure of mortgage constitute sufficient findings, if findings are required.—Hibernia Sav. & L. Soc. v. Clarke, 110 Cal. 27, 32, 42 Pac. 425.

34. Defective finding—Or absence of any findings, does not render judgment a nullity. They only constitute grounds for reversal on appeal. For such defect or absence judgment could not be collaterally attacked.—Breeze v. Doyle, 19 Cal. 101, 106.

As to failure to find, see Parts V, VI, VII, this note.

As to effect of insufficient findings, see par. 51, this note.

35. Effect of provision of section—Is directory in so far as it applies to conclusions of law being separately stated.—Spencer v. Duncan, 107 Cal. 423, 426, 40 Pac. 549.

As to law not being merely directory and court having no power to impair its efficacy, see par. 57, this note.

36. Entry of judgment—Ministerial act—Rendition, judicial act.—Entry of judgment after it has been rendered by court is but ministerial act of clerk. Rendition of judgment is judicial act; entering it upon record is merely ministerial.—San Joaquin L. & W. Co. v. West, 99 Cal. 345, 347, 33 Pac. 928. See In matter of Cook, 77 Cal. 220, 226, 227, 11 Am. St. Rep. 267, 1 L. R. A. 567, 17 Pac. 923, 19 Pac. 431; Broder v. Conklin, 98 Cal. 360, 364, 33 Pac. 211.

37. Same—Lack of entry—Effect of.—Entry of judgment is mere ministerial act of clerk, and lack of it does not take away or delay effect of adjudication, except where some statute expressly, or by implication, so provides.—Otto v. Long, 144 Cal. 144, 146, 77 Pac. 885. See In matter of Newman, 75 Cal. 213, 221, 7 Am. St. Rep. 146, 16 Pac. 887; In matter of Cook, 77 Cal. 220, 224, 225, 11 Am. St. Rep. 267, 1 L. R. A. 567, 17 Pac. 923, 19 Pac. 431.

38. Erroneous conclusion of law—Constitutes no cause for reversal, if judgment is right.—Spencer v. Duncan, 107 Cal. 423, 426, 40 Pac. 549. See Helm v. Dumars, 3 Cal. 454, 457; Blevens v. Freer, 10 Cal. 172, 178; Haffley v. Maier, 13 Cal. 13, 15; Kidd v. Teeple, 22 Cal. 255, 263; Davis v. Baugh, 59 Cal. 568, 576; Miller v. Hicken, 92 Cal. 229, 234, 28 Pac. 339.

39. Facts admitted by pleadings—Findings unnecessary.—Averments in cross complaint which were either admitted or covered by findings actually made need not be directly found.—Giselman v. Starr, 106 Cal. 651, 659, 40 Pac. 8.

As to findings not necessary where facts admitted or stipulated, see Part VIII, this note.

40. Same—Fact being alleged in complaint and not denied in answer, there is no issue upon such fact rendering finding necessary.—Powell v. Bank of Lemoore, 125 Cal. 468, 471, 53 Pac. 83.

41. Same—Finding adverse to admission in pleadings should be disregarded in determining question whether proper conclusion of law was drawn from facts found and admitted by pleading. Mere finding by court against averment not denied does not create an issue which party has right to have tried.—Machado v. Kinney, 135 Cal. 354, 355, 67 Pac. 331.

42. Same—Same—Effect of.—Fact admitted by pleadings need not be found by court, but if court finds against such admission it would, if material, be ground for reversal.—Faulkner v. Rondoni, 104 Cal. 140, 143, 37 Pac. 883.

43. Same—Findings are not necessary when allegations of complaint are not denied, or as to facts admitted by pleading.—Gregory v. Gregory, 102 Cal. 50, 52, 36 Pac. 364; Pomeroy v. Gregory, 66 Cal. 572, 573, 6 Pac. 492; Taylor v. Central Pac. R. Co., 67 Cal. 615, 619, 8 Pac. 438.

44. Same—Matters of fact admitted by pleadings require no findings, and as to such facts pleadings in effect become part of findings. Findings always relate to matters contained in pleadings,—that is, they determine material issues of fact raised by pleading.—Kennedy & S. L. Co. v. S. S. Const. Co., 123 Cal. 584, 585, 586, 56 Pac. 457.

45. Same—Should be treated as found.—Court need not expressly find fact averred in pleading of one party and not denied by other.—In matter of Doyle, 73 Cal. 564, 570, 15 Pac. 125; Ortega v. Cordero, 83 Cal. 221, 226, 26 Pac. 80.

46. Facts need not necessarily follow the pleadings which they support. If truth or falsity of each material allegation not admitted can be demonstrated from the findings, requirements of code are met.—Mott v. Ewing, 90 Cal. 231, 235, 27 Pac. 194.

47. Failure to sign and file—Effect of.—Where not waived it is reversible error to omit to sign and file findings of fact.—Pierson v. Pierson, 15 Cal. App. 568, 115 Pac. 461.

As to signature, see pars. 104 et seq., this note.

48. Finding being conclusive against right of plaintiff to recover, findings upon other issues are unnecessary to support judgment.—Gregory v. Gregory, 102 Cal. 50, 52, 36 Pac. 364; Dyer v. Brogan, 70 Cal. 136, 139, 11 Pac. 589.

49. Finding certain matters not to be true does not fix or determine fact, but finds that something is not fact but the opposite—that it is false.—Goodnow v. Griswold, 68 Cal. 599, 603, 9 Pac. 837.

50. Findings of facts and conclusions of law—Separately stating—Directory provision.—Requirement that findings of fact

and conclusions of law shall be separately stated is mere directory, therefore, if correct findings or conclusions of law and fact be made they may be considered in their true character wherever set out.—Butler v. Agnew, 9 Cal. App. 327, 330, 99 Pac. 395.

51. Findings of judge—Is single act; and his signature and filing with clerk are sufficient to make it matter of record.—Reynolds v. Harris, 8 Cal. 617, 618.

52. Findings outside of issues—Can not aid in sustaining judgment.—Green v. Chandler, 54 Cal. 626, 628; Sachse v. Auburn, 95 Cal. 650, 651, 30 Pac. 800; Gamache v. South School Dist., 133 Cal. 145, 148, 65 Pac. 301.

As to finding outside of issues, made, see Part IX, this note.

53. Finding under wrong heading—Immaterial.—Whether certain conclusion from specific facts found should be classified as finding of fact or of law is often difficult to determine; and mere fact that one finding was placed under wrong heading would be very feeble reason for reversal of judgment.—Millard v. Supreme Council of A. L. of H., 81 Cal. 340, 342, 22 Pac. 864. See Burton v. Burton, 79 Cal. 490, 495, 21 Pac. 847.

54. Findings contrary to evidence—Immaterial matter—Harmless.—In those cases in which some of the findings are contrary to the evidence, or even contrary to the admissions in the pleadings, if these findings are as to matters other than those facts upon which the judgment is based, are harmless and not grounds for reversal.—Thayer v. Tyler, 169 Cal. 671, 147, Pac. 979.

55. Thus, the general finding by the court of the untruth of each and all of the allegations of the complaint, which general finding embraces a finding that plaintiff was not the owner of the land, the subject-matter of the litigation, which fact was abundantly proved by the evidence; declared it to be untrue that defendant entered upon the properties of the plaintiff and accepted employment from him, whereas the uncontroverted evidence showed this to be the fact; that the allegations of the complaint that defendant had full and ample credit in the business houses of the town adjacent to the property in question for all necessary purposes connected with the operation of the ranch were untrue, while the evidence abundantly established such credit; that 400 or more orange trees had died under defendant's charge and care, was found to be untrue, although fully established by the evidence,—was held to be harmless error, the decision and judgment of the court being based upon unrelated matters.—Thayer v. Tyler, 169 Cal. 671, 147, Pac. 979.

56. Same—Same—Judgment resting upon for its validity—Reversal.—It is only in those cases in which a judgment rests for its validity upon a finding which is not supported, or which negatives a fact admitted by the pleadings, that injury is

worked and a reversal must follow.—Thayer v. Tyler, 169 Cal. 671, 147, Pac. 979, following doctrine in Silvey v. Neary, 59 Cal. 98; Estate of Doyle, 73 Cal. 570, 15 Pac. 125; Diefendorff v. Hopkins, 95 Cal. 343, 28 Pac. 265, 30 Pac. 549; Machado v. Kinney, 135 Cal. 354, 67 Pac. 331.

57. Findings of fact by court—Is regarded in light of special verdict; and if court draws erroneous conclusion from its findings, that conclusion, like general verdict of jury which is inconsistent with its special verdict, being inconsistent with findings, renders any judgment entered thereon erroneous.—Simmons v. Hamilton, 56 Cal. 493, 496.

58. Same—Placed after conclusions of law and given as fact resulting from other findings of facts does not cease to be finding of fact by reason of its position.—Knowlton v. Mackenzie, 110 Cal. 183, 186, 42 Pac. 580.

59. Same—Shall be made only upon issues joined by pleadings, under § 590 ante, where decision of court following findings is judgment.—Waller v. Weston, 125 Cal. 201, 204, 57 Pac. 892.

60. Same—Sufficiency of findings.—The court "embraced its decision in a single set of findings," and it made but one finding as to each matter, which was common or applicable to all the causes of action in both complaints, and it made a separate finding for each matter peculiar to or applicable only to any one cause of action. Held, that it is not necessary to repeat in the finding matters which are common to two or more causes of action.—Anderson v. Blean, 19 Cal. App. 581, 126 Pac. 859, 860.

61. Same—Required when.—The requirement of finding applies only to civil actions and to those special proceedings to which the provisions of this and the following sections are specially made applicable.—Matter of Danford, 157 Cal. 425, 430, 108 Pac. 322.

As to when findings of court are required, see, ante, § 632, note pars. 15, 16.

62. General finding—A mere conclusion.—Where, in an action for divorce, the complaint charged nine specific acts of cruelty against the wife, and the cross-complaint, twelve or thirteen distinct acts of cruelty against the husband, the court, ignoring all such specific charges, found generally that "defendant has been guilty of extreme cruelty toward plaintiff," it was held that such finding was a mere conclusion, and furnished no basis for a judgment against defendant.—Cargnani v. Cargnani, 16 Cal. App. 99, 116 Pac. 306.

63. Same—Controlled by special finding.—General finding that certain averments of complaint were true, which included fact that attached property belonged to both defendants in action, is controlled by special finding that it belonged to one of said defendants alone, and that other defendant

had no interest therein.—*McCormick v. National Surety Co.*, 134 Cal. 510, 511, 512, 66 Pac. 741.

64. Instructions to court—Propositions of law which are, in effect, instructions to court, presented by counsel after court has announced its decision orally, and before written findings are filed, in such form that court could answer "yes" or "no," and thus put itself on record as to its views of propositions of law therein involved, are properly refused consideration by court either as instructions or as proposed findings.—*Wheatland M. Co. v. Pirrie*, 89 Cal. 459, 461, 26 Pac. 964.

As to no reason existing for court to instruct itself as to propositions of law in advance of its decision, see par. 19, this note.

As to presenting findings to court and requesting court to find same as facts in case, not being proper practice, see par. 69, this note.

As to requesting court to find upon certain issues, and upon refusal of court so to do taking exception and asking for review of same as error at law, not being proper practice, see par. 79, this note.

65. Insufficient finding—Is not finding in one sense, because it is not determinative of issue, but in another sense attempted finding is to be treated as finding in so far as it enters into record to be reviewed by supreme court and in that it clearly shows that findings were not waived by parties.—*Kimball v. Stormer*, 65 Cal. 116, 118, 3 Pac. 408.

As to defective findings not rendering judgment a nullity, see par. 28, this note.

66. Same—May be disregarded when.—A finding that all the averments of defendant's answer and cross-complaint "adverse to or inconsistent with plaintiff's complaint are untrue," may be conceded to be insufficient; but where all material issues are found, and the findings support the judgment, such general finding may be disregarded.—*Pinheiro v. Bettencourt*, 17 Cal. App. 119, 118 Pac. 941.

67. Judgment—As conclusions of law.—Judgment which fully expresses conclusions of law, being attached to statement of facts found and filed at same time, makes it unnecessary for any other statement of conclusion of law. All that is required is that the facts found and conclusions of law must be separately stated.—*Gainsley v. Gainsley*, 5 Cal. Unrep. 310, 44 Pac. 456.

68. Same—Entry of.—The entry here required is a purely ministerial act to be performed by the clerk of the court.—*Hoover v. Lester*, 16 Cal. App. 153, 116 Pac. 382.

69. Entry of judgment is sufficient when the clerk enters in the judgment-book the substance of the findings and conclusions written and filed by the judge, as required

in the preceding section.—*Hoover v. Lester*, 16 Cal. App. 154, 116 Pac. 382.

70. Same—Same—Filing of findings and conclusions and not the writing and signing thereof determines the action and constitutes rendition of judgment. It matters not, therefore, that such writing and signing took place outside the county, afterwards being transmitted by mail and duly filed by the clerk and judgment entered accordingly.—*Estudillo v. Security Loan & T. Co.*, 158 Cal. 66, 69, 109 Pac. 884.

71. Same—Same—Signature of judge.—The fact that the signature of the judge appears on the entry of the judgment in the judgment-book adds nothing to the record, nor does the want thereof detract from its sufficiency.—*Hoover v. Lester*, 16 Cal. App. 153, 116 Pac. 382.

As to signature, see pars. 104 et seq., this note.

72. Same—Statement of conclusions of law generally precedes rendition of final judgment, in which case it is provided that judgment must accord with preceding conclusions of law; but, except in cases of this kind, there is no reason why conclusion of law should be twice stated in same case. Findings of fact and conclusions of law constitute decision, but this does not preclude inclusion of conclusions of law in the judgment alone, in case judgment is drawn and filed at same time that findings of fact are drawn and filed.—*Gainsley v. Gainsley*, 5 Cal. Unrep. 310, 44 Pac. 456. See *Miller v. Hicken*, 92 Cal. 229, 234, 28 Pac. 339.

73. Same—Which is to be entered upon the decision is sentence of court in conformity with conclusions of law, and must find its basis therein. Conclusions of law resulting from facts found form basis of judgment, and until they have been made decision has not been given.—*Broder v. Conklin*, 98 Cal. 360, 363, 33 Pac. 211.

74. Judgment and findings—In same document.—Judgment is not rendered ineffective by reason of being contained in same document with findings. There is no rule which requires findings and judgment to be incorporated in separate documents.—*Hopkins v. Warner*, 109 Cal. 133, 139, 41 Pac. 868.

As to findings in decree on foreclosure, see pars. 22, 23, this note.

75. Labor and duty of finding facts is devolved upon lower court by statute, and such court can not turn it over to supreme court or to any other tribunal or person. Parties litigant have substantial right to have facts found by trial court.—*Goodnow v. Griswold*, 68 Cal. 599, 603, 9 Pac. 837.

As to court being responsible for finding of facts, see par. 71, this note.

76. Law is not merely directory—Court has no right to destroy and impair its effect.—Intention of law is that decision of court shall be basis of judgment in same manner as verdict of jury, and it follows

that without such decision judgment can not stand.—*Russel v. Armador*, 2 Cal. 305.

As to effect of provision being directory in so far as it applies to separately stating conclusions of law, see par. 29, this note.

77. Line of demarcation—Between questions of fact and conclusions of law is not easy to be drawn in all cases. If, from fact in evidence, result can be reached by that process of natural reasoning adopted in investigation of truth, it becomes ultimate fact to be found as such. If, on other hand, resort must be had to artificial process of law in order to reach final determination, result is conclusive of law.—*Levins v. Rovigno*, 71 Cal. 273, 275, 278, 12 Pac. 161; *Weidenmueller v. Stearns Ranchos Co.*, 128 Cal. 623, 626, 61 Pac. 374.

78. Material finding—Definition of.—A material finding is one which has the effect to countervail or destroy the effect of the other findings.—*Sharp v. Pitman*, 166 Cal. 501, 137 Pac. 234.

79. Minute entry—Directing that findings and decree be drawn in favor of defendant, does not constitute decision of court, and is entirely immaterial.—*Canadian & A. M. & T. Co. v. Clarita L. & I. Co.*, 140 Cal. 672, 677, 74 Pac. 301.

80. Nonsuit—Findings are not required in case of nonsuit.—*Toulouse v. Pare*, 103 Cal. 251, 252, 37 Pac. 146. See *Gilson Q. M. Co. v. Gilson*, 47 Cal. 597, 601; *Reynolds v. Brummagim*, 54 Cal. 254, 258.

81. Nunc pro tunc—Findings may be so filed.—Making and filing of findings of fact being essential to decision of court, court has same authority to order these findings to be filed nunc pro tunc as it has to order the judgment thereon to be so entered. These various acts—the making, as well as the filing of findings, and entry of judgment—are only parts of decision which court has been invoked to make upon submission of cause, and together constitute final determination of rights of parties.—*Fox v. Hale, & N. S. M. Co.*, 108 Cal. 478, 481, 482, 41 Pac. 328.

82. Object of section—Is twofold.—(1) To preclude trial court from mingling together questions of fact and law arising in case, in order that facts, as presented in findings, may contain all essential attributes of special verdict, to end that proper application of legal principles to case may be investigated independent of facts; and (2) that conclusions of law may serve as directory to clerk in entering judgment upon facts as found.—*Spencer v. Duncan*, 107 Cal. 423, 426, 40 Pac. 549.

83. Same—To do away with doctrine of implied findings, and to separate, for facility of investigation, questions of fact and of law. Party may now present as distinct matters, first, point that judgment is not legal conclusion from facts found; and, second, that evidence does not sustain

findings or some of them.—*Dowd v. Clarke*, 51 Cal. 262, 263.

84. Same—One main object of section seems to have been to prevent court from summarily ordering judgment without giving any reasons for it—without stating any facts or conclusions upon which it is based. There was also some intent to facilitate review of judgment on appeal. But main object was not to afford cover under which losing party might successfully set trap to capture just judgment.—*Millard v. Supreme Council A. L. of H.*, 81 Cal. 340, 342, 22 Pac. 864.

85. Only purpose of findings—To answer questions raised by pleadings, and if facts are stated in findings in same way they are stated in pleadings, they are sufficient.—*Dam v. Zink*, 112 Cal. 91, 93, 44 Pac. 331.

86. Opinion of court—Different from findings.—Findings of facts and conclusions of law contemplated by statute is something different from opinion. Finding shall consist of concise, distinct, pointed, and separate statement of each specific, essential fact established by evidence, in its proper order, without any of testimony by which facts are proved, followed by similar statement of conclusions of law drawn from facts thus found.—*Hidden v. Jordan*, 28 Cal. 301, 305.

87. Opinion by judge in which he states his reasons why, in his judgment, findings of facts ought to be against plaintiff and in favor of defendant cannot be regarded as finding.—*McClory v. McClory*, 38 Cal. 575, 577.

88. Same—Opinion of court in deciding a cause setting forth its reasons for judgment, is not finding of facts under statute requiring express finding of facts.—*Victor G. & S. M. Co. v. National Bank*, 18 Utah 87, 72 Am. St. Rep. 767, 55 Pac. 72.

As to opinion of trial court being no part of record, see, ante, § 632 and not pars. 8-11.

As to opinion of trial court not being admissible to show nature of action or issues, see, ante, § 632 and note pars. 8, 9.

89. Presenting findings to court—Requesting court to find same as facts in case, is not proper practice, and it is not error for court to refuse so to do. Party requiring finding upon particular point should specify point without dictating terms of finding. Right of party is to suggest point.—*Edgar v. Stevenson*, 70 Cal. 286, 287, 11 Pac. 704.

As to no reason existing for court to instruct itself as to propositions of law in advance of its decision, see par. 19, this note.

As to presenting propositions of law which are in effect instructions to the court in order to have court put itself on record as to its views, before findings are filed, being properly refused consideration by court, see par. 50, this note.

As to requesting court to find upon certain issues and upon refusal of court so to do, taking exceptions and asking for review of same as error at law, not being proper practice, see par. 79, this note.

90. **Presumption**—That court found on all issues necessary for judgment when the appeal is on judgment-roll, presumption is that there was evidence to support findings, and that it went in without objection, and was admissible under pleadings.—*Beardsley v. Clem*, 137 Cal. 328, 332, 70 Pac. 175.

91. **Same**—Express finding not appearing in record on appeal, presumption of law is that court found all matters of fact in issue necessary to support its judgment in favor of successful party. Such findings are implied, and if evidence is insufficient to justify court in finding any material or necessary fact, such implied finding of fact may be excepted in the same manner and with same effect as if it were an express finding.—*Blanc v. Paymaster M. Co.*, 95 Cal. 524, 530, 29 Am. St. Rep. 149, 30 Pac. 765.

92. **Same**—Findings being waived, all issues made by pleadings are presumed to have been found in favor of successful party.—*Antonelle v. Board of New City Hall Commissioners*, 92 Cal. 228, 229, 28 Pac. 270; *Pacific I. Co. v. Ross*, 131 Cal. 8, 10, 63 Pac. 67.

As to waiver of findings, see, post, § 634 and note.

93. **Probate matters**—When findings necessary.—Issues joined in probate proceedings, such as setting apart homestead, are to be tried and determined by the court as in civil cases; and upon trial by court, without jury, parties to proceedings are entitled to findings unless they are waived.—In matter of *Burton*, 63 Cal. 36, 37.

94. **Same**—Issues of fact arising on motion for sale of real property being tried by probate court, findings of fact are proper.—*Estate of Crosby*, 55 Cal. 574, 576. See *Miller v. Lux*, 100 Cal. 609, 613, 35 Pac. 345, 639.

95. **Same**—It has never been definitely determined by supreme court that findings are necessary in all matters of probate heard before court alone.—In matter of *Sanderson*, 74 Cal. 199, 201, 15 Pac. 753.

96. **Same**—Same—As to contest of account of executor; In matter of *Arguello*, 85 Cal. 151, 152, 24 Pac. 641.

97. **Same**—Same—As to contest over order for sale of real property; In matter of *Adams*, 128 Cal. 380, 388, 57 Pac. 569, 60 Pac. 965, as to setting aside homestead.

98. **Same**—Manner in which account of executor is usually made out, and manner in which objections thereto are usually presented, do not at all conduce to developments of issues such as arise upon pleading in civil action, and in such proceeding it is not incumbent upon court to make and file express findings.—In matter of

Levinson, 108 Cal. 450, 455, 41 Pac. 483, 42 Pac. 479.

99. **Same**—Proceeding to settle accounts of executors is not such proceeding in which it is incumbent upon court to make and file express findings; still when account is assailed in any particular for matters not appearing upon its face, court may properly express findings upon such issues, and when it does so such findings become part of judgment-roll.—*Miller v. Lux*, 100 Cal. 609, 613, 35 Pac. 345, 369.

100. **Reason for separately stating findings of fact and conclusions of law** is that court may examine facts found and see that they justify conclusions of law and judgment pronounced on them.—*Murphy v. Bennett*, 68 Cal. 528, 534, 9 Pac. 738 (dis. op. *Thornton, J.*); *Savings & L. Soc. v. Burnett*, 106 Cal. 514, 539, 33 Pac. 922.

101. **Requesting court to find upon certain issues** contended by party to be presented by pleadings and which he deemed material, and upon refusal of such request by court to take exception thereto and have such refusal reviewed as error at law, is not practice recognized by our present method of procedure.—*Haight v. Tryon*, 112 Cal. 4, 6, 44 Pac. 318.

As to no reason existing for court to instruct itself as to propositions of law in advance of its decision, see par. 19, this note.

As to presenting findings to court and requesting court to find the same as facts in the case, not being proper practice, see par. 69, this note.

As to presenting propositions of law which are in effect instructions to the court in order to have court put itself on record as to its views, before findings are filed, being properly refused consideration by court, see par. 50, this note.

102. **Rights of parties**—Being fully protected by findings of fact and conclusions of law, it is not error to refuse to make further findings and conclusions.—*Goodman v. Malcolm*, 9 Kan. App. 887, 58 Pac. 564.

103. **Separately and specifically finding**—That contract set up in complaint was sustained by evidence necessarily negatives fraud set up as defense, and is sufficient to sustain judgment without finding upon question of fraud.—*Snelgrove v. Earl*, 17 Utah 321, 326, 53 Pac. 1017.

104. **Signing by judge**—As to generally.—A superior judge who presides at the trial of an action outside of his county has the power to settle and sign the findings in the county of his residence, and the amendment of 1913 to section 634 of the Code of Civil Procedure has not changed the rule.—*Weinstock-Nichols Co. v. Courtney*, 26 Cal. App. 445, 147 Pac. 218.

105. **Same**—Papers required to be signed by trial judge are only the findings of fact and conclusions of law herein referred to.

—Hoover v. Lester, 16 Cal. App. 153, 116 Pac. 382.

106. Same—To judgment, has no effect, but court will sometimes give it significance upon question of his intention.—O'Brien v. O'Brien, 124 Cal. 422, 429, 57 Pac. 225.

107. Special proceedings.—Above section refers to trial of civil actions and not to special proceedings.—Lyons v. Marcher, 119 Cal. 382, 383, 51 Pac. 559.

108. Special verdict of jury—Adopted by court by making order, upon hearing of motion for judgment, "that judgment be entered in accordance with verdict of jury rendered herein"; and all special issues submitted to jury, and their answers or findings thereon, were incorporated in judgment, together with general verdict.—Morrison v. Stone, 103 Cal. 94, 96, 37 Pac. 142.

109. When adopted by court, takes place of and is equivalent to findings by court.—Morrison v. Stone, 103 Cal. 94, 96, 37 Pac. 142.

110. Statements by judge—Findings of court is not impaired by statement of judge at time he announced his decision, where he stated, in answer to inquiry by attorney of defendant in reference to conflict of testimony, that he believed testimony of witnesses concerning matter regarding interview concerning which finding was made. Court was not concluded by such statement from subsequently making finding contrary thereto, nor could its findings be impeached by affidavits of what occurred at time decision was announced.—Flisk v. Casey, 119 Cal. 643, 645, 51 Pac. 1077.

111. Suits in equity—Court may make findings of fact of its own and adopt special findings of jury so far as they are not inconsistent with those of court.—Gordon v. Lemp, 7 Idaho 677, 65 Pac. 444.

112. Same—Findings of fact to support the judgment—Are not necessary in suits in equity.—Lyons v. Lyons, 18 Cal. 447, 448.

113. Same—General verdict of jury is not determinative of issues made by pleadings in actions in equity, and judgment will be reversed if court fails to find upon such issues.—Learned v. Castle, 67 Cal. 41, 42, 7 Pac. 34. See Warring v. Freeear, 64 Cal. 54, 56, 28 Pac. 115; Stockman v. Riverside L. & I. Co., 64 Cal. 57, 58, 28 Pac. 116; Bell v. Marsh, 80 Cal. 411, 414, 22 Pac. 170.

114. Same—Presumption in favor of correctness of findings does not apply to a proceeding in equity which was tried upon complaint, answer and exhibits.—Dewey v. Bowman, 8 Cal. 145, 148.

115. Same—Special agreement between parties that general verdict should be returned by jury in equity case in favor of plaintiff or defendant, losing party cannot thereafter object to such form of verdict; as it disposed of all issues in case and was conclusive of whole case, further findings of court were unnecessary.—Johnson

v. Mina Rica Min. Co., 128 Cal. 521, 522, 61 Pac. 76.

116. Same—Verdict of jury in equity cause not responding to all issues, it becomes duty of court, if it adopts the verdict as far as it is responsive to issues, to proceed and find, upon evidence which has been given and any other which may be offered by parties, as to other issues not covered by verdict.—Warring v. Freeear, 64 Cal. 54, 56, 28 Pac. 115. See Bates v. Gage, 49 Cal. 126, 128; Wingate v. Ferris, 50 Cal. 105, 108.

117. Supplementary Proceedings—Findings of fact are not necessary to be made by the court in proceedings in aid of execution.—Lyons v. Marcher, 119 Cal. 382, 383, 51 Pac. 559.

118. Term of judge—Expiring before findings filed—Entry of judgment upon decision, being but ministerial act, could be performed by clerk after judge's term of office had expired with as much effect as before. There is no provision in our statute requiring any judgment to be signed by judge and judgment produced from original records of court in which it was rendered needs no signature or exemplification.—Crim v. Kessing, 89 Cal. 478, 489, 23 Am. St. Rep. 491, 26 Pac. 1074; San Joaquin L. & W. Co. v. West, 99 Cal. 345, 347, 33 Pac. 928.

As to succeeding judge setting aside order of predecessor when not filed of record, and presumptions indulged, see I Kerr's Cumulative Current Code Annotations, Code of Civil Procedure, § 1963.

119. Same—Same—Judicial Power of judge ceases upon expiration of term of office and it is not competent for him thereafter to do any act necessary to complete trial of any cause which then remained unfinished.—Border v. Conklin, 98 Cal. 360, 362, 33 Pac. 211. See Mace v. O'Reilly, 70 Cal. 231, 234, 11 Pac. 721; Connolly v. Ashworth, 98 Cal. 205, 206, 33 Pac. 60.

120. Same—Same—Trial of cause by court is not concluded until decision is filed with clerk; and when term of office of judge who tried case expires before decision is filed, fact that it was signed by him and ordered by his successor in office to be filed, and was so filed, is not sufficient to sustain judgment entered thereon.—Connolly v. Ashworth, 98 Cal. 205, 206, 33 Pac. 60. See Hastings v. Hastings, 31 Cal. 95, 98; Polhemus v. Carpenter, 42 Cal. 375, 384; Comstock Q. M. Co. v. Superior Court, 57 Cal. 625, 626; Van Court v. Winterson, 61 Cal. 615, 616; Warring v. Freeear, 64 Cal. 54, 56, 28 Pac. 115; Mace v. O'Reilly, 70 Cal. 231, 235, 11 Pac. 721.

121. Same—Same—Trial of issues of fact in action is not completed until decision upon those issues has been given by the court, and this decision must not only be given in writing but must also be filed with clerk. If not filed until after expiration of term of office, it cannot form basis of judg-

ment.—*Broder v. Conklin*, 98 Cal. 360, 362, 33 Pac. 211. See *Connolly v. Ashworth*, 98 Cal. 205, 206, 33 Pac. 60.

As to changing conclusions of law by different judge from one who tried cause, see par. 103, this note.

122. Unlawful detainer—Findings are required in an action of unlawful detainer.—*Lee Chuck v. Quan Wo Chong & Co.*, 91 Cal. 593, 599, 28 Pac. 45.

123. Written findings—Disbarment of attorney—Not required.—Written findings are not required in a proceeding for the disbarment of an attorney.—*Matter of Danford*, 157 Cal. 425, 430, 108 Pac. 322.

II. AMENDMENTS TO FINDINGS.

As to additional findings after entry of judgment being invalid, see pars. 2-5, this note.

As to amendments generally, see, ante, § 473 and note.

124. Additional findings—Immaterial.—Where the judgment is upon stipulated facts, the making of additional findings, if erroneous, is harmless error, where such additional findings do not materially change the result, and the stipulated facts justify the judgment made.—*Los Angeles v. Los Angeles Farming & M. Co.*, 152 Cal. 645, 648, 93 Pac. 869, 1135.

125. Clerical and judicial errors distinguished.—Clerical misprisions can be corrected at any time by order of court, but judicial errors can be remedied only through motion for new trial, or on appeal. Clerk failing to enter judgment as it was pronounced, court always has power to correct matter and order proper entry to be made.—*Egan v. Egan*, 90 Cal. 15, 21, 27 Pac. 22.

See pars. 126, 127, this note.

As to judicial errors, see par. 134, this note.

126. Clerical error—Correction by court.—Face of record showing that error to be corrected consists of clerical misprision, court has always inherent power to correct it.—*Fay v. Stubenrauch*, 141 Cal. 573, 575, 75 Pac. 174.

See par. 125, this note.

As to clerical mistake in entering judgment, see par. 135, this note.

As to correction of clerical errors in judgment to conform to findings and conclusions of law, see, ante, § 473, note Part VII.

127. Clerk failing to enter judgment as it was pronounced, court has power to correct the matter and order proper entry to be made.—*Egan v. Egan*, 90 Cal. 15, 21, 27 Pac. 22.

128. Conclusions of law upon facts found, may be changed by the court at any time before entry of judgment; and such change could be made by another judge than one who tried cause.—*Crim v. Kessing*, 89 Cal.

478, 489, 23 Am. St. Rep. 491, 26 Pac. 1074. See *Condee v. Barton*, 62 Cal. 1, 5, 6.

129. Courts have power, at all times, to allow amendments to judgments for purpose of having judgment as entered express that which was rendered so that record will contain actual decision of court; and such amendments can be made after expiration of six months from entry of judgment.—*Egan v. Egan*, 90 Cal. 15, 21, 27 Pac. 22; *San Joaquin L. & W. Co. v. West*, 99 Cal. 345, 347, 33 Pac. 928.

As to amendments by court, generally, see, ante, § 473 and note.

130. Court may amend findings of fact—Pending motion for new trial in case where amendments are responsive to issues presented by pleadings and are supported by evidence.—*Hayes v. Lavagnino*, 17 Utah 185, 53 Pac. 1029.

131. Court may change or modify findings—Before judgment without ordering new trial. *Spaulding v. Howard*, 121 Cal. 194, 198, 53 Pac. 563. See *Smith v. Taylor*, 82 Cal. 538, 544, 23 Pac. 217.

132. Final judgment having been entered—Court has no power to change findings of fact in any material respect. Power to set aside judgment and findings on various grounds is provided by this code, but there is no provision of law authorizing any change in findings of fact after entry of final judgment thereon, while judgment is allowed to stand.—*County of Los Angeles v. Lankershim*, 100 Cal. 525, 532, 35 Pac. 153, 556.

133. Judgment entered by clerk—Not being judgment ordered by court, court not only had power to amend it to make it conform to judgment and order made and rendered, but it was its duty so to do.—*Canadian & A. M. & T. Co. v. Clarita L. & I. Co.*, 140 Cal. 672, 677, 74 Pac. 301.

134. Judicial errors—Can be remedied only through motion for new trial or by appeal, but there is no question as to power of court to amend its judgment of record to make it conform to judgment pronounced by court.—*Canadian & A. M. & T. Co. v. Clarita L. & I. Co.*, 140 Cal. 672, 676, 74 Pac. 301.

As to clerical and judicial errors distinguished, see par. 125, this note.

135. Mistake of clerk—In entering judgment not authorized by decision of court will be error apparent upon face of record, and rule is universal that when a mistake is made in entry of judgment, and that fact is plainly apparent from entry itself, such mistake may be rectified at any time; and this rule arises by reason of inherent power of the court over its own proceedings.—*San Joaquin L. & W. Co. v. West*, 99 Cal. 345, 347, 33 Pac. 928.

As to clerical errors, see pars. 126, 127 this note.

136. Mistake of name in findings and in judgment is mere clerical error which

could properly be corrected by order, upon court's attention being called to it, at any time before appeal taken, or after case is remanded.—*Mitchell v. Patterson*, 120 Cal. 286, 287, 52 Pac. 589.

137. Order denying new trial—Can not affect findings.—Findings being filed and judgment entered thereon, there is only one method by which those findings can be completely changed or modified—except, perhaps, in respect to mere clerical error or misprision—and that is mode pointed out by statute by granting of new trial. Until findings are thus set aside, they must, under our present system, stand in their integrity as originally made. Any recitals in order of court denying new trial can have no effect upon findings.—*Hawthurst v. Rathgeb*, 119 Cal. 531, 532, 533, 63 Am. St. Rep. 142, 51 Pac. 846.

138. Right of court to correct its record so that its judgment as entered shall conform with its judgment as rendered, is unquestioned, and its record, when so corrected, as well as order making correction, is conclusive upon any other court in any other proceeding in which record is offered as evidence.—*Galvin v. Palmer*, 134 Cal. 426, 428, 66 Pac. 572.

III. CONSTRUCTION OF FINDINGS—A. IN GENERAL.

139. As to generally.—It is not always easy to determine on which side of the line between findings of fact and conclusions of law, findings made upon issues raised by the pleadings should be placed. The conclusions reached frequently partake of the nature of both law and fact and if there be any doubt as to which class the finding belongs the doubt should be resolved in favor of the judgment.—*Butler v. Agnew*, 9 Cal. App. 327, 330, 99 Pac. 395.

140. Ambiguity and uncertainty.—Any uncertainties or ambiguities in findings must be construed, if possible, so as to support the judgment.—*Hambricht & Walsh Co. v. Provident Pledge Corp.*, 25 Cal. App. 600, 144 Pac. 971.

141. Considered as a whole.—Findings can not be detached from each other and considered piecemeal. They must be considered and construed as a whole, and not merely according to their numerical subdivisions.—*Brown v. Fuller & Co.*, 28 Cal. App. 676, 153 Pac. 960.

142. Construed—To uphold judgment—Facts that may be inferred.—The entire findings and conclusions of law are to be construed to uphold the judgment, when, from the facts found, other facts may be inferred which will support the judgment.—*Terry v. Southwestern Building Co.*, — Cal. App. — 185 Pac. 212. See *Breeze v. Brooks*, 97 Cal. 72, 22 L. R. A. 257, 31 Pac. 742; *Pacific States Corp. v. Arnold*, 23 Cal. App. 672, 139 Pac. 239.

143. Contradictory findings—Recovery granted on counter-claim and cross-com-

plaint.—In a case in which the defendant files counter-claims and a cross-complaint for various sums alleged to be due to him from the plaintiff and for profits, a general finding by the court that the counter-claims and cross-complaint are true, except that no profits accrued from the ranch operated by the defendant, and that a less sum was due than the amount claimed by defendant in his counter-claims, the finding must be construed to mean that, while the defendant was entitled to recover under his counter-claims and cross-complaint, but that the amount which the defendant is entitled to recover is a less amount than the sum claimed by him; and so construed there is no contradiction in the finding and no ambiguity.—*Thayer v. Tyler*, 169 Cal. 671, 147 Pac. 979.

144. Facts found—Showing conversion of stock by defendant can not be affected by later finding that defendant did not convert such stock.—*Niles v. Edwards*, 90 Cal. 10, 13, 27 Pac. 159.

145. Finding allegations of answer true—Form and effect of.—Findings "that all of the denials and allegations contained in the answer of the defendants to said third amended complaint are, and that each of them is, supported by the evidence and true," is an unusual form of expression, but its meaning is clear and unequivocal and is equivalent to a finding that each allegation of the complaint is untrue.—*Fritz v. Mills*, 170 Cal. 449, 150 Pac. 375.

146. A finding that all of the allegations in the answer are not true is not a finding that all of them are untrue, or that any particular one of them is untrue, as such finding does not negative the fact that some of them are true.—*Auerbach v. Healy*, 174 Cal. 60, 161 Pac. 1157.

147. Finding allegations of complaint true—Effect of.—A finding that the allegations of fact in the complaint are true is not a finding that any conclusions of law therein are true.—*Postal Telegraph-Cable Co. v. City of Los Angeles*, 164 Cal. 156, 128 Pac. 19, 20.

148. Finding of evidence and not of facts—Effect of.—Where a finding is of the evidence and not of the fact in issue, it will not aid the judgment unless the evidentiary facts thus determined carry with them by necessary implication the ultimate fact which should have been determined.—*Nichols v. Wolf*, 27 Cal. App. 1, 148 Pac. 799.

149. Findings—Are but incidental to judgment.—Findings come after case has been tried, considered, and determined, and after character of judgment—whether it is right or wrong—has been fixed. They are merely incidental to main thing—the judgment; and to test their sufficiency by standard which exacts extreme of accurate statement in minute detail is to put instrument in place of principal.—*Millard v. Supreme Council of A. L. of H.*, 81 Cal. 340, 342, 22 Pac. 864.

150. Same—Are to be read and considered together, and liberally construed in support of judgment, and, if possible, are to be reconciled so as to prevent any conflict upon material points.—People's Home Sav. Bank v. Rickard, 139 Cal. 285, 291, 73 Pac. 858. See Ames v. San Diego, 101 Cal. 390, 395, 35 Pac. 1005; Murray v. Tulare Irr. Co., 120 Cal. 311, 315, 49 Pac. 563, 52 Pac. 586; Mitchell v. Hutchinson, 142 Cal. 404, 409, 76 Pac. 55.

151. Same—Can not be altogether detached from each other and considered piecemeal. If particular finding be doubtful or obscure, reference may be had to context for purpose of ascertaining true meaning.—Mott v. Ewing, 90 Cal. 231, 235, 27 Pac. 194.

152. Same—Which are in part probative facts, and in part ultimate facts, and conclusions which are in part more findings of ultimate facts than conclusions of law, may all be looked to in determining whether they are supported by sufficient evidence, and are sufficiently responsive to issues made by pleading to support judgment.—Mason v. Llievre, 145 Cal. 514, 523, 78 Pac. 1040.

153. Findings of fact—Are like special verdicts of jury, they must be taken in connection with pleading to support judgment, and when language of finding is equivocal, construction which accords with pleadings and supports judgment should be adopted.—Kennedy & S. L. Co. v. S. S. Const. Co., 123 Cal. 584, 586, 56 Pac. 457.

154. Same—Should receive such construction as will uphold, rather than defeat, the judgment, and it has been held that when, from facts found by court, other facts may be inferred which will support judgment, such inference will be deemed to have been made by trial court.—Breeze v. Brooks, 97 Cal. 72, 77, 31 Pac. 742, 22 L. R. A. 256; Warren v. Hopkins, 110 Cal. 506, 512, 42 Pac. 986; Gould v. Eaton, 111 Cal. 639, 644, 52 Am. St. Rep. 201, 44 Pac. 319; Perkins v. West Coast L. Co., 129 Cal. 427, 429, 62 Pac. 57; Krasky v. Wollpert, 134 Cal. 338, 342, 66 Pac. 309; De Haven v. Berendes, 135 Cal. 178, 180, 67 Pac. 786; People's Home Sav. Bank v. Rickard, 139 Cal. 285, 291, 73 Pac. 858; Paine v. San Bernardino V. T. Co., 143 Cal. 654, 656, 77 Pac. 659.

155. "Findings of fact"—"Conclusions of law"—"Relativity of designation."—As to matters designated "findings of fact" and "conclusions of law," in one connection a word or a phrase may stand for a fact, while in another the same word or phrase may designate a conclusion of law.—Lynip v. Alturas School District, 24 Cal. App. 426, 435, 141 Pac. 835, following doctrine in Hill v. Finigan, 77 Cal. 267, 11 Am. St. Rep. 279, 19 Pac. 494.

156. "That the assignment and delivery of the contract was a mortgage and not a

pledge", although stated as a finding of fact, was held, in view of the other facts admitted and found, to be a mere conclusion of law.—Gay v. Moss, 34 Cal. 125.

157. "That there is now due, owing and unpaid to plaintiff from defendant on account of the money loaned and advanced by him to A as aforesaid the sum of" a named amount, considered in the light of the averments of the complaint and the other findings, it was held that this so-called findings must be treated as a conclusion of law.—Lynip v. Alturas School District, 24 Cal. App. 426, 435, 141 Pac. 835.

158. General finding — That plaintiffs have failed to make out cause is sufficient foundation for decree dismissing action.—Noyes v. King County, 18 Wash. 417, 51 Pac. 1052.

159. Indebtedness—Finding of includes non-payment.—Finding that defendant was indebted to plaintiff in certain sum is finding of fact, and includes finding that it was unpaid, and is sufficient to support judgment for amount.—Ramsey v. Johnson, 7 Wyo. 392, 52 Pac. 1084.

160. Language of findings—Should not be strained by court to make out case of conflict, finding should be reconciled if it can possibly be done.—Heaton Hobson A. L. Offices v. Arper, 145 Cal. 282, 285, 78 Pac. 721. See Alhambra A. W. Co. v. Richardson, 72 Cal. 598, 606, 14 Pac. 379; Schultz v. McLean, 93 Cal. 329, 348, 28 Pac. 1053.

161. Liberal construction to be given to.—The findings made by the trial court must be given a liberal construction in support of the judgment, and are, if possible, to be reconciled so as to prevent any conflict upon material points.—Price v. Occidental Life Ins. Co., 49 Cal. Dec. 535, 147 Pac. 1175.

162. Province of trial court—Is to make any inference of fact which may be drawn from evidence before it, or from facts found by it, and if from facts which it has found other facts may be inferred which will support judgment, it will be presumed that trial court made such inferences. If different inferences may be drawn from those facts, supreme court will not, upon appeal from judgment, draw an inference contrary to that drawn by trial court, or which will have effect to defeat judgment of that court.—Paine v. San Bernardino V. T. Co., 143 Cal. 654, 656, 77 Pac. 659. See Breeze v. Brooks, 97 Cal. 72, 77, 22 L. R. A. 256, 31 Pac. 742; Gould v. Eaton, 111 Cal. 639, 644, 52 Am. St. Rep. 201, 44 Pac. 319; Krasky v. Wollpert, 134 Cal. 338, 342, 66 Pac. 309; People's Home Sav. Bank v. Rickard, 139 Cal. 285, 291, 73 Pac. 858.

163. Uncertain findings—Construction of.—An uncertain finding on the question of payment must be construed so as to support the judgment rather than to defeat it.—Harlan v. Lambert, 19 Cal. App. 349, 125 Pac. 1079.

IV. CONSTRUCTION OF FINDINGS—B. ULTIMATE AND PROBATIVE FACTS IN FINDINGS—EFFECT OF.

164. Finding is sufficient where probative facts are found and court can declare that the ultimate facts necessarily result from facts which are found.—*Mott v. Ewing*, 90 Cal. 231, 235, 27 Pac. 194; *Murdock v. Clarke*, 90 Cal. 427, 435, 27 Pac. 275.

165. Finding of evidence and not of facts in issue—Effect of.—Where a finding is of the evidence and not of the fact in issue, it will not aid the judgment unless the evidentiary facts thus determined carry with them by necessary implication the ultimate fact which should have been determined.—*Nichols v. Wolf*, 27 Cal. App. 1, 148 Pac. 799.

166. Finding of particular facts—Relied upon as a substitute for the ultimate fact alleged, must be inconsistent with the fact which they tend to negative, and every particular fact necessary to constitute this negation must be stated in the finding.—*Kusel v. Kusel*, 147 Cal. 56, 81 Pac. 297.

167. Finding that "sales were not rescinded" is ultimate finding depending upon probative facts, and finding that "no lien existed" is also such ultimate finding, and we fail to see why finding "that plaintiff had prescriptive right" is not ultimate finding in fact. It depends upon certain probative facts, which in their turn depend upon evidence.—*Weidenmueller v. Stearns Ranchos Co.*, 128 Cal. 623, 626, 61 Pac. 374.

As to ultimate in sale and delivery, see par. 178, this note.

168. Findings of probative facts—Can be used to overcome an express finding of the ultimate facts only where the probative facts are inconsistent with the ultimate facts found, or where it appears that the trial court made the alleged finding of the ultimate fact simply as a conclusion from the particular facts found.—*Estate of Hill*, 167 Cal. 59, 138 Pac. 690.

As to ultimate and probative facts, see pars. 180-184, this note.

169. Where the trial court makes both probative and ultimate findings and the one set is inconsistent with the other, the former will not, in general, control, limit, or modify the latter.—*Breeze v. International Banking Corporation*, 25 Cal. App. 437, 143 Pac. 1066.

170. It is only in those cases where it clearly appears that the ultimate fact found is based upon and deduced from findings of probative facts and it is plain that the latter do not justify or support the ultimate fact found, that the findings of probative facts will control that of the ultimate fact and rob the judgment of support.—*Breeze v. International Banking Corporation*, 25 Cal. App. 437, 143 Pac. 1066.

171. Findings in an action to recover the rental of certain mules and wagons for a

designated month, that the rental due for such month was as stated in the answer, and that the money due for the use of said property should be paid on the tenth of each month for the preceding month, or as soon after the tenth as the money was received by the defendants, and that the defendants between the first and the tenth of the month received a payment of approximately four hundred and fifty dollars, and on or about the nineteenth, five hundred dollars, are sufficient to establish both the amount of the indebtedness included in the judgment and the fact that it was due and payable at the time of the commencement of the action, the seventeenth.—*Calkins v. Berliner*, 26 Cal. App. 601, 147 Pac. 985.

172. Findings should be statements of ultimate facts in controversy, not of probative facts or mere conclusions of law.—*Murphy v. Bennett*, 68 Cal. 528, 530, 9 Pac. 738.

173. Findings should be statements only of ultimate facts in controversy and not of probative facts, though findings of probative facts were ultimate facts necessarily resulted from them have been held sufficient.—*Southern Pac. R. Co. v. Whitaker*, 109 Cal. 268, 274, 41 Pac. 1083.

174. Presumption on appeal—Is in favor of ultimate fact declared in findings, but when it appears that there was material conflict in evidence in court below as to probative facts essential to be found to support ultimate fact, further presumption obtains that such conflict was resolved by lower court in such manner as to sustain general finding.—*Ballard v. Nye*, 138 Cal. 588, 593, 72 Pac. 156.

175. Probative facts being found—Court can declare ultimate facts that necessarily result from facts which are found.—*Alhambra A. W. Co. v. Richardson*, 72 Cal. 598, 601, 14 Pac. 379.

As to finding of probative facts, see pars. 168-171, this note.

176. Probative facts only being found, yet if ultimate fact flows as necessary conclusion therefrom, findings are sufficient.—*Bull v. Bray*, 89 Cal. 286, 288, 13 L. R. A. 576, 26 Pac. 873; *In matter of Benton*, 131 Cal. 472, 475, 63 Pac. 775.

177. Same—Will not, in general, control, limit, or modify finding of ultimate fact, and although finding of probative fact from which ultimate fact conclusively follows is sufficient, yet when ultimate fact (issuable fact) is found, no finding of probative facts which may tend to establish that ultimate fact was found against evidence, can overcome principal finding. In such case only remedy is to move for a new trial.—*Sharp v. Bowle*, 142 Cal. 462, 469, 76 Pac. 62. See *Smith v. Acker*, 52 Cal. 217, 219; *Gill v. Driver*, 90 Cal. 72, 74, 27 Pac. 64; *Perry v. Quackenbush*, 105 Cal. 299, 305, 38 Pac. 740.

178. Sale and delivery—Ultimate fact.—An averment of sale and delivery held to be an averment of an ultimate fact and not a conclusion of law; although, as in the case of averments of ownership, it may be otherwise sometimes, according to circumstances. —*Napa Valley Packing Co. v. San Francisco Relief & Red Cross Funds*, 16 Cal. App. 470, 118 Pac. 469.

See par. 167, this note.

As to ultimate facts, see pars. 180-184, this note.

179. Trial court—Is to find facts, not evidence of facts.—Supreme court is not competent to deduce conclusions of facts from evidence; to do that would be the assumption of original jurisdiction committed by constitution to superior court and denied by same instrument to supreme court. —*McDonald v. Burton*, 68 Cal. 445, 454, 9 Pac. 714.

180. Ultimate and probative facts—In general.—A finding of an ultimate fact in support of the judgment prevails notwithstanding a finding of probative or evidentiary facts which tend to show that the ultimate fact was found against the evidence. —*Forsythe v. Los Angeles R. Co.*, 149 Cal. 575, 87 Pac. 24.

As to declaring ultimate facts from probative facts found, see pars. 175, 176, this note.

181. Findings of probative facts will not invalidate the finding of an ultimate fact unless the latter is based on the former, and is entirely overcome thereby, and unless, also, it appears that the findings of probative facts dispose of all the facts involved in the pleadings, and that the facts found constitute all the facts in the case. —*Forsythe v. Los Angeles R. Co.*, 149 Cal. 575, 87 Pac. 24.

182. Where the judgment for defendant is based upon clear and specific findings of ultimate facts, it is immaterial that the evidence is insufficient to sustain certain findings of probative facts, where such findings, if in plaintiff's favor, are of such a nature that they could not affect the findings of ultimate facts in support of the judgment. —*Zihn v. Zihn*, 153 Cal. 410, 95 Pac. 868.

183. An ultimate finding of fact, which is drawn as a conclusion from the probative facts previously found, can not stand if the specific facts upon which it is based do not support it. —*McKay v. Gesford*, 163 Cal. 243, 124 Pac. 1016.

184. Where the findings made cover the ultimate facts proposed by the pleadings and counter-claim, the defendant can not complain that they are inconsistent because they fail to find upon certain issues presented by the counter-claim as to the wholesale price agreed upon. —*Wagner v. El Centro Seed & N. Co.*, 17 Cal. App. 388, 119 Pac. 952.

V. FAILURE TO FIND UPON CERTAIN ISSUES—A. IN GENERAL

185. Affirmative finding in plaintiff's cause—Which is wholly inconsistent with truth of defendant's case, having been made by court, failing to make finding on defendant's case is not error. —*Snelgrove v. Earl*, 17 Utah 321, 53 Pac. 1017.

186. Announcing conclusions orally from bench.—Although the judge announces orally from the bench his conclusion as to the questions of use and necessity in condemnation proceedings, this is in no legal sense equivalent to findings which the law requires him to make and which are not made until after the jury has rendered their verdict. —*San Joaquin & Kings River Canal & Irr. Co. v. Stevenson*, 30 Cal. App. 405, 158 Pac. 768.

187. Cause being heard on judgment-roll, it will not be presumed against correctness of judgment that there was evidence upon point in respect to which there is no finding. —*Eva v. Symons*, 145 Cal. 202, 205, 78 Pac. 648.

188. Facts essential to recovery—Effect of omissions in findings.—Failure to find from evidence the fact declared essential to recovery by decision of supreme court in former appeal of same case, as well as its own construction of findings, which it has made by rendering judgment thereon in favor of defendants, must be regarded as its own conclusion that evidence was insufficient to justify such findings as, under former opinion of supreme court, would authorize decision in favor of plaintiff. —*Breeze v. Brooks*, 97 Cal. 72, 77, 22 L. R. A. 256, 31 Pac. 742.

189. Failure to find—Judgment reversed, when.—A judgment will not be reversed for want of a finding unless it appears there was evidence or lack of evidence which required the court to make a finding in favor of the appellant. —*Terry v. Southwestern Building Co.*, 43 Cal. App. 366, 185 Pac. 212, following *Winslow v. Gohransen*, 88 Cal. 450, 26 Pac. 504, and *Bliss v. Sneath*, 119 Cal. 526, 529, 51 Pac. 848.

190. The failure to make findings on certain issues is not a ground for reversal where they are not material. —*Sharp v. Pitman*, 166 Cal. 501, 137 Pac. 234.

191. Same—On an immaterial issue.—Where, in an action to quiet title to land, the plaintiff disclaimed any interest in defendant's land, and defendant, by cross-complaint, set up that plaintiff owned an easement over his land, the failure of the court to find upon the issue thus made is not prejudicial to the defendant, and is not ground for a new trial upon his motion. —*Pinheiro v. Bettencourt*, 17 Cal. App. 119, 118 Pac. 941.

192. Same—On necessary points.—Where in an action for the reasonable value of services rendered the findings were not waived, it would, of course, follow, in order

to support the judgment, that it should be found by the court that the money had not been paid.—*Harlan v. Lambert*, 19 Cal. App. 349, 125 Pac. 1079.

193. In an action to recover the reasonable value of services rendered the defendant at his special instance and request, where the court failed to find directly the non-payment of the sum sued upon, but where it did find that the services rendered were worth a certain amount and that a less amount had been paid thereon, this was held sufficient to constitute the finding of the non-payment of the difference, particularly where the court in its conclusion of law stated that the plaintiff was entitled to a judgment for the difference between the amount of the services and the amount which was found to have been paid thereon.—*Harlan v. Lambert*, 19 Cal. App. 349, 125 Pac. 1079.

194. The issue raised by the pleadings as to the amount of the damage so suffered by the plaintiffs was material, and the failure to find thereon rendered the decision one "against law."—*Knoch v. Halzlip*, 163 Cal. 146, 124 Pac. 998.

195. Failure to make special findings.—In an action for goods sold and delivered, where there was a general finding following the language of the complaint that the amount claimed fell due prior to the commencement of the action, it is held that the defendant can not complain that the court failed to find specially as to the exact date such amount fell due.—*Warner v. El Centro Seed & N. Co.*, 17 Cal. App. 387, 388, 119 Pac. 952.

196. Finding of fact implied by law, not necessary.—*Pinheiro v. Bettencourt*, 17 Cal. App. 120, 118 Pac. 941.

197. Findings must be sufficient to support judgment, and must contain nothing inconsistent with it, but failure to find upon some issue, finding upon which would merely have effect of invalidating judgment, will not be held ground for reversal, unless it is shown by statement or bill of exceptions that evidence was submitted in relation to such issue.—*Himmelman v. Henry*, 84 Cal. 104, 106, 23 Pac. 1098; *Klokke v. Escallier*, 124 Cal. 297, 300, 56 Pac. 1113.

198. Immaterial issue.—Failing to make an express finding on issue of value and damage is not erroneous in action for conversion where effect of finding made is that there was no damage, for value of goods is of no consequence.—*Dieffendorff v. Hopkins*, 95 Cal. 343, 347, 30 Pac. 549, see 28 Pac. 265.

199. Failure to pass upon an issue which has become immaterial is not error, or at least is not a prejudicial error.—*Dieffendorff v. Hopkins*, 95 Cal. 343, 347, 30 Pac. 549. See 28 Pac. 65; *McCourtney v. Fortune*, 57 Cal. 617, 619; *Dyer v. Brogan*, 70 Cal. 136, 139, 11 Pac. 589; *Malone v. County of Del Norte*, 77 Cal. 217, 218, 19 Pac. 422; *Brison v. Brison*, 90 Cal. 323, 329, 27 Pac. 186.

200. Immaterial omission to make.—Where the judgment rendered is fully sustained by the findings made, the failure of the court to find upon other issues presented is immaterial where a finding thereon in appellant's favor would not have justified a different judgment.—*Fogg v. Ferris Irr. Co.*, 154 Cal. 219, 97 Pac. 316.

201. Judgment—Will not be reversed for want of finding upon particular issue where it is apparent that omission in no way prejudiced appellant.—*Gregory v. Gregory*, 102 Cal. 50, 52, 36 Pac. 364.

202. Purpose of statute—Is not to give party dubious advantage of having right to finding upon every specific issue in each case in order that he may plead it as res adjudicata in some possible future controversy where it may become material, although it is not so with regard to matter being litigated.—*Dieffendorff v. Hopkins*, 95 Cal. 343, 348, 30 Pac. 549. See 28 Pac. 265.

203. Special findings—On issues raised by cross-complaint and answer are not necessary in action for recovery of money and where verdict of jury covered all issues presented by pleadings.—*Hunt v. Elliott*, 77 Cal. 588, 590, 20 Pac. 132.

204. Statement of new matter in answer.—Constituting alleged counter-claim is deemed denied by plaintiff, and burden is therefore on defendant to prove such affirmative matter. Such defendant, on appeal taken by himself as losing party, is not prejudiced by failure of lower court to make findings, in his behalf upon such new matter, unless such findings would counter-vail other findings in favor of plaintiff; and as error in court below is not to be presumed, but must be shown by appellant, if omitted findings must have been adverse to appellant, their omission is not error sufficient to authorize reversal.—*Reed v. Johnson*, 127 Cal. 538, 541, 59 Pac. 986.

205. Statute of limitations—Raised by answer.—Failure to find upon issue of statute of limitations raised by answer, when it does not appear that defense was claimed in court below, will not be held to be error. It will be assumed on appeal that such defense was not made in court below as it is assumed that no evidence was offered upon any other issue on which no finding is made.—*Bliss v. Sneath*, 119 Cal. 526, 529, 51 Pac. 848.

VI. FAILURE TO FIND UPON CERTAIN ISSUES—B. EVIDENCE ON ISSUE NECESSARY.

206. Absence of contest of issue.—While there were allegations of fraud in the complaint, and denials thereof in the answer, no evidence thereon was introduced, and the court made no finding upon the subject, this did not constitute error.—*Kern River Co. v. Los Angeles County*, 164 Cal. 751, 130 Pac. 714, 715.

207. Absence of issue.—Where there is no issue made by the pleadings on a ques-

tion of indebtedness, it was not error to omit a finding thereon.—*Younger v. Moore*, 155 Cal. 775, 103 Pac. 221.

208. Same—Plaintiff's averments admitted by defendants.—Where, in an action to quiet title to land, the ownership of the land, claimed by the plaintiff, was admitted by the defendant, except as to a right of way, as to which a finding was made, no issue was raised as to such ownership, and no finding was necessary.—*Pinheiro v. Bettencourt*, 17 Cal. App. 119, 118 Pac. 941.

209. Facts in issue constituting a defense to an action, failure to find upon will not justify a reversal unless it is shown that there was evidence given from which such facts could be found.—*Callahan v. James*, 141 Cal. 291, 294, 74 Pac. 853. See *Himmelman v. Henry*, 84 Cal. 104, 105, 23 Pac. 1098; *Gregory v. Gregory*, 102 Cal. 50, 52, 36 Pac. 364; *Kaiser v. Dalto*, 140 Cal. 167, 170, 73 Pac. 828.

210. Failure to find upon issue not made.—Where, in an action to quiet title to land, the defendant, by cross-complaint, averred that they had a right of way over their own land, and such averment was not denied by plaintiff, no issue was raised, and no finding thereon was necessary.—*Pinheiro v. Bettencourt*, 17 Cal. App. 119, 118 Pac. 941.

As to failure to find upon issues not raised by the evidence and estoppel, see, ante, § 607, note pars. —, —.

211. Finding and judgment upon issue not raised, invalid.—A finding and a judgment based upon a supposed breach of contract, not attempted to be alleged in the complaint, are erroneous and invalid.—*Lyden v. Spohn-Patrick Co.*, 155 Cal. 181, 100 Pac. 236.

212. Issue not raised by evidence.—Direct evidence not being introduced upon any issue, findings should be against party who had burden of proof.—*People ex rel. Love v. Center*, 66 Cal. 551, 564, 5 Pac. 263, 6 Pac. 481; *Demartin v. Demartin*, 85 Cal. 71, 75, 24 Pac. 594.

As to effect of failure to find where no evidence upon the issue appears in the record, see, ante, note to § 53 C. C. P. part.

213. Appellant from judgment can not complain that court failed to find upon some issue tendered by him, unless he brings up evidence and thereby shows that he litigated that issue in trial and introduced evidence upon issue which would have justified ruling in his favor. One reason for this rule is that, since he had affirmative upon that issue, if he introduced no evidence, finding would necessarily have been against him, and therefore he is not injured by failure of court to make finding.—*In matter of Carpenter*, 127 Cal. 582, 587, 60 Pac. 162.

214. A failure to find upon an issue is not a ground for complaint, where no evidence has been introduced in relation thereto.—

Sausalito Bay Land Co. v. Sausalito Impr. Co., 166 Cal. 302, 136 Pac. 57.

215. It was not necessary to find upon alleged fraud and undue influence of the plaintiff in obtaining the deed from the defendant, where there is an entire absence of proof in relation thereto, and it appears to the contrary that the deed was delivered with defendants' consent. Nor was it necessary to find upon the question of rents and profits after the termination of the life estate of the defendant, there being no evidence relative to that question.—*Hynes v. All Persons, etc.*, 19 Cal. App. 185, 125 Pac. 253.

216. A court is not required to make any finding upon any affirmative matter as a defense to a counter-claim, unless the same constitutes a defense and is supported by some evidence.—*L. Scatena & Co. v. Van Loben Sels*, 19 Cal. App. 423, 126 Pac. 187.

217. Same—Estoppel.—Where there was no issue with relation to an estoppel, no finding thereon was necessary.—*Mentry v. Broadway Bank & Trust Co.*, 20 Cal. App. 388, 129 Pac. 470, 471.

218. Issues presented by cross-complaint—Omission of court to make findings upon, is not ground for reversal of judgment in absence of any bill of exceptions or other showing that evidence was given upon issues so presented.—*Stewart v. Hollingsworth*, 129 Cal. 177, 180, 61 Pac. 936.

As to failure to find on issues raised by counter-claim, where the record fails to disclose evidence offered in support of it, see par. 221, this note.

219. Objection that court failed to find upon affirmative matters set forth in answer can not be raised where defendant offered no evidence in support of them.—*Frantz v. Harper*, 6 Cal. Unrep. 560, 62 Pac. 603.

220. Presumption that no evidence was offered at trial court on issue regarding which there is no finding, applies not only to issues that are made to allegations of complaint by answer, but also to issues made by averments of new matter in answer which are deemed controverted. Failure to make a finding upon any of these issues will not, in absence of bill of exceptions, be held to be error.—*Bliss v. Sneath*, 119 Cal. 526, 529, 51 Pac. 848; *In matter of Carpenter*, 137 Cal. 582, 587, 60 Pac. 162.

221. Record not showing that evidence was offered in support of counter-claim, failure of court to make finding thereon will not justify reversal of judgment.—*Cutting Fruit P. Co. v. Canty*, 141 Cal. 692, 696, 75 Pac. 564. See *Winslow v. Gorhansen*, 88 Cal. 450, 452, 26 Pac. 504; *F. A. Hihn Co. v. Fleckner*, 106 Cal. 95, 97, 39 Pac. 214.

As to issues presented by cross-complaint, see par. 218, this note.

222. Showing that there was evidence upon an affirmative defense set up is in-

cumbent upon party complaining that there was no finding upon such defense, and further that such evidence would have justified finding in his favor. It will be presumed in favor of judgment that there was no evidence offered as to affirmative defense.—*De Tolna v. De Tolna*, 135 Cal. 575, 578, 67 Pac. 1045. See *Woodhman v. Cline*, 130 Cal. 497, 499, 62 Pac. 822.

VII. FAILURE TO FIND UPON CERTAIN ISSUES—C. MATERIAL ISSUES.

223. Complaint setting forth financial condition of defendant and praying for order for permanent alimony, makes question of alimony an issue of case. Court failing to find upon this issue, and decree being silent on subject, is error, as every material issue must be met by findings.—*O'Brien v. O'Brien*, 124 Cal. 422, 426, 57 Pac. 225.

224. Divorce—Failure to find upon material issues.—Where the complaint in an action for divorce charges desertion, and the answer takes issue thereupon, the failure of the court to find at all upon that issue is ground for a reversal of the judgment for the defendant.—*Kusel v. Kusel*, 147 Cal. 55, 81 Pac. 297.

As to failure to find upon material issues, see pars. 226, 229, 242-245, this note.

225. Duty of court to find—Upon all material issues—Independent of any request therefor by the parties or either of them (dictum).—*Cargnani v. Cargnani*, 16 Cal. App. 99, 116 Pac. 306.

226. Failure to find—Writ of mandate to compel payment of official salary.—Where the defense to a petition for writ of mandate to compel payment of salary as a public officer is the plea that the appointee of the defendants, and not the petitioner, has been in possession of the office in question ever since the date of his appointment, has discharged its duties and received its salary, and the evidence clearly and without dispute sustains such plea, an omission to find thereon is reversible error on an appeal from a judgment for petitioner.—*Black v. Board of Police Commissioners*, 17 Cal. App. 313, 119 Pac. 674.

As to failure to find upon material issue in divorce proceeding, see par. 224, this note.

227. Findings of facts—Must respond to all material issues.—*Wilson v. Wilson*, 6 Idaho 597, 57 Pac. 708.

228. Findings on issues raised by allegations of cross-complaint—May sometimes be omitted.—The test is whether a finding either way would or might have affected the judgment, and findings are essential where this is the case, otherwise they are immaterial.—*Cargnani v. Cargnani*, 16 Cal. App. 100, 116 Pac. 306.

229. General rule—As to failure to find upon material issues.—General rule that failure of court to find upon all material

issues will cause judgment to be set aside, is applicable only in cases where issue upon which there is no finding is material, or where findings upon neglected issues have effect to destroy other findings. Findings made being such as dispose of issues which are sufficient to uphold judgment, it is not error or against law to omit to make findings upon other issues which, if they were made, would not invalidate judgment.—*Snelgrove v. Earl*, 17 Utah 321, 326, 53 Pac. 1017. Citing *Brisson v. Brisson*, 90 Cal. 323, 327, 27 Pac. 186.

As to effect of failure to find upon material issues, see pars. 224, 226, 242-245, this note.

230. Immaterial issues—Need not be found, nor do material issues when they would necessarily be prejudicial to appellant and when those already found are sufficient to sustain judgment.—*Maynard v. Locomotive Engineers' Mut. L. Assoc.*, 16 Utah 145, 67 Am. St. Rep. 602, 51 Pac. 259.

231. Issues made by pleadings—Should all be covered by findings of trial court, whether evidence be introduced or not, and if there be no finding on material issue judgment can not be supported.—*Mitchell v. Jensen*, 29 Utah 346, 81 Pac. 165, following doctrine in *Speegle v. Leese*, 51 Cal. 415; *Golson v. Dunlap*, 73 Cal. 157, 161, 14 Pac. 576.

232. Judgment—Must be reversed when there is failure to find upon any material issue made by pleading.—*Kimball v. Stormer*, 65 Cal. 116, 118, 3 Pac. 408.

233. Same—Will not be reversed, when.—Failing to find upon material issue will not warrant reversal of judgment if findings omitted must have been adverse to appellant.—*People ex rel. Love v. Center*, 66 Cal. 551, 564, 5 Pac. 263, 6 Pac. 481; *Murphy v. Bennett*, 68 Cal. 528, 530, 9 Pac. 738; *Demartin v. Demartin*, 85 Cal. 71, 75, 24 Pac. 594.

See, also, par. 237, this note.

234. No particular form necessary.—Material issues raised by pleadings and evidence should be covered by findings, but if it appears that there are such findings it is not necessary that they should be in the exact language of the pleadings or in any particular form.—*Millard v. Supreme Council A. L. of H.*, 81 Cal. 340, 342, 22 Pac. 864.

235. Party is entitled to distinct finding—Upon every material issue, whether issue was made by denials of averments in complaint or by denials presumed by law of averments in answer.—*Harlan v. Ely*, 55 Cal. 340, 344.

As to effect of failure to find upon material issue, see pars. 224, 226, 229, 242-245, this note.

236. Pretermitted findings—Requirement as to.—Nothing more is required than that the material issues should be covered by the findings, and where a pretermitted find-

ing must necessarily have been adverse to appellants, they are not aggrieved.—Pinheiro v. Bettencourt, 17 Cal. App. 120, 118 Pac. 941.

237. Reversal of judgment—Will not be ordered if all material issues are not found upon, unless findings on those issues in favor of appellant would entitle him to judgment.—*Blochman v. Spreckels*, 135 Cal. 662, 664, 57 L. R. A. 213, 67 Pac. 1061. See *Gould v. Adams*, 108 Cal. 365, 368, 41 Pac. 408.

See, also, par. 233, this note.

As to when judgment must be reversed, see par. 232, this note.

238. Special findings—Not always necessary to make.—It is not always necessary to make a specific finding as to each of several material issues where the findings, taken as a whole or construed together, clearly enough show that they include the court's conclusion upon all the material issues.—*Rossi v. Beaulieu Vineyard*, 20 Cal. App. 770, 130 Pac. 201, 205.

239. Where the court failed to make a finding upon a material issue submitted by the pleadings, the judgment will be reversed.—*Rossi v. Beaulieu Vineyard*, 20 Cal. App. 770, 130 Pac. 201, 203.

240. Special findings should, if possible, be so construed as to harmonize them with each other and with the general verdict.—*Petersen v. California Cotton Mills Co.*, 20 Cal. App. 750, 130 Pac. 169, 173.

241. Special findings will not control unless they exclude every theory which will sustain the verdict, and "are inconsistent only when, as a matter of law, they will authorize a judgment different from that which the verdict will permit."—*Petersen v. California Cotton Mills Co.*, 20 Cal. App. 750, 130 Pac. 169, 173.

242. Where no finding on material issue—Effect of.—Where the trial court finds in favor of the defendant as to one of the counts in the complaint, he can not complain of the absence of findings as to issues raised in that count.—*Luchini v. Roux*, 29 Cal. App. 755, 157 Pac. 554.

As to effect of failure to find on material issues, see pars. 224, 226, 229, 235.

243. In findings of fact the omission to find in expressed terms that the defendant was negligent will not defeat the judgment, if the facts found show an omission of duty with a resultant injury.—*Cooley v. Brunswick Drug Co.*, 30 Cal. App. 58, 157 Pac. 13.

244. If any material issue is left un-found, it is ground for reversal of judgment.—*Math v. Crescent Hill Gold Mines Co.*, 31 Cal. App. 636, 161 Pac. 140.

245. In an action for services performed in working in a mine, where the defendant files a cross-complaint in which it is alleged that the plaintiff is indebted to the defendant for money loaned and for goods and merchandise furnished and delivered to

the plaintiff, at the latter's special instance and request, in a certain sum, and the plaintiff in his answer to the cross-complaint denies the indebtedness, and evidence is admitted upon the issue, the failure to make a finding upon the issue requires a reversal of the judgment.—*Math v. Crescent Hill Gold Mines Co.*, 31 Cal. App. 636, 161 Pac. 140.

VIII. STIPULATION OF FACTS—FINDINGS NOT NECESSARY.

246. Agreed statement of facts—Finding upon not necessary.—A finding of an ultimate fact upon an agreed statement of facts was held properly made where the statement set forth merely evidentiary matter from which the ultimate fact may have been found either way.—*Crisman v. Lauterman*, 149 Cal. 654, 87 Pac. 89.

247. Facts admitted—Findings not necessary.—Findings upon admitted facts are not required and a judgment will not be disturbed because of a real or apparent conflict in them.—*Fernandez v. Watt*, 26 Cal. App. 86, 146 Pac. 47.

248. Findings of fact not necessary where facts are stipulated.—There is no necessity for findings covering facts which have been settled by a stipulation of the parties.—*Alderson v. Cutting*, 163 Cal. 503, 126 Pac. 157.

249. Where an action is tried upon a stipulated statement of facts, it is not necessary that specific findings be made upon the matters in issue.—*Stanwood v. Carson*, 169 Cal. 640, 147 Pac. 562.

250. Stipulation of parties that "contestant introduced evidence on issue of menace" is sufficient to take place of evidence on such issue to show whether finding was justified by such evidence. Such stipulation or certificate of judge of like purport to certain extent takes away from supreme court power to determine appeal upon real facts of case.—*In matter of Carpenter*, 127 Cal. 582, 587, 60 Pac. 162.

As to stipulations, see, ante, § 283 and note pars. 214, et seq.

IX. FINDINGS OUTSIDE OF ISSUES.

As to objections to findings outside of the issues made, see par. 266, this note.

251. Are immaterial—Not binding in subsequent action.—Findings outside the issues, and not carried into the judgment, are immaterial, and, even if not supported by the evidence, could not constitute error prejudicial to the party, and would not be binding upon him in a subsequent action.—*Collins v. Gray*, 154 Cal. 135, 97 Pac. 142.

252. A finding of fact not pleaded in the answer is outside the issues, and error.—*Johnson v. All Night and Day Bank*, 17 Cal. App. 572, 120 Pac. 432.

253. Disregarded—Not support judgment.—Findings on issues not made by the pleadings must be disregarded, and can not fur-

nish support for a judgment.—*Simmons v. Simmons*, 166 Cal. 438, 137 Pac. 20.

As to exception, see par. 254, this note.

254. Will not support judgment—Exception.—The general rule that a judgment can not stand, where findings are not waived, and the findings are wholly outside the issues, is subject to the limited qualification that where a case has been tried upon the theory, without objection from either party, that some vital question, not in fact made an issue by the pleadings, has nevertheless been made an issue by the proof introduced, findings on such an issue will support a judgment.—*Howard v. D. W. Hobson Co.*, 38 Cal. App. 445, 176 Pac. 715.

See par. 293, this note.

X. OBJECTIONS TO FINDINGS—HOW PRESENTED—A. IN GENERAL.

As to judgment being vacated where erroneous conclusions of law are inconsistent with findings of fact, see, post, § 663 and note.

As to notice of motion to vacate judgment based on erroneous conclusions of law, see, post, § 663½ and note.

As to defective findings, how attacked, see par. 28, this note.

255. Contention that finding is not within issues.—Can not be made on appeal, when no objection was made to evidence in support of finding at trial.—*McDougald v. Hulet*, 132 Cal. 154, 163, 64 Pac. 278.

256. Direction of court.—As to the order of sale of personal property, though not prayed for in complaint, is not erroneous as matter of law, nor is there any presumption against its validity. If it is erroneous as a matter of fact, it is incumbent upon appellant to cause such error to appear.—*Bank of Ukiah v. Reed*, 131 Cal. 597, 601, 63 Pac. 921.

257. Examination on motion for new trial.—Limited to consideration of sufficiency of evidence to sustain findings of fact and whether any errors of law occurred at trial.—*Churchill v. Flournoy*, 127 Cal. 355, 361, 59 Pac. 791.

258. Facts found by court.—Not sustaining judgment, this can be shown by appeal without any bill of exceptions setting forth failure of trial court to make application of proper legal principles; and if its decision by any controverted question of facts results from failure to properly apply the law applicable thereto, or from a consideration of evidence not entitled to be considered, this error can be reviewed through bill of exceptions in which is specified such error of law, or that evidence is insufficient to sustain decision.—*Lamb v. Harbaugh*, 105 Cal. 680, 692, 39 Pac. 56.

259. Failure to find upon issue.—Will not be ground for reversing judgment otherwise correct, unless it appears by statement or bill of exceptions that evidence was given in such case.—*Kaiser v. Dalto*, 140 Cal. 167, 170, 73 Pac. 828.

260. Going to trial.—Upon theory that there is a material issue, and allowing evidence to be received upon such issue without objection, and court making finding upon such evidence upon theory that proper issue was made by pleading, with no objection from either party, neither of parties will be allowed on appeal to say for first time that there was no such issue.—*Carroll v. Briggs*, 138 Cal. 452, 454, 71 Pac. 501.

261. Issue upon which a finding might have effect of invalidating a judgment fully supported by findings made not being found upon, is not ground for reversal, unless it be shown, by statement or bill of exceptions, that evidence was submitted in relation to issue sufficient to authorize such finding as would have effect of invalidating judgment.—*Winslow v. Corhansen*, 88 Cal. 450, 451, 26 Pac. 504; *Dedmon v. Moffitt*, 89 Cal. 211, 213, 26 Pac. 800; *Brady v. Burke*, 90 Cal. 1, 9, 27 Pac. 52; *Rogers v. Duff*, 97 Cal. 66, 69, 31 Pac. 836; *Gregory v. Gregory*, 102 Cal. 50, 52, 36 Pac. 364; *F. A. Hihn Co. v. Fleckner*, 106 Cal. 95, 97, 39 Pac. 214; *Merchant v. Hayes*, 117 Cal. 669, 672, 49 Pac. 840; *Bliss v. Sneath*, 119 Cal. 526, 529, 51 Pac. 848; *Roebbling's Sons Co. v. Gray*, 139 Cal. 607, 609, 73 Pac. 422.

XI. OBJECTIONS TO FINDINGS—HOW PRESENTED—B. BY APPEAL FROM JUDGMENT.

As to appeals, in general, see, post, §§ 934-938 and notes.

As to appeals to the supreme court, see, post, §§ 939-958 and notes.

262. Correction of wrong judgment.—Re-examination of an issue of fact in order to correct wrong judgment upon facts which were properly determined can not be granted. All issues of fact raised by pleading being found by court, and findings being correct, erroneous judgment drawn from those facts can not be corrected by means of new trial.—*Kaiser v. Dalto*, 140 Cal. 167, 169, 73 Pac. 828.

263. Every material issue having been decided in favor of losing party, new trial will not be awarded, for if he is not entitled to judgment with every fact found in his favor he has nothing to gain by new trial of same issues; and if upon findings as made he is entitled to prevail, his only remedy is by appeal from any judgment rendered against him.—*Sharp v. Bowle*, 142 Cal. 462, 467, 76 Pac. 62. See *Martin v. Matfield*, 49 Cal. 42, 44; *Brison v. Brison*, 90 Cal. 323, 27 Pac. 186; *Bode v. Lee*, 102 Cal. 583, 587, 36 Pac. 936; *Rauer v. Fay*, 128 Cal. 523, 525, 61 Pac. 90; *Swift v. Occidental M. & P. Co.*, 141 Cal. 161, 165, 74 Pac. 700.

264. Failure to find upon material facts.—No ground for granting new trial, when. —Whether judgment is authorized by pleadings or findings in question not involved in re-examination of facts.—*Churchill v. Flournoy*, 127 Cal. 355, 361, 59 Pac. 791.

As to failure to find on material issue, see Par VII, this note.

265. Compare: *Power v. Fairbanks*, 146 Cal. 611, 614, 80 Pac. 1075.

266. Findings outside of issues.—Effect of.—Fact that trial court has made findings outside of issues does not warrant granting of motion for new trial. Such objection is available only upon an appeal from judgment. New trial is simply re-examination of issue of fact, and where there is no issue of fact there is nothing to re-try.—*Power v. Fairbanks*, 146 Cal. 611, 614, 80 Pac. 1075.

As to findings outside the issues made, see Part IX, this note.

267. Judgement—Not supported by findings.—Appeal from order denying motion for new trial can not raise objections to certain findings being outside of issues, and that judgment is not supported by findings.—*Bell v. Southern Pac. R. Co.*, 144 Cal. 560, 562, 77 Pac. 1124.

268. Objection that findings are against law and do not support conclusions of law, are not reviewable on motion for new trial on ground that decision is against law.—*Petaluma Pav. Co. v. Singley*, 136 Cal. 616, 618, 69 Pac. 426. See *Bode v. Lee*, 102 Cal. 583, 587, 36 Pac. 936; *Pierce v. Willis*, 103 Cal. 91, 93, 36 Pac. 1080; *Churchill v. Flournoy*, 127 Cal. 355, 361, 59 Pac. 791.

269. Objection that findings do not support judgment, and that findings are contradictory to and inconsistent with pleading, can not be considered on appeal from order denying motion for new trial.—*Moore v. Douglas*, 132 Cal. 399, 400, 64 Pac. 705. See *Rauer v. Fay*, 128 Cal. 523, 525, 61 Pac. 90; *Swift v. Occidental M. & P. Co.*, 141 Cal. 161, 165, 166, 74 Pac. 700.

XII. OBJECTIONS TO FINDINGS—HOW PRESENTED—C. BY MOTION FOR NEW TRIAL.

As to notice of intention to move for a new trial, see, post, § 659 and note.

As to preparation and settlement of bills of exceptions, see, post, § 650 and note.

As to specifications of insufficiency of evidence to justify findings, see, post, §§ 648, 659 and notes.

270. Decision is against law.—Where there is failure to find upon material issue, and it may be reviewed on appeal from order granting or refusing to grant new trial.—*Adams v. Helbing*, 107 Cal. 298, 301, 40 Pac. 422; *Clark v. Hewitt*, 136 Cal. 77, 79, 68 Pac. 303; *Kaiser v. Dalto*, 140 Cal. 167, 169, 170, 73 Pac. 828.

271. Decisions which may be vacated.—On motion for new trial are those in which is given on original trial of question of fact, and upon it judgment is to be entered. Provision that judgment is to be entered upon the decision implies that it is subsequent to the decision, and dependent upon

it.—*Brison v. Brison*, 90 Cal. 323, 327, 27 Pac. 186.

272. Duty of court is to find.—Upon all material issues, regardless of any request of parties, and failure in that respect is ground for new trial to party aggrieved as "decision against law."—*Haight v. Tryon*, 112 Cal. 4, 6, 44 Pac. 318. See *Knight v. Roche*, 56 Cal. 15, 17; *Spotts v. Hanley*, 85 Cal. 155, 168, 24 Pac. 738.

273. Failure to find upon material issue.—Ground for new trial upon such issue.—*Power v. Fairbanks*, 146 Cal. 611, 614, 80 Pac. 1075.

274. Compare: *Churchill v. Flournoy*, 127 Cal. 355, 361, 59 Pac. 791.

275. Findings being contradictory, and bill of exceptions specifying that decision of court was against law because of such contradictory findings, and this being one of grounds for motion of new trial, motion should be granted.—*Langan v. Langan*, 89 Cal. 186, 194, 26 Pac. 764.

XIII. PLEADINGS INCORPORATED IN FINDINGS—BY REFERENCE.

As to finding that several matters are not true and that allegations of complaint not in conflict are true, being insufficient, see, ante, § 632, note par. 17.

276. All allegations of plaintiff's complaint.—Sufficient.—Finding generally that each and all of allegations of plaintiff's complaint are true and are sustained by evidence, and "that none of denials contained in defendant's answer herein is true or is sustained by evidence," is sufficient.—*Gale v. Bradbury*, 116 Cal. 39, 40, 47 Pac. 778. See *McEwen v. Johnson*, 7 Cal. 258, 260; *Johnson v. Klein*, 70 Cal. 186, 187, 11 Pac. 606; *Gwinn v. Hamilton*, 75 Cal. 265, 266, 17 Pac. 212; *Williams v. Hall*, 79 Cal. 606, 607, 21 Pac. 965; *County of San Diego v. Seifert*, 97 Cal. 594, 597, 32 Pac. 644; *Krug v. F. A. Lux Brew. Co.*, 129 Cal. 322, 323, 61 Pac. 1125; *County of Sutter v. McGriff*, 180 Cal. 124, 126, 62 Pac. 412; *Cohn v. Kelly*, 132 Cal. 468, 469, 64 Pac. 759.

277. All issues covered, when.—Finding that all of allegations of complaint are true necessarily covers all issues made by pleadings, where answer contains nothing but denials and admission of matters.—*Johnson v. Klein*, 70 Cal. 186, 187, 11 Pac. 606.

278. All issues of fact.—Insufficient.—Finding that all issues of fact raised by pleadings are hereby found and decided in favor of plaintiff and against defendant is insufficient, as it suggests inquiry as to what issues are raised by pleadings.—*Johnson v. Squires*, 53 Cal. 37.

279. All other averments are not true.—Insufficient.—Finding "that all other averments in pleading herein and in issue not comprised and passed upon in these findings, are not true," is too vague and indefinite for any purpose. Party is entitled

to distinct findings upon every material issue made by pleading. Supreme court is not called upon to examine record for purpose of determining what matters at issue made by pleading come within finding.—*Perkins v. West Coast L. Co.*, 120 Cal. 27, 28, 29, 52 Pac. 118. See *Harlan v. Ely*, 55 Cal. 340, 344.

280. Allegations of answer—Inconsistent with complaint—Insufficient.—Finding that all allegations of plaintiff's complaint are true, and that all allegations of defendant's answer, so far as they are inconsistent with allegations of said complaint, are not true, is insufficient, and findings do not support judgment.—*Krug v. F. A. Lux Brew. Co.*, 129 Cal. 322, 324, 61 Pac. 1125. See *Continental B. & L. Assoc. v. Wilson*, 144 Cal. 776, 777, 778, 78 Pac. 254.

281. Same—Consistent with facts—Insufficient.—Finding "that foregoing are all the facts of the case, and all and singular the allegations of second amended answer, are untrue, except only in so far as they accord with foregoing facts," is insufficient. Trial court should assume labor of comparing allegations of answer with facts found by it, and supreme court can not assume function of determining for first time truth or falsity of any of them, either by reference to testimony, or to facts actually found.—*Harlan v. Ely*, 55 Cal. 340, 344.

282. Denials in answer—Contradictory to complaint—Insufficient.—Finding that all allegations of complaint are true, and that allegations and denials of answer contradictory to complaint in any respect are untrue, is not finding upon issue tendered by answer, and judgment must be reversed for want of sufficient finding.—*Bank of Woodland v. Treadwell*, 55 Cal. 379.

283. Compare: *Alameda County v. Crocker*, 125 Cal. 101, 103, 57 Pac. 766.

284. Facts set forth in complaint—Sufficient.—Finding that facts set forth in complaint are true is sufficient to support decree if complaint is sufficient.—*Bitter v. Mout L. & I. Co.*, 10 Colo. App. 307, 51 Pac. 519.

285. Finding—May refer to pleading for a specification of facts found and not found, providing such reference is sufficiently distinct to make it intelligible, and facts are sufficiently stated in pleadings.—*McEwen v. Johnson*, 7 Cal. 258, 260.

286. Material averments of complaint—Insufficient.—Finding that all material averments of complaint are true is insufficient.

—*Johnson v. Squires*, 53 Cal. 37; *Krug v. F. A. Lux Brew. Co.*, 129 Cal. 322, 323, 61 Pac. 1125.

287. Nothing left undetermined—Sufficient.—Finding that all facts in complaint are true, except as to those hereinafter otherwise specified, and as to those allegations, court finds as follows, and court then finding specifically as to such omitted matters, is sufficient finding. In cases holding to contrary, finding left something undetermined so that court could not ascertain precisely what facts had been found. In above instances court finds specifically.—*Alameda Co. v. Crocker*, 125 Cal. 101, 103, 57 Pac. 766.

288. Other findings immaterial.—Finding that all and singular the allegations of plaintiff's complaint are true, and allegations of defendant's answer are false, and specifically negating the charge of fraud and conspiracy which was basis of separate defense, and findings being supported by evidence, makes other findings immaterial.—*Cohn v. Kelly*, 132 Cal. 468, 469, 64 Pac. 759.

289. Paragraphs by number—Sufficient.—Finding that certain named paragraphs in complaint are true is sufficient. There is no material difference between saying that certain paragraph of complaint is true and saying that averments of paragraph are true.—*Homeseekers Loan Assoc. v. Gleeson*, 133 Cal. 312, 314, 65 Pac. 617. See *Johnson v. Klein*, 70 Cal. 186, 187, 11 Pac. 606; *Williams v. Hall*, 79 Cal. 606, 607, 21 Pac. 965.

290. Reference may be had to pleadings in findings.—For instance, it would be sufficient to find that a promissory note, mortgage, or other instruments set forth in complaint was executed by parties at time as therein alleged; and so with other matters alleged which were established by evidence. But in all cases reference should be distinct and pointed so as to leave no doubt as to what particular facts are intended.—*Breeze v. Doyle*, 19 Cal. 101, 106.

291. Subdivisions by number—Sufficient.—Finding that all allegations contained in subdivisions 12, 13 and 46 are true, has reference only to pleadings to which court must always look, not only to ascertain what facts are admitted, but to determine whether findings are within issues, and such findings are sufficient where complaint is divided into such subdivisions and answer is not.—*Kennedy & S. L. Co. v. S. S. Const. Co.*, 123 Cal. 584, 586, 56 Pac. 457.

§ 634. FINDINGS MAY BE WAIVED, HOW. Findings of fact may be waived by several parties to an issue of fact.

1. By failing to appear at the trial;
2. By consent in writing filed with the clerk;
3. By oral consent in open court, entered in the minutes.

[Findings, service of proposed, and signing.] In all cases where the court

directs a party to prepare findings, a copy of said proposed findings shall be served upon all the parties to the action at least five days before findings shall be signed by the court, and the court shall not sign any findings therein prior to the expiration of such five days.

History: Enacted March 11, 1872; amendment approved April 22, 1913, Stats. and Amdts. 1913, p. 58. In effect August 10, 1913.

WAIVER OF FINDINGS.

1. Absence of findings in record—Is not fatal defect.
2. All issues made by pleadings—Are presumed to have been found.
3. Appearing for special purpose only—And moving for short postponement.
4. Construction of section—As directory only and not prohibitory.
5. Same—As mandatory merely.
6. Same—Service of proposed findings.
- 7, 8. Same—Same—Amendment of 1913.
9. Default of party—Makes findings unnecessary.
10. Same—Of defendant—Denying divorce after—Findings unnecessary.
11. Dismissal of action sua sponte.
12. Effect of waiver of findings.
13. Express findings by court—Are necessary.
14. Fact that findings were not waived—Must affirmatively appear.
- 15, 16. Failure to serve copy of proposed findings—Effect of.
17. Same—Objection on appeal from judgment.
18. Findings not directed—Need not be served before finding.
19. Findings not filed—Constructive error.
20. Findings not being waived.
21. Judgment—Can not be permitted to stand in absence of findings.
22. Same—Entered without findings.
23. Same—May be vacated for want of findings.
24. Minutes of court—May be corrected.
25. Ordering judgment to be set aside.
26. Parties are entitled to findings.
27. Premature signing of findings—Denial of substantial rights.
28. Presumption—Is in favor of judgment.
29. Same—Is that defendant waived findings.
30. Same—That findings have been waived.
31. Report of referee—No provision for waiver of.
32. Several parties to issue.
33. Signature of findings—Time of—Code provisions directory.
34. Statute—Does not absolutely and unconditionally require findings.
35. Statutory waiver of findings—Takes place by failing to attend trial.
36. Stipulation in writing—That findings be waived.
37. Suffering default to be entered.
38. Want of findings in record on appeal—Presumption.

1. Absence of findings in record—Is not fatal defect unless it affirmatively appears that they were not waived.—*Richardson v. City of Eureka*, 110 Cal. 441, 446, 42 Pac. 965.

As to presumption from want of finding in record on appeal, see par. 30, this note.

2. All issues made by pleadings—Are presumed to have been found in favor of successful party where findings have been waived.—*Antonelle v. Board of New City Hall Comrs.*, 92 Cal. 228, 229, 28 Pac. 270.

3. Appearing for special purpose only—And moving for short postponement of trial, and withdrawing from case, and not appearing at trial, is waiver of findings.—*Eltzroth v. Ryan*, 91 Cal. 584, 588, 27 Pac. 932.

4. Construction of section—As directory only and not prohibitory.—The provisions of the above section are to be construed as directory and not mandatory; if construed as mandatory it would often operate to work injustice, for there are many cases in which a delay in the signing of findings would so operate, and perhaps chief among them are cases of forceable entry or of unlawful detainer. Trial courts are justified in disregarding the direction contained in the above section whenever a compliance with it would work injustice to a litigant. —*Asebez v. Bliss*, 178 Cal. 137, 172 Pac. 595.

5. Same—As mandatory merely.—And where it appears that the findings were prepared by a party under an order directing him so to do, and that the findings were signed less than five days after proposed findings were served on the defendant, the validity of the judgment would not be impaired thereby. —*Sadico v. Jackson*, — Cal. App. —, 189 Pac. 111, following the doctrine in *Admundson v. Shafer*, 36 Cal. App. 398, 172 Pac. 173.

6. Same—Service of proposed findings pursuant to above section, as amended in 1913, is not required in a case where no direction is made that findings be prepared. —*Hoffman v. Rush Co.*, 27 Cal. App. 167, 149 Pac. 177.

7. Same—Same—Amendment of 1913.—The amendment of 1913 has not changed the rule that a superior court judge presiding outside his own county has the power to

settle and sign the findings in the county of his residence.—Weinstock-Nichols Co. v. Courtney, 26 Cal. App. 445, 147 Pac. 218.

8. The amendment to this section was passed solely in the interests of parties litigant, to give them an opportunity to suggest to the trial judge, before signing findings, certain matters they desired to have incorporated. The amendment was not enacted for any public reason and the provisions may be waived by a party litigant.—California Cent. Creameries Co. v. Crescent City L. W. & P. Co., 30 Cal. App. 619, 159 Pac. 209.

9. **Default of party—Makes findings unnecessary,** and in such case they form no part of judgment-roll.—In matter of Cook, 77 Cal. 220, 230, 11 Am. St. Rep. 267, 1 L. R. A. 567, 17 Pac. 923, 19 Pac. 431.

10. **Same—Of defendant—Denying divorce after—Findings unnecessary.**—Under the provisions of section 131 of the Civil Code regulation proceeding in actions for divorce and requiring the court to file its decision and conclusions of law as in other cases should be read in connection with the above section, and with sections 588 to 590, ante, and when so read, the construction to be placed upon the Civil Code section is that in divorce cases, as in other cases, findings are required upon a trial of issues of fact, only, which issues of fact are raised by the pleading of the respective parties, and then only in cases where findings have not been waived as provided for in the above section.—Waldecker v. Waldecker, 178 Cal. 566, 174 Pac. 36, following doctrine in *Foley v. Foley*, 120 Cal. 33, 65 Am. St. Rep. 147, 52 Pac. 122; *Waller v. Weston*, 125 Cal. 201, 57 Pac. 897.

11. **Dismissal of action sua sponte.**—The dismissal of an action by the court on its own motion, after the evidence is all in, is not a nonsuit under subdivision 5 of section 571, ante, but is a final judgment, and when such a judgment is unsupported by findings and conclusions as prescribed by section 632, ante, waiver thereof will not be presumed; but the conclusion will be that the only reasonable inference is that the court acted under an erroneous view of the law, and under the impression that such findings and conclusions were not required.—*Saul v. Moscone*, 16 Cal. App. 511, 118 Pac. 452.

12. **Effect of waiver of findings.**—Where findings are expressly waived, and a recital in the judgment that a homestead, alleged in the complaint to be community property, was the separate property of the husband, it will be presumed, in support of the judgment, that evidence was introduced sufficient to justify a finding that would support such judgment.—*Bruce v. Bruce*, 16 Cal. App. 356, 116 Pac. 994.

13. **Express findings by court—Are necessary** unless they are waived.—*Richardson v. City of Eureka*, 110 Cal. 441, 446, 42 Pac. 956.

14. **Fact that findings were not waived—Must affirmatively appear** by bill of exceptions, unless the judgment-roll shows it, otherwise all intendments are in favor of validity of judgment and it will not be reversed on appeal.—*Leadbetter v. Lake*, 118 Cal. 515, 50 Pac. 686. See *In re Arguello*, 85 Cal. 151, 153, 24 Pac. 641.

15. **Failure to serve copy of proposed findings—Effect of.**—A judgment is not void on its face by reason of the failure of the party directed to prepare findings to serve a copy of the proposed findings upon all other parties at least five days before the findings are signed.—*California Cent. Creameries Co. v. Crescent City L. W. & P. Co.*, 30 Cal. App. 619, 159 Pac. 209.

16. An order directing the preparation of finding is not a part of the judgment-roll, and, therefore, an inspection thereof would not disclose that such direction was given.—*California Cent. Creameries Co. v. Crescent City L. W. & P. Co.*, 30 Cal. App. 619, 159 Pac. 209.

17. **Same—Objection an appeal from the judgment,** the respondent can not urge in support of such appeal that a copy of the proposed findings was not served upon him within the five days required by the above section where he recovered the judgment desired.—*Jarvis v. Frey*, 175 Cal. 687, 166 Pac. 997.

18. **Findings not directed—Need not be served before finding.**—The provisions of the above section requiring that where the court directs a party to prepare findings, a copy thereof shall be served upon the other party to the action at least five days before findings shall be signed by the court does not apply in a case in which the findings are not directed by the court, and in such a case where the findings are signed and filed on the same date on which they are served, the proceedings are not objectionable under the above section, for the reason that the case is not brought within the provisions of the section.—*MacFarlane v. Doyle*, — Cal. App. —, 192 Pac. 462, following the doctrine in *Hoffman v. Guy M. Rush Co.*, 27 Cal. App. 167, 149 Pac. 177.

19. **Findings not filed—Constructive error.**—Findings not being filed or waived in case constitutes error.—*Bennet v. Pardini*, 63 Cal. 154, 156.

20. **Findings not being waived,** it is error to enter judgment without them.—*Estate of Burton*, 63 Cal. 36, 37.

21. **Judgment—Can not be permitted to stand in absence of findings of fact,** when it does not appear that such findings were waived.—*Dowd v. Clarke*, 51 Cal. 262, 263. See *Savings & L. Soc. v. Thorne*, 67 Cal. 53, 54, 7 Pac. 36.

22. **Same—Entered without findings,** findings not having been waived, is error.—*Estate of Burton*, 63 Cal. 36, 37.

23. **Same—May be vacated for want of findings of fact,** although losing party had

previously given notice that he would move for new trial, and afterwards gave notice of his abandonment of that motion. Such notice of motion was not waiver of findings, as statute enumerates modes which must be held to be exclusive.—*Savings & L. Soc. v. Thorne*, 67 Cal. 53, 54, 7 Pac. 36.

24. Minutes of court—May be corrected so as to make them state truth in relation to waiver of findings, in one of modes above described, and when minutes so corrected show such waiver judgment will not be disturbed on that ground.—*Sullivan v. Hume*, 4 Cal. Unrep. 161, 33 Pac. 1121.

25. Ordering judgment to be set aside and cause restored to calendar for new trial for reason that it appeared to court that no findings of fact were ever prepared, signed, or filed, and findings were not waived, is not error.—*Van Court v. Winterston*, 61 Cal. 615, 616.

26. Parties are entitled to findings upon trial of issues joined in proceeding to try objections on confirmation of referee's report in an estate, unless they are waived.—*Estate of Burton*, 63 Cal. 36, 37.

27. Premature signing of findings—Denial of substantial rights.—Conceding it to have been error, under the above section, for the court to sign finding before the expiration of the five-day period, if no substantial right was denied thereby, such error will be disregarded in appeal.—*Baker v. Eilers Music Co.*, 175 Cal. 652, 166 Pac. 1006.

28. Presumption—Is in favor of judgment, and mere non-appearance in judgment-roll does not necessarily establish fact that error was committed. Party complaining that court committed error in failing to find facts, must, by bill of exceptions or some other similar and appropriate method, make it affirmatively appear by record that no waiver of findings had in fact occurred in court below, otherwise intentment on appeal must go to support, and not to overthrow, judgment rendered.—*Mulcahy v. Glazier*, 51 Cal. 626, 627. See *Reynolds v. Brummagim*, 54 Cal. 254, 258; *Campbell v. Coburn*, 77 Cal. 36, 37, sub nom. *Campbell v. Hayes*, 18 Pac. 860; *In re Arguello*, 85 Cal. 151, 153, 24 Pac. 641; *Tomlinson v. Ayres*, 117 Cal. 568, 570, 49 Pac. 717; *Leadbetter v. Lake*, 118 Cal. 515, 50 Pac. 686; *Horwege v. Sage*, 137 Cal. 539, 541, 542, 70 Pac. 621.

29. Same—Is that defendant waived findings in case where findings should have been made but were not made.—*Horwege v. Sage*, 137 Cal. 539, 541, 70 Pac. 621.

30. Same—That findings have been waived, unless contrary is affirmatively shown by bill of exceptions, can not have force as against writing on its face designated the "decision," filed by court below, and clearly intended to be finding upon material issue.—*Kimball v. Stormer*, 65 Cal. 116, 118, 3 Pac. 408.

31. Report of referee—No provision for waiver of.—Presumption that findings were waived can have no application to report of referee, for reason that no provision is made for waiver in such cases, and in very nature of case could not be.—*Lee Sack Sam v. Gray*, 104 Cal. 243, 247, 38 Pac. 85.

32. Several parties to issue of fact includes all parties, and must be held to apply to infants as well as adults.—*Western L. Co. v. Phillips*, 94 Cal. 54, 56, 29 Pac. 328.

33. Signature of findings—Time of—Code provisions directory.—The provisions of the above section requiring that where the court directs the preparation of findings, the same shall not be signed prior to the expiration of five days from a service of a copy thereof on the adverse party, is directory only, and may be disregarded when compliance would work injustice to the rights of a litigant.—*Amundson v. Schafer*, 36 Cal. App. 398, 172 Pac. 173.

34. Statute—Does not absolutely and unconditionally require findings of fact should be filed, but only that they must be filed unless waived in some one or more of three modes mentioned.—*Mulcahy v. Glazier*, 51 Cal. 626, 627.

35. Statutory waiver of findings—Taken place by failing to attend trial.—Fact that judgment erroneously refers to findings when none existed is of no consequence. Statute requires none under such circumstances.—*Fincher v. Malcolmson*, 96 Cal. 38, 41, 30 Pac. 835.

36. Stipulation in writing—That findings be waived is complete waiver of findings, although not filed until after entry of judgment.—*Dougherty v. Friermuth*, 68 Cal. 240, 9 Pac. 98.

37. Suffering default to be entered and failing to appear at trial is waiver of findings.—*Hibernia Sav. & L. Soc. v. Clarke*, 110 Cal. 27, 32, 42 Pac. 425.

38. Want of findings in record on appeal—Presumption.—Where no findings appear in the judgment-roll in the record on appeal on the judgment-roll alone, it will be presumed that they were waived as herein provided.—*Kritzer v. Tracy Eng. Co.*, 16 Cal. App. 290, 116 Pac. 700.

§ 635. FINDINGS, HOW PREPARED. [Repealed.]

History: Enacted March 11, 1872; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 312; repeal approved April 3, 1876, Code Amdts. 1875-6, p. 91; re-enacted by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 146, held unconstitutional, see history, § 5 ante.

§ 636. PROCEEDINGS AFTER DETERMINATION OF ISSUE OF LAW.

On a judgment for the plaintiff upon an issue of law, he may proceed in the manner prescribed by the first two subdivisions of section five hundred and eighty-five, upon the failure of the defendant to answer. If judgment be for the defendant upon an issue of law, and the taking of an account, or the proof of any fact, be necessary to enable the court to complete the judgment, a reference may be ordered, as in that section provided.

History: Enacted March 11, 1872.

PROCEEDING AFTER DETERMINATION OF ISSUE OF LAW.

1. Agreed facts.
2. Default of plaintiff—For not answering cross-complaint.
3. Defendant who failed to answer within time—After demurrer.
4. Demurrer sustained—Without leave to amend.
5. Entry of judgment against one defendant, only.
6. Judgment on pleadings—Is proper, when
7. Motion for judgment on pleadings—Admission.
8. One of several defendants not appearing.
9. Too late to inquire whether judgment was warranted, when.

1. **Agreed facts.**—Where a case is submitted upon an agreed statement covering all the facts of the case no findings of fact are necessary.—*Earle v. Bryant*, 12 Cal. App. 553, 557, 107 Pac. 1018.

As to finding upon agreed statement of facts, see, ante, § 633, note, Part VIII.

2. **Default of plaintiff**—For not answering cross-complaint does not deprive him of right to establish cause of action set forth in his complaint. Verdict on cross-complaint in favor of defendant would not, ipso facto, extinguish claim of plaintiff or defeat his right to have issue thereon determined.—*Langford v. Langford*, 136 Cal. 507, 508, 69 Pac. 235.

3. **Defendant who failed to answer within time**—After demurrer overruled is not

entitled to participate in further proceedings in case.—*People v. Culverwell*, 44 Cal. 620, 622.

4. **Demurrer sustained**—Without leave to amend, and no showing that plaintiff asked leave to amend, supreme court will not reverse judgment on ground that leave was not granted when none was asked.—*Barker v. Freeman*, 85 Cal. 533, 535, 24 Pac. 926.

5. **Entry of judgment against one defendant** who failed to answer after his demurrer was overruled, without at same time entering judgment against co-defendant who had not been served, is in accordance with statute.—*Edwards v. Hellings*, 103 Cal. 204, 207, 37 Pac. 218.

6. **Judgment on pleadings**—Is proper when denials of answer are merely of matters of law and where proof of averments of answer would have been immaterial.—*Heydenfeldt v. Jacobs*, 107 Cal. 373, 376, 40 Pac. 492.

7. **Motion for judgment on pleadings**—Admission that all averments of answer are true.—*McGowan v. Ford*, 107 Cal. 177, 185, 40 Pac. 231.

8. **One of several defendants not appearing**, is not entitled to judgment in his favor, though demurrer of other defendants who did appear was sustained.—*Farwell v. Jackson*, 28 Cal. 105, 107.

9. **Too late to inquire whether judgment was warranted** by law and facts of case, where judgment was duly entered on sufficient pleadings and findings and time for appeal had elapsed.—*People ex rel. Bank Comrs. v. Bank of Mendocino County*, 133 Cal. 107, 109, 65 Pac. 124.

CHAPTER VI.

OF REFERENCES AND TRIALS BY REFERENCES.

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| <p>§ 638. Reference ordered upon agreement of parties, in what cases.</p> <p>§ 639. Reference ordered on motion, in what cases.</p> <p>§ 640. Number of referees, qualifications, etc. [In eminent domain.]</p> | <p>§ 641. Either party may object. Grounds of objection.</p> <p>§ 642. Objections, how disposed of.</p> <p>§ 643. Referees to report within twenty days.</p> <p>§ 644. Effect of referee's findings.</p> <p>§ 645. How excepted to, etc.</p> |
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§ 638. REFERENCE ORDERED UPON AGREEMENT OF PARTIES IN WHAT CASES. A reference may be ordered upon the agreement of the parties filed with the clerk, or entered in the minutes:

1. To try any or all of the issues in an action or proceeding, whether of fact or of law, and to report a finding and judgment thereon;
2. To ascertain a fact necessary to enable the court to determine an action or proceeding.

History: Enacted March 11, 1872, re-enactment of § 182 of Practice Act.

REFERENCE AND TRIALS BY REFEREE.

- 1, 2. Accounts and accounting.
3. Action of court—Must not be reviewed by referee.
4. Court commissioner—Appointed as referee.
5. Court has power to state account between parties.
6. Duty of referee—Is to act upon questions committed to him.
- 7, 8. Hearing before referee—Notice to counsel—Necessity of.
9. Order of court—Agreement filed with clerk being lacking—Effect of.
10. Order of reference—Is general and not special, when.
11. Same—Power of court.
12. Referee—Can exercise all powers of judge.
- 13, 14. Same—Judge pro hac vice.
15. Reference is not a discontinuance of suit.
16. Silence does not constitute consent.
17. Stipulation of parties that cause be referred.
18. Suit in equity—Consent of party is not necessary.
19. Unknown party—Ordering reference, improper.

As to compelling accounting between tenants in common, see note Ann. Cas. 1913A, 789.

As to right to order compulsory reference in an equitable action independently of statute, see note Ann. Cas. 1912D, 1136.

1. Accounts and accounting.—An accounting may be ordered through a reference, or the court may, with or without

a preliminary interlocutory order, proceed to take a statement of account itself, rendering such final judgment thereon as may appear to be proper.—Fox v. Hall, 164 Cal. 287, 128 Pac. 749, 750.

2. One who is put in charge of a ranch under an agreement that he is to pay all taxes on the same and to pay the net income thereof upon the mortgage subsisting against the same, occupies a fiduciary relation with regard to the owners of such ranch, and is compellable by them to render an accounting of the receipts and disbursements of said ranch. Upon such accounting, the burden would probably be upon the defendant to establish any expenditures or credits upon which he might rely as offsets to the gross income shown to have been received by him.—Fox v. Hall, 164 Cal. 287, 128 Pac. 749, 750.

3. Action of court—Must not be reviewed by referee.—Where court had already settled character in which land in controversy was held, duty of referee was simply to take accounts in pursuance of principles stated by court.—Smith v. Walker, 38 Cal. 385, 388, 99 Am. Dec. 415.

4. Court commissioner—Appointed as referee.—Order for reference appointing W., court commissioner, as referee, is appointment of W. as referee under above section, and his authority is derived from order appointing him and not from statute defining duties and powers of court commissioners. His resignation from office of court commissioner does not in any degree impair his authority to make valid finding upon issue referred to him.—Jackson v. Puget Sound L. Co., 123 Cal. 97, 98, 101, 55 Pac. 788.

5. Court has power to state account between parties and determine all questions in case, if they choose so to do. Unquestion-

ably better and safer practice would be, where time of court is limited, to refer it to some competent person to state account, but court can pursue such course as it may deem advisable.—*Hidden v. Jordan*, 28 Cal. 301, 308, 309; *Emery v. Mason*, 75 Cal. 222, 225, 16 Pac. 894.

6. Duty of referee—Is to act upon questions committed to him, and to report whatever he is required to report by order under which he acts.—*Hihn v. Peck*, 30 Cal. 280, 285.

7. Hearing before referee — Notice to counsel—Necessity of.—Where counsel for the defendant were in court when the order appointing the referee was made and the directions as to his duties given, and thus received actual notice that certain testimony essential to the final decision of the case would be taken at some time by such referee, even if it can not be held that in such case the parties should not be given notice by the referee of the time and place fixed for his hearings, and although there is no special provision in the code requiring such notice to be given, yet, under the circumstances, it is clear that, if it be true that they were given no notice, counsel for the defendant had sufficient warning from their actual knowledge of the appointment of a referee for the purpose stated to put them on their guard, so that, by the exercise of a little diligence, they could have ascertained the time and place at which testimony was to be taken by the referee.—*Doudell v. Shoo*, 20 Cal. App. 424, 129 Pac. 478, 487.

8. Where the absence of the defendant or his attorneys at the hearing before a referee is due to their own negligence, they have no ground upon which to found a just complaint against the judgment of the court because of their alleged absence from said hearings or investigations. (On rehearing.)—*Doudell v. Shoo*, 20 Cal. App. 424, 129 Pac. 478, 490.

9. Order of court—Agreement filed with clerk being lacking—Effect of.—An order of court, and agreement filed with clerk or entered in minutes all being lacking, attempted reference is voluntary withdrawal of case from jurisdiction of court by which court loses all control over cause, and has no authority to enter judgment upon findings of referee except by consent of party.—*Heslep v. City of San Francisco*, 4 Cal. 1, 4.

10. Order of reference — Is general and not special when referee is to try issues and report his findings thereon. Such order does not require referee to report facts.—*Hihn v. Peck*, 30 Cal. 280, 285.

11. Same—Power of court.—Under the provisions of the above section the court is authorized to appoint a referee and direct him to try any and all issues, whether of law or of fact, in the action or proceeding in which the order of reference is made, and to report findings and judgment there-

on, thus investing the referee with power to make a definite disposition of the issues and of the action, subject, of course, to the power of the court to reject or confirm his report; this plenary power is vested in the referee from the presumption enunciated in the above section, that the order of reference is made upon the agreement of the parties to the action or proceeding.—*Fredenhall v. Schrader*, — Cal. App. —, 188 Pac. 580.

12. Referee—Can exercise all powers of judge in relation to trial of cause referred to him. For purpose of trial he takes place of judge, and not only possesses power, but upon abandonment of cause by plaintiff before its submission, or upon motion of defendant when plaintiff fails to prove sufficient cause, it is his duty to grant nonsuit and report his judgment to that effect.—*Plant v. Fleming*, 20 Cal. 92, 93.

13. Same—Judge pro hac vice.—Where the stipulation of the parties, in conformity with which an order of reference is made, authorizes that officer not only to take the evidence, but to report his "findings of fact and conclusions of law" thereon, with no provision either in the stipulation or the order for a review by the court of his rulings on evidence or on matters of procedure, the reference is something more than the ordinary reference to a master in a suit in equity. It constitutes the referee a judge pro hac vice, with power as ample for the conduct of the trial and rulings on all questions arising therein, excepting only for entry of judgment, as if the cause were being tried by the court itself; and the report or determination of such an officer is not subject to be set aside by the court, except for a want of evidence to sustain his findings or manifest error in his conclusions of law.—*United States v. United Surety Co.*, 226 Fed. 985.

14. A reference, by consent of parties, of an entire case for the determination of all its issues, though not strictly a submission of the controversy to arbitration—a proceeding which is governed by special rules—is a submission of the controversy to a tribunal of the parties' own selection, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law. Its findings, like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise.—*United States v. United Surety Co.*, 226 Fed. 985.

15. Reference is not a discontinuance of suit as is case in arbitration.—*Gunter v. Sanchez*, 1 Cal. 45, 48; *Draghicevich v. Vulicevich*, 76 Cal. 378, 380, 18 Pac. 406.

16. Silence does not constitute consent nor waiver of right to trial by jury. Referee

ence which would amount to finding of jury and have direct effect to deprive party of right of trial by jury can not be ordered without consent of party.—*Smith v. Polack*, 2 Cal. 92, 94.

17. **Stipulation of parties that cause be referred** to referee to take evidence and report judgment is no longer binding after referee has reported judgment in favor of plaintiff, and defendant has moved for new trial and motion been granted. Power conferred by stipulation expires when judgment was reported, and when new trial was granted parties were restored to power

which they occupied when issues were originally made. Either party could then demand trial by jury or object to reference.—*Daverkosen v. Kelley*, 43 Cal. 477, 478.

18. **Suit in equity—Consent of party is not necessary** to reference in case in equity.—*Smith v. Rowe*, 4 Cal. 6, 7.

19. **Unknown Party—Ordering reference** for purpose of trying of issues in action for partition in which there is party whose name is unknown, is error, for consent of unknown party to reference can not be procured.—*Hastings v. Cunningham*, 35 Cal. 549, 552.

§ 639. REFERENCE ORDERED ON MOTION, IN WHAT CASES. When the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases:

1. **When the trial of an issue of fact requires the examination of a long account** on either side; in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein;

2. **When the taking of an account is necessary** for the information of the court before judgment, or for carrying a judgment or order into effect;

3. **When a question of fact, other than upon the pleadings**, arises upon motion or otherwise, in any stage of the action;

4. **When it is necessary** for the information of the court in a special proceeding.

History: Enacted March 11, 1872, re-enactment of § 183 of Practice Act.

REFERENCE ORDERED ON MOTION— IN WHAT CASES.

1. Collateral matters not raised by pleadings.
2. Compulsory power of court—How confined.
3. Evidence is not necessary part of report.
4. Examination of long account.
5. Intention of section.
6. Issue arising upon pleadings—When referred.
7. Judgment—Entered by clerk on report of referee.
8. Same—May be reported by referee, when.
9. Order for reference—Made without consent and against objection.
10. Ordering reference in divorce action.
11. Presumption—As to ground on which order granted.
12. Reference to try issues of fact or law—Power of court—Interlocutory order.
13. Sufficiency of notice—Though formerly defective.
14. Suit in equity.
15. Taking and stating account of guardian.
16. Whole case referred—Consent necessary.

1. **Collateral matters not raised by pleadings** being sent to referee for information

of court, motion for new trial is not necessary to bring action of referee before court for review. Report of referee would not be binding upon court until adopted by it.—*Harris v. San Francisco S. R. Co.*, 41 Cal. 393, 405.

2. **Compulsory power of court—How confined.**—The compulsory power of court over question of reference is confined to issues involving examination of long account; and under the constitution this section can not be considered to include issues of that character in cases where parties have constitutional right to trial by jury.—*Williams v. Benton*, 24 Cal. 424, 426.

3. **Evidence is not necessary part of report** of referee under order of court to report judgment on filing of report, judgment is to be entered as matter of course; and only mode in which party can take advantage of it is by moving to set aside judgment as on motion for new trial.—*Sloan v. Smith*, 3 Cal. 406, 407.

4. **Examination of long account.**—Motion for appointment of referee properly denied, it not having been made to appear that there was issue which required examination of long account, and also, that note sued on by plaintiff in such action implied settlement between plaintiff and defendant up

to that time.—*Clarkson v. Hoyt*, 4 Cal. Unrep. 547, 36 Pac. 332.

5. Intention of section is not to authorize court to refer all issues involved in action, against consent of parties, merely because one of them involves examination of long account, and this is made manifest by contrasting terms of above section with those of preceding section.—*Williams v. Benton*, 24 Cal. 424, 426.

6. Issue arising upon pleadings will not be referred to referee except when trial of issue requires examination of long account on either side.—*Hastings v. Cunningham*, 35 Cal. 549, 552.

7. Judgment—Entered by clerk on report of referee.—Those cases in which an order appointing a referee may be regarded as general and unlimited, vesting such referee with power to try the whole issue presented as to the accounts between the parties, it is the plain duty of the referee to make and file findings of fact and conclusions of law; upon these findings of fact and conclusions of law a judgment will follow immediately, to be entered by the clerk, and the decision will stand as that of the court, subject to exception and review, the same as if the action had been tried by the court.—*Weaver v. Schneider*, — Cal. App. —, 198 Pac. 418.

As to entry of judgment by clerk on filing of findings and conclusions by referee, see, ante, § 639.

8. Same—May be reported by referee, when.—Power is not given court to direct a referee to report judgment. Whole case may be sent to referee if there be but one issue in action and that issue involves examination of long account. If, however, there are other issues in case not involving examination of long account, court has no compulsory power to send them to referee for trial.—*Williams v. Benton*, 24 Cal. 424, 425.

9. Order for reference—Made without consent and against objection of defendant in ordinary suit at law for recovery of debt is cause for reversal of judgment. Constitution provides right that trial by jury shall remain inviolate. Ground of reference that trial would require examination of long account is no excuse; for if such construction could be maintained, right to trial by jury could be entirely swept away by legislative enactment.—*Grim v. Norris*, 19 Cal. 140, 142, 79 Am. Dec. 206; *Hendy Machine Works v. Pacific Cable C. Co.*, 99 Cal. 421, 423, 33 Pac. 1084.

10. Ordering reference in divorce action for the purpose of determining division of community property is no ground for delaying motion for a new trial upon judgment previously rendered. Such reference was one for purpose of securing information necessary for carrying judgment already ordered into effect, and not for taking account or for reporting upon any subject

necessary to enable court to render judgment upon issues in cause.—*Sharon v. Sharon*, 79 Cal. 633, 702, 22 Pac. 26, 131.

11. Presumption—As to ground on which order granted.—Before the amendment of the above section in 1919, where a motion was made and granted, the court may presume that the order was made on the insufficiency of the evidence to justify the verdict, in the absence of any other cause appearing in the record.—*Daniels v. McGuire*, — Cal. App. —, 198 Pac. 421, following *Gordon v. Roberts*, 162 Cal. 506, 508, 123 Pac. 238.

12. Reference to try issues of fact or law—Power of court—Interlocutory order.—In an action by the stockholders of a corporation brought for the purpose of having cancelled certain deeds of trust and chattel mortgages and certificates of stock issued, and after the filing of an amended complaint certain other stockholders intervene and by leave of the court filed a complaint in intervention in which they adopted the amended and supplemental complaint filed by the original plaintiffs in the action as their complaint in intervention and thereafter on motion of the original plaintiffs the action was dismissed so far as they were concerned, and the issues between the interveners and the defendants were ordered to be tried by a referee to ascertain and report on certain things enumerated in the order of reference; on objection on appeal from judgment by the defendants that the court was without jurisdiction to order a reference because it had not previously to making such order found that the interveners were entitled to an accounting as prayed for in the amended and supplemental complaint, and had not entered an interlocutory decree adjudicating that fact, is without force because no such statutory provisions requires such preliminary formality in a proceeding under the above section.—*Fredenhall v. Schrader*, 45 Cal. App. 719, 188 Pac. 580, following doctrine in *Gunter v. Sanchez*, 1 Cal. 45, 48; *Smith v. Rowe*, 4 Cal. 6; *Grim v. Norris*, 19 Cal. 140, 79 Am. Dec. 206; *Williams v. Benton*, 24 Cal. 425; *Jones v. Gardener*, 57 Cal. 641; *Moore v. Calkins*, 85 Cal. 177, 190, 24 Pac. 729, harmonizing *Fox v. Hall*, 164 Cal. 287, 128 Pac. 749, by explaining the force and effect of the language of that decision and showing that it does not go to the extent of deciding that an interlocutory order is essential.

13. Sufficiency of notice—Though formerly defective.—Where the notice of intention to move for a new trial stated that the motion would be made upon certain grounds set forth "and upon the records, papers, and filings in said action," although formerly defective in that it does not specifically comply with the letter of the above statute, it did in substance comply with the rule and was therefore sufficient.—*McNeely v. Hill*, — Cal. App. —, 198 Pac. 427.

14. **Suit in equity.**—Reference may be made in any equity suit when either party alleges facts showing examination of long account necessary. Power of court to refer depends upon pleadings on one side or the other.—*Jones v. Gardner*, 57 Cal. 641, 643.

15. **Taking and stating account of guardian.**—Court having power to take and state account of guardian has power to refer to

some proper person to state it.—*Trumpler v. Cotton*, 109 Cal. 250, 255, 41 Pac. 1033.

16. **Whole case referred—Consent necessary.**—Effect of reference to state account between parties being reference of whole case for trial, is not authorized without consent of parties.—*Hendy Machine Works v. Pacific Cable Const. Co.*, 99 Cal. 421, 423, 33 Pac. 1084.

§ 640. NUMBER OF REFEREES, QUALIFICATIONS, ETC. [IN EMINENT DOMAIN.] A reference may be ordered to the person or persons, not exceeding three, agreed upon by the parties. If the parties do not agree, the court or judge must appoint one or more referees, not exceeding three, who reside in the county in which the action or proceeding is triable, and against whom there is no legal objection, or the reference may be made to a court commissioner of the county where the cause is pending; provided, that in any action brought under title seven of part three of this code, if the plaintiff is the state, a county, city and county, or any incorporated city or town, or a municipal water district, the referees are not required to be residents of the county in which the action or proceeding is triable. Nothing herein contained shall be construed as repealing any law of this state giving jurisdiction to the state railroad commission to ascertain the just compensation which must be paid in eminent domain proceedings.

History: Enacted March 11, 1872, re-enactment of § 184 Practice Act with clause added; amendment approved May 22, 1913, Stats. and Amdts. 1913, p. 246. In effect August 10, 1913.

NUMBER OF REFEREES—QUALIFICATION.

1. Clerk of defendant—Being appointed referee.
2. New referees—May be appointed in place of those who have resigned.
3. Referees need not be sworn.

1. **Clerk of defendant—Being appointed referee** is not circumstance of any considerable evidence of fraud in view of the nature of duties of referee, for his duties are very limited and plain, and his acts subject to revision of court.—*Adams v. Hackett*, 7 Cal. 187, 201.

2. **New referees—May be appointed in place of those who have resigned.**—Even where referees have acted and reported, if court does not approve their report it may appoint new referees. Parties can not, every time new referee is appointed, stay all proceedings by appeal from such order.—*Fallon v. Brittan*, 84 Cal. 511, 514, 24 Pac. 381.

3. **Referees need not be sworn.**—Imposition of oath by court would be of no effect other than to put it in their power to commit moral perjury without being amenable to law.—*Sloan v. Smith*, 3 Cal. 406, 407.

§ 641. EITHER PARTY MAY OBJECT. GROUNDS OF OBJECTION. A party may object to the appointment of any person as referee, on one or more of the following grounds:

1. **A want of any of the qualifications prescribed by statute to render a person competent as a juror;**

2. **Consanguinity or affinity, within the third degree, to either party, or to an officer of a corporation which is a party, or to any judge of the court in which the appointment shall be made;**

3. **Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent, to either party; or being a member**

of the family of either party; or a partner in business with either party; or security on any bond or obligation for either party;

4. **Having served as a juror or been a witness** on any trial between the same parties for the same cause of action;

5. **Interest on the part of such person in the event of the action**, or in the main question involved in the action;

6. **Having formed or expressed an unqualified opinion or belief** as to the merits of the action;

7. **The existence of a state of mind** in such person evincing enmity against or bias to either party.

History: Enacted March 11, 1872, re-enactment of § 185 of Practice Act; amendment approved March 3, 1897, Stats. and Amdts. 1897, p. 60; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 146, held unconstitutional, see history, § 5 ante; March 20, 1907, Stats. and Amdts. 1907, p. 714, Kerr's Stats. and Amdts. 1906-7, p. 448.

As to consanguinity or affinity, see Kerr's Cyc. Civ. Code, 2d ed. §§ 1390-1393 and notes.

As to disqualifications of judge to sit or act in matter, see, ante, § 170 and note.

As to grounds of challenge of jurors, see, ante, § 602 and note.

As to who are competent to act as jurors, see, ante, § 198 and note.

As to who are exempt from jury duty, see, ante, § 200 and note.

As to who are not competent to act as jurors, see, ante, § 199 and note.

§ 642. OBJECTIONS, HOW DISPOSED OF. The objections taken to the appointment of any person as referee must be heard and disposed of by the court. Affidavits may be read and witnesses examined as to such objections.

History: Enacted March 11, 1872, re-enactment of § 186 Practice Act.

As to objection, see, ante, § 641.

As to who may be referee, see, ante, § 641.

§ 643. REFEREES TO REPORT WITHIN TWENTY DAYS. The referees or commissioner must report their findings in writing to the court within twenty days after the testimony is closed, and the facts found and conclusions of law must be separately stated therein.

History: Enacted March 11, 1872, founded upon § 187 Practice Act.

REFEREES—REPORT OF—WHEN TO BE MADE.

1. Bringing in and filing attached or amended report improper.
2. Case being submitted—Amended pleadings improper.
3. Controversy relating to settlement of long-standing account—Procedure.
4. Judge sitting as referee—Distinct from court.
5. One rule for guidance of all referees.
6. Presumption that findings were waived—Can have no application.
7. Provision of above section is directory merely.
8. Referee has discretion to re-open cause for additional testimony.

9. Referee should report in writing—And find facts.

10. Specific facts being put in issue by pleadings.

11. Striking out finding of fact by referee.

1. **Bringing in and filing attached or amended report** is beyond power of referee, and on appeal case must be reviewed with reference to original report alone.—Headley v. Reed, 2 Cal. 322, 325.

2. **Case being submitted—Amended pleadings improper.**—Case being submitted, referee has no power to allow plaintiff to introduce amended complaint, nor compel defendant to file amended answer. Issue being made up and submitted to referee, he must pass upon that issue and can not

change it.—*De La Riva v. Berreyesa*, 2 Cal. 195, 197.

3. Controversy relating to settlement of long-standing account — Procedure.—In those cases in which there is a controversy relating to settlement of long-standing account running through a period of several years and consisting of numerous items on both sides, and general facts only being averred in complaint and answer, record would be encumbered with mass of useless matter if referee was required to find facts proved in respect to each separate item. If particular items were improperly allowed or disallowed, aggrieved party has his remedy by motion for new trial, which will be more convenient in practice than a detailed statement by referee of facts proved in respect to each item of a long account. In such case, if items on debit side are intelligibly stated by referee so that on face of report it clearly appears how indebtedness arose, this would be sufficient compliance with statute in this class of cases.—*Pratalongo v. Larco*, 47 Cal. 378, 382.

4. Judge sitting as referee—Distinct from court acting as such within its own proper sphere, as if different referee had been selected.—*Lee Sack Sam v. Gray*, 104 Cal. 243, 248, 38 Pac. 85.

5. One rule for guidance of all referees is fixed by code, they are alike and without exceptions subject to its provisions.—*Lee Sack Sam v. Gray*, 104 Cal. 243, 248, 38 Pac. 85.

6. Presumption that findings were waived—Can have no application to report of referee, for reason that no provision is made for waiver in such cases, and in very nature of case should not be.—*Lee Sack Sam v. Gray*, 104 Cal. 243, 247, 38 Pac. 85.

7. Provision of above section is directory merely, and failure to file in time prescribed can not have effect of invalidating report or judgment rendered thereon.—*Keller v. Sutrick*, 22 Cal. 471, 473.

8. Referee has discretion to re-open cause for additional testimony.—The referee has discretion to open case after it has been closed, for purpose of receiving additional testimony. Exercise of such discretion, except in case of gross abuse, can not be reviewed on appeal.—*Marziou v. Ploche*, 10 Cal. 545, 546.

9. Referee should report in writing—And find facts.—Referee should not only report in writing, but should find facts upon which judgment of court is thereafter to be pronounced. By no other means can court be informed so as to intelligently act in premises.—*Lee Sack Sam v. Gray*, 104 Cal. 243, 247, 38 Pac. 85.

10. Specific facts being put in issue by pleadings, it is the duty of court or referee to find distinctly as to these facts.—*Pratalongo v. Larco*, 47 Cal. 378, 382.

11. Striking out finding of fact by referee and substituting for it finding by court is practice not to be commended.—*Pratalongo v. Larco*, 47 Cal. 378, 383.

§ 644. EFFECT OF REFEREE'S FINDING. The finding of the referee or commissioner upon the whole issue must stand as the finding of the court, and upon filing of the finding with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court.

History: Enacted March 11, 1872.

REFEREE'S FINDING—EFFECT OF.

1. Facts only being found—Action of court necessary.
- 2, 3. Findings of referee—Take place of findings of court.
- 4, 5. Same—Upon collateral matters.
6. Same—Upon whole issue.
7. Mandamus to compel judge to enter judgment.
8. Objections to report of referee—Should be filed before trial.
9. Referee acts as substitute for jury.
10. Referee to try issues may return general verdict.
11. Report of referee—Has same legal effect as award in arbitration.
12. Stipulation for reference to try all issues—Judgment upon.
13. Sufficient upon which to base judgment being contained in report.
14. Whole issue being tried by referee—Judgment follows.

15. Same—Findings need not be reported, when.

1. Facts only being found—Action of court necessary.—The facts only being found, whether by report of referee or special verdict of jury, direct action of court must be invoked before judgment can be entered. Though trial in such cases has ended, judgment does not follow as matter of course; and time within which notice of motion to set aside report or verdict must be given should be the same in two cases, and date from filing of report or rendition of verdict.—*Peabody v. Phelps*, 9 Cal. 213, 224.

2. Findings of referee—Take place of findings of court.—The findings and decision of referee take place of findings and decisions of court, where referee tries case and reports judgment, and such papers and no others constitute judgment-roll when case is tried by referee as would if case were tried by court.—*Faulkner v. Hendy*, 103 Cal. 15, 21, 36 Pac. 1021.

3. **Compare:** *Harris v. San Francisco S. R. Co.*, 41 Cal. 393, 405.

4. **Same—Upon collateral matters** is not finding of fact which takes place of special verdict. Different provisions are made where issue is upon whole case, and where referee reports facts. In former case report stands as decision of court, in latter it has effect of special verdict. Necessary inference is that in other cases not mentioned, report of referee has neither effect of decision of court nor of special verdict.—*Harris v. San Francisco S. R. Co.*, 41 Cal. 393, 405.

5. **Compare:** *Faulkner v. Hendy*, 103 Cal. 15, 21, 36 Pac. 1021.

6. **Same—Upon whole issue** must stand as finding of court, and judgment may be entered thereon.—*Faulkner v. Hendy*, 103 Cal. 15, 20, 36 Pac. 1021.

7. **Mandamus to compel judge to enter judgment.**—Damages upon dissolution of injunction being properly ascertained by reference under direction of court, mandamus was proper remedy to compel judge to enter judgment upon such report of referee, he having refused to do so on ground that he had no power to enter same.—*Russell v. Elliott*, 2 Cal. 245, 248.

8. **Objections to report of referee.**—Should be filed before trial court so as to enable court to correct error if any existed.—*Porter v. Barling*, 2 Cal. 72, 73.

9. **Referee acts as substitute for jury** and judgment is rendered upon his report same as upon verdict of jury.—*Gunter v. Sanchez*, 1 Cal. 45, 48.

10. **Referee to try issues may return general verdict** in same manner as jury.—*Hihn v. Peck*, 30 Cal. 280, 285.

11. **Report of referee—Has same legal effect as award in arbitration.**—The report of a referee has the same legal effect as award of arbitrator.—*Headley v. Reed*, 2 Cal. 322, 325. See *Tyson v. Wells*, 2 Cal. 122, 130.

12. **Stipulation for reference to try all issues—Judgment upon.**—Judgment may be entered by clerk upon report of referee in action where party stipulates for reference, with power of referee to determine all issues in cause, of fact as well as law, and further, that upon filing of referee's report that judgment should be entered in accordance therewith. (Whether entry of judgment would have followed as a matter of course without such stipulation as to its entry, not decided.)—*Bowie v. Borland*, 68 Cal. 233, 234, 9 Pac. 79.

13. **Sufficient upon which to base judgment being contained in report of referee.** It is duty of trial court to enter judgment in accordance with report as far as it concerns matters referred to, and it has no right to sustain any objections whatever. After rendition of judgment, court may award new trial, and set aside report for any reason that would compel court of competent jurisdiction to set aside award of arbitrator and for no other.—*Headley v. Reed*, 2 Cal. 322, 325, 326.

14. **Whole issue tried by referee—Judgment follows.**—In those cases in which the whole issue is tried by referee, judgment follows immediately as conclusion of law upon facts found and in such case decision of referee stands as decision of court, and may be excepted to and reviewed in same manner as if action had been tried by court. Entry by clerk in such case is matter of course. Parties can have no knowledge of decision of referee in such case, either upon facts or law, until it is announced in form of judgment or direction for its entry.—*Peabody v. Phelps*, 9 Cal. 213, 224, 225.

15. **Same—Findings need not be reported** by referee in action where referee is to try all issues, both of law and fact, and to report judgment thereon. Such reference is not for purpose of bringing facts which have effect of special verdict under above section.—*Connor v. Morris*, 23 Cal. 447, 451.

§ 645. HOW EXCEPTED TO, ETC. The findings of the referee or commissioner may be excepted to and reviewed in like manner as if made by the court. When the reference is to report the facts, the finding reported has the effect of a special verdict.

History: Enacted March 11, 1872.

EXCEPTION TO REPORT OF REFEREE.

1. **Conclusions of law—Reported by referee—**May be set aside, when.
2. **Court—Can interfere and set aside report,** when.
3. **Court of equity—Always had power.**
4. **Exceptions—Having been filed to report—**Procedure.
5. **Same—Must be taken to rulings of referee.**
6. **Failing to dispose of issues referred—**Necessary to decision.

7. **Finding of fact by referee—Effect of.**
8. **New trial—May be granted, and report of referee be set aside,** when.
9. **No error of law or fact appearing on face of report—Effect of.**
10. **Objection to report, etc., of referee—Must be presented in trial court.**
11. **Report of referee—How taken advantage of.**
12. **Same—Should state facts found and conclusions of law.**

13. Same—Will not be disturbed unless error appears on face.
14. Time within which notice of motion must be filed.
15. Trial before referee—How conducted.
16. Same—Review of decision of referee.

1. Conclusions of law—Reported by referee—May be set aside by court upon motion for judgment and proper judgment may be directed to be entered upon facts found, where error of referee was in legal conclusion drawn from facts found. Such error does not affect any findings of fact and consequently there is no occasion to re-examine evidence or determine facts anew.—*Calderwood v. Pyser*, 31 Cal. 333, 337.

2. Court—Can interfere and set aside report of referee on same ground as it would proceed to set aside verdict of jury; so court of chancery will set aside report of referee not only where it is against weight of evidence, but where facts of case are various and intricate and matters involved are in doubt or obscurity.—*McHenry v. Moore*, 5 Cal. 90, 92.

3. Court of equity—Always had power, when report of master was excepted to on account of incorrect deductions of facts from testimony, in its discretion, either to refer case back, or to proceed upon testimony reported and find facts and render decree accordingly.—*McHenry v. Moore*, 5 Cal. 90, 93.

4. Exceptions—Having been filed to report—Procedure.—Exceptions having been filed to report of referee upon facts, and report having been set aside, judge may take up testimony reported by referee, find facts, and render decree in cause. There is no other course to pursue—except that court should either order re-reference, or take up cause itself upon testimony which had been taken and decided upon by it.—*McHenry v. Moore*, 5 Cal. 90, 92.

5. Same—Must be taken to rulings of referee during progress of trial in same manner as they are taken before a court; and then such exceptions must be embodied in the report of referee, or made part of his report by being properly certified by him. Where report of referee does not embody either the evidence with proper exceptions to show that he erred in fact, or rule of law pointed out by which he arrived at his conclusions, court to whom report is made has no right to disturb it, and must hold it valid and conclusive between parties.—*Tyson v. Wells*, 2 Cal. 122, 131.

6. Failing to dispose of issues referred—Necessary to decision.—Failing to dispose of issue referred to referee which was necessary to decision of case leaves no basis for judgment. Where there is failure to find upon a material issue, decision is against law and may be reviewed on appeal on order granting or refusing new trial.—*Clark v. Hewitt*, 136 Cal. 77, 79, 68 Pac. 303.
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7. Finding of fact by referee—Effect of.—Finding of facts by referee, and report thereof to court, equivalent to a special verdict on the findings of fact made by the court upon the trial of a cause without the intervention of a jury.—*Bernard v. Sloan*, 2 Cal. App. 737, 84 Pac. 232, 237.

8. New trial—May be granted, and report of referee be set aside upon ground of insufficiency of evidence to justify decision. Court has same power in cases tried by referee as in cases tried by court itself, or by jury. Each case is placed upon same footing, and grounds upon which new trial may be granted are same in all cases, irrespective of manner in which case was originally tried.—*Cappe v. Brizzolara*, 19 Cal. 607, 608.

9. No error of law or fact appearing upon face of report—Effect of.—No error of law or fact appearing upon face of report of referee in suit in equity, and no showing of any exceptions taken before referee to point out any errors, if such exist, or to show that his decision was objected to, trial court has no right to set aside report or grant a new trial.—*Grayson v. Guld*, 4 Cal. 122, 124, 125.

10. Objection to report, etc., of referee—Must be presented in trial court.—Objections that the report, findings and conclusions of the referee are not sustained by the evidence, and that the report goes beyond the scope of the order of reference, should be presented to the trial court, and where not so urged, they can not be presented for the first time on appeal.—*Clark, Wise & Co. v. Hauschildt*, 28 Cal. App. 47, 151 Pac. 149.

11. Referee's report—How taken advantage of.—Report of referee should be taken advantage of in filing written objections to entry of judgment thereon, or by motion for new trial setting forth grounds of alleged errors.—*Porter v. Barling*, 2 Cal. 72, 73.

12. Same—Should state facts found and conclusions of law, like findings of court. Without this, party would be remediless and his rights concluded in many cases by arbitrary decision of referee.—*Lambert v. Smith*, 3 Cal. 408, 409, 410.

13. Same—Will not be disturbed unless error appears on face.—The report of a referee will not be disturbed by court unless error complained of, whether it be of law or fact, appears on face of award.—*Tyson v. Wells*, 2 Cal. 122, 131.

14. Time within which notice of motion must be filed to set aside report of referee, and statement to be prepared for that purpose, depends upon character of reference, whether it be special, to report facts, or general, to report upon whole issue. In former case report has effect of special verdict; in latter it stands as decision of court, and judgment may be entered on and decision be excepted to and reviewed in

like manner as if action had been tried by court.—*Peabody v. Phelps*, 9 Cal. 213, 224.

15. Trial before referee—How conducted.—Trial before referee should be conducted in same manner as though it was had before court, and evidence must be embodied in a bill of exceptions and certified by referee. In case order of reference fails to direct return of evidence to court, party objecting to report must see that such testimony as he relies on is properly certified to.—*Goodrich v. Mayer*, 5 Cal. 430, 431; *Phelps v. Peabody*, 7 Cal. 50, 52, 53.

16. Same—Review of decision of referee upon question of fact is subject to same rules as action of jury in special verdict, or of a court upon finding of facts. The weight of evidence, the resolution of any conflict in the evidence, the credibility of the witnesses, the character of the testimony, are matters upon which he is required to exercise his judgment, and wherein his judgment will be accepted by the court as correct, unless clearly shown to be erroneous.—*Bernard v. Sloan*, 2 Cal. App. 737, 84 Pac. 232, 237.

CHAPTER VII.

PROVISIONS RELATING TO TRIALS IN GENERAL.

Article I. EXCEPTIONS, §§ 646-653.

II. NEW TRIALS, §§ 656-663a.

ARTICLE I.

EXCEPTIONS.

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| § 646. Exceptions may be taken. Time when taken, etc. | § 651. Exceptions after judgment, etc. |
| § 647. What deemed excepted to. | § 652. When exception is refused, application to supreme court to prove the same, etc. |
| § 648. Exception, form of. | § 653. Proceedings where judge ceases to hold office. |
| § 649. Bill of exceptions. When to be presented, etc. | |
| § 650. Exceptions not presented at time of ruling. Notice to adverse party. [Draft of proposed bill; amendments.] How settled, etc. | |

§ 646. EXCEPTIONS MAY BE TAKEN. TIME WHEN TAKEN, ETC. An exception is an objection upon a matter of law to a decision made, either before or after judgment, by a court, tribunal, judge, or other judicial officer, in an action or proceeding. The exception must be taken at the time the decision is made, except as provided in section six hundred and forty-seven.

History: Enacted March 11, 1872, founded on § 188 Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 313; April 3, 1876, Code Amdts. 1875-6, p. 91.

EXCEPTION—WHEN TO BE TAKEN.

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| 1. Construed—Essential part of definition of exceptions. | 16. Delay as affecting right to sue. |
| 2-8. Admission or rejection of evidence—In general. | 17. Delivery of sealed verdict to coroner. |
| 9. Same—Failure of court to pass on question of admissibility of evidence. | 18. Failure to object—That there was no proof of genuineness of indorsement of instrument. |
| 10. Same—Objection to competency of expert witness. | 19. Failure to permit amendment of complaint. |
| 11. Same—Objection on ground of variance. | 20, 21. Instructions—Not excepted to at time. |
| 12. Same—Time of taking. | 22. Same—Error in giving contradictory instructions. |
| 13. Same—Trial by person not a lawyer. | 23. Same—Further instructions—Error of law. |
| 14. Allowance or settlement of bill of exceptions. | 24. Objection—That complaint does not state facts sufficient to constitute cause of action. |
| 15. Capacity to sue. | 25. Same—To costs allowed. |

- 26, 27. Same—To evidence—As to waiver.
28. Same—Same—Theory of case.
29. Same—To method of procedure.
30. Same—To order striking out statement on motion for new trial.
31. Same—To special verdict.
32. Order striking bill of costs from files.
33. Refusal to hear evidence.
34. Right of appellants to ask for revocation of probate of will.
- 35, 36. Ruling granting motion for nonsuit.
37. Ruling on allowance or exclusion of ballots—In election contest.
38. Ruling sustaining objection to application to file complaint in intervention.
39. Sufficiency of pleading to raise issue.
40. Time of making.
41. Where no exceptions were taken.

As to the necessity of an exception to an order refusing to strike out a pleading, see, post, § 647, and note.

1. **Construed—Essential part of definition of exception** is that it must be taken upon fact or facts not denied.—In matter of Bowen, 34 Cal. 682, 686.

2. **Admission or rejection of evidence—In general.**—The admission or rejection of evidence made during course of trial must be excepted to at time it is made in order to be made available on motion for new trial or appeal.—Turner v. Tuolumne Co. W. Co., 25 Cal. 397, 404; Keeran v. Griffith, 34 Cal. 580; Russell v. Dennison, 45 Cal. 337, 338; Lucas v. Richardson, 68 Cal. 618, 620, 10 Pac. 183; McGuire v. Drew, 83 Cal. 225, 233, 23 Pac. 312; Dickerson v. Dickerson, 108 Cal. 351, 352, 41 Pac. 475.

As to exceptions to exclusion of evidence, see note 12 L. R. A. 554.

3. Where no objection to evidence is made on ground that answer admitted delivery of mortgage an objection on such ground is waived.—Le Mesnager v. Hamilton, 101 Cal. 532, 539, 40 Am. St. Rep. 81, 35 Pac. 1054.

4. Objection that evidence of expert was not adapted to facts which had been shown in case and was not based on hypothesis consistent with those facts, can not be urged on appeal where no objection was taken on such ground at trial.—Healy v. Visalia & T. R. Co., 101 Cal. 585, 591, 36 Pac. 125.

5. Where no exceptions were taken to questions asked by court of witnesses, propriety of such questions will not be considered on appeal.—Woods v. Jensen, 130 Cal. 200, 205, 62 Pac. 473.

6. Admissibility of evidence can not be considered on appeal where no objection was taken to its introduction.—Estate Arnold, 147 Cal. 583, 82 Pac. 252, 254; Estate of Doyle, 73 Cal. 564, 568, 15 Pac. 125.

7. The fact that the trial was conducted by a person not versed in law may serve to account for the failure to take exceptions to adverse rulings but can afford the appellate court no ground for disregarding the want of such exceptions where necessary.—Randall v. Freed, 154 Cal. 299, 301, 97 Pac. 669.

8. Where points are urged on appeal which concern the admission of evidence, it is a simple and complete answer thereto that no objection having been made at the trial to the admission of such evidence, the appellant can not be heard to complain on appeal.—Crackel v. Crackel, 17 Cal. App. 603, 121 Pac. 295. See Roper v. McFadden, 48 Cal. 346; Bullard v. Stone, 67 Cal. 477, 8 Pac. 17; Burnett v. Lyford, 93 Cal. 114, 117, 28 Pac. 855; Durkee v. Chino L. & W. Co., 151 Cal. 571, 91 Pac. 393; Randall v. Freed, 154 Cal. 299, 97 Pac. 669; Cotton Seed Oil Co. v. Bank of Stroud, 12 Okla. 179, 70 Pac. 206.

9. **Same—Failure of court to pass on question of admissibility of evidence** which was taken subject to subsequent ruling as to such admissibility need not be excepted to, as no decision was made.—Raymond v. Glover, 122 Cal. 471, 476, 55 Pac. 398.

10. **Same—Objection to competency of expert witness** who estimates value of fruit in boxes can not be made for first time on appeal.—Brumley v. Flint, 87 Cal. 471, 474, 25 Pac. 683; Ah Tong v. Earle Fruit Co., 112 Cal. 679, 681, 45 Pac. 7.

11. **Same—Objection on ground of variance** between evidence and complaint is waived if not taken at time, and can not be considered on appeal.—Bode v. Lee, 102 Cal. 583, 587, 36 Pac. 936; Stockton C. H. & A. Works v. Glens Falls Ins. Co., 121 Cal. 167, 173, 53 Pac. 565; Barret v. Lake View L. Co., 122 Cal. 129, 132, 54 Pac. 594; Cushing v. Pires, 124 Cal. 663, 665, 57 Pac. 572. See Dikeman v. Norrie, 36 Cal. 94, 103; Bell v. Knowles, 45 Cal. 193, 194; Hutchings v. Castle, 48 Cal. 152; Henry v. Southern Pac. R. Co., 50 Cal. 176, 181; Scott v. Sierra L. Co., 67 Cal. 71, 75, 7 Pac. 131; Estate of Doyle, 73 Cal. 564, 568, 15 Pac. 125; Knox v. Higby, 76 Cal. 264, 268, 18 Pac. 381; Eversdon v. Mayhew, 85 Cal. 1, 8, 21 Pac. 431, 24 Pac. 382; Tuffree v. Polhemus, 108 Cal. 670, 676, 41 Pac. 806; Swamp Land Dist. v. Glide, 112 Cal. 85, 89, 44 Pac. 451.

12. **Same—Time for taking.**—Under the provisions of this section, exceptions to all rulings of the court, except those which, under the provisions of section 647, post, are deemed excepted to, must be taken at the time the ruling or decision is made, and if not so taken can not be reviewed on appeal.—Randall v. Freed, 154 Cal. 301, 97 Pac. 669.

As to time of taking objection or exception, see par. 40, this note.

13. **Same—Trial by person not a lawyer.**—The fact that the trial was conducted by a person not versed in the law is not ground

sufficient to excuse the taking of exceptions to decisions complained of, as herein prescribed, at the time such decisions are made, or to justify the supreme court in disregarding the failure to take such exceptions.—*Randall v. Freed*, 154 Cal. 301, 97 Pac. 669.

14. **Allowance or settlement of bill of exceptions** will not be considered on appeal where no exceptions were taken in court below.—*Estate of Dougherty*, 139 Cal. 14, 16, 72 Pac. 357.

15. **Capacity to sue.**—Objection that plaintiff was partnership and incapacitated to sue, can not be made for first time on appeal.—*Phillips v. Goldtree*, 74 Cal. 151, 155, 13 Pac. 313; *Cook v. Fowler*, 101 Cal. 89, 35 Pac. 431.

16. **Delay as affecting right to sue.**—Objection that action can not be maintained by reason of plaintiff's delay can not be made for first time in appellate court, but must be presented in court below.—*Larkin v. Mullen*, 128 Cal. 449, 454, 60 Pac. 1091.

17. **Delivery of sealed verdict to coroner** instead of clerk, failure to take exception to amounts to acquiescence therein.—*Paige v. O'Neal*, 12 Cal. 483, 493.

18. **Failure to object.**—That there was no proof of genuineness of indorsement of instrument at time instrument was offered in evidence waived such objection.—*Shain v. Sullivan*, 106 Cal. 208, 211, 39 Pac. 606.

19. **Failure to permit amendment of complaint** can not be considered for first time on appeal where nothing appears on record to show an abuse of discretion. If plaintiff desired to amend, she should have applied to court below, and, if refused, exception should have been taken.—*Durrell v. Dooner*, 119 Cal. 411, 413, 51 Pac. 628. See *Buckley v. Howe*, 86 Cal. 596, 605, 25 Pac. 132.

20. **Instruction.**—Not excepted to at time, can not be considered on motion for new trial or on appeal.—*Sharp v. Hoffman*, 79 Cal. 404, 408, 21 Pac. 846; *Lynn v. Southern Pac. Co.*, 103 Cal. 78, 36 Pac. 1018, 24 L. R. A. 710; *Merguire v. O'Donnell*, 103 Cal. 50, 52, 36 Pac. 1033; *Anderson v. Hinshaw*, 110 Cal. 682, 686, 43 Pac. 389; *Laver v. Hoatling*, 115 Cal. 613, 616, 47 Pac. 593; *Bryant v. Broadwell*, 140 Cal. 490, 495, 74 Pac. 33; *Story v. Nidiffer*, 146 Cal. 549, 552, 80 Pac. 692.

21. **Law in determining merits** is fixed by such instructions.—*Lynn v. Southern Pac. Co.*, 103 Cal. 7, 8, 24 L. R. A. 710, 36 Pac. 1018.

22. **Same.**—**Error in giving contradictory instructions** can not be considered unless it has been excepted to when ruling was made.—*Sierra Union W. & M. Co. v. Baker*, 70 Cal. 572, 581, 8 Pac. 305, 11 Pac. 654.

23. **Same.**—**Further instructions.**—**Error of law.**—Further instructions given by court to jury if erroneous constituted error of law occurring at trial and should have been ex-

cepted to.—*Southern Pac. R. Co. v. Superior Court*, 105 Cal. 84, 86, 38 Pac. 627.

24. **Objection.**—That complaint does not state facts sufficient to constitute cause of action can be considered for first time on appeal.—*Holly v. Heiskell*, 112 Cal. 174, 176, 44 Pac. 466.

As to waiver to objection to answer, see, ante, § 444 and note.

As to waiver of objection to complaint, see, ante, § 434 and note.

25. **Same.**—To costs allowed can not be considered on appeal where no objection was made either before or after judgment.—*People v. County of Marin*, 103 Cal. 223, 232, 26 L. R. A. 659, 37 Pac. 203.

26. **Objections to evidence.**—As to waiver. —Where evidence offered is admitted over objection and exception, the subsequent introduction of evidence in rebuttal does not constitute a waiver of such objection.—*Estate of Boyes*, 151 Cal. 149, 90 Pac. 454.

27. Where evidence offered for a specific purpose is admitted over objection and exception, the fact that it is admissible in part for another purpose does not constitute a waiver of the objection made.—*Estate of Boyes*, 151 Cal. 149, 90 Pac. 454.

28. **Same.**—**Same.**—**Theory of case.**—Where the case was tried on the theory that the evidence was admissible, and was offered and received without objection, an objection thereto can not be raised by the losing party for the first time on appeal.—*Cargnani v. Cargnani*, 16 Cal. App. 101, 116 Pac. 306.

29. **Same.**—To method of procedure where complaint gave court of equity jurisdiction, can not be raised for first time on appeal.—*Broadway Ins. Co. v. Wolters*, 128 Cal. 162, 169, 60 Pac. 766. See *Wood v. Curry*, 49 Cal. 359, 362; *Thompson v. Laughlin*, 91 Cal. 313, 27 Pac. 762.

30. **Same.**—To order striking out statement on motion for new trial is not covered by definition of exception.—*Quivey v. Gambert*, 32 Cal. 304, 307.

31. **Same.**—To special verdict.—Objections to the uncertainty of the verdict in response to special issues should be made, and remedied if tenable, at the time the answers are returned into court, and upon failure to do so the defeated party can not complain on appeal.—*Shaw v. Shaw*, 160 Cal. 740, 117 Pac. 1048.

32. **Order striking bill of costs from files** made after judgment can not be reviewed unless order was excepted to.—*Brown v. Delavau*, 63 Cal. 303, 304.

33. **Refusal to hear evidence.**—In action to foreclose lien of street assessment, if court refuse to hear any evidence in support of defense that work contracted for has not been done or that specifications have been disregarded, or disregards such evidence in its decision, exceptions must be taken to its rulings in order to have

same considered on motion for new trial.—*Santa Cruz R. P. Co. v. Bowle*, 104 Cal. 286, 287, 37 Pac. 934.

34. Right of appellants to ask for revocation of probate of will can not be considered on appeal where no exception was taken to action of court in hearing their petition and rendering judgment thereon.—*Estate of Robinson*, 106 Cal. 493, 496, 39 Pac. 862.

35. Ruling Granting motion for nonsuit presents question of law which must be excepted to and specified as error, occurring at trial, in order to be considered on appeal.—*Schroeder v. Schmidt*, 74 Cal. 459, 460, 16 Pac. 243; *Flashner v. Waldron*, 86 Cal. 211, 212, 24 Pac. 1063; *Warner v. Darrow*, 91 Cal. 309, 311, 27 Pac. 737; *Malone v. Beardsley*, 92 Cal. 150, 151, 28 Pac. 218; *Craig v. Hesperia L. & W. Co.*, 107 Cal. 675, 40 Pac. 1057; *Hanna v. De Garmo*, 140 Cal. 172, 174, 73 Pac. 830; *Estate of Kasson*, 141 Cal. 33, 36, 74 Pac. 436. See *Cravens v. Dewey*, 13 Cal. 40, 42.

36. It can not be reviewed on ground that evidence is insufficient to sustain decision.—*Schroeder v. Schmidt*, 74 Cal. 459, 460, 16 Pac. 243; *Malone v. Beardsley*, 92 Cal. 150, 151, 28 Pac. 218.

37. Ruling on allowance or exclusion of ballots—In election contest will not be considered on appeal in absence of exceptions.—*Lay v. Parsons*, 104 Cal. 661, 663, 38 Pac. 447.

38. Ruling sustaining objection to application to file complaint in intervention can

not be considered where no exception was taken by interveners.—*Grand Grove U. A. O. of D. of C. v. Duchein*, 105 Cal. 219, 226 38 Pac. 947.

39. Sufficiency of pleading to raise issue.—Where parties to an action have proceeded to trial on pleading without objection to its sufficiency to raise particular issue, and evidence has been received as to facts and issue found upon, party whose duty it was to object will not be heard to say on appeal that finding is not within issue.—*Illinois T. & S. Bank v. Pacific R. Co.*, 115 Cal. 285, 297, 47 Pac. 60. See *King v. Davis*, 34 Cal. 100; *Horton v. Dominguez*, 68 Cal. 642, 645, 10 Pac. 186; *Moore v. Campbell*, 72 Cal. 251, 253, 13 Pac. 689; *Sukeforth v. Lord*, 87 Cal. 399, 25 Pac. 497; *Sprigg v. Barber*, 122 Cal. 573, 579, 55 Pac. 419; *Cushing v. Pires*, 124 Cal. 663, 666, 57 Pac. 572; *Casey v. Leggett*, 125 Cal. 664, 672, 58 Pac. 264.

40. Time of making.—Exception to instructions of court not taken until after return of jury is too late, and must be disregarded.—*Garoutte v. Williamson*, 108 Cal. 136, 141, 41 Pac. 35, 36, 413. See *Collier v. Corbett*, 15 Cal. 183; *Mallett v. Swain*, 56 Cal. 171, 172.

See pars. 12, 13, this note.

As to when exceptions must be taken, see notes 83 Am. Dec. 457, 8 L. R. A. 608.

41. Where no exceptions were taken to any ruling of court during trial, sole question on appeal was whether evidence justified verdict.—*Morse v. Wilson*, 138 Cal. 558, 560, 71 Pac. 801.

§ 647. WHAT DEEMED EXCEPTED TO. The verdict of the jury, the final decision in an action or proceeding, an interlocutory order or decision, finally determining the rights of the parties, or some of them, an order or decision from which an appeal may be taken, an order sustaining or overruling a demurrer, allowing or refusing to allow an amendment to a pleading, striking out a pleading or a portion thereof, refusing a continuance, an order made upon ex parte application, giving an instruction, although no objection to such instruction was made, refusing to give an instruction, modifying an instruction requested, an order or decision made in the absence of the party or an order granting or denying a non-suit or a motion to strike out evidence or testimony, and a ruling sustaining or overruling an objection to evidence, are deemed to have been excepted to.

History: Enacted March 11, 1872, founded on § 191 Practice Act; amendment approved April 3, 1876, Code Amdts. 1875-6, p. 92; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 147, held unconstitutional, see history, § 5 ante; March 20, 1907, Stats. and Amdts. 1907, p. 715, Kerr's Stats. and Amdts. 1906-7, p. 449; March 20, 1909, Stats. and Amdts. 1909, p. 586.

WHAT DEEMED EXCEPTED TO.

1. Amended complaint — Striking from files.
2. Construction of section—As recognizing interlocutory orders.

3. Same—Does not make order striking out pleading, or portion thereof, part of judgment.
4. Same—"Order," as used in section—Meaning of.
5. Same—Same—Order denying application to set aside default.

6. Denial of nonsuit—Review of evidence—Lack of specification.
7. Dismissal without a motion—Not a dismissal or a nonsuit.
8. Errors in calling jury—Not deemed excepted to.
9. Errors in ruling—Upon admission of testimony.
10. Exceptions—Amendment of 1907—Rulings in giving instruction.
11. Same—Rulings in impanelment of jury—Rulings upon evidence.
12. Instructions—In civil cases.
- 13, 14. Same—Prior to amendment of 1907.
15. Motion to dismiss—Refusal to pass on—Exception.
16. Nonsuit—Motion for new trial not based entirely on errors of law.
17. Same—Improper granting.
18. Objection—That statement on motion for new trial was not presented in time.
19. Same—To form of question for special verdict.
20. Order of court—Admitting will to probate.
21. Same—Denying motion for entry of different judgment on findings.
22. Same—Denying plaintiff right to amend his complaint.
23. Same—Directing jury to answer special issues.
24. Same—Granting motion for judgment on pleadings.
25. Same—Granting nonsuit.
26. Same—Made in absence of party.
27. Same—Of sale.
- 28, 29. Same—Refusing to allow supplemental complaint.
30. Same—Refusing nonsuit.
31. Same—Same—Deemed excepted to.
- 32, 33. Same—Refusing to strike out pleading.
34. Same—Striking out demurrer.
35. Same—Striking out pleading.
36. Refusal to allow child nine years old to testify.
37. Report of referee.
38. Ruling—Either admitting or excluding evidence.
39. Special verdict—Objections on ground of uncertainty.

1. Amended complaint—Striking from files.—Under the provisions of the above section an order striking an amended complaint filed by permission of the court from the files is an order deemed excepted to under the provisions of the above section, inasmuch as it necessarily affected the judgment, and for that reason may be reviewed upon appeal from the judgment under the provisions of section 956, post.—*Ross v. Flynn*, — Cal. App. —, 189 Pac.

293, following the doctrine in *Alpers v. Bliss*, 145 Cal. 565, 569, 79 Pac. 171.

2. Construction of section—As recognizing interlocutory orders.—As making express recognition of interlocutory orders or decisions.—*Thompson v. White*, 63 Cal. 505, 509.

3. Same—Does not make order striking out pleading, or portion thereof, part of judgment, though it is deemed excepted to, and hence such order must be presented by bill of exceptions.—*Hawley v. Kocher*, 123 Cal. 77, 80, 55 Pac. 696.

4. Same—"Order," as used in section—Meaning of.—"Order," as used in above section, is decision made during progress of cause settling some point of practice or some question collaterally to make issue presented by pleading and necessarily to be disposed of before such issue can be passed on by court or necessarily to be determined in carrying into execution final judgment.—*McGuire v. Drew*, 83 Cal. 225, 232, 23 Pac. 312.

5. Same—Same—Order denying application to set aside default judgment for surprise, is within provisions of above section, and deemed excepted to.—*Roberts v. Willson*, 3 Cal. App. 32, 84 Pac. 216.

6. Denial of nonsuit—Review of evidence—Lack of specification.—In an action in which an agent enters into an agreement with his employer that all statements rendered by the employer as to commissions due shall be considered as correct, final and binding upon all parties unless written exception is filed thereto within ten days and that no suit upon any statement shall be commenced after six months of the date upon which the statement is rendered where suit is brought after the lapse of the six-month period, and the defense of the limitations is set up, upon which defense, in advance of the trial, the trial court held evidence and denies the motion for nonsuit. on appeal from the judgment on such motion the sufficiency of the evidence to support the order denying the motion for a nonsuit may be reviewed where the evidence is brought up by a bill of exceptions although it contains no specifications either as to the sufficiency of the evidence or as to errors of law, and no formal exception to the order is necessary in order to authorize such a review under the provisions of the above section.—*Beeson v. Schloss*, 183 Cal. 618, 192 Pac. 292, applying the doctrine in *Shadburn v. Daly*, 76 Cal. 355, 18 Pac. 403; *Barfield v. Southside Irr. Co.*, 111 Cal. 119, 43 Pac. 406; *Martin v. Southern Pac. Co.*, 150 Cal. 124, 88 Pac. 701; *Carter v. Canty*, 181 Cal. 749, 186 Pac. 346; disapproving the remark to the contrary in *Miller v. Wade*, 87 Cal. 411, 25 Pac. 487.

7. Dismissal without a motion—Not a dismissal, or a nonsuit, under section 581, ante, subdivision 5, requiring prior to 1909 an exception to protect the right of appeal, but is a final judgment, which never needed

an exception for that purpose.—*Saul v. Moscone*, 16 Cal. App. 509, 118 Pac. 452.

8. **Errors in calling jury—Not deemed excepted to by law.**—*Randall v. Freed*, 154 Cal. 229, 301, 97 Pac. 669.

9. **Errors in ruling—Upon admission of testimony of defendant** are not deemed by law excepted to.—*Randall v. Freed*, 154 Cal. 299, 301, 97 Pac. 669.

10. **Exceptions—Amendment of 1907—Rulings in giving instructions.**—In cases tried prior to the amendment of 1907, instructions of the court to the jury are not deemed excepted, and can not be reviewed on appeal in the absence of exceptions.—*Randall v. Freed*, 154 Cal. 301, 97 Pac. 669.

11. **Same—Rulings in impanelment of jury—Rulings upon evidence.**—Rulings of the trial court in calling a jury, and in admitting evidence, are not deemed excepted to under this section, and can not be reviewed on appeal in the absence of exceptions taken at the time and in the manner prescribed by law.—*Randall v. Freed*, 154 Cal. 301, 97 Pac. 669.

12. **Instructions—In civil cases** are not deemed excepted to under this section.—*Story v. Nidiffer*, 146 Cal. 549, 552, 80 Pac. 692.

13. **Same—Prior to amendment of 1907** an instruction to which no exception had been taken could not be reviewed on appeal.—*Fleischhauer v. Fabens*, 8 Cal. App. 30, 32, 96 Pac. 17.

14. **Prior to the amendment of 1907** instructions to the jury must have been excepted to in order to enable the appellant to take advantage of errors in them if there were such errors.—*Randall v. Freed*, 154 Cal. 299, 301, 97 Pac. 669.

15. **Motion to dismiss—Refusal to pass on—Exception.**—Under the provisions of the above section a defendant is not given an exception to a refusal of the court to pass upon a motion of the plaintiff to be permitted to dismiss as to one of the defendants in an action for damages for personal injury, where such defendant fails to file written consent thereto in compliance with the provisions of subdivision 2 of section 581, ante.—*Lampton v. Davis Standard Bread Co.*, — Cal. App. —, 191 Pac. 710.

16. **Nonsuit—Motion for new trial not based entirely on errors of law.**—Where motion for a new trial is not entirely based upon error of law, involved in ruling upon motion for a nonsuit, and the order granting the motion is general, it must be sustained if good on any of the grounds upon which the motion was based.—*Smith v. Hyer*, 11 Cal. App. 597, 599, 105 Pac. 787.

17. **Same—Improper granting of a nonsuit** is an error of law, and prior to the amendment of 1909 to this section, could be reviewed by an appellant court only where an exception was entered at the time of the ruling, and the same was specified in the motion as grounds for a new trial, or upon an appeal from the judgment based upon a

bill of exceptions disclosing that such exception was taken at the time the order was made.—*Smith v. Hyer*, 11 Cal. App. 597, 598, 105 Pac. 787.

18. **Objection—That statement on motion for new trial was not presented in time** is deemed excepted to under this section.—*Perry v. Noonan Loan Co.*, 1 Cal. App. 609, 611, 82 Pac. 623.

19. **Same—To form of question for special verdict** must be made upon its submission to the jury; otherwise assent will be presumed.—*Napa Valley Packing Co. v. San Francisco Relief & Red Cross Funds*, 16 Cal. App. 461, 118 Pac. 469.

20. **Order of court—Admitting will to probate** need not be excepted to under Practice Act, section 191.—In matter of *Bowen*, 34 Cal. 682, 686.

21. **Same—Denying motion for entry of different judgment on findings** made subsequent to judgment is deemed excepted to under this section, it being special order made after final judgment, and hence appealable.—*Rahmel v. Lehnendorff*, 142 Cal. 681, 682, 100 Am. St. Rep. 154, 76 Pac. 659.

22. **Same—Denying plaintiff right to amend his complaint** is deemed excepted to by force of statute and it is not necessary that he should move to vacate and modify it in order to have point reviewed on appeal.—*Schaaake v. Eagle A. C. Co.*, 135 Cal. 472, 480, 63 Pac. 1025, 67 Pac. 759.

23. **Same—Directing jury to answer special issues** not one of the matters deemed excepted to herein.—*Kearney v. Bell*, 160 Cal. 670, 117 Pac. 325.

24. **Same—Granting motion for judgment on pleadings** is not deemed excepted to when made in presence of party.—*Lamet v. Miller*, 2 Cal. Unrep. 679, 11 Pac. 744, 745.

25. **Same—Granting nonsuit** is not order finally determining rights of parties deemed excepted to under this section.—*Flashner v. Waldron*, 86 Cal. 211, 212, 24 Pac. 1063; *Hanna v. De Garmo*, 140 Cal. 172, 174, 73 Pac. 830.

26. **Same—Made in absence of party**, though deemed excepted to, must be shown by bill of exceptions to have been made under circumstances which would give him benefit of such statutory exceptions, and hence where it did not appear that order granting plaintiff's motion for judgment on appeal was made in absence of defendant, it will not be considered.—*Lamet v. Miller*, 2 Cal. Unrep. 679, 11 Pac. 744, 745.

27. **Same—Of sale** being special order made after final judgment need not be excepted to (dis. op. *Paterson, J.*).—*Latham v. Blake*, 77 Cal. 646, 648, 18 Pac. 150, 20 Pac. 417.

28. **Same—Refusing to allow supplemental complaint** to be filed is not deemed excepted to under this section, supplemental complaint not being an amendment to pleading.—*Giddings v. The, 76 Land & Water Co.*, 109 Cal. 116, 120, 121, 41 Pac. 788.

29. **Compare:** *Seehorn v. Big Meadows & B. W. R. Co.*, 60 Cal. 240, 252.

30. **Same—Refusing nonsuit** not being appealable it is not deemed excepted to, and hence can not be reviewed on appeal where no exception has been taken thereto.—*Witkowski v. Hern*, 82 Cal. 604, 607, 23 Pac. 132. See *Schroeder v. Schmidt*, 74 Cal. 459, 460, 16 Pac. 243.

31. **Same—Same—Deemed excepted to.**—Under the provisions of the above section an order denying a nonsuit is deemed excepted to and the order denying the motion may be reviewed upon appeal as an error of law, upon any ground precisely and specifically stated in the motion for the nonsuit, notwithstanding the fact that such review may invoke a question of the sufficiency of the evidence to take a prima facie cause for the plaintiff.—*Carter v. Canty*, 181 Cal. 749, 186 Pac. 346, following the doctrine in *Martin v. Southern Pac. Co.*, 150 Cal. 124, 131, 88 Pac. 701.

32. **Same—Refusing to strike out pleading** is not an order deemed excepted to under this section.—*Ganceart v. Henry*, 98 Cal. 281, 283, 33 Pac. 92.

33. An order refusing to strike out a pleading, or a portion thereof, is not an order deemed excepted to, and it must be excepted to at the time it is made to entitle it to be considered on appeal.—*Davies v. Ramsdell*, 40 Cal. App. 424, 181 Pac. 94.

34. **Same—Striking out demurrer** is deemed excepted to under this section, and hence can be considered on appeal though no exception was taken.—*Davis v. Honey Lake W. Co.*, 98 Cal. 415, 417, 33 Pac. 270.

35. **Same—Striking out pleading** is deemed excepted to under this provision, and hence may be reviewed on appeal from judgment.—*Alpers v. Bliss*, 145 Cal. 566, 569, 79 Pac. 171.

36. **Refusal to allow child nine years old to testify.**—The refusal of the court to allow a nine-year-old child to testify, not being deemed excepted to under the above section, and not being objected to, is presumed to have been acquiesced in.—*Exposite v. United Railroads*, 42 Cal. App. 320, 183 Pac. 576.

37. **Report of referee** which was not made immediately after close of testimony is deemed excepted to under Practice Act section 191.—*Headley v. Reed*, 2 Cal. 322, 325.

38. **Ruling—Either admitting or excluding evidence** is not an order made which is deemed excepted to under this section.—*McGuire v. Drew*, 83 Cal. 225, 232, 23 Pac. 312.

39. **Special verdict—Objections on ground of uncertainty** required to be made at the time the responses to special issues are returned into court, otherwise they can not be reviewed on appeal.—*Shaw v. Shaw*, 160 Cal. 740, 117 Pac. 1048.

§ 648. EXCEPTION, FORM OF. No particular form of exception is required, but when the exception is to the verdict or decision, upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient. The objection must be stated, with so much of the evidence or other matter as is necessary to explain it, and no more. Only the substance of the reporter's notes of the evidence shall be stated. Documents on file in the action or proceeding may be copied, or the substance thereof stated, or a reference thereto sufficient to identify them may be made.

History: Enacted March 11, 1872, founded on § 190 Practice Act; amendment approved April 3, 1876, Code Amdts. 1875-6, p. 92.

EXCEPTIONS—FORM OF.

1. Bill of exceptions—As to being necessary, when.
2. Same—Findings unsupported by evidence—Failure to specify particulars.
3. Same—Specific findings.
- 4-7. Same—Specifications of particulars.
8. Bill of particulars—Insufficiency of evidence—Specification of.
9. Construction of section—As not changing requirements respecting sufficiency of specifications in bill of exceptions.
10. Same—"Decision" referred to in above section.
11. Same—No particular form of exception required.
12. Same—Not to mean what.
13. Same—Provisions of above section as guide to judge.
14. Damages—Measure of—Rental or usable value.
- 15, 16. Exceptions to charge—Sufficiency of.
17. Exceptions to decision—As to sufficiency of.
- 18-20. Same—On ground of insufficiency of evidence—Necessity for specifications of particulars.
21. Same—Same—Insufficiency of specifications.
22. Same—Same—Single finding.

23. Same—Same—Want of specification of particulars.
24. Same—Proper mode of exception on ground of error of law.
- 25, 26. Exception to introduction of evidence—As incompetent, irrelevant, and immaterial.
27. Excuse for not presenting in time—No notice of order denying motion.
28. Insufficiency of evidence—Assignment of error—Necessity for.
29. Motion for new trial—If on ground of insufficiency of evidence—Failure to specify particulars.
30. Object of section—To shorten statement.
31. Papers to be included—Affidavits which were not read at trial.
32. Same—Judgment-roll on admission of will to probate.
33. Same—Notice of intention to move for new trial.
34. Same—Order refusing new trial.
35. Same—Original complaint.
- 36-38. Referring to documents in statement—By direction: "Here insert."
- 39, 40. Same—Reference in bill to documents as marked exhibits and hereto attached.
- 41-43. Specification of particulars—Of insufficiency of evidence.
44. Same—Same—Appellant on appeal from order granting new trial need not make any specifications.
45. Same—Same—Order striking out complaint.
46. Same—Same—Where no point is made as to insufficiency of evidence.
47. Same—Same—Where there is no evidence to sustain findings.
48. Same—Same—Where there was slight evidence to sustain finding.
49. Same—Object of requirements.
50. Same—Sufficiency—Each distinct proposition excepted to on ground that it is not justified by evidence.
- 51, 52. Same—Same—Specifications clearly designating findings and parts of findings.
53. Same—Same—Specifications of particular items in action on account.
54. Same—Same—Specifications ignoring evidence.
55. Same—Same—Specification pointing to sole question raised.
56. Same—Same—Specification that evidence does not show certain facts.
57. Same—Same—Specification that plaintiff showed no right of possession to premises sued for.
- 58-61. Same—Same—Specification to finding as whole.
62. Same—Same—Where evidence is set out in full.
63. Statement of evidence—In general.
- 64, 65. Same—All evidence tending to explain objection taken will be presumed to have been inserted.
66. Same—Bill of exceptions merely setting forth other findings and stating that such facts were established by evidence.
67. Same—Evidence in full need not be given.
68. Same—Evidence need not accompany objections to conclusion of fact.
- 69, 70. Same—Mere rescript of notes of shorthand reporter.
- 71, 72. Sufficiency of objection—In general.
- 73, 74. Sufficiency of record—Not treated as bill of exceptions.

1. **Bill of exceptions—As to being necessary when appeal is not taken according to the new and alternative method as prescribed in section 9539, post, to an order denying a motion for a new trial, in conformity with the practice which has always prevailed in connection with motion for a new trial made upon the minutes and the requirements of the provisions of the above section.**—*Mills v. Brady*, 185 Cal. 317, 196 Pac. 776, following the doctrine in *Hawley v. Harrington*, 152 Cal. 188, 92 Pac. 177; *Carter v. Canty*, 181 Cal. 749, 186 Pac. 346; *Martin v. Hildebrand*, 183 Cal. 270, 191 Pac. 676.

2. **Same—Findings unsupported by evidence—Failure to specify particulars.**—In an action brought to construe a contract of settlement of an estate and an escrow agreement, on appeal from an order denying new trial on the ground that the evidence is insufficient to support the findings where the bill of exceptions fails to specify wherein the findings were unsupported by the evidence the question of the sufficiency of the evidence can not be considered by a court on appeal in view of the provisions of the above section.—*Moore v. Franklin*, — Cal. App. —, 192 Pac. 1047.

As to specification of particulars, see pars. 4-7, 8, this note.

3. **Same—Specific findings.**—Where there are specific findings the code requires no more than a specification of the particular finding or findings which, it is claimed, are not supported, but this at least must be done, and a general specification that the evidence does not support "the findings" is not in compliance with the requirements of the above section that the particulars wherein it does not support them must be noted, and for that reason is wholly insufficient.—*Mills v. Brady*, 185 Cal. 377, 196 Pac. 776, following doctrine in *Swift v. Occidental Min. Co.*, 141 Cal. 161, 74 Pac. 700; *Bell v. Staacke*, 141 Cal. 186, 74 Cal. 774; *Harris v. Duarte*, 141 Cal. 497, 70 Pac. 298, 75 Pac. 58; *Millar v. Millar*, 175 Cal. 797, Ann. Cas. 1918E, 184, L. R. A. 1918B, 415, 167 Pac. 394.

4. Same—Specifications of particulars.—Where the bill of exceptions fails to contain specifications of particulars of insufficiency, the appellate court is without authority to consider the evidence or review its sufficiency to sustain the decision and order based thereon.—*Matter of Baker*, 153 Cal. 542, 96 Pac. 12.

As to specification of errors in bill of exceptions, see, post, § 652, and note par. 29.

5. Specification of particulars wherein the evidence is insufficient to justify the findings are necessary in bill of exceptions to order appointing guardian.—*Matter of Baker*, 153 Cal. 537, 542, 96 Pac. 12.

6. Upon appeal from an order denying a new trial, the sufficiency of the evidence to support the finding can not be reviewed, where there is nothing in the bill of exceptions specifying the particulars in which the evidence is insufficient, as required by this section.—*Layne v. Johnson*, 19 Cal. App. 95, 97, 124 Pac. 860.

7. No specifications of the insufficiency of the evidence are necessary in the bill of exceptions to enable the court to consider on appeal errors in the rulings of the court on the introduction of documents and in the motion to strike them from the record, and for nonsuit on the ground of irrelevancy and immateriality, in the absence of proper foundation.—*Western California Land Co. v. Welch*, 41 Cal. App. 435, 183 Pac. 169.

8. Bill of particulars—Insufficiency of evidence—Specification of.—Under the provisions of the above section on an appeal because of the insufficiency of the evidence, the bill of particulars in which it is claimed the evidence is not sufficient to sustain the findings must be set forth, or the question can not be considered on appeal.—*W. P. Fuller & Co. v. McClure*, — Cal. App. —, 191 Pac. 1027, following the doctrine in *Millar v. Millar*, 175 Cal. 797, Ann. Cas. 1918E, 184, L. R. A. 1918B, 415, 167 Pac. 394; *Regoll v. Stevenson*, 179 Cal. 257, 176 Pac. 158.

As to specification of particulars, see pars. 2, 4-7, this note.

9. Construction of section—As not changing requirements respecting sufficiency of specifications in bill of exceptions either as enacted or recently amended, and it follows that where there are no specifications sufficient to comply with the requirements of the law and in fact not even the suggestion of an attempt to make any specifications, an appellate court can not consider the contention that the findings of fact are not sufficiently supported by the evidence.—*Carter v. Canty*, 181 Cal. 749, 186 Pac. 346.

As to object of section, see par. 30, this note.

10. Same—"Decision" referred to in above section is statement of facts found and conclusions of law therefrom mentioned in section 633, ante.—*Clifford v. Allman*, 84 Cal. 528, 532, 24 Pac. 292, approving *Coveny v. Hale*, 49 Cal. 552, 555.

11. Same—No particular form of exception required, yet there must be some exception, when it is based upon the ground of insufficiency of the evidence to justify the decision, and the objection must specify particulars.—*Estate of Piper*, 147 Cal. 608, 82 Pac. 246.

12. Same—Not to mean what.—Section construed not to mean that party desiring bill of exceptions must propose perfect bill in first draft or forfeit his right to review of decisions from which he has appealed.—*Walkerley v. Greene*, 104 Cal. 208, 211, 37 Pac. 890.

13. Same—Provisions of above section as guide to judge.—Provisions of this section are mainly intended as guide to judge in settling bills, though it imposes duty on moving party to proceed in good faith and to do his proper share of work involved in settling of bill. He has no right to put off on opposite party or judge necessity of amendments, giving statements of evidence or other matters to which he knows proper and fair bill of exceptions ought to point, nor ought he to include statements or matters that are untrue or irrelevant; and corresponding duty is on other party.—*Walkerley v. Greene*, 104 Cal. 208, 211, 37 Pac. 890.

14. Damages—Measure of—Rental or usable value.—In an action for the wrongful detention of property, interest for the ordinary measure of damages to be awarded but in those cases where the property has a rental or a usable value which exceeds the lawful rate of interest, this rule has no application, and the successful party is entitled to recover for such detention, the rental value, or the value of the use of the property during the period that he was wrongfully deprived thereof, which value is to be estimated by the ordinary rental value or market price of the use of the property, less the damages to the property which would result from the extra wear and tear caused by the use of it while so rented or used.—*Tucker v. Hagerty*, 37 Cal. App. 789, 174 Pac. 908, approving doctrine in *Peerless Machine Co. v. Gates*, 61 Minn. 124, 63 N. W. 260.

15. Exceptions to charge—Sufficiency of.—Exceptions to oral charge must be specific and point out particular portion of charge claimed to be objectionable, though counsel shall subsequently claim that all propositions laid down in charge are objectionable, and this rule applies without exception.—*Rider v. Edgar*, 54 Cal. 127, 130. See *Sill v. Reese*, 47 Cal. 294, 295.

As to sufficiency of exceptions, see note, 99 Am. Dec. 132, and cases collected, I Complete L. R. A. Dig. p. 283, § 260.

16. Exception to charge given by court of its own motion as follows: "to which charge and whole thereof defendant then and there duly excepted" is insufficient, it not being sufficiently specific to call attention of court to portions thereof assailed.—

Love v. Anchor Raisin Vineyard Co., 5 Cal. Unrep. 425, 45 Pac. 1044, 1046. See Rogers v. Mahoney, 62 Cal. 611, 613; Frost v. Grizzly B. C. Co., 102 Cal. 525, 527, 36 Pac. 929.

17. Exceptions to decision—As to sufficiency of.—A mere statement that party excepted to decision of court unaccompanied by objection, and ground either of law or of fact on which it is made, does not constitute exception upon which any question involved can be examined on appeal.—Estate of Page, 57 Cal. 238, 239.

As to sufficiency of exception, see note 99 Am. Dec. 132.

18. Same—On ground of insufficiency of evidence—Necessity for specifications of particulars.—The evidence can not be reviewed on an appeal from an order denying a motion for a new trial when the bill of exceptions, upon which the motion was made, and which purports to contain such evidence omits to specify the particulars in which the evidence is insufficient.—Hawley v. Harrington, 152 Cal. 189, 92 Pac. 177. See par. 21, this note.

19. Where there is no specification that the evidence is insufficient to show that the negligence which caused the injury in an action by an employee against his employer was that of the principal and not of a fellow servant, the question can not be considered.—Reeve v. Colusa Gas & El. Co., 152 Cal. 99, 110, 92 Pac. 89.

20. Specifications of particulars held to be necessary to authorize consideration of insufficiency of the evidence on appeal from the judgment.—Coghlan v. Quartararo, 15 Cal. App. 665, 115 Pac. 664.

21. Same—Same—Insufficiency of specifications.—Where the only specification relied on for reversal of judgment is "that the evidence is wholly insufficient to justify a judgment in favor of the plaintiff," this is not a sufficient compliance with the requirements of above section.—Rousseau v. Cohn, 20 Cal. App. 469, 129 Pac. 618. See par. 18, this note.

22. Same — Same — Single finding. — Whether it is necessary to specify insufficiency where there is but a single finding not decided.—Meek v. Southern Cal. R. Co., 7 Cal. App. 606, 607, 95 Pac. 166.

23. Same—Same—Want of specification of particulars is fatal to the review of the evidence by the appellate court to ascertain whether it is sufficient to support the findings or decision or not.—California Portland Cement Co. v. Wentworth Hotel Co., 16 Cal. App. 710, 118 Pac. 103.

24. Same—Proper mode in exception on ground of error of law in an action tried by court without jury is to ask court to decide what counsel may consider an applicable principle of law, and on refusal to have it noted in bill of exceptions.—Estate of Page, 57 Cal. 238, 239. See Griswold v. Sharpe, 2 Cal. 17, 23; Touchard v. Crow, 20 Cal. 150, 163, 81 Am. Dec. 108.

25. Exception to introduction of evidence—As incompetent, irrelevant, and immaterial, without showing in what respect it was incompetent, irrelevant, and immaterial, is insufficient.—Adams v. Crawford, 116 Cal. 495, 501, 48 Pac. 488.

26. Objection that testimony was incompetent, irrelevant, and immaterial for particular reason, is insufficient to raise question as to whether such evidence was incompetent, irrelevant, or immaterial for any other reason.—Le Mesnager v. Hamilton, 101 Cal. 532, 539, 40 Am. St. Rep. 81, 35 Pac. 1054. See Adams v. Crawford, 116 Cal. 495, 499, 48 Pac. 488.

27. Excuse for not presenting in time—No notice of order denying motion.—Upon an appeal taken from an order denying a motion to tax costs, the trial court is not justified in refusing to settle the bill of exceptions to be used on the appeal, on the ground that it was not presented in time, where no notice of the order denying the motion was given to the appellant, except by a letter mailed to counsel for appellant by counsel for the opposing party demanding payment of the costs.—East Side Canal & Irr. Co. v. Superior Court, 30 Cal. App. 528, 158 Pac. 773.

28. Insufficiency of evidence—Assignment of error—Necessity for.—In an appeal taken on the judgment-roll and a brief bill of exceptions containing no assignment of error either in general or particular terms no review can be had on appeal of that particular matter.—Smith v. Meade, 36 Cal. App. 173, 171 Pac. 815, following doctrine in Hawley v. Harrington, 152 Cal. 188, 92 Pac. 177; Millar v. Millar, 175 Cal. 797, L. R. A. 1918D, 415, 167 Pac. 394; Meek v. Southern Cal. R. Co., 7 Cal. App. 606, 95 Pac. 166.

29. Motion for new trial—If on ground of insufficiency of evidence—Failure to specify particulars.—Under the provisions of the above section where an exception is taken to a verdict of the jury or a decision of the court upon the ground that the evidence was insufficient to justify the verdict or the decision, in order to have that objection considered by an appellate court the particulars wherein the evidence was insufficient must be specified otherwise it will be insufficient; and this rule applies to an order denying a new trial.—Moore v. Franklin, — Cal. App. —, 192 Pac. 1047.

30. Object of section—To shorten statement.—The object of the provisions of the above section requiring specifications another bill of exceptions of the things relying upon it to shorten the statement of the evidence by excluding everything irrelevant to the specified fact, and also to notify the opposing party of the particular finding or matter in question, in order that he may see that the statement fairly and fully represents the evidence bearing thereon (dictum).—Smith v. Meade, 36 Cal. App. 173, 171 Pac. 815, approving and applying the rule in Swift v. Occidental Min. & Petroleum Co., 141 Cal. 161, 47 Pac. 700.

As to construction of section, see pars. 9-13, this note.

31. Papers to be included—Affidavits which were not read at trial for any purpose, and such parts of them as were not so read nor necessary to explain parts thereof which were read, were "redundant and useless matter," which should not have been inserted in bill, but error in inserting them is not reversible error, as they will be disregarded by appellate court; and this is the only remedy for the error, except that the appellate court may tax the costs of redundant matter to party that caused its insertion.—*Wolff v. Wolff*, 102 Cal. 433, 441, 36 Pac. 767, 1037.

As to necessity of incorporation of papers in bill of exceptions to make them part of the record, see, post, § 661 and note.

32. Same—Judgment-roll on admission of will to probate being matter of record, should have been excluded from bill of exceptions.—*Estate of Robinson*, 106 Cal. 493, 497, 39 Pac. 862.

33. Same—Notice of intention to move for new trial need not be included in bill of exceptions on motion for new trial, and forms no part of judgment-roll.—*Kahn v. Wilson*, 120 Cal. 643, 644, 53 Pac. 24. See *Pico v. Cohn*, 78 Cal. 384, 20 Pac. 706; *Southern Pac. R. Co. v. Superior Court*, 105 Cal. 84, 86, 38 Pac. 627.

34. Same—Order refusing new trial being made after bill of exceptions is settled and authenticated need not and could not be included in such bill.—*Mendocino County v. Peters*, 2 Cal. App. 24, 82 Pac. 1122.

35. Same—Original complaint which is necessary to explain exception to order sustaining demurrer to amended complaint, can be brought up in bill of exceptions.—*Redington v. Cornwell*, 90 Cal. 49, 62, 27 Pac. 40.

36. Referring to documents in statement—By direction: "Here insert" is countenanced by this section.—*Lake Shore C. Co. v. Modoc L. & L. Co.*, 127 Cal. 37, 39, 59 Pac. 206.

37. Reference in statement in minute-book of said board appearing in following order on page 331 "[here insert]" is sufficient, as words "here insert" inform opposite party that it is to become part of statement, though it would not be sufficient in an engrossed statement.—*Reclamation Dist. v. Hamilton*, 112 Cal. 603, 607, 44 Pac. 1074.

38. Practice of proposing bill in skeleton form does not find any support in language of code, but has been created by profession, and is possible merely because no absolute limit is placed on time within which judge can certify bill, and recognizing practice certification of bill was not delayed by reason of its engrossment before it was presented, where no amendments had been suggested, and where it was not suggested that bill was in any respect defective

so that new engrossment would be necessary, and hence delay caused by such engrossment was not unreasonable.—*Houghton v. Superior Court*, 128 Cal. 352, 356, 60 Pac. 972.

39. Same—Reference in bill to documents as marked exhibits and hereto attached and herewith filed is not sufficient to warrant there being considered where they were attached to former bill of exceptions, which was an independent document.—*Estate of Carpenter*, 127 Cal. 582, 585, 60 Pac. 162.

40. Papers in evidence used at hearing of motion to set aside service of summons by publication must be authenticated by incorporating same in bill of exceptions, and this means they must be set forth in and be made part of it; mere reference in bill of exceptions to different papers and documents without incorporating them in bill is not sufficient, especially where they were authenticated merely by stipulation of attorneys.—*San Diego Sav. Bank v. Goodsell*, 137 Cal. 420, 423, 70 Pac. 299.

41. Specification of particulars—Of insufficiency of evidence.—Construed peremptory.—*Martin v. Matfield*, 49 Cal. 42, 45.

42. Insufficiency of evidence can not be considered where bill of exceptions contains no specification of particulars in which evidence is alleged to be insufficient.—*Coveny v. Hale*, 49 Cal. 552, 555, 556; *Watson v. San Francisco H. B. R. Co.*, 50 Cal. 523; *Bonner v. Quackenbush*, 51 Cal. 180; *Eltzroth v. Ryan*, 89 Cal. 135, 139, 140, 26 Pac. 647; *Winterburn v. Chambers*, 91 Cal. 170, 27 Pac. 653; *Commercial Bank v. Redfield*, 122 Cal. 405, 407, 55 Pac. 160; *Estate of Behrens*, 130 Cal. 416, 418, 62 Pac. 603.

43. Bill of exceptions containing no specifications of insufficiency of evidence to justify finding, and no assignments of error in any particular, can not be considered on appeal from an order denying motion for new trial.—*Leonard v. Shaw*, 114 Cal. 69, 72, 45 Pac. 1012; *Sather Banking Co. v. Briggs Co.*, 138 Cal. 724, 726, 72 Pac. 353.

As to specifications of insufficiency of evidence in notice of intention to move for new trial and in statement, see, post, § 659 and note.

As to specification of particulars in exceptions, see note 8 L. R. A. 608.

44. Same—Same—Appellant on appeal from order granting new trial need not make any specifications of insufficiency of evidence to justify verdict, or specify errors of law occurring at trial on which he would rely, since it is party who moves for new trial who is called on to file bill of exceptions, or whatever is relied on as ground for his motion, and record thus presented must contain specifications as required.—*Byxbee v. Dewey*, 128 Cal. 322, 324, 60 Pac. 847.

45. Same—Same—Order striking out complaint which was duly excepted to may be reviewed, though bill of exceptions contains no specification of any particulars in

which evidence is alleged to be insufficient.—*Clifford v. Allman*, 84 Cal. 528, 532, 24 Pac. 292.

46. **Same—Same—Where no point is made as to insufficiency of evidence to sustain verdict**, no specification of particulars in which such evidence is insufficient is required.—*Shadburne v. Daly*, 76 Cal. 355, 356, 18 Pac. 403.

47. **Same—Same—Where there is no evidence to sustain findings** party complaining is not required to show insufficiency of evidence. In such case burden is on party sustaining findings to call attention to enough evidence to justify finding.—*San Luis W. Co. v. Estrada*, 117 Cal. 168, 184, 48 Pac. 1075.

48. **Same—Same—Where there was slight evidence to sustain finding**, absence of specification of insufficiency can not be dispensed with under rule that in case of entire evidence, burden is on party sustaining finding to call attention to at least enough evidence to justify finding.—*Estate of Behrens*, 130 Cal. 416, 418, 62 Pac. 603.

49. **Same—Object of requirements** is to advise respondent of particulars wherein he should take note whether evidence, if any, sustaining decision appeared in bill of exceptions when proposed.—*Estate of Levinson*, 108 Cal. 450, 455, 41 Pac. 483, 42 Pac. 479.

50. **Same—Sufficiency—Each distinct proposition excepted to on ground that it is not justified by evidence** should be separately specified, and no statement of evidence nor deduction therefrom by way of argument is proper in connection with specification.—*Baird v. Peall*, 92 Cal. 235, 239, 28 Pac. 285.

51. **Same—Same—Specifications clearly designating findings and parts of findings** which it is claimed evidence does not justify them, are sufficient. No reference to evidence is required in specification, except to see that it is insufficient to justify particular finding called in question.—*Swift v. Occidental M. & P. Co.*, 141 Cal. 161, 167, 74 Pac. 700.

52. **Noting that if** *Kyle v. Craig*, 125 Cal. 107, 116, 57 Pac. 791, was understood differently, it conveyed an erroneous impression.

53. **Same—Same—Specifications of particular items in action on account** which appellate deems to be unsupported by evidence, sufficiently advises respondent of particulars wherein he should take note whether evidence, if any, sustaining account appeared in bill of exceptions when proposed.—*Estate of Levinson*, 108 Cal. 450, 455, 41 Pac. 483, 42 Pac. 479.

54. **Same—Same—Specifications ignoring evidence**.—Specifications in an action to recover property which ignored release of property by sheriff, and were based on statement that they were never taken by sheriff, is an insufficient specification that jury disregarded evidence which related to release.—*Rider v. Edgar*, 54 Cal. 127, 130.

55. **Same—Same—Specification pointing to sole question raised**.—Where bill of exceptions expressly shows that only question to be raised on motion for new trial was as to whether or not plaintiff was entitled under evidence to damages, and bill included all evidence bearing on that question, and specification points to sole question professedly involved in motion so that opposite party might see to it that all evidence bearing on issue and proper to be considered by court was set forth in bill, specification was sufficient.—*Live Stock G. P. Co. v. Union S. Co.*, 114 Cal. 447, 450, 46 Pac. 286.

56. **Same—Same—Specification that evidence does not show certain facts** is equivalent to showing that evidence is insufficient to justify decision on those particular facts, and hence is insufficient.—*Estate of Fath*, 132 Cal. 609, 614, 64 Pac. 995.

57. **Same—Same—Specification that plaintiff showed no right of possession to premises sued for** against defendant or at all, is not sufficient specification of particulars in which evidence failed to show tender of purchase-money in action to foreclose contract to purchase, as such specification is as applicable to any other of series of alleged facts on which plaintiff relied to make out his right of possession.—*Thorne v. Hammond*, 46 Cal. 530, 534.

58. **Same—Same—Specification to finding as whole** is insufficient where finding contains three distinct propositions of fact. Each proposition must be separately specified.—*Baird v. Peall*, 92 Cal. 235, 239, 28 Pac. 285.

59. **Specification that court erred in finding certain facts** is not sufficient under this section.—*Coglan v. Beard*, 67 Cal. 303, 304, 7 Pac. 738.

60. **Statement in bill of exceptions that "foregoing is all evidence introduced on trial, cause was submitted to court for decision, and, after considering same, court filed its findings of fact and conclusions of law and ordered judgment entered in accordance therewith, to which order and decision defendant then and there duly excepted,"** is an insufficient exception to enable court to examine evidence for purpose of determining its sufficiency and justify findings, but findings can only be examined to see whether they support judgment.—*City, etc., of San Francisco v. Pacific Bank*, 89 Cal. 23, 24, 26 Pac. 615, 835.

61. **Specification that court erred in finding that allegations of plaintiff's complaint were true and all denials and allegations of defendant's answer were untrue** inasmuch as testimony does not disclose such state of facts; that findings are not borne out by testimony; fraud and misrepresentation of law having been proven by defendant and his witnesses, is not sufficient specification of insufficiency under this section.—*Gamble v. Tripp*, 99 Cal. 223, 226, 33 Pac. 851.

62. **Same—Same—Where evidence is set out in full**.—On appeal from an order re-

fusing new trial after granting discharge to insolvent, specification of ground on which evidence was insufficient to justify decision was that evidence was not sufficient to finding that insolvent did keep proper books of account, and bill was settled by judge as full, true, and correct, and so stipulated by attorney for respondent, and it appeared from bill itself that evidence concerning books kept by insolvent was full and complete, and objection to consideration of sufficiency of evidence on ground that it appeared from bill of exceptions that certain evidence in regard to validity of claims of mother and aunt of insolvent was by stipulation considered evidence in trial of this proceeding for discharge, was not set out in bill will be overruled.—*Sullivan v. Washburn & M. Mfg. Co.*, 139 Cal. 257, 263, 72 Pac. 992.

63. Statement of evidence.—In general.—Evidence or other matter which may be stated in bill of exceptions for purpose of explaining objection taken, does not include objections taken by party proposing amendment or any evidence or other matter necessary to explain same.—In matter of *Gates*, 90 Cal. 257, 259, 27 Pac. 195.

64. Same.—All evidence tending to explain objection taken will be presumed to have been inserted in bill, and if from such evidence it appears that court below erred in ruling as to material matter, it is ground for reversal. Supreme court will take it for granted that judge of trial court will see to it that sufficient of testimony as will sustain his ruling, if any such was given, is incorporated in bill of exceptions.—*Wilson v. Atkinson*, 68 Cal. 590, 591, 10 Pac. 203. See *Couson v. Wilson*, 2 Cal. App. 181, 83 Pac. 262.

65. If there was any evidence which would explain or overcome that set forth in the bill, it was the duty of the respondent to cause it to be incorporated therein.—*Couson v. Wilson*, 2 Cal. App. 181, 83 Pac. 262.

As to amendments to bill on questions of evidence, see, post, § 650 and note.

66. Same.—Bill of exceptions merely setting forth other findings and stating that such facts were established by evidence, is not statement of so much of evidence as may be necessary to explain objection that portion of one finding is not sustained by evidence, it not being statement of evidence at all, but general conclusion that certain facts were established by evidence.—*Cox v. McLaughlin*, 1 Cal. Unrep. 858, 18 Pac. 111.

67. Same.—Evidence in full need not be given where question presented is solely as to sufficiency of conflicting evidence to sustain particular finding. All that is required is that sufficient amount of evidence be inserted bearing on each side of question to show substantial conflict, since in such case decision of court below will not be interfered with.—*Vatcher v. Wilbur*, 144 Cal. 536, 539, 78 Pac. 14.

68. Same.—Evidence need not accompany objections to conclusion of fact from other facts specifically found.—*Walkerley v. Greene*, 104 Cal. 208, 211, 37 Pac. 290.

69. Same.—Mere rescript of notes of shorthand reporter in which evidence is detailed by question and answer with objections taken and rulings thereon, is not sufficient statement under this section.—*Caldwell v. Parks*, 50 Cal. 502, 503; *City of Santa Ana v. Ballard*, 126 Cal. 677, 678, 59 Pac. 133.

70. Duty devolved upon petitioner to prepare proper statement of bill of exceptions so as to sustain his contention of insufficiency of evidence to justify decision of trial court on point in question, does not mean that statement or bill of exceptions should embody all reporter's notes.—*Vatcher v. Wilbur*, 144 Cal. 536, 540, 78 Pac. 14.

71. Sufficiency of objection.—In general.—Where the defense of want of consideration rests upon the allegation of a conclusion of law, the objection thereto made after the trial of the case upon the merits will not be considered upon an appeal supported only by a record which does not show that such objection was interposed by demurrer or otherwise in the court below.—*Rivera v. Cappa*, 29 Cal. App. 497, 156 Pac. 1017.

72. An objection so general as not to call the court's attention to the particular aspect in which the question is claimed to be obnoxious will not be regarded as sufficient to entitle one to have the exception reviewed.—*Aston v. Examiner Printing Co.*, 226 Fed. 496.

73. Sufficiency of record.—Not treated as bill of exceptions.—In the case of an appeal where the form of the record is not a statement on appeal, and is wanting in a specification of the particulars wherein it is claimed that the evidence is insufficient to justify the decision, it will not be treated as a bill of particulars, under the provisions of the above section and section 650, post.—*Weissand v. City of Petaluma*, 37 Cal. App. 296, 174 Pac. 955, following the doctrine in *Coveny v. Hale*, 49 Cal. 553; *Watson v. San Francisco & Humboldt Bay R. Co.*, 50 Cal. 523; *Bonner v. Quackenbush*, 51 Cal. 180; *Eltzroth v. Ryan*, 89 Cal. 135, 140, 26 Pac. 647; *Winterburn v. Chambers*, 91 Cal. 170, 185, 27 Pac. 658; *Commercial Bank v. Redfield*, 122 Cal. 405, 55 Pac. 160, 772; *Estate of Behrens*, 130 Cal. 416, 418, 62 Pac. 603.

74. In those cases in which a record is wanting in specifications of particulars wherein the evidence is claimed insufficient to justify the decision, and such record not being treated as a bill of exceptions, as pointed out in the preceding paragraph, the sufficiency of the evidence to support the findings of the court can not be reviewed unless the full record has been up, as provided in section 953a, post.—*Weissand v. City of Petaluma*, 37 Cal. 296, 174 Pac. 955.

§ 649. BILL OF EXCEPTIONS. WHEN TO BE PRESENTED, ETC. A bill containing the exception to any decision may be presented to the court or judge, for settlement at any time after the decision is made, but the same must be presented within ten days after written notice of making such decision, and after having been settled must be signed by the judge and filed with the clerk. When the decision excepted to is made by a tribunal other than a court, or by a judicial officer, the bill of exceptions must be presented to and settled and signed by such tribunal or officer.

History: Enacted March 11, 1872; amendment approved April 3, 1876, Code Amdts. 1875-6, p. 92; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 147, held unconstitutional, see history, § 5 ante; March 20, 1907, Stats. and Amdts. 1907, p. 715, Kerr's Stats. and Amdts. 1906-7, p. 449; March 20, 1911, Stats. and Amdts. 1911, p. 402.

BILL OF EXCEPTIONS—WHEN TO BE PRESENTED.

1. Construction of section—As permissive.
2. Same—Does not fix any specific time for settling bill of exceptions.
- 3-5. Bill of exceptions—Must be presented to judge and settled at time ruling is made.
6. Same—Certificate governs as to time of presenting.
- 7-9. Same—Reasonable time.
10. Writing and signing—Exceptions taken during progress of trial.

1. Construction of section—As permissive.—The above section has been construed to be permissive and privilege granted party of presenting his bill of exceptions for settlement at time of ruling is not necessarily exclusive.—*Flagg v. Puterbaugh*, 98 Cal. 134, 136, 32 Pac. 863.

2. Same—Does not fix any specific time for settling of bill of exceptions, but only declares that it may be done immediately upon rendering of decision to which exception is made. If not done immediately, right is not taken away.—*Tregambo v. Comanche M. & M. Co.*, 57 Cal. 501, 503, 504.

3. Bill of exceptions—Must be presented to judge and settled at time ruling is made and in presence of adverse party. It can not be properly presented to judge or settled at any other time.—*Estate of Carpenter*, 127 Cal. 582, 584, 60 Pac. 162; *Estate of Scott*, 128 Cal. 578, 580, 61 Pac. 98.

4. Bill of exceptions must be reduced to writing and settled by judge immediately upon taking of exception under Practice Act.—*Central Pac. R. Co. v. Pearson*, 35 Cal. 247, 257.

5. It does not contemplate settlement of bill after adjournment of court without any notice to adverse counsel, and hence where

bill was signed next day, it was too late, though at time order was made appellant stated that he would at once present bill embodying exceptions, and that short draft of such bill was prepared and presented to judge, who stated that if minor corrections were made and bill properly typewritten, he would approve same, but adjourned before bill was typewritten and presented for his approval.—*Estate of Scott*, 128 Cal. 578, 579, 580, 61 Pac. 98.

6. Same—Certificate governs as to time of presenting.—Under certificate of judge reciting that bill of exceptions was "duly presented within time allowed by law" it must be assumed that bill was presented at time when decision was made, and if court actually settled it at day later than its presentation, it can not affect right of appellant to use bill.—*Estate of Gordon*, 142 Cal. 125, 134, 75 Pac. 672.

7. Same—Reasonable time.—Bill of exceptions in case which falls under this section should be allowed and settled within reasonable time; analogy furnished by sections 650 and 651, post, should determine what is reasonable time.—*Flagg v. Puterbaugh*, 98 Cal. 134, 136, 32 Pac. 863; *Smith v. Jordan*, 122 Cal. 68, 69, 54 Pac. 368.

8. Hence where proposed bill was not prepared and served after order was made it was error to settle bill.—*Smith v. Jordan*, 122 Cal. 68, 69, 54 Pac. 368.

9. Bill of exceptions dated more than four months after ruling striking out portion of defendant's answer was made should not have been allowed.—*Levee District v. Huber*, 57 Cal. 41, 42.

10. Writing and signing — Exceptions taken during progress of trial should be written upon sheet of paper and signed by judge and filed in case, and when judgment-roll was made up, attached to judgment-roll.—*More v. Del Valle*, 28 Cal. 170, 174; *Kavanagh v. Maus*, 28 Cal. 261, 263.

§ 650. EXCEPTIONS NOT PRESENTED AT TIME OF RULING. NOTICE TO ADVERSE PARTY. [DRAFT OF PROPOSED BILL; AMENDMENTS.] HOW SETTLED, ETC. When a party desires to have exceptions

taken at a trial settled in a bill of exceptions, he may, at any time thereafter, and within ten days after the entry of judgment, if the action was tried with a jury, or after receiving notice of the entry of judgment, if the action was tried without a jury, or if proceedings on motion for a new trial be pending, within ten days after notice of decision denying said motion, or other determination thereof, or such further time as the court in which the action is pending, or a judge thereof, may allow, prepare the draft of a bill, and serve the same, or a copy thereof, upon the adverse party.

[Contents of draft.] Such draft must contain all the exceptions and proceedings taken upon which the party relies, and may contain all matters reviewable on the same appeal whether occurring at the trial or on motion for a new trial. It may also contain a statement of any matters occurring upon the trial, in the presence of the court, showing any of the matters mentioned in subdivisions one and two of section six hundred fifty-seven of this code.

[Adverse party may propose amendments.] Within ten days after such service the adverse party may propose amendments thereto, and serve the same or a copy thereof, upon the other party. The proposed bill and amendments must, within ten days thereafter be presented by the party seeking the settlement of the bill, to the judge who tried or heard the case, upon five days' notice to the adverse party, or be delivered to the clerk of the court for the judge.

[Clerk must deliver to judge.] When received by the clerk he must immediately deliver them to the judge, if he is in the county; if he is absent from the county, and either party desires the paper to be forwarded to the judge, the clerk must, upon notice in writing of such party, immediately forward them by mail, or other safe channel; if not thus forwarded the clerk must deliver them to the judge immediately after his return to the county.

[Judge to designate time of settling.] When received from the clerk, the judge must designate the time at which he will settle the bill, and the clerk must immediately notify the parties of such designation. At the time designated the judge must settle the bill. The bill must thereupon be engrossed and presented to the judge to be certified, by the party presenting it, within ten days.

[Action tried before referee.] If the action was tried before a referee, the proposed bill, with the amendments, if any, must be presented to such referee for settlement within ten days after service of the amendments, upon notice of five days to the adverse party, and thereupon the referee must settle the bill. If no amendments are served or if served are allowed, the proposed bill may be presented, with the amendments, if any, to the judge or referee, for settlement without notice to the adverse party.

[Judge to strike out useless matter.] It is the duty of the judge or referee, in settling the bill, to strike out of it all redundant and useless matter so that the exceptions and proceedings may be presented as briefly as possible. When settled, the bill must be signed by the judge or referee, with his certificate to the effect that the same is allowed, and must then be filed with the clerk.

[Not to be served on party when default entered.] No bill of exceptions, notice of appeal, or notice or paper, other than amendments to the pleadings or

an amended pleading, need be served upon any party whose default has been duly entered, or who has not appeared in the action or proceeding.

History: Enacted March 11, 1872; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 313; by Code Commission, Act March 2, 1901, Stats. and Amdts. 1900-1, p. 147, held unconstitutional, see history, § 5 ante; March 20, 1907, Stats. and Amdts. 1907, p. 716, Kerr's Stats. and Amdts. 1906-7, p. 449; April 19, 1909, Stats. and Amdts. 1909, p. 993; March 20, 1911, Stats. and Amdts. 1911, p. 400; April 24, 1915, Stats. and Amdts. 1915, p. 207. In effect August 8, 1915.

BILL OF EXCEPTIONS—TIME OF PRESENTATION OF—NOTICE TO ADVERSE PARTIES.

1. "Adverse parties"—As to who is.
2. Alternative method of appeal—Sections 941a-941c, repealed in 1921.
3. Same—Defective record—Not regarded as bill of exceptions.
4. Amendment of 1907—As to service on adverse party.
5. Amendments which may be proposed to draft—In general.
6. Same—Amendment by trial judge after appeal.
7. Same—Amendment on appeal.
8. Same—Condensing narrative form.
9. Same—Determination of judge.
10. Same—Failure of respondent to propose amendments.
11. Same—Insertion in engrossed bill.
12. Same—Matter to obviate error.
13. Same—Service by mail.
14. Same—Same—Acknowledgment by letter of receipt of.
15. And statement of the case.
- 16, 17. Authentication and certification.
18. Certificate—Failure to produce.
- 19, 20. Same—Filing settled and engrossed bill before it was certified by inadvertence of judge or referee.
21. Same—Unauthenticated bill of exceptions.
22. Construction of section—As to sufficiency of compliance.
23. Same—Applicable where order excepted to is appealable order.
- 24-26. Same—Does not relate to exceptions taken after trial and judgment.
27. Same—Includes exceptions taken in course of proceedings before trial has commenced.
28. Same—Includes persons claiming as devisees under will.
29. Same—Not retroactive.
30. Same—Provides for settlement of bills of exception based on errors of law occurring at trial.
31. Same—Provides how all papers, proceedings, and exceptions not otherwise part of record may be made such.
32. Same—"Trial"—Meaning of.
- 33-35. Contents of—Exception to ruling on motion for new trial.
36. Same—Irrelevant matters.
37. Same—Prayer or request that it be allowed or certified as bill of exceptions.
38. Same—Reference to pleadings on hearing of motion for new trial.
- 39, 40. Same—Specification of particular errors of law.
- 41-43. Same—Statements of fact.
- 44-51. Delay in service of proposed bill of exceptions—Effect of.
52. Effect of certification.
53. Effect of filing.
- 54, 55. Engrossment—As to generally.
56. Same—Correct engrossment, question of how determined.
57. Same—Determination of judge as to whether bill of exceptions is correctly engrossed.
58. Same—Failure to serve engrossed bill on attorney for opposing party.
59. Same—Leaving engrossed bill with deputy clerk without request to present it to judge.
- 60-62. Same—Unexplained neglect in causing bill of exceptions to be engrossed.
63. Extension of time—For preparation of bill—Not an estoppel.
- 64, 65. Same—Of filing proposed bill—Second default.
66. Same—To settle and allow bill.
67. Failure to deliver—Court may relieve from.
68. Failure to serve proposed bill—Loss of right.
69. Filing—Delay in.
70. Form—Draft of bill must be authenticated.
- 71, 72. Full statement of evidence unnecessary—In general.
73. Same—Skeleton bill—Amendments in general terms.
74. Same—Striking out redundant matter.
75. In default case—Incorporation of evidence in transcript.
76. Instructions—Failure to show at whose request—Presumption.

77. Mandatory provision.
78. Motion for new trial—Order denying—Bill of exceptions.
79. Same—Motion pending—Ground for refusal to settle bill.
80. Necessity of filing.
81. New trial order—Bill of exceptions—Time for preparing bill.
82. Parties upon whom bill must be served—In general.
83. Same—"Adverse parties."
84. Same—Interlocutory decree final by affirmance.
- 85, 86. Preparation and settlement—As to generally.
- 87, 88. Same—As to time of.
- 89-92. Same—Extension of time.
93. Same—Same—May be made by stipulation.
- 94, 95. Same—Same—Order made after expiration of statutory period.
- 96-101. Same—Failure to settle bill of exceptions within time specified.
102. Same—Same—Waiver of delay.
103. Same—Notice of entry of decision.
104. Same—Same—Judgment rendered by trial court according to directions of supreme court.
- 105, 106. Presentation for settlement—In general.
- 107-109. Same—Must be presented to judge who made ruling.
- 110, 111. Same—Same—Duty to settle.
112. Same—Notice to adverse parties at time of delivery of bill of exceptions to clerk.
- 113, 114. Same—Same—Designation of time for settlement when court was in session and both parties were present.
115. Same—Same—Same—When attorneys for both parties were actually present at time of settlement.
116. Same—Failure to serve copy of notice of time and place of settlement.
117. Same—Same—If amendments to bill are allowed.
- 118, 119. Same—Same—Waiver of notice.
120. Same—Same—Waiver of objection to notice.
121. Same—Request to settle.
122. Same—Same—Delivery of proposed bill and amendments to clerk.
123. Same—Time for presentation and settlement.
- 124-126. Same—Same—Failure to present proposed amendments.
- 127, 128. Same—Same—Failure to give five days' notice of presentment.
129. Same—Same—If no amendments were served.
- 130-132. Same—Same—Relief from delay.
133. Same—Same—Waiver of delay.
134. Record on appeal—Appeal before motion for new trial disposed of—Transmission to appellate court—Procedure.
- 135-137. Same—Contents of.
- 138, 139. Refusal to settle bill—Can not be relieved on appeal.
- 140-142. Same—Mandamus lies to compel judge to settle bill of exceptions.
143. Same—Same—Answer to alternative writ of mandate.
144. Same—Same—Application for mandamus made more than five months after refusal.
- 145, 146. Same—Same—Petition for mandamus.
147. Same—Policy of the law.
148. Same—Same—Policy of law as to doubtful cases.
149. Same—Service of proposed amendments by mail.
150. Service of engrossed bill.
151. Settled under provisions of above section.
- 152-155. Settlement of bill—In general.
156. Signature—As to necessity for.
157. Signing and certifying bill—Refusal of judge.
158. Same—Same—Incorporation of documents not accessible to appellant.
- 159, 160. Specifications of errors—Not required.
161. Statement on motion for new trial—Failure of service on adverse parties.
162. Striking out redundant and useless matter.
163. Same—Additional costs.
164. Same—Redundant matter disregarded.
165. Same—Setting up will twice.
166. Same—Things which did not transpire in court.
167. Same—Time of making demand—Termination of new-trial proceeding—Failure of court to act on motion.
168. Same—Same—Written notice.
169. Unauthenticated bill of exceptions—Can not be considered.
170. Use of bill—By other than person making.
171. Waiver of notice—By one adverse parties—Does not affect other adverse party.
172. What constitutes bill—In general.
173. Same—Certificate of judge.
174. Same—Purpose for which settled.

175. Same—Statement.

176. When proper—Appeal from order directing conveyance.

177. When right of party to have bill is in doubt.

As to time to serve notice of motion for new trial, see, post, § 659 and note.

1. "Adverse party"—As to who is.—Held to be "every party whose interest in the subject-matter of the appeal is adverse to or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken."—*Estate of Young*, 149 Cal. 175, 85 Pac. 145. See *Senter v. De Bernal*, 38 Cal. 637; *O'Kane v. Daly*, 63 Cal. 319; *Williams v. Santa Clara Min. Assoc.*, 66 Cal. 195, 5 Pac. 85; *Randall v. Hunter*, 69 Cal. 80, 10 Pac. 130; *In Matter Castle Dome Min. Co.*, 79 Cal. 246, 249, 21 Pac. 746; *Harper v. Hildreth*, 99 Cal. 267, 33 Pac. 1103; *De Arnaz v. Jaynes*, 4 Cal. Unrep. 226, 34 Pac. 223; *Lancaster v. Maxwell*, 103 Cal. 67, 36 Pac. 951; *Vincent v. Collins*, 122 Cal. 390, 55 Pac. 129; *Estate of Scott*, 124 Cal. 671, 57 Pac. 654; *Elliott v. Superior Court*, 144 Cal. 406, 103 Am. St. Rep. 102, 77 Pac. 1109; *Johnson v. Phenix Ins. Co.*, 146 Cal. 571, 575, 80 Pac. 719; *Bell v. San Francisco Sav. Union*, 153 Cal. 71, 94 Pac. 228; *Ford v. Cannon*, 5 Cal. App. 187, 89 Pac. 1072; *Ford & Sanborn v. Braslan Seed Growers Co.*, 10 Cal. App. 762, 765, 103 Pac. 946.

2. Alternative method of appeal—Sections 941a-941c repealed in 1921. — The taking of an appeal under the provisions of sections 941a et seq. does not dispense with the preparation of a bill of exceptions to be used upon such appeal in the manner prescribed in this and the succeeding sections.—*Ford & Sanborn Co. v. Braslan Seed Growers Co.*, 10 Cal. App. 762, 766, 103 Pac. 946.

3. Same—Defective record—Not regarded as bill of exceptions.—In a case in which an appeal is taken by the alternative method provided for by sections 953a to 953c, post, and the transcript is prepared by the trial judge from his own minutes, certified in usual form, this defective transcript can not be regarded as a bill of exceptions within the contemplation of the above section, notwithstanding the fact that the judge certified as to its correctness.—*Clemens v. Gregg*, 34 Cal. App. 272, 167 Pac. 299.

4. Amendment of 1907—As to service on adverse party.—Failure to serve a bill of exceptions upon the adverse party, after it has been settled, engrossed and certified, as provided by the amendment of 1907, will not warrant striking it from the record on appeal where there is no claim or suggestion that the bill as settled and certified and printed in transcript on appeal is in any respect incorrect, unfair or incomplete.—*Smith v. Goethe*, 159 Cal. 629, 115 Pac. 223.

5. Amendments which may be proposed to draft—In general.—Amendments which may be proposed to draft of bill of excep-

tions relate to evidence or other matters authorized to be stated in bill for purpose of explaining objection taken and do not include exceptions taken by party proposing amendments or any evidence or other matter necessary to explain same.—In matter of *Gates*, 90 Cal. 257, 259, 27 Pac. 195.

As to amendment of bill on petition to supreme court, see, post, § 652 and note.

6. Same—Amendment by trial judge after appeal had been taken by insertion of particulars of insufficiency of evidence was proper where appeal was from decision made before bill of exceptions was settled.—*Estate of Lamb*, 95 Cal. 397, 408, 29 Am. St. Rep. 121, 30 Pac. 568.

7. Same—Amendment on appeal.—Bill of exceptions authenticated by trial court can not be amended on appeal.—*County of Mendocino v. Peters*, 1 Cal. App. 576, 578, 82 Pac. 1122. See *Bonds v. Hickman*, 29 Cal. 461, 465; *Boston v. Haynes*, 31 Cal. 107; *Satterlee v. Bliss*, 36 Cal. 489, 521; *Boyd v. Burrell*, 60 Cal. 280, 284; *Warren v. Hopkins*, 110 Cal. 506, 509, 42 Pac. 986.

As to amendment on petition to supreme court to settle, see, post, § 652 and note pars. 4-8.

8. Same—Condensing narrative form.—It is the duty of the judge to settle a bill of exceptions when properly presented, and if it contains redundant or useless matter it is his duty to strike it out or order it to be stricken out whether the parties consent thereto or not, or to make the statement truly represent the case, and hence it is error to refuse to permit an amendment to the statement which embodied the reporter's notes by condensing the narrative form or in any other particular.—*City of Santa Ana v. Ballard*, 126 Cal. 677, 678, 59 Pac. 133.

9. Same—Determination of judge who tried and heard case is final as to whether matter which is proposed by way of amendments to bill of exceptions shall be allowed, no mode of review being provided.—In matter of *Gates*, 90 Cal. 257, 259, 27 Pac. 195.

10. Same—Failure of respondent to propose amendments to draft of bill which had been proposed by appellant does not preclude judge from making same conform to facts.—*Hyde v. Boyle*, 89 Cal. 590, 591, 26 Pac. 1092.

11. Same—Insertion in engrossed bill.—Where amendments proposed by respondent to proposed bill of exceptions are merely attached thereto and not inserted in their proper place in bill of exceptions as engrossed, bill of exceptions can not be considered on appeal.—*Fritsch v. Stampff*, 117 Cal. 441, 442, 49 Pac. 559. See *Marlow v. Marsh*, 9 Cal. 259; *Skillman v. Riley*, 10 Cal. 300; *Baldwin v. Ferre*, 23 Cal. 461; *Kimball v. Semple*, 31 Cal. 657.

12. Same—Matter to obviate error.—If in proposed draft for bill of exceptions there is inserted ruling of court deemed by party

preparing same to be erroneous, it is duty of opposite party to present in his amendment any matters which would obviate apparent error, and it must be assumed that judge in settling bill has caused to be inserted therein all matter which is relevant to his ruling or which will explain same.—*Bedan v. Turney*, 99 Cal. 649, 651, 34 Pac. 442.

13. Same—Service of by mail under the provisions of sections 1012 and 1013, post, party being given a certain number of days in which to object, etc., is entitled to one additional day for each twenty-five miles distance between the place where deposited in the post office and the place to which addressed.—*Prefumo v. Russell*, 148 Cal. 451, 113 Am. St. Rep. 301, 7 Ann. Cas. 704, 83 Pac. 810.

14. Same—Same—Acknowledgment by letter of receipt of proposed amendment to a proposed bill of exceptions does not make the service of the proposed amendment personal, so as to deprive of the extended time provided for in section 1013, post.—*Prefuma v. Russell*, 148 Cal. 451, 113 Am. St. Rep. 301, 7 Ann. Cas. 704, 83 Pac. 810.

15. And statement of the case may be incorporated in the same paper.—*Martin v. Southern Pacific Co.*, 150 Cal. 131, 88 Pac. 701.

16. Authentication and certification.—Where upon an appeal from an order denying a motion for a new trial the notice of intention to move for a new trial has not been authenticated, the order can not be reviewed, even though the notice is printed in the transcript.—*Lincoln County Bank v. Fetterman*, 170 Cal. 357, 149 Pac. 811.

As to certificate of judge, see pars. 18-21, this note.

17. Upon an appeal from a judgment foreclosing a mortgage, intermediate orders and papers included in the record not certified to by the trial judge can not be considered.—*Dietz v. Scott*, 27 Cal. App. 320, 149 Pac. 775.

18. Certificate—Failure to produce certificate that bill of exceptions had been settled and allowed until bills had been filed and appeal taken, argument on appeal made and motion to strike out bills made, is too late, and bills must be stricken out.—*Keller v. Lewis*, 56 Cal. 466, 469.

As to authentication and certificate, see pars. 16, 17, this note.

19. Same—Filing settled and engrossed bill before it was certified by inadvertence of judge or referee does not destroy right of appellant to proper certificate, but such filing will be considered as premature and unauthorized, and if timely request is made for certificate of allowance it should be granted and bill refiled.—*Jackson v. Puget Sound L. Co.*, 115 Cal. 632, 635, 47 Pac. 603.

20. Distinguishing: *Keller v. Lewis*, 56 Cal. 466, 469; *Adams v. Dohrmann*, 63 Cal. 417, 419.

21. Same—Unauthenticated bill of exceptions consisting entirely of specifications of errors will not be considered.—*Houghton v. Trumbo*, 103 Cal. 239, 240, 37 Pac. 152.

22. Construction of section—As to sufficiency of compliance.—A sufficient compliance with above sections and section 659, post, in preparing and presenting a statement of the case on a motion for a new trial, is had where the moving party leaves his proposed statement with the clerk and the adverse party thereafter likewise leaves his proposed amendments thereto, and the judge subsequently receives all of the papers, either from the clerk or from the judge in whose place he presided at the trial, and thereupon in open court fixes a day for the settlement of the statement in the presence of both counsel, notwithstanding the failure of the moving party to give the notice of intention of presentation of the statement to the judge as provided by such sections.—*Keating v. Keating*, 169 Cal. 754, 147 Pac. 974.

23. Same—Applicable where order excepted to is appealable order as well as where ruling could only be reviewed on an appeal from final judgment.—*Flagg v. Putterbaugh*, 98 Cal. 134, 136, 32 Pac. 863.

24. Same—Does not relate to exceptions taken after trial and judgment, but only to exceptions taken at trial.—*County of Sacramento v. Central Pac. R. Co.*, 61 Cal. 250, 255.

25. Order made after rendition of judgment, unless founded on affidavits, can be reviewed only by statement on appeal, and in no case by bill of exceptions under Practice Act.—*Caulfield v. Doe*, 45 Cal. 221, 222.

26. Bill of exceptions taken to any decision made after judgment may be presented and settled afterwards as provided by this section.—*Tregambo v. Comanche M. & M. Co.*, 57 Cal. 501, 505.

27. Same—Includes exceptions taken in course of proceedings before trial has commenced, as an exception taken to decision rendered on motion to set aside default and not limited to exceptions taken at trial of cause.—*Tregambo v. Comanche M. & M. Co.*, 57 Cal. 501, 504, 505.

28. Same—Includes persons claiming as devisees under will in opposing application for partial distribution; they are "adverse" parties within meaning of section and must be served with draft of bill of exceptions.—*Estate of Young*, 149 Cal. 173, 85 Pac. 145.

29. Same—Not retroactive.—*Caulfield v. Doe*, 45 Cal. 221, 222.

30. Same—Provides for settlement of bills of exception based on errors of law occurring at trial of cause, and this may be done after entry of judgment and after judgment-roll has already been made up.—*Estate of Gordon*, 142 Cal. 125, 134, 75 Pac. 672.

31. Same—Provides how all papers, proceedings, and exceptions not otherwise part of a record may be made such by bill of ex-

ceptions.—*Herrlich v. McDonald*, 80 Cal. 472, 476, 22 Pac. 299.

As to papers to be incorporated, see, ante, § 648 and note.

32. Same—"Trial"—Meaning of.—The word "trial," in this section, means trial of issue of law as well as trial of issue of fact.—*Redington v. Cornwell*, 90 Cal. 49, 62, 27 Pac. 40.

33. Contents of.—Exception to ruling on motion for new trial must appear in stating or substantive part of bill of exceptions, and bill must affirmatively show that ruling assigned as error actually took place at trial and was excepted to.—*Craig v. Hesperia L. & W. Co.*, 107 Cal. 675, 40 Pac. 1057; *Hanna v. De Garmo*, 140 Cal. 172, 174, 73 Pac. 830.

34. No exception appearing on record it must be presumed that no exception was taken to an order granting nonsuit.—*Flashner v. Waldron*, 86 Cal. 211, 24 Pac. 1063.

35. Mere fact that exception was referred to in assignment of error which counsel annexed to bill of exceptions is not sufficient.—*Craig v. Hesperia L. & W. Co.*, 107 Cal. 675, 40 Pac. 1057.

36. Same—Irrelevant matters incorporated into bill of exceptions and matters which show upon face of bill that they were not presented to court at time it made its rulings or could not have any weight in determining correctness of such rulings will not be considered by supreme court.—*Hyde v. Boyle*, 89 Cal. 590, 592, 26 Pac. 1092.

37. Same—Prayer or request that it be allowed or certified as bill of exceptions must be contained in draft of proposed bill of exceptions.—*Landers v. Lawler*, 84 Cal. 547, 549, 24 Pac. 307.

As to papers to be included in bill, see, ante, § 648 and note.

38. Same—Reference to pleadings on hearing of motion for new trial need not be presented by bill of exceptions.—*Southern Pac. R. Co. v. Superior Court*, 105 Cal. 84, 86, 38 Pac. 627.

39. Same—Specification of particular errors of law on which appellant will rely is not necessary in bill of exceptions.—*Reay v. Butler*, 69 Cal. 572, 11 Pac. 463; *Shadburne v. Daly*, 76 Cal. 355, 356, 18 Pac. 403; *Hagman v. Williams*, 88 Cal. 146, 151, 25 Pac. 11; *Barfield v. South Side I. Co.*, 111 Cal. 118, 119, 43 Pac. 406; *Snell v. Payne*, 115 Cal. 218, 220, 46 Pac. 1069; *Smith v. Smith*, 119 Cal. 183, 185, 48 Pac. 730, 51 Pac. 183; *Hauper v. Gordon*, 128 Cal. 489, 491, 61 Pac. 84.

40. Specification of particular errors on which moving party will rely though an essential part of statement is act of attorney annexed to bill of exceptions after trial.—*Braverman v. Fresno C. & I. Co.*, 101 Cal. 644, 645, 36 Pac. 386.

As to specification of particulars of insufficiency of evidence, see, ante, § 648 and note.

41. Same—Statements of fact in bill of exceptions are made only to explain exceptions which it shows were taken.—*Estate of Carpenter*, 127 Cal. 582, 585, 60 Pac. 162.

As to statements of evidence in bill, see, ante, § 648 and note.

42. Matters to which specifications of error point, must be found in substantive portion of bill of exceptions, otherwise they can not be considered; exceptions incorporated in assignment of errors coupled with statement that it was given against objection of appellant, can not be considered.—*Braverman v. Fresno C. & I. Co.*, 101 Cal. 644, 645, 36 Pac. 386. See *People v. Faulke*, 96 Cal. 17, 19, 30 Pac. 837.

43. Bill of exceptions when necessary must always contain statement of facts which will authorize review of action of court below, and hence an order which is not deemed excepted to must be shown by bill of exceptions to come within statutory exception that it has been made in absence of party.—*Lamet v. Miller*, 2 Cal. Unrep. 679, 11 Pac. 744, 745.

44. Delay in service of proposed bill of exceptions—Effect of.—Written notice of entry of order denying a motion for a new trial is waived by the making of an application for an order setting aside the order denying the motion on the ground of excusable neglect of counsel, and a proposed bill of exceptions not served within ten days after the making of such application is too late, in the absence of any order extending the time of such service.—*Figliera v. Dewhirst*, 32 Cal. App. 245, 162 Pac. 655.

As to delay in filing, see par. 69, this note.

45. The mere pendency of a motion by appellant to amend the findings, subsequently made, could not operate to extend the ten days given herein within which to serve his bill.—*Hole v. Takekawa*, 165 Cal. 372, 132 Pac. 445.

46. Delay in serving a bill of exceptions may be cured by the voluntary consent and waiver of the parties not served.—*Title Ins. & Trust Co. v. California Devel. Co.*, 171 Cal. 174, 152 Pac. 542.

47. A bill of exceptions which has not been served upon some of the parties may be considered with a view to the modification of the judgment so far as the rights of those parties not served are not affected.—*Title Ins. & Trust Co. v. California Devel. Co.*, 171 Cal. 174, 152 Pac. 542.

48. A bill of exceptions, even though not served upon certain adverse parties, may be considered and the judgment modified in so far as such modification may be ordered without impairing the rights of the parties not served.—*Title Ins. & Trust Co. v. California Devel. Co.*, 171 Cal. 174, 152 Pac. 542.

49. The failure to make timely service of the bill of exceptions to be used on a motion for a new trial does not affect the jurisdiction of the subject-matter, and

such delay may be cured by the voluntary consent and waiver of the parties not served.—*Title Ins. & Trust Co. v. California Devel. Co.*, 171 Cal. 174, 152 Pac. 542.

50. An appeal taken by the heirs of a deceased incompetent from an order settling the final account of the guardian of his estate will not be dismissed because of the failure of the appellants to serve upon the administrator their proposed bill of exceptions, or a copy of the engrossed bill, or a copy of the transcript on appeal.—*Estate of Clanton*, 171 Cal. 381, 153 Pac. 459.

51. Upon an appeal from an order denying a new trial, the objection can not be raised for the first time that the bill of exceptions used on the hearing of the motion was not served within the time allowed by law, where the respondent proposed amendments to the bill, and raised no objection at the time of its settlement.—*Lantz v. Cole*, 172 Cal. 245, 156 Pac. 45.

52. **Effect of certification.**—Is an adjudication that the bill has been correctly engrossed.—*Merced Bank v. Price*, 152 Cal. 700, 93 Pac. 866.

As to certificate, see par. 18, this note.

53. **Effect of filing.**—When filed an engrossed and certified bill of exceptions becomes the record, and the only record of the court in the matter.—*Merced Bank v. Price*, 152 Cal. 699, 93 Pac. 866.

As to filing and delay in filing, see pars. 19, 20, 41-45, this note.

54. **Engrossment—As to generally.**—Bill of exceptions is not settled until it has been certified as correct and this can not be done until it has been engrossed, if engrossing be necessary.—*Houghton v. Superior Court*, 128 Cal. 352, 356, 60 Pac. 972.

55. **Distinguished:** As having been used as an answer to contention that particular bill therein questioned should have been engrossed before it was settled, and it was not meant thereby that until actual certification by judge no separate bill of exceptions or statement has been made, and that it is open so as to have inserted in it any objection or motion which party can make; but on contrary, when matter of settlement is taken up by judge and it is determined by him what should be included in statement or bill of exceptions, it is actually settled, notwithstanding he may direct it to be engrossed and does not finally certify it as corrected and allowed until engrossment is made.—*Ryer v. Rio L. & I. Co.*, 30 Cal. Dec. 138, 139, 82 Pac. 62.

56. **Same—Correct engrossment, question of how determined.**—Whether a bill of exceptions has been correctly engrossed so as to embody all that the judge, at the time of actual settlement, ordered incorporated therein, is a matter to be determined by the judge, when the bill is presented for certification.—*Merced Bank v. Price*, 152 Cal. 699, 93 Pac. 866, citing *Ryer v. Rio*

Land & Imp. Co., 147 Cal. 462, 465, 82 Pac. 62.

As to determination by trial judge being final, see par. 57, this note.

57. **Same—Determination of judge as to whether bill of exceptions is correctly engrossed as settled is final.**—*Ryer v. Rio Land & Imp. Co.*, 147 Cal. 462, 82 Pac. 62.

See par. 56, this note.

58. **Same—Failure to serve engrossed bill on attorney for opposing party before presentation to judge would not justify an absolute refusal to certify, though it might justify refusal to certify until counsel might examine it.**—*Ryer v. Rio Land & Imp. Co.*, 147 Cal. 462, 82 Pac. 62.

59. **Same—Leaving engrossed bill with deputy clerk without request to present it to judge on his return for his signature is not sufficient to relieve party of necessity of presenting such bill to judge for his signature.**—*Miller v. American Central Ins. Co.*, 1 Cal. App. 751, 753, 83 Pac. 289.

60. **Same—Unexplained neglect in causing bill of exceptions to be engrossed, for five months where parties have agreed on form and contents of bill, was inexcusable, it being duty of moving party to have bill engrossed and presented to judge without unreasonable delay.**—*Miller v. Queen Ins. Co.*, 1 Cal. App. 749, 750, 83 Pac. 287.

61. Refusal to sign engrossed bill of exceptions where after matter of settlement had been taken under advisement, moving party had actual knowledge of action of court in settling it and failed to proceed to have it engrossed and presented for period of five months, is not an abuse of discretion.—*Galbraith v. Lowe*, 142 Cal. 295, 297, 75 Pac. 831.

62. Whether party has exercised due diligence in causing bill of exceptions to be engrossed after it was settled, or in presenting it to judge for his signature after it has been engrossed, is to be determined by judge under circumstances of each case, and in absence of abuse of discretion his determination will be accepted as correct and conclusive.—*Miller v. American Cent. Ins. Co.*, 1 Cal. App. 751, 753, 83 Pac. 289. See *Galbraith v. Lowe*, 142 Cal. 295, 75 Pac. 831.

63. **Extension of time—For preparation of bill—Not an estoppel.**—In a case in which a litigant contemplated an appeal upon a bill of exceptions as prescribed in the above section, and took steps to obtain an extension of time for the preparation thereof, an order of the court, made upon his application, extending the time within which to prepare a bill of exceptions to be used on appeal, could not deprive such litigant of the rights given by section 953a, post, to bring upon the record in the manner therein prescribed.—*Brown v. Superior Court*, 175 Cal. 141, 165 Pac. 429.

64. **Same—Of filing proposed bill—Second default.**—Where upon an appeal from the

judgment appellant failed to serve his bill of exceptions within time, and upon application under section 473 of the Code of Civil Procedure the court expressly allowed a new bill of exceptions to be proposed and served, and fixed the time for amendments thereto, but the appellant, imprudently relying upon a stipulation with respondent, which was superseded by such order, suffered another default, it is held that it can not be said that it was an abuse of discretion to deny relief from such second default, there being no excusable neglect or mistake in non-compliance with the first order granting relief, which it was his duty to observe.—*Smith v. Riverside Groves & Water Co.*, 19 Cal. App. 165, 124 Pac. 870.

65. There being no proper bill of exceptions than can be considered upon the appeal from the judgment, and the bill of exceptions settled upon appeal from the order refusing to vacate a second default in the settlement of a bill of exceptions for use on appeal from the judgment showing no ground of appeal from such order, both the judgment and the order appealed from must be affirmed.—*Smith v. Riverside Groves & Water Co.*, 19 Cal. App. 165, 124 Pac. 870.

66. Same.—To settle and allow bill.—On appeal from a divorce judgment, where the respondent objects to the consideration of the bill of exceptions on the ground that it was not settled and allowed in time, in the absence of a showing to the contrary and in support of the action of the trial court in settling and allowing the bill, it will be presumed that the time to settle and allow was extended under the provisions of section 1054, post.—*Sheppard v. Sheppard*, 15 Cal. App. 616, 115 Pac. 751.

As to effect on the bill of exceptions of the judge's neglect to sign within the time allowed by law, see note Ann. Cas. 1913A. 914.

67. Failure to deliver.—Court may relieve from.—The trial court may, by order, relieve a party from the failure to deliver a proposed bill of exceptions and the proposed amendments thereto to the clerk for the judge within the time required by this section, if they were mailed to the clerk in due time and did not reach him because they were lost in transmission through the mail.—*Long v. Long*, 162 Cal. 427, 428, 122 Pac. 1077.

68. Failure to serve proposed bill.—Loss of right.—In a case in which there has been no attempt to comply with the provisions of the above section requiring that unless the time for so doing has been extended, the draft of a bill of exceptions shall be served upon the adverse party within ten days after notice of decision denying motion, and is an entire loss of right to settlement of a bill of exceptions unless he be relieved on proper application under the provisions of section 473, ante, on account of mistake, inadvertence, surprise, or inexcusable neglect.—*McArthur v. Packston*,

39 Cal. App. 608, 179 Pac. 521, following the doctrine in *Smith v. Solomon*, 84 Cal. 537, 24 Pac. 286; *Whipple v. Hopkins*, 119 Cal. 349, 51 Pac. 535; *Moultrie v. Tarpio*, 147 Cal. 376, 81 Pac. 1112.

69. Filing.—Delay in.—Under last clause of this section, whether delay in filing bill of exceptions was unreasonable was for lower court to determine, and such determination will not be reviewed in absence of bill of exceptions.—*Jaffe v. Lillenthal*, 101 Cal. 175, 177, 35 Pac. 636.

As to delay in service of bill, see pars. 44-51, this note.

As to necessity of filing, see par. 80, this note.

As to what constitutes filing bill of exceptions, see note 15 Am. St. Rep. 297.

70. Form.—Draft of bill must be authenticated either by signature or indorsement of attorney or party if he appear in person.—*Landers v. Lawler*, 84 Cal. 547, 549, 24 Pac. 307.

As to skeleton bill, see, ante, § 648 and note.

71. Full statement of evidence unnecessary.—In general.—It is not necessary, in preparing a statement or bill of exceptions for use in this court, to give the evidence in full, where the question to be presented is solely as to the sufficiency of conflicting evidence to sustain a particular finding. All that is required is that a sufficient amount of the evidence be inserted bearing upon each side of the question to show a substantial conflict. It was never intended that the reporter's notes should constitute a bill of exceptions, and a judge would be justified in refusing to settle a bill presented in that form.—*Cripe v. Unangst*, 20 Cal. App. 75, 128 Pac. 345, 346.

72. Where evidence is omitted which is material and upon which findings are based, all that is necessary is to give so much of the evidence as to each of the witnesses, naming them, as would be sufficient to show in substance all of the evidence bearing upon the questions presented by the findings.—*Cripe v. Unangst*, 20 Cal. App. 75, 128 Pac. 345, 346.

73. Same.—Skeleton bill.—Amendments in general terms.—Where an appellant presents a mere skeleton bill of exceptions, he can not complain if the amendments are in general terms.—*Cripe v. Unangst*, 20 Cal. App. 75, 128 Pac. 345, 346.

74. Same.—Striking out redundant matter.—Aside from the question of expense to the litigants, there are code provisions which direct the striking out of all redundant matter, that only such of the evidence or other matter necessary to explain the statement, and no more, shall be incorporated, and that the exceptions may be presented as briefly as possible, all of which indicates that it was intended as well that a reviewing court should not be required to go through a mass of unimportant, re-

dundant and unnecessary matter upon a review of the case. It was not a proper exercise of the discretion vested in the trial judge to require a transcription of the full reporter's notes as a condition for settling said statement, merely because, by reason of the lapse of time, he had forgotten many important matters, and, for that reason, a peremptory writ should issue requiring him to settle the same.—*Cripe v. Unangst*, 20 Cal. App. 75, 128 Pac. 345, 346.

75. In default case—Incorporation of evidence in transcript.—There being no issue of fact in a default case, the appellant is not entitled to have the evidence incorporated in the transcript on appeal, and the mere fact that the evidence is inserted in the record does not warrant the court in reviewing or considering it for any purpose.—*Crackel v. Crackel*, 17 Cal. App. 601, 121 Pac. 295.

76. Instructions—Failure to show at whose request—Presumption.—Where the bill fails to show at whose request the instructions complained of were given it will be presumed that they were given at appellant's request.—*Skrocki v. Stahl*, 14 Cal. App. 7, 110 Pac. 957.

77. Mandatory provision.—The provisions of this section are not merely directory so far as they relate to service of notice.—*Ford v. Braslan Seed Growers Co.*, 10 Cal. App. 762, 768, 103 Pac. 946.

78. Motion for new trial—Order denying—Bill of exceptions.—The provisions of the above section and the following sections providing as to procedure on appeal from an order denying a motion for a new trial do not abrogate the right to resort to a bill of exceptions in support of such motion, where it is grounded upon errors of law occurring during the trial.—*Nathan v. Porter*, 36 Cal. App. 356, 172 Pac. 170.

79. Same—Motion pending—Ground for refusal to settle bill.—In a case in which a trial judge refused to settle the bill of exceptions solely on the ground that the attempted appeal was not taken within the time allowed by law, and the further ground that the proposed bill was not served in time, such refusal is error where it was pending a motion for a new trial and the appeal was taken more than sixty days after the entry of the judgment but within thirty days after the order denying the new trial was entered under the provisions of the above section and section 939, post.—*Estate of O'Neill*, 183 Cal. 585, sub nom. *Hardiman v. Church*, 191 Pac. 1106.

80. Necessity for filing.—When engrossed and certified, the bill of exceptions must be filed with the clerk.—*Merced Bank v. Price*, 152 Cal. 699, 93 Pac. 866.

As to delay in filing, see par. 69, this note.

81. New trial order—Bill of exceptions—Time for preparing bill.—In a case in which a notice of intention to move for a new trial is filed in an action for the probate of

a will, and the time required under the provisions of the above section for the preparation and serving of the bill of exceptions is extended from February 20 to March 1, where the bill of exceptions is served on March 1, it will be in time.—*Estate of Bergland*, 177 Cal. 227, 170 Pac. 400.

82. Parties upon whom bill must be served—In general.—Parties upon whom bill of exceptions must be served on appeal from decree in partition are to be determined by appellate court, and hence refusal to settle bill because not served on all parties was improper, and whether bill should have been served on all parties can not be determined until after bill has been settled and brought up to appellate court; and if in opinion of trial judge other parties than those served would be affected by matters set forth in bill of exceptions, their rights can be preserved by stating in his certificate of settlement parties on whom the proposed bill was served or who have participated in its settlement.—*Gutierrez v. Hebbard*, 106 Cal. 167, 170, 39 Pac. 529.

83. Same—"Adverse parties," within meaning of above section, include persons claiming as devisees under will in application for partial distribution.—See *Estate of Young*, 149 Cal. 173, 85 Pac. 145.

As to adverse parties, see par. 1, this note.

84. Same—Interlocutory decree final by affirmation.—Where an interlocutory decree has become final by its affirmation on appeal, only matters which can be reviewed on appeal from final decree would be such as had intervened subsequent to interlocutory decree, and hence bill of exceptions made after such final decree need be served only on those parties who might be affected by modification of decree.—*Gutierrez v. Hebbard*, 106 Cal. 167, 169, 39 Pac. 529.

85. Preparation and settlement—As to generally.—Appellant is entitled to notice of entry of an order denying relief from a default judgment, and the failure to give such is not excused from the fact of the presence of counsel in court during the argument of the motion.—*Hughes Mfg. & Lumber Co. v. Elliott*, 167 Cal. 494, 140 Pac. 17.

86. The insufficiency of the evidence to sustain the findings can not be considered on appeal from an order denying a new trial, where there is no particular specification in the bill of exceptions which points out the weakness of the testimony as to any of the facts in issue.—*Tingey v. Callahan Construction Co.*, 28 Cal. App. 777, 154 Pac. 28.

87. Same—As to time of.—The time within which bill of exceptions to order of family allowance must be prepared and served is prescribed by this section.—*Leach v. Pierce*, 93 Cal. 614, 623, 29 Pac. 235.

88. Where under this section bill of exceptions is valid which has been settled be-

fore entry of order appealed from, is not determined because it was assumed that bill was settled under section 649, ante.—*Estate of Gordon*, 142 Cal. 125, 134, 75 Pac. 672.

89. **Same—Extension of time.**—Order extending time to serve bill of exceptions stating such time "is hereby extended thirty days," extends such time from expiration of ten days' period from filing of judgment, and not from day of order, and hence where bill of exceptions was filed within such thirty days from expiration of statutory period, it was in time.—*Emeric v. Alvarado*, 64 Cal. 529, 541, 2 Pac. 418.

As to extension of time within which to prepare bill of exceptions, see, post, § 1054 and note.

90. Party is not bound to present his bill of exceptions at time of ruling under section 649, ante, but had right to have it settled at any time within limit provided by this section, and within such further time as court might grant by an order made before expiration of such time, and hence where bill of exceptions was presented within time provided by this section, it was in time.—*Tregambo v. Comanche M. & M. Co.*, 57 Cal. 501, 504, 505. See *Berry v. San Francisco & N. P. R. Co.*, 50 Cal. 435; *Higgins v. Mahoney*, 50 Cal. 444.

91. Order extending time for preparing and serving draft of bill of exceptions is to be considered as giving defendant time specified in addition to ten days allowed by this section.—*Cameron v. Arcata M. R. R. Co.*, 129 Cal. 279, 281, 61 Pac. 955.

92. Provision that draft of bill of exceptions may be prepared within ten days after entry of judgment, or such further time as court may allow, does not authorize court to grant an indefinite extension of time for preparation and serving of draft, but is to be read in connection with restriction in section 1054, post, on amount of time which may be allowed by court.—*Cameron v. Arcata M. R. R. Co.*, 129 Cal. 279, 292, 61 Pac. 955.

93. **Same—Same—May be made by stipulation of attorneys for parties.**—*Simpson v. Budd*, 91 Cal. 488, 489, 27 Pac. 758.

94. **Same—Same—Order made after expiration of statutory period within which to propose bill of exceptions extending time for such proposal is ineffectual and void.**—*Estate of Clary*, 112 Cal. 292, 295, 44 Pac. 569.

95. But not when extension is made by stipulation of attorneys for parties.—*Simpson v. Budd*, 91 Cal. 488, 489, 27 Pac. 758.

96. **Same—Failure to settle bill of exceptions within time specified by law authorized dismissal of appeal where in addition there is unexcused failure to file transcript on appeal within time prescribed by rules of appellate court.**—*Smith v. Solomon*, 84 Cal. 537, 539, 24 Pac. 286.

97. Failure to prepare bill of exceptions within time allowed by statute or any au-

thorized extension thereof justifies refusal to settle proposed bill, as right to have it settled was thereby lost.—*Estate of Clary*, 112 Cal. 292, 295, 44 Pac. 569.

98. Bill of exceptions not prepared and served within time allowed by law must be disregarded.—*Kelleher v. Creclat*, 89 Cal. 38, 40, 26 Pac. 619.

99. Bill of exceptions filed two months after order appealed from was entered in minutes of court can not be considered.—*Pereira v. State Sav. Bank*, 128 Cal. 45, 46, 60 Pac. 524.

100. Filing bill of exceptions more than nine years after ruling was taken is too late.—*Estate of Carpenter*, 127 Cal. 582, 584, 60 Pac. 162.

101. Failure to prepare and serve proposed bill of exceptions until twenty days after order dissolving writ of attachment had been made, renders order of settlement of bill error.—*Smith v. Jordan*, 122 Cal. 68, 69, 54 Pac. 368.

102. **Same—Same—Waiver of delay.**—Where no objection was made when proposed bill and amended bill were served, that they were not made in time, objection on appeal will be disregarded, though they were not made within time provided by law, and no order had been made extending time.—*Hungarian Hill G. M. Co. v. Moses*, 58 Cal. 168, 175.

103. **Same—Notice of entry of decision.**—Copy of findings and judgment served on appellants' attorneys after entry of judgment as shown by acknowledgment of service is sufficient notice of entry of judgment so as to require bill of exceptions to be settled within ten days thereafter.—*Kelleher v. Creclat*, 89 Cal. 38, 40, 26 Pac. 619.

104. **Same—Same—Judgment rendered by trial court according to directions of supreme court after case has been appealed is final judgment in case, and hence party has ten days after entry of such judgment in which to have exceptions taken at trial settled.**—*Klauber v. San Diego St. C. Co.*, 98 Cal. 105, 109, 32 Pac. 876.

105. **Presentation for settlement—In general.**—Burden is at all times on moving party in proceedings for new trial to take whatever steps are necessary to enable court to hear its motion.—*Miller v. Queen Ins. Co.*, 1 Cal. App. 749, 750, 83 Pac. 287; *Estate of Depeaux* (erroneously cited in official report as *Depeaux v. Peck*), 118 Cal. 522, 523, 50 Pac. 682.

106. Whether proposed amendments are adopted or not it was duty of moving party to present statement and amendment to judge, and it is not duty of defendant to take any further steps towards settlement of statement.—*Lee Doon v. Tesh*, 131 Cal. 406, 409, 63 Pac. 764.

107. **Same—Must be presented to judge who made ruling whether it was presented at time of ruling or after judgment, and where ruling was made by one judge and**

trial had before another appellant should have two or more bills settled and properly presented for consideration to court on appeal.—*Turner v. Hearst*, 115 Cal. 394, 399, 47 Pac. 129. See *Cummings v. Conlan*, 66 Cal. 403.

108. Bill of exceptions signed by judge who heard motion for new trial and not by judge who tried case can not be considered.—*Pereira v. State Sav. Bank*, 128 Cal. 45, 46, 60 Pac. 524.

109. Settlement of bill of exceptions before another judge than one before whom proceedings were had is improper where bill of exceptions was not one to be used on motion for new trial and it did not appear that former judge was dead or had refused to settle it.—*Estate of Carpenter*, 127 Cal. 582, 584, 60 Pac. 162.

As to settlement by judge after expiration of term, see, post, § 653 and note.

110. Same—Same—Duty to settle.—It is duty of judge to settle statement on motion for new trial and not to make one, and hence where proposed statement is mere pretense and fraud court properly refused to settle it.—*Hearst v. Dennison*, 72 Cal. 227, 228, 13 Pac. 628.

111. Where bill of exceptions submitted does not show an attempt to present such fair and bona fide statement of things as entitles it to be considered and settled as bill of exceptions, writ of mandate will not issue to compel its settlement.—*Pacific L. Assoc. v. Hunt*, 105 Cal. 202, 38 Pac. 635.

112. Same—Notice to adverse parties at time of delivery of bill of exceptions to clerk of his intention to present statement and amendments to judge is not required. Notice given by clerk under this section is sufficient.—*Mellor v. Crouch*, 76 Cal. 594, 595, 596, 18 Pac. 685.

113. Same—Same—Designation of time for settlement when court was in session and both parties were present complies with provision that judge shall designate time at which he will settle bill and clerk shall immediately notify parties of such designation.—*Horton v. Jack*, 115 Cal. 29, 35, 46 Pac. 920.

114. Contention that delivery of proposed statement for new trial and amendments to judgment in presence of opposing counsel and that appointment of day for settlement by judge with notice of such appointment are equivalent to method provided in this section, can not be sustained where notice actually given of day when such statement would be presented for settlement is inconsistent with such contention and when documents were handed to judge no notice had been served on such opposing counsel, who then made objection to proceeding.—*Estate of Kruger*, 130 Cal. 621, 625, 63 Pac. 31.

115. Same—Same—Same—When attorneys for both parties were actually pres-

ent at time of settlement.—Failure of judge to fix time for settlement of bill of exceptions and to give previous notice thereof can not invalidate settlement of bill unless at time objection be made on that ground.—*Horton v. Jack*, 115 Cal. 29, 35, 46 Pac. 920; *Reeve v. Colusa G. & E. Co.*, 30 Cal. Dec. 373, 378.

116. Same—Failure to serve copy of notice of time and place of settlement of bill of exceptions on attorneys of opposite party renders refusal to settle bill proper.—*Gillardo v. Atlantic & Pac. T. Co.*, 9 Cal. 510, 511.

117. Same—Same—If amendments to bill are allowed, bill and amendments may be presented to judge or referee without notice within reasonable time.—*Gay v. Torrance*, 143 Cal. 14, 18, 76 Pac. 717. See *Pendergrass v. Cross*, 73 Cal. 475, 15 Pac. 63; *Houghton v. Superior Court*, 128 Cal. 352, 60 Pac. 972; *Black v. Hilliker*, 130 Cal. 190, 62 Pac. 481.

118. Same—Same—Waiver of notice.—Written notice of presentation of bill of exceptions to court for settlement being for benefit of adverse party may be waived by him, and hence if he consents to time designated by judge for settlement he will not be permitted when that time arrives to say that bill should not be settled because written notice had not been served.—*Hicks v. Masten*, 101 Cal. 651, 653, 36 Pac. 130.

119. Error of clerk in failing to notify counsel of day which had been appointed for settlement of bill of exceptions is waived by presence of counsel at such hearing.—*Reeve v. Colusa G. & E. Co.*, 30 Cal. Dec. 373, 377.

120. Same—Same—Waiver of objection to notice.—Continuance of hearing of settlement of bill of exceptions in amendments without objection that notice of such hearing omitted to state that appellant would present to court amendments offered by respondent as well as proposed bill of exceptions prepared by appellant until hearing after such continuance, waives objection to such notice, as court had jurisdiction of both bill and amendment.—*O'Brien v. O'Brien*, 124 Cal. 422, 425, 57 Pac. 225.

121. Same—Request to settle.—Where original proposed bill of exceptions was signed by attorney and opposing counsel were notified that it was proposed as bill of exceptions, and judge certifies that he was asked to settle and certify it, and that he refused simply because it was not in time, objection that judge was not asked to settle and certify bill cannot be sustained.—*Flagg v. Puterbaugh*, 101 Cal. 583, 584, 36 Pac. 95.

122. Same—Same—Delivery of proposed bill and amendments to clerk for judges not sufficient. It is duty of party to obtain from same judge an order to him setting day for amendment of bill, and other party is not required to move in matter.—*Miller v.*

Queen Ins. Co., 1 Cal. App. 749, 750, 83 Pac. 287.

As to demand to compel judge to sign bill of exceptions, see note 33 Am. Dec. 451.

123. Same—Time for presentation and settlement of all bills of exceptions is fixed by this section.—*Tregambo v. Comanche M. & M. Co.*, 57 Cal. 501, 505; *Prefumo v. Russell*, 148 Cal. 451, 113 Am. St. Rep. 301, 7 Ann. Cas. 704, 83 Pac. 810.

124. Same—Same—Failure to present proposed amendments of bill of exceptions to judge who tried case for settlement within ten days after receiving such amendment upon five days' notice to opposite party justified court in refusing to settle bill.—*Whipple v. Hopkins*, 119 Cal. 349, 351, 51 Pac. 535. See *Henry v. Merguire*, 106 Cal. 142, 39 Pac. 599.

125. Distinguishing *Pendergrass v. Cross*, 73 Cal. 475, 15 Pac. 63, where moving party adopted proposed amendment and there was no occasion to give opposite party notice of settlement.

126. Failure of appellant to file proposed bill of exceptions with amendments thereto with clerk or his deputies or to present them to judge until several months after time limited in this section renders refusal to settle such bill of exceptions proper.—*Gamache v. Budd*, 129 Cal. 554, 555, 62 Pac. 105.

127. Same—Same—Failure to give five days' notice of presentment of proposed bill of exceptions to judge until after expiration of ten days in which such bill may be presented to judge renders subsequent notice too late and settlement of statement by judge thereafter was erroneous.—*Witter v. Andrews*, 122 Cal. 1, 2, 54 Pac. 276.

128. Failure to give notice of intention to ask court to disallow amendment to bill of exceptions and set forth bill as proposed within ten days after service of such amendments renders refusal to settle bill proper where no excuse was offered for not doing so.—*Whipple v. Hopkins*, 119 Cal. 349, 351, 51 Pac. 535.

129. Same—Same—If no amendments were served.—Provision that when amendments are served bill and amendments must be presented for settlement within ten days thereafter, does not apply in case where no amendments were proposed, and hence failure to present proposed bill of exceptions to which no amendments were proposed for settlement within ten days did not justify refusal and no absolute time is limited in which judge may certify bill.—*Houghton v. Superior Court*, 128 Cal. 352, 356, 60 Pac. 972.

130. Same—Same—Relief from delay.—Compliance with requirement that proposed bill and amendments must within ten days thereafter be presented to judge who tried or heard case is essential to right of party to have his bill of exceptions settled, and if he fails to so comply, his right is

gone unless he be relieved from effect of such failure by trial under section 473, ante, on account of mistake, inadvertence, surprise, or excusable neglect, and where more than six months has passed no bill of exceptions could be made effectual for any purpose.—*Moultrie v. Tarpio*, 147 Cal. 376, 81 Pac. 1112.

131. Where court refused to settle bill of exceptions on ground that it was not filed within time prescribed and that no excuse was shown for delay and did not pass on question as to whether presentation of bill had been unnecessarily delayed by engrossment before presentation where no amendments had been asked, and under construction of code that no time was fixed in which bill must be certified where no amendments were proposed, mandamus will issue to compel court to settle such bill.—*Houghton v. Superior Court*, 128 Cal. 352, 356, 60 Pac. 972.

132. That defendant was interested in other causes during time its attorney had occupied in settling bill of exceptions is circumstance to be considered by judge in determining whether there has been undue negligence in settlement of bill.—*Miller v. Queen Ins. Co.*, 1 Cal. App. 749, 750, 83 Pac. 287.

133. Same—Same—Waiver of delay.—Where after service of large number of amendments to proposed bill of exceptions counsel for both parties conferred as to an agreement upon amendment and after reaching partial agreement continued their conference until subsequent day beyond that in which moving party is required to present bill of exceptions and amendments, in case he does not adopt such amendments, and at such adjourned conference attorneys do not agree it was error to refuse to settle bill of exceptions filed four days later in which moving party adopted proposed amendments, that being within reasonable time, and hence mandamus will issue to compel settlement.—*Gay v. Torrance*, 143 Cal. 14, 15, 76 Pac. 717.

134. Record on appeal—Appeal before motion for new trial disposed of—Transmission to appellate court—Procedure.—While the law as now written apparently provides no procedure for transmission to the appellate court the record used as the basis for a motion for a new trial, yet it is thought that in a case where an appeal from a judgment has been rightfully taken in advance of the hearing and determination of the motion, nevertheless, in the absence of such provisions for transmission, it would be permissible, for the purpose of having the cause disposed of on its merits rather than upon a technicality,—to adopt any suitable procedure which, conformable to the spirit of the code, would achieve the desired result.—*Nathan v. Porter*, 36 Cal. App. 356, 172 Pac. 170.

135. Same—Contents of.—Upon an appeal from an order denying a new trial the

insufficiency of the evidence to justify the verdict of the jury or the findings of the court can not be considered, where it appears from the certificate of the trial judge attached to the bill of exceptions that the bill does not contain all the evidence, since it must be presumed in such a case that had all the evidence been presented therein, it would appear therefrom that it was sufficient to justify both the verdict and findings.—*Foster v. Young*, 172 Cal. 317, 156 Pac. 476.

136. Alleged error in refusing to grant a new trial upon the ground of newly discovered evidence likewise can not be considered, where the affidavits presented on the hearing of the motion in support thereof are not incorporated in the record.—*Foster v. Young*, 172 Cal. 317, 156 Pac. 476.

137. Alleged error predicated upon the giving to the jury of certain isolated instructions and in refusing to give certain requested instructions can not be considered on appeal from an order denying a new trial, where the given instructions are not incorporated in the record.—*Foster v. Young*, 172 Cal. 317, 156 Pac. 476.

138. Refusal to settle bill.—Can not be relieved on appeal.—Refusal to settle a bill of exceptions can not be relieved on appeal.—*Hudson v. Hudson*, 129 Cal. 141, 144, 61 Pac. 773; *Whipple v. Hopkins*, 119 Cal. 349, 351, 51 Pac. 535.

As to refusal to settle bill of exceptions as an appealable order, see, post, § 963 and note.

139. Appeal from refusal to settle bill of exceptions when not prepared, see *Stonesifer v. Armstrong*, 86 Cal. 594, 25 Pac. 50; *Stonesifer v. Kilburn*, 94 Cal. 33, 29 Pac. 332.

140. Same.—Mandamus lies to compel judge to settle bill of exceptions or statement where he refuses to sign it or any other bill of exceptions.—*Hearst v. Dennison*, 72 Cal. 227, 229, 13 Pac. 628; *Landers v. Landers*, 82 Cal. 480, 481, 23 Pac. 126; *Tibbets v. Riverside B. Co.*, 97 Cal. 258, 32 Pac. 174; *Hudson v. Hudson*, 129 Cal. 141, 145, 61 Pac. 773; *Miller v. American Cent. Ins. Co.*, 1 Cal. App. 751, 753, 83 Pac. 289.

141. Mandamus as proper remedy to compel judge to settle bill of exceptions when filed in time.—See *Careaga v. Fernald*, 66 Cal. 351, 353, 5 Pac. 615; *Hicks v. Masten*, 101 Cal. 651, 653, 36 Pac. 130.

142. Mandamus to compel court to allow amendment of bill of exceptions as statement.—See *Kruse v. Chester*, 66 Cal. 353, 5 Pac. 613; *Leach v. Pierce*, 93 Cal. 614, 618, 29 Pac. 235; *Tibbets v. Riverside Bank Co.*, 97 Cal. 258, 32 Pac. 174; *Winters v. Buck*, 121 Cal. 279, 53 Pac. 799; *City of Santa Ana v. Ballard*, 126 Cal. 677, 678, 59 Pac. 133.

As to mandamus to compel judge to sign bill of exceptions, see note 40 Am. Dec. 575.

143. Same.—Same.—Answer to alternative writ of mandate when it alleges that respondent has settled, certified, and filed cor-

rect bill of exceptions supreme court will not order reference in order that evidence may be taken to determine whether such bill of exceptions is correct one.—*Thornton v. Hoge*, 84 Cal. 231, 232, 23 Pac. 1112.

144. Same.—Same.—Application for mandamus made more than five months after refusal to settle statement will be denied on ground of laches.—*McConoughey v. Torrence*, 124 Cal. 330, 57 Pac. 81.

145. Same.—Same.—Petition for mandamus to compel court to settle bill of exceptions should allege that proposed bill contained everything that petitioner believed it should contain in order to make it fair and proper draft of bill such as statute requires.—*Walkerley v. Greene*, 104 Cal. 208, 211, 37 Pac. 890.

146. Where petition for mandamus to compel insertion of affidavits in bill of exceptions asked for insertion of one affidavit which could not be properly inserted, petition must be denied though other affidavits should have been inserted.—*Gay v. Torrance*, 145 Cal. 144, 153, 78 Pac. 540.

147. Same.—Policy of the law.—The rule requiring the trial court to resolve doubtful cases in favor of the right of the party to have a bill is based upon the theory that it is the policy of the law to protect the right of appeal, which might be destroyed in certain cases by the refusal of the court to settle a bill.—*Calkins v. Monroe*, 17 Cal. App. 326, 119 Pac. 680.

148. Same.—Same.—Policy of law as to doubtful cases.—The rights of the parties are best subserved by the trial court signing the bill presented, under the rule requiring such settlement in doubtful cases, to the end that the whole matter may be submitted to the appellate court, for an inspection of all the pleadings, reports, and judgment for the better understanding and determination of the questions involved.—*Calkins v. Monroe*, 17 Cal. App. 326, 119 Pac. 680.

149. Same.—Service of proposed amendments by mail and effect of on proponent's right to extension of time, see *Prefumo v. Russell*, 148 Cal. 451, 112 Am. St. Rep. 301, 7 Ann. Cas. 704, 83 Pac. 810.

150. Service of engrossed bill.—The above section, by the amendment of 1907, and prior to the amendment of 1909, required that a bill of exceptions, amendments to which were not agreed to, should be presented to the judge and settled by him, etc., "and upon being certified must within five days thereafter be served upon the adverse party." It then provided for the case where there was no contest in reference to the bill for a presentation to the judge without notice, etc., and that when signed by the judge "must then be filed with the clerk." This section, as it then read, contemplated two proceedings, one in which the adverse party proposes amendments which are contested and subsequently settled on notice to the parties designating the

time for settlement; and another in which there is no controversy in regard to amendments but either no amendments are proposed, or if any such are proposed that they are adopted by the person seeking the settlement of the bill, and the bill is filed with the clerk. It is only with regard to the case where the amendments are not excepted and the bill is settled by the judge after controversy, that the service is required after the settlement of the bill. Where it is settled without controversy, the statute did not require such service.—*Broadbuss v. James*, 13 Cal. App. 478, 479, 110 Pac. 164.

151. Settled under provisions of above section only bill that may be used on an appeal from the judgment.—*Dernham v. Bagley*, 151 Cal. 219, 90 Pac. 543.

152. Settlement of bill—In general.—It is error upon an appeal taken from a judgment entered by the clerk upon the verdict of the jury in an equity case before the signing and filing of findings of fact and the rendition by the court of any judgment therein, to direct the insertion in the bill of exceptions of the ex parte order made subsequent to such judgment vacating the same, the findings of fact and conclusions of law and the judgment based on such findings, for the same are immaterial to such appeal, and, being so, mandamus will not lie to compel the striking of the same from the bill of exceptions.—*Holland v. Superior Court*, 169 Cal. 361, 146 Pac. 878.

153. A statement on motion for a new trial, settled by a judge other than the one who presided at the trial, will not be refused consideration on appeal because of the failure to recite why the statement was not settled by the latter judge, since the presumption of regularity attending official acts of courts and their judges is sufficient to support such action.—*Lincoln v. Sibeck*, 27 Cal. App. 61, 148 Pac. 967.

154. Ordinarily the burden is cast upon the proponents of a bill of exceptions to bring the matter of its settlement to hearing and determination even after the proponents of the bill have left it with its amendments with the clerk for the judge.—*Slye v. Hunt*, 29 Cal. App. 117, 154 Pac. 607.

155. Where upon the hearing of the settlement of a bill of exceptions upon a motion for a new trial, the trial judge after the matter of the settlement had proceeded for some time requested counsel for both sides to confer and attempt to agree on certain of the amendments and report to him as to what could not be agreed upon, and the further hearing of the matter was continued until such report, the court is not justified four months thereafter in refusing to settle the bill on the ground of laches; under such circumstances the judge constituted counsel for both parties as in a sense his aids in the duty which was primarily his own, and by so doing invested each with

the responsibility of reporting back to him their failure to agree upon the bill.—*Slye v. Hunt*, 29 Cal. App. 117, 154 Pac. 607.

156. Signature—As to necessity for.—Engrossed bill of exceptions which was not signed or settled at all can not be considered.—*Pereira v. State Sav. Bank*, 128 Cal. 45, 46, 60 Pac. 524.

157. Signing and certifying bill—Refusal of judge.—Where the engrossed bill of exceptions fails to truly and fully set forth the matters directed to be inserted therein on the settlement thereof, or to correctly exhibit the proceedings which the bill purports to introduce into the record on appeal, the trial judge is justified in refusing to sign and certify the same.—*Galvin v. Hunt*, 153 Cal. 105, 94 Pac. 423.

158. Same—Same—Incorporation of documents not accessible to appellant.—The trial judge is not justified in refusing to sign and certify an engrossed bill solely on the ground that it fails to set out certain documents ordered to be inserted, where the omission was due to the fact that the originals of such documents were lost and the only copies were in possession of the adverse party who refused their use for the purpose of insertion in the bill. Under such circumstances the judge should require the adverse party to produce the copies, and should grant further time for their insertion.—*Galvin v. Hunt*, 153 Cal. 105, 94 Pac. 423.

159. Specification of errors—Not required in bills of exceptions.—*Martin v. Southern Pac. Co.*, 150 Cal. 131, 88 Pac. 701.

As to specifications of particulars, see, ante, § 648, note pars. 41-62.

160. Specification in bill of exceptions that the conclusions of law embraced in the findings are erroneous is not available on appeal from an order denying a new trial. The conclusions of law are always merged in and superseded by the judgment.—*Mentone Irr. Co. v. Redlands Electric Light & P. Co.*, 155 Cal. 323, 324, 100 Pac. 1082.

161. Statement on motion for new trial—Failure of service on adverse parties.—Where the moving party failed to make those adverse in interest parties to the motion by service of the notice of intention, and such parties were thereby deprived of all participation in the settling and allowance of the statement, and an opportunity to submit amendments thereto, such statement can not be used as a bill of exceptions on appeal from the judgment.—*National Bank of California v. Mulford*, 17 Cal. App. 555, 120 Pac. 446.

162. Striking out redundant and useless matter so that exceptions may be presented as briefly as possible, provision for is not for limitation on his functions in settling bill, but is more in nature of definition of course which judge is authorized to adopt

in settling bill.—Hyde v. Boyle, 89 Cal. 590, 591, 26 Pac. 1092.

163. Same—Additional costs will not be imposed on respondents by reason of their insertion of redundant matter in bill of exceptions where judgment is reversed and costs of appeal are imposed on them.—In Estate of Robinson, 106 Cal. 493, 497, 39 Pac. 862.

164. Same—Redundant matter disregarded.—Insertion of clause stating that evidence was sufficient to prove all allegations of complaint in bill of exceptions will be disregarded on appeal from assignment of motion for nonsuit as an attempt to forestall very question which is to be examined on evidence brought up.—Hudson v. Hudson, 129 Cal. 141, 143, 61 Pac. 773.

165. Same—Setting up will twice in bill of exceptions was improper and one copy of it should have been excluded from bill.—Estate of Robinson, 106 Cal. 493, 497, 39 Pac. 862.

166. Same—Things which did not transpire in court and concerning which so far as it appears no showing was made in court can not be noticed though recited in bill.—Estate of Carpenter, 127 Cal. 582, 584, 60 Pac. 162.

167. Same—Time of making demand—Termination of new-trial proceeding—Failure of court to act on motion.—The ten days' time "after notice of decision" denying a motion for new trial or "other termination of such a motion," within which a party litigant may file a demand for record under section 953a, post, or to serve a proposed bill of exceptions under the above section, commences to run immediately upon the failure of the trial court to pass on the motion within three months after the verdict of the jury or service on the moving party of notice of decision of the court.—Bernschein v. Whitaker, 175 Cal. 130, sub nom. Bornschein v. Whitaker, 165 Pac. 153.

168. Same—Same—Written notice of the decision of the trial court denying the motion is not essential where the party has actual notice of what was done or left undone; and in the event of the termination of a new trial proceedings, the law itself gives the notice.—Bernschein v. Whitaker, 175 Cal. 130, sub nom. Bornschein v. Whitaker, 165 Pac. 153.

169. Unauthenticated bill of exceptions—Can not be considered, though included in the transcript, where it is accompanied by an order or ruling of the court objecting to the settlement thereof on the ground that it was not presented in time, no exception to such ruling being taken.—Brode v. Gosslin, 16 Cal. App. 633, 117 Pac. 778.

170. Use of bill—By other than person making.—Bill of exceptions made out on behalf of one defendant to be used on motion for new trial by him, also on any appeal he might take, can not be used by another

defendant on appeal by him.—Houghton v. Trumbo, 103 Cal. 239, 240, 37 Pac. 152.

171. Waiver of notice—By one adverse party—Does not affect other adverse parties or dispense with the necessity of notice to them and it is immaterial that they are not complaining.—Ford v. Braslan Seed Growers Co., 10 Cal. App. 762, 768, 103 Pac. 946.

172. What constitutes bill—In general.—Ex parte affidavit of appellant in which he sets forth certain alleged errors, together with statement of alleged facts on which he based his motion to vacate an award, can not take place of bill of exceptions or settlement of statement of case. If alleged errors committed by arbitrators can be reviewed at all in way that errors committed by court can be reviewed it must be in same manner.—In re Connor, 128 Cal. 279, 281, 60 Pac. 862.

173. Same—Certificate of judge that he did of his own motion both in hearing and deciding defendant's motion take notice and use its own records in case, and that attorney who appeared on behalf of said motion used or presented no papers save those in this certificate hereinbefore mentioned, does not amount to bill of exceptions, and, in absence of such bill, appellant is not entitled to be heard on appeal.—Ramsbottom v. Fitzgerald, 128 Cal. 75, 76, 60 Pac. 522.

174. Same—Purpose for which settled.—Presentation of bill of exceptions for settlement and use on appeal from an order from which no direct appeal lies, will not preclude its use for purpose of reviewing such order on appeal from judgment.—Foley v. Foley, 120 Cal. 33, 38, 65 Am. St. Rep. 147, 52 Pac. 122.

175. Same—Statement.—There being no substantial difference between statement and bill of exceptions, fact that appellant presented for settlement what he termed proposed statement on appeal will not prevent his appeal, but document will be treated as bill of exceptions.—Witter v. Andrews, 122 Cal. 1, 2, 54 Pac. 276; People v. Crane, 60 Cal. 279; Jue Fook Sam v. Lord, 83 Cal. 159, 23 Pac. 225.

176. When proper—Appeal from order directing conveyance of real estate by an executor is properly brought by bill of exceptions.—Estate of Corwin, 61 Cal. 160, 163.

As to when bill of exceptions is proper, see, post, § 658 and note.

177. When right of party to have bill is in doubt.—Such doubts should be resolved in favor of the party, and the better practice is for the court to sign the bill, with the objections and the evidence relating thereto incorporated therein, so that the appellate court may be able to determine the same.—Calkins v. Monroe, 17 Cal. App. 326, 119 Pac. 680.

§ 651. EXCEPTIONS AFTER JUDGMENT, ETC. Exceptions to any decision made after judgment may be presented to the judge at the time of such decision, and be settled or noted, as provided in section six hundred forty-nine, or a bill thereof may be presented and settled afterward, as provided in section six hundred fifty, and within like periods after written notice of entry of the order, upon appeal from which such decision is reviewable.

History: Enacted March 11, 1872; amended March 24, 1874, Code Amdts. 1873-4, p. 314; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 148, held unconstitutional, see history, § 5 ante; March 20, 1907, Stats. and Amdts. 1907, p. 716, Kerr's Stats. and Amdts. 1906-7, p. 450; May 6, 1919, Stats. and Amdts. 1919, p. 288. In effect July 22, 1919.

EXCEPTIONS AFTER JUDGMENT.

1. Construed.
2. Affidavits.
3. Exceptions to decisions after judgment.
4. Findings of fact and conclusions of law.
5. Order denying new trial.
6. Papers used on motion to recall and set aside execution.
7. Refusal to hear any evidence in support of defense—Or disregard of such evidence.
8. Right to bill.

1. **Construed.**—Person desiring to appeal from an order granting new trial may always show what was used on hearing of motion by bill of exceptions settled as authorized by this section.—Wyckoff v. Pajaro V. C. R. Co., 146 Cal. 681, 682, 81 Pac. 17.

As to authentication of papers used in proceedings after judgment to make them part of record, see, post, § 661 and note.

2. **Affidavits.**—On appeal from an order made after judgment based on affidavits, bill of exceptions is proper and only proper mode of authentication of such affidavits.—Somers v. Somers, 81 Cal. 608, 610, 22 Pac. 967.

3. **Exceptions to decisions after judgment** may be preserved by bill thereof where matter is heard on oral evidence.—Lyons v. Marcher, 119 Cal. 382, 383, 51 Pac. 559. See Herrlich v. McDonald, 80 Cal. 472, 476, 22 Pac. 299.

4. **Findings of fact and conclusions of law** made on hearing of application for supplemental and final decree with decree entered thereon, are not matters which could properly be included in bill of exceptions, since they are already matters of record.—White v. White, 112 Cal. 577, 580, 44 Pac. 1026.

5. **Order denying new trial** being appealable, is deemed to have been excepted to and need not be embodied in bill of exceptions.—Southern Pac. R. Co. v. Superior Court, 105 Cal. 84, 86, 38 Pac. 627.

6. **Papers used on motion to recall and set aside execution** must be authenticated by bill of exceptions.—Herrlich v. McDonald, 80 Cal. 472, 476, 22 Pac. 299.

7. **Refusal to hear any evidence in support of defense—Or disregard of such evidence** must be presented in bill of exceptions or statement of case, and can not be considered if presented merely in ex parte affidavit containing notice which was presented at trial and rulings thereon.—Santa Cruz R. P. Co. v. Bowie, 104 Cal. 286, 287, 37 Pac. 934.

8. **Right to bill.**—On appeal from an order striking out competent affidavits to be used on motion for new trial on ground of irregularity in proceedings, appellant is entitled to bill of exceptions containing such affidavits, and mandamus will issue where court refuses to settle such bill.—Gay v. Torrance, 145 Cal. 144, 147, 78 Pac. 540.

§ 652. WHEN EXCEPTION IS REFUSED, APPLICATION TO SUPREME COURT TO PROVE THE SAME, ETC. If the judge in any case refuses to allow a bill of exceptions in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same; the application may be made in the mode and manner, and under such regulations as that court may prescribe; and the bill, when proven, must be certified by the chief justice as correct, and filed with the clerk of the court in which the action was tried, and when so filed it has the same force and effect as if settled by the judge who tried the cause.

History: Enacted March 11, 1872; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 148, held uncon-

stitutional, see history, § 5 ante; March 20, 1907, Stats. and Amdts. 1907, p. 716, Kerr's Stats. and Amdts. 1906-7, p. 450.

PROVING EXCEPTIONS.

- 1, 2. Construction of section—Authorize supreme court to prove exception only where judge refuses to allow an exception.
3. Same—Criminal causes not included.
- 4, 5. Same—Does not authorize in addition to statement of ruling and exception any evidence or other matters.
6. Same—Same—Amendment on part of respondent.
- 7, 8. Same—Does not give authority to strike out evidence or other matters.
9. Same—Limits authority of supreme court to interfere in settlement of bill of exceptions.
10. Same—Purpose of section.
11. Jurisdiction of district court of appeals.
- 12, 13. Notice of application.
- 14, 15. Petition—As to in general.
16. Same—Amendment to petition.
- 17, 18. Same—Exhibits.
19. Same—Requests for allowance.
20. Presumption.
21. Reference to take testimony.
22. Refusal to allow exception—In contest against allowance of claim.
23. Refusal to settle a bona fide statement.
24. Stipulation of parties—Settlement by supreme court unnecessary.
25. Time to apply—In general.
26. Same—Right to relief accrues, when.
27. Where evidence is directly conflicting.
28. Where preponderance of evidence shows.
29. Where proposed bill and bill as settled do not state exceptions exactly.

1. Construction of section—Authorizes supreme court to prove an exception only where judge refused to allow an exception on settlement of bill of exceptions or statement, and does not authorize court to sign and seal bill of exceptions where judge of superior court has refused to sign it or any other bill of exceptions. In such case judge can be compelled by mandamus to settle bill or statement.—*Landers v. Landers*, 82 Cal. 480, 481, 23 Pac. 126; *Hyde v. Boyle*, 86 Cal. 352, 24 Pac. 1059; *Tibbets v. Riverside B. Co.*, 97 Cal. 258, 32 Pac. 174; *Hudson v. Hudson*, 129 Cal. 141, 145, 61 Pac. 773; *Estate of Dolbeer*, 147 Cal. 539, 81 Pac. 1098.

2. Construed to refer solely to case where judge is charged with having refused to allow an exception; that is where party claims that he has made an objection upon matter of law to decision made by court and took an exception to decision, and court refuses to certify in bill or statement that such exception was taken or that such occurrence took place. In such case party

may prove that he did take such exception and no doubt may prove sufficient surrounding facts to show what point of exception is. If he succeed in making his proof, his exception will be here put into bill, certified by this court, through its chief justice, and filed by clerk below, where it will take its place among other things which constitute record.—*Vance v. Superior Court*, 87 Cal. 390, 392, 25 Pac. 500.

3. Same—Criminal causes not included in this section.—*People v. Knoblock*, 11 Cal. App. 333, 336, 104 Pac. 1012.

4. Same—Does not authorize in addition to statement of ruling and exception any evidence or other matters which may be alleged to have been improperly omitted therefrom.—*Estate of Dolbeer*, 147 Cal. 359, 81 Pac. 1098.

5. Construed to authorize ballots as to exclusion of which exceptions were taken to be certified for an inspection of supreme court where trial court refused to insert them in bill of exceptions, since it can not be said that judge has allowed an exception to ruling admitting ballot in evidence when ballot itself and everything objected to is excluded from bill.—*Jennings v. Brown*, 109 Cal. 290, 292, 41 Pac. 1085. See *Lay v. Parsons*, 104 Cal. 661, 38 Pac. 447.

6. Same—Same—Amendment on part of respondent.—Party desiring bill settled is one who has taken exception and presented bill to judge for settlement, and hence does not include respondent so as to authorize him to have amendments to bill inserted showing exceptions taken by him to admission or rejection of evidence.—In matter of *Gates*, 90 Cal. 257, 258, 27 Pac. 195.

7. Same—Does not give authority to strike out any evidence or other matters stated in connection with such ruling when exception to particular ruling has been allowed on ground that such evidence was not given or that such matters are untrue or incorrectly stated.—*Hyde v. Boyle*, 86 Cal. 352, 24 Pac. 1059; *Hyde v. Boyle*, 89 Cal. 590, 591, 26 Pac. 1092; *Cox v. Delmas*, 92 Cal. 652, 653, 28 Pac. 687; *Estate of Dolbeer*, 147 Cal. 359, 81 Pac. 1098.

8. Petition to supreme court under this section does not lie to settle bill of exceptions to determine whether judge has inserted or refused to insert correct statement of proceedings and evidence in action.—*Vance v. Superior court*, 87 Cal. 390, 391, 25 Pac. 500.

As to amendment of bill on appeal, see, ante, § 650 and note.

9. Same—Limits authority of supreme court to interfere in settlement of bill of exceptions to single instance in which judge refuses to allow an exception.—In matter of *Gates*, 90 Cal. 257, 259, 27 Pac. 195; *Hyde v. Boyle*, 86 Cal. 352, 24 Pac. 1059.

10. Same—Purpose of section was not to require supreme court to discharge duties of judge of court below, but only to provide mode for settlement of bill in case that judge in court below, on proper application therefor, refused to settle any bill of exceptions or refused to settle bill in accordance with facts. The court will not proceed to settle bill which court below properly refused to settle.—*Gallardo v. Atlantic & Pac. Tel. Co.*, 49 Cal. 510.

11. Jurisdiction of district court of appeals.—The provisions of this section are held to be merely incidental to appeals, and, under the provisions of section 4 of article VI of the constitution, a petition hereunder in a criminal case, properly appealed to the district court of appeals, is properly cognizable in that court.—*Glass v. Lawlor*, 152 Cal. 603, 93 Pac. 490.

12. Notice of application to supreme court to prove exceptions should be served on judge of court below.—*Estate of Hawes*, 68 Cal. 413, 414, 9 Pac. 456; *People v. Bitancourt*, 73 Cal. 1, 2, 14 Pac. 372. See *Estate of Hawes*, 2 Cal. 656, 11 Pac. 220.

13. Notice of intended application to supreme court to prove exceptions should be served on attorney of adverse party.—*People v. Bitancourt*, 73 Cal. 1, 2, 14 Pac. 372.

14. Petition—As to in general.—A petition to supreme court to prove an exception should set forth fully and specifically exceptions which he presented to judge and which judge wrongfully refused to put in bill, and also evidence on which he based proof of his proposed exceptions, so that court can see on face of petition what alleged aggrievance is.—*Estate of Hawes*, 68 Cal. 413, 414, 9 Pac. 456; *People v. Bitancourt*, 73 Cal. 1, 2, 14 Pac. 372; *Landers v. Landers*, 82 Cal. 480, 481, 23 Pac. 126. See *Wormath v. Gardner*, 35 Cal. 227, 228.

15. But this only requires general statement of tendency of evidence, so that materiality of ruling alleged to have been excepted to may appear.—*People v. Bitancourt*, 73 Cal. 1, 2, 14 Pac. 372.

16. Same—Amendments to petition to be allowed to prove an exception will not be permitted after reference to hear evidence and report on matter originally presented. Whole matter should be presented in original petition or before hearing on reference.—*Estate of Dolbeer*, 147 Cal. 359, 81 Pac. 1098.

17. Same—Exhibits.—Petition for leave to prove bill of exceptions which has annexed thereto as an exhibit writing containing evidence, rulings and exceptions taken on hearing of an application for letters of guardianship from court below is sufficient, demurrer to such petition will be overruled.—*Estate of Hawes*, 2 Cal. Unrep. 656, 11 Pac. 220.

18. Petition alleging that judge settled and signed bill of exceptions, but that C. C. P.—102

same is not true bill in accordance with facts, and annexing to petition copy of bill as settled, and also copy of proposed bill, presents case in which petitioner should be allowed to prove truth of issue thus presented.—*Curran v. Kennedy*, 3 Cal. Unrep. 259, 24 Pac. 276.

19. Same — Requests for allowance.—Judge will not be held to have refused to allow an exception unless it is shown that he has been properly requested to allow it, and hence petition for leave to prove an exception should show that petitioner has taken proper steps to secure settlement of bill of exceptions, and that he included in his proposed bill statement of particular exception which he desires to prove, and that judge, in settling bill, refused to allow that he had taken such an exception.—*Estate of Dolbeer*, 147 Cal. 359, 81 Pac. 1098.

20. Presumption.—Ballots marked at trial as exhibits are presumed, on petition to compel allowance of exceptions by inserting them, to be in same condition as shown by reporter's notes, and where such notes stated that they were marked as exhibits, it will be presumed that they can be identified.—*Jennings v. Brown*, 109 Cal. 290, 292, 41 Pac. 1085.

21. Reference to take testimony.—Evidence that statements contained in bill of exceptions as stated by judge of superior court in connection with statements which he allowed were incorrect either in way of omission or inclusion of matter not properly omitted or included was immaterial.—*Estate of Dolbeer*, 147 Cal. 569, 82 Pac. 192.

22. Refusal to allow exception—In contest against allowance of claim.—Refusal to allow exception to denial of application to prove facts in contest against allowance, on final account, of claim which had been allowed by administrator, justifies an application to supreme court under this section.—*Estate of Hill*, 62 Cal. 186.

23. Refusal to settle bona fide statement.—Judge may be compelled to settle it by proceedings under this section.—*Hearst v. Dennison*, 72 Cal. 227, 229, 13 Pac. 628.

24. Stipulation by parties—Settlement by supreme court unnecessary.—In an application for leave to prove a bill of exceptions in the supreme court, under the provisions of the above section, after order to show cause was made the parties filed their written consent and undertaking that certain charges shall be made in the bill proposed to be settled by the trial judge, and will sufficiently present appellants' case to allow the presentation of such points as the appellants are entitled to make on appeal, a settlement of the bill of exceptions by the supreme court is unnecessary.—*Powell v. Powell*, 176 Cal. 676, 170 Pac. 147.

25. Time to apply—In general.—Where statement has been settled and motion for new trial based on such statement

has been denied it is too late to apply to supreme court to prove an exception.—*Frankel v. Deidesheimer*, 83 Cal. 44, 45, 23 Pac. 136.

26. Same—Right to relief under this section accrues just as soon as trial judge has concluded settlement of proposed bill of exceptions or statement, and directed its engrossment with omission of exception or exceptions which parties seeking allowance of bill claim to have reserved, and application should be made with reasonable promptitude, but where considerable time was consumed in trial of case and bulk of statement to be engrossed was very great delay of two months in presenting petition was held excusable.—*Estate of Dolbeer*, 147 Cal. 359, 81 Pac. 1098.

27. Where evidence is directly conflicting as to whether exceptions to remarks made by counsel were made, supreme court

on petition to allow appellant to prove such exceptions will not hold that superior judge erred or abused his discretion in not allowing exceptions or declaring that they should not be included in bill.—*People v. Scott*, 121 Cal. 101, 53 Pac. 364.

28. Where preponderance of evidence shows that an instruction which it was claimed was asked and refused and exception thereto denied was not one given petition to prove exception will be denied.—*Crow v. Minor*, 85 Cal. 214, 215, 24 Pac. 640.

29. Where proposed bill and bill as settled do not state exceptions exactly as they appeared in notes of official reporter of superior court, and where all of several exceptions actually taken were not allowed, supreme court will settle separate bill including those not allowed and stating form in which they appear in official notes.—*Estate of Dolbeer*, 147 Cal. 569, 82 Pac. 192.

§ 653. PROCEEDINGS WHERE JUDGE CEASES TO HOLD OFFICE.

When the decision excepted to was made by any judicial officer, other than a judge, the bill of exceptions shall be presented to such judicial officer and be settled and signed by him in the same manner as it is required to be presented to, settled, and signed by a court or judge.

A judge or judicial officer may settle and sign a bill of exceptions after, as well as before, he ceases to be such judge or judicial officer. If such judge or judicial officer, before the bill of exceptions is settled, dies, is removed from office, becomes disqualified, is absent from the state, or refuses to settle the bill of exceptions, or if no mode is provided by law for the settlement of the same, it shall be settled and certified in such manner as the supreme court may, by its order or rules, direct.

Judges, judicial officers, and the supreme court shall respectively possess the same power, in settling and certifying statements, as is by this section conferred upon them in settling and certifying bills of exceptions.

History: Enacted March 11, 1872; amendment approved April 3, 1876, Code Amdts. 1875-6, p. 93.

BILL OF EXCEPTIONS—WHERE JUDGE CEASES TO HOLD OFFICE.

1. Construction of section—Criminal causes not included.
2. Constitutionality of section not decided.
3. Mandamus—Will not lie to compel ex-judge, before whom action was tried, to settle bill.
4. Refusal to transfer cause to superior court of adjoining county.
5. Special application to supreme court.
6. Same—Such application must be made promptly.
7. Where successor of judge decides action.

1. Construction of section—Criminal causes not included in this section. *People v. Knoblock*, 11 Cal. App. 333, 336, 104 Pac. 1012.

2. Constitutionality of section not decided, but settlement of bill by judge of superior court, before whom case was tried, after his term of office had expired, held to be valid on principle of rule of stare decisis, in view of previous rulings recognizing this method of settling bill of exceptions.—*Miller & Lux v. Enterprise C. & L. Co.*, 142 Cal. 208, 215, 100 Am. St. Rep. 115, 75 Pac. 770.

3. Mandamus—Will not lie to compel ex-judge, before whom action was tried, to settle bill of exceptions in such action after his term of office expired, statute merely authorizing him to sign and settle bill, and not enjoining on him duty of settling it.—*Leach v. Aitken*, 91 Cal. 484, 485, 23 Pac. 777. See *Estate of Depeaux*, 118 Cal. 522, 523, 50 Pac. 682.

4. Refusal to transfer cause to superior court of adjoining county in order to settle

statement of case, was improper where judge was disqualified, and judge who tried case was no longer in office, and judge who heard motion was not judge of adjoining county.—*Finn v. Spagnoli*, 67 Cal. 330, 331, 7 Pac. 746.

5. Special application to supreme court for an order directing settlement of bill of exceptions should be made where judge who tried case refuses to settle such bill after his term of office has expired in order to render such exceptions available on appeal.—*Estate of Depeaux*, 118 Cal. 522, 523, 50 Pac. 682.

6. Same.—Such application must be made promptly and within reasonable time after appellant is informed that judge refuses to act, as appellant is allowed forty days within which to file transcript on appeal

after appeal is directed, and neglect on part of appellant for this period of time to take such steps as were necessary for purpose of securing settlement of bill is equivalent to his failure to file transcript within time limited, and where more than six months has elapsed conclusion is authorized that appellant abandoned exception set forth in bill.—*Estate of Depeaux*, 118 Cal. 522, 524, 50 Pac. 682.

7. Where successor of a judge decides action, hears and denies motion for new trial made upon the records and minutes of the court, a subsequent statement on appeal from order denying motion should be settled by the judge who made the order, and not by his predecessor who tried the action.—*Cummings v. Conlan*, 66 Cal. 403, 405, 407, 408, 5 Pac. 796, 903.

ARTICLE II.

NEW TRIALS.

§ 656. New trial defined.

§ 657. When a new trial may be granted.

§ 658. On what papers moved for.

§ 659. Notice of motion, upon whom served, and what to contain.

§ 660. Motion to be heard at the time specified, or dismissed.

§ 661. Record on appeal. [Repealed.]

§ 662. New trial on court's own motion. [Repealed.]

§ 663. Vacation of judgment.

§ 663a. Notice of intention to move. When to be given, and what to contain.

§ 656. NEW TRIAL DEFINED. A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court, or referee.

History: Enacted March 11, 1872, re-enactment of § 192 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, 148, held unconstitutional, see history, § 5 ante; March 20, 1907, Stats. and Amdts. 1907, p. 717, Kerr's Stats. and Amdts. 1906-7, p. 451.

NEW TRIAL—IN GENERAL.

1. Construction of section—Confined to what causes.
2. Same—Does not apply to every order which may be made ex parte or by court of its own motion.
3. Same—"Trial."
4. Same—Same—Meaning of.
5. Admissions by pleadings.
6. Conclusions of law.
- 7, 8. Errors apparent on face of the judgment-roll.
9. Failure to file findings within six months.
10. Finding as to attorneys' fees—In action to foreclose mechanics' lien.
11. In probate proceedings.
12. Same—Where jury in will contest did not decide all issues.
13. Judgment authorized by pleadings—Question as to not involved.
14. Judgment by default—Can not be reviewed.
15. Motion for new trial—Not directed at judgment.
16. Motion for new trial of motion.
17. New trial authorized—In proceedings for changing boundaries.
18. Objections to form of action or pleadings.
19. Partition—Practice prescribed in Practice Act.
20. Reconsideration—Of disbarment proceedings in supreme court.
21. Right of party to move for new trial on single issues.
- 22, 23. Ruling on demurrer.
24. Sufficiency of complaint.
- 25-27. Sufficiency of findings—To support judgment—Can not be inquired into.
28. Sufficiency of verdict—To support judgment.
29. Trial of issue not presented.
30. When all facts are agreed on.
31. When every material issue has been decided in favor of losing party.

32, 33. Where there is no issue of fact to be tried.

34. Where no verdict was rendered.

1. **Construction of section—Confined to what causes.**—The above section is construed to be confined to those cases in which code has expressly authorized issues of fact to be framed.—*Leach v. Pierce*, 93 Cal. 614, 619, 29 Pac. 235. See *Estate of Moore*, 72 Cal. 335, 340, 13 Pac. 880.

2. **Same—Does not apply to every order which may be made ex parte or by court of its own motion,** simply because court has permitted written objection to be filed, and hence motion for new trial is not proper as to order of court granting family allowance out of estate of decedent.—*Leach v. Pierce*, 93 Cal. 614, 619, 29 Pac. 235.

3. **Same—"Trial."**—The above section does not define what is meant by a trial.—*San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 30 Cal. App. 405, 158 Pac. 768.

4. **Same—Same—Meaning of.**—The word "trial," as used in provisions relating to new trial, is issue which arises only where material averment of fact is made on one side and is controverted on other.—*Foley v. Foley*, 120 Cal. 33, 37, 65 Am. St. Rep. 147, 52 Pac. 122.

5. **Admissions by pleadings.**—New trial being re-examination of an issue of fact, new trial was properly denied where it was contended that matter was admitted by pleadings, since in such case there was no issue to try, even though findings were made on supposed issue.—*Estate of Doyle*, 73 Cal. 564, 570, 15 Pac. 125.

6. **Conclusions of law which court draws from facts found can not be reviewed on motion for new trial.**—*Pacific Mut. L. I. Co. v. Fisher*, 106 Cal. 224, 237, 39 Pac. 758. See *Brisson v. Brisson*, 90 Cal. 323, 327, 27 Pac. 186.

7. **Errors apparent on face of judgment-roll will only be reviewed on appeal from judgment, and not on appeal from order denying motion for new trial.**—*Estate of Westerfield*, 96 Cal. 113, 114, 30 Pac. 1104. See *Thompson v. Patterson*, 54 Cal. 542, 548.

8. **Errors appearing in judgment-roll, even if not named in specifications of errors in statement, will be considered on appeal.**—*Heinlen v. Heilbron*, 71 Cal. 557, 564, 12 Pac. 673. See *Sharp v. Daugney*, 33 Cal. 505; *Shepard v. McNeil*, 38 Cal. 72; *Patterson v. Sharp*, 41 Cal. 133.

9. **Failure to file findings within six months after case had been submitted for decision and court had ordered judgment can not be reviewed on appeal from an order denying new trial.**—*Kepfler v. Kepfler*, 134 Cal. 205, 206, 66 Pac. 208. See *Brisson v. Brisson*, 90 Cal. 323, 27 Pac. 186; *Rauer v. Fay*, 128 Cal. 522, 61 Pac. 90; *Fogarty v. Fogarty*, 129 Cal. 46, 61 Pac. 570; *Owen v.*

Pomona L. & W. Co., 131 Cal. 530, 535, 63 Pac. 850, 64 Pac. 253; *Reclamation Dist. v. Thisby*, 131 Cal. 572, 63 Pac. 918.

10. **Finding as to attorneys' fees—In action to foreclose mechanics' lien** being on an issue raised by law is not outside pleadings, though no reference was made to it in pleadings, and hence it is reviewable on motion for new trial.—*Hooper v. Fletcher*, 145 Cal. 375, 378, 79 Pac. 418.

11. **In probate proceedings, whenever action of court which is invoked is dependent on existence of extrinsic facts, which are presented to it for determination in form of pleadings, and are to be decided by it in conformity with preponderance of evidence, an issue of fact arises, which under its decision may be re-examined by court on motion for new trial, and hence motion for new trial was permissible where respondents filed written opposition to appointment of appellant as executrix, setting forth facts alleged to render her incompetent to receive appointment, to which an answer was filed, denying such facts, and on issue thus presented, trial was had, in which many witnesses were called, and weight and credibility of testimony court was called on to determine.**—*Estate of Bauquier*, 88 Cal. 302, 315, 26 Pac. 178, 532.

12. **Same—Where jury in will contest did not decide all issues raised by petition, motion for new trial made on verdict of jury and before decision of case was premature.**—*Estate of McKenna*, 138 Cal. 439, 440, 71 Pac. 501. See *Morris v. De Celis*, 41 Cal. 331; *De Gaze v. Lynch*, 42 Cal. 362, 364; *Baker v. Borello*, 131 Cal. 615, 617, 63 Pac. 914.

13. **Judgment authorized by pleadings—Question as to not involved.**—The question whether the judgment is authorized by the pleadings or findings can not be agitated on the motion for a new trial, for it is not involved in a re-examination of the issues of fact.—*Bloxham v. Tehama County Tel. Co.*, 29 Cal. App. 326, 155 Pac. 654.

14. **Judgment by default—Can not be reviewed by new trial; there were no issues of fact to be tried, and hence no office to be subserved by new trial, and this is true where, though defendant did not technically make default, there was no answer controverting any fact; and this is true in actions for divorce, where law requires proofs of facts alleged, even though there is no answer, the effect of provision not being to raise an "issue of fact" nor to constitute taking of proof "trial," as these terms are used in provisions relating to new trials.**—*Foley v. Foley*, 120 Cal. 33, 37, 65 Am. St. Rep. 147, 52 Pac. 122.

15. **Motion for new trial—Not directed at judgment, but at verdict, or other decision of fact—it being re-examination of an issue of fact.**—*Martin v. Matfield*, 49 Cal. 42, 44; *Boston T. Co. v. McKenzie*, 67 Cal. 485, 486, 8 Pac. 22.

16. **Motion for new trial of motion is not countenanced or permitted by our procedure.**—Doyle v. Republic L. Ins. Co., 125 Cal. 15, 16, 57 Pac. 667; Harper v. Hildreth, 99 Cal. 265, 270, 33 Pac. 1103.

17. **New trial is authorized.**—In proceedings for changing boundaries of city, under section 803, post, where other questions of fact than those relating to such proceedings may have been involved, and errors of law may have been committed at trial.—People v. City of Oakland, 123 Cal. 145, 146, 55 Pac. 772. See People ex rel. Warfield v. Sutter St. R. Co., 117 Cal. 604, 49 Pac. 736; People ex rel. Warren v. Rodgers, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668.

18. **Objections to form of action or pleadings,** either by demurrer or motion, or objection to evidence, or that trial was by jury, or that verdict did not cover material issues and is therefore insufficient, can not be made on motion for new trial, but only on appeal from judgment.—Morse v. Wilson, 138 Cal. 558, 560, 71 Pac. 801. See Riverside W. Co. v. Gage, 108 Cal. 240, 41 Pac. 299.

19. **Partition—Practice prescribed in Practice Act,** as to granting of new trial in civil action, is applicable to review of decrees rendered in proceedings on partition.—Tormey v. Allen, 45 Cal. 119, 121. See Regan v. McMahon, 43 Cal. 625.

20. **Reconsideration—Of disbarment proceedings in supreme court** can not be had by motion for new trial.—In matter of Philbrook, 108 Cal. 14, 15, 40 Pac. 1061. See In matter of Tyler, 71 Cal. 353, 60 Am. Rep. 539, 12 Pac. 289, 13 Pac. 169; Granger's Bank v. Superior Court, 101 Cal. 198, 35 Pac. 642.

21. **Right of party to move for new trial on single issue** is well established.—Duff v. Duff, 101 Cal. 1, 4, 35 Pac. 437. See San Diego L. & T. Co. v. Neale, 78 Cal. 63, 3 L. R. A. 83, 20 Pac. 372.

22. **Ruling on demurrer** is matter to be reviewed on appeal from judgment and not an order denying new trial.—Hellbron v. Centerville & K. I. D. Co., 76 Cal. 8, 9, 17 Pac. 932; Bode v. Lee, 102 Cal. 583, 587, 36 Pac. 936. See Evans v. Paige, 102 Cal. 132, 36 Pac. 406.

23. **Where demurrer has been sustained to complaint motion for new trial** does not lie, demurrer raising only questions of law.—Jones v. Chalfant, 128 Cal. 334, 60 Pac. 852.

24. **Sufficiency of complaint** can not be considered on appeal from order denying or granting new trial.—Hook v. Hall, 2 Cal. Unrep. 459, 6 Pac. 422; Brison v. Brison, 90 Cal. 323, 327, 27 Pac. 186; Bode v. Lee, 102 Cal. 583, 587, 36 Pac. 936; Rauer v. Fay, 128 Cal. 523, 61 Pac. 90; Reclamation Dist. v. Thisby, 131 Cal. 572, 573, 63 Pac. 918; Petaluma P. Co. v. Singley, 136 Cal. 616, 618, 69 Pac. 426; Lambert v. Marcuse, 137 Cal. 44, 69 Pac. 620; Kaiser v. Dalto, 140 Cal. 167, 169, 73 Pac. 828; Swett v. Gray, 141 Cal. 63,

70, 74 Pac. 439; Swift v. Occidental M. & P. Co., 141 Cal. 161, 165, 74 Pac. 700. See Thompson v. Los Angeles, 125 Cal. 270, 271, 57 Pac. 1015.

25. **Sufficiency of findings—To support judgment—Can not be inquired into on appeal from an order denying new trial,** but only whether findings are supported by evidence.—Brison v. Brison, 90 Cal. 323, 327, 27 Pac. 186; Thompson v. Los Angeles, 125 Cal. 270, 271, 57 Pac. 1015; Rauer v. Fay, 128 Cal. 523, 61 Pac. 90; Reclamation Dist. v. Thisby, 131 Cal. 572, 573, 63 Pac. 918; Petaluma P. Co. v. Singley, 136 Cal. 616, 618, 69 Pac. 426; Kaiser v. Dalto, 140 Cal. 167, 169, 73 Pac. 828; Swift v. Occidental M. & P. Co., 141 Cal. 161, 165, 74 Pac. 700; Burns v. Shoenfeld, 1 Cal. App. 121, 81 Pac. 713.

26. **Motion for new trial** is not necessary in order to enable plaintiff to avail himself of objection made to judgment for an error which arises on face of finding.—California Nat. Bank v. Ginty, 108 Cal. 148, 153, 41 Pac. 38.

27. **Conceded, but not decided, that erroneous judgment drawn from findings of fact which are not complained of can not be corrected by means of motion for new trial.**—Knight v. Roche, 56 Cal. 15, 17. See Jenkins v. Frink, 30 Cal. 586, 596, 89 Am. Dec. 134.

28. **Sufficiency of verdict—To support judgment,** whether treated as verdict or finding, can not be considered on appeal from order denying motion for new trial.—Morse v. Wilson, 138 Cal. 558, 560, 71 Pac. 801.

29. **Trial of issue not presented.**—Where no issue as to damages is presented in an action for an injunction new trial can not be granted for purpose of trying question of damages.—Bigelow v. Los Angeles, 141 Cal. 503, 507, 75 Pac. 111.

30. **Where all facts were agreed on,** there was no issue of fact to be examined—only question being as to what law was applicable to those facts, and hence denial of motion for new trial will not be reviewed.—Gregory v. Gregory, 102 Cal. 50, 52, 36 Pac. 364.

31. **When every material issue has been decided in favor of losing party,** a new trial being a re-examination of issues of fact will not be awarded, he having nothing to gain at new trial of same issues, and on appeal from an order denying new trial sufficiency of findings of fact to sustain conclusions of law will not be considered.—Sharp v. Bowie, 142 Cal. 462, 467, 76 Pac. 62.

32. **Where there is no issue of fact to be tried, and no trial, new trial** can not be had.—Fabretti v. Superior Court, 77 Cal. 305, 307, 19 Pac. 481.

33. **Motion for new trial** is not an appropriate proceeding to review action of court and give judgment in case where no

trial on issues of fact.—*Foley v. Foley*, 120 Cal. 33, 37, 65 Am. St. Rep. 147, 52 Pac. 122. See *Savings & L. Soc. v. Meeks*, 66 Cal. 371, 5 Pac. 624; *Estate of Heldt*, 98 Cal. 553, 33 Pac. 549.

24. Where no verdict was rendered by jury for or against defendant, no new trial could be had—new trial being re-examination of an issue of fact after trial and decision.—*Benjamin v. Stewart*, 61 Cal. 605, 608.

§ 657. WHEN NEW TRIAL MAY BE GRANTED. The former verdict or other decision may be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. **Irregularity in the proceedings** of the court, jury, or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial;

2. **Misconduct of the jury**; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors;

3. **Accident or surprise**, which ordinary prudence could not have guarded against;

4. **Newly discovered evidence**, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial;

5. **Excessive damages**, appearing to have been given under the influence of passion or prejudice;

6. **Insufficiency of the evidence** to justify the verdict or other decision, or that it is against law;

7. **Error in law**, occurring at the trial and excepted to by the party making the application.

When a new trial is granted upon the ground of the insufficiency of the evidence to sustain the verdict, the order shall so specify; otherwise, on appeal from such order, it will be presumed that the order was not based upon that ground.

History: Enacted March 11, 1872, re-enactment with additions of § 193 Practice Act; amendment approved May 3, 1919, Stats. and Amdts. 1919, p. 141. In effect July 22, 1919.

WHEN NEW TRIAL GRANTED.

- I. IN GENERAL, 1-102.
- II. IRREGULARITY IN PROCEEDINGS—SUBDIVISION 1, 103-116.
- III. MISCONDUCT OF JURY—SUBDIVISION 2, 117-143.
- IV. ACCIDENT OR SURPRISE—SUBDIVISION 3, 144-162.
- V. NEWLY DISCOVERED EVIDENCE—SUBDIVISION 4, 163-225.
- VI. EXCESSIVE DAMAGES—SUBDIVISION 5, 226-250.
- VII. INSUFFICIENCY OF EVIDENCE—SUBDIVISION 6, 251-282.
- VIII. ERRORS OF LAW—SUBDIVISION 7, 283-294.

IX. DECISION AGAINST LAW, 295-313.

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- 1. As to right to a.
- 2-4. Same—As to part of issues.
- 5. Same—As to one or more co-defendants.
- 6-8. Agreed statement of facts—Stipulation waiving finding.
- 9. Amendments and proceedings on new trial.
- 10. Amendment of pleadings—New trial to permit.
- 11. Appeal from order granting new trial—As to generally.
- 12, 13. Same—Insufficiency of evidence.

14. Same—Order overruling demurrer to cross-complaint.
 15. Same — Presumption on, as to grounds of new trial.
 16. Same—What may be reviewed.
 - 17, 18. Conditional granting of new trial.
 19. Construction of section—Applies to what.
 - 20, 21. Same—"Decision" which may be vacated.
 22. Same—Not applicable, when.
 - 23, 24. Same—Party aggrieved.
 25. Determination of motion—Absence of affidavits—Effect on jurisdiction.
 - 26-29. Discretion of court—As to generally.
 30. Same—Abuse of.
 31. Same—Conflict in evidence.
 32. Same—Where court grants new trial without any legal reasons.
 33. Dismissal of probate proceedings—For failure to appear.
 34. Duty of court to grant new trial, when.
 35. Excusable neglect — Is not one of the grounds of motion.
 36. Same—Where neglect through wrongful procurement of other party.
 37. Failure to file findings—Until six months after case was submitted.
 38. Filing bill of exceptions and statement of facts.
 39. Same—Change or erasure of filing marks, effect of.
 40. Same — Filing marks prima facie proof of filing.
 41. Finding outside of issues—Does not warrant granting of motion.
 42. Grounds for granting—As to generally.
 43. Same—Statutory provisions.
 44. Insufficient damages.
 45. Insufficiency of findings—To support conclusions or judgment.
 - 46, 47. Judgment — May be set aside and new trial granted.
 - 48-52. Motion for new trial—Character of proceedings.
 53. Same—Effect of.
 54. Order denying a new trial—Presumption on appeal.
 55. Order granting new trial — Appeal from—As to scope of review on.
 - 56-60. Same—Same—Order affirmed, when.
 61. Same—In criminal cause—Presumption on.
 62. Order setting apart homestead and family allowance—Motion for new trial not proper procedure.
 63. Plain disregard by jury of evidence.
 64. Probate proceedings, in.
 65. Proceedings at new trial—Scope of inquiry.
 66. Same—When ordered upon one of several issues.
 67. Proceeding under section ten, Bank Commissioners Act.
 - 68-74. Province and discretion of court.
 - 75-79. Relative positions—Of trial and appellate courts.
 - 80-82. Refusal of leave to amend — After issue joined.
 83. Review—Of new trial order—Defects in the complaint.
 84. Same—Same—That the findings contradict pleadings.
 85. Same—Of questions as to pleadings and sufficiency of findings.
 86. Right to recover nominal damages, only.
 - 87-94. Specifications and statements—Mandamus.
 - 95, 96. Specification of issues — Decision against the law.
 97. Same—Requisites and sufficiency of.
 98. Statements in public journals — Which do not appear to have been read by jury.
 - 99, 100. Sufficiency of complaint—Can not be reviewed by new trial motion.
 101. Support of judgment—Findings can not be examined as to.
 102. Where new trial of issue must result in same decision.
- II. IRREGULARITY IN PROCEEDINGS—SUBDIVISION 1.
103. Action for damages for death from electric shock—Theory of defense as to cause of death—Misconduct of counsel.
 104. Appearance of minor—By guardian ad litem.
 - 105, 106. Construction—Language of this subdivision is sufficiently broad to include, what.
 107. Same — Includes neglect induced through wrongful procurement.
 108. Decision—Signing without reading—Irregularity.
 109. Irregularities—In issuing execution — Not ground for new trial.
 110. Same — Of presiding judge — Controlling conduct of cause.
 111. Same—Same—Language of in ruling upon evidence.
 112. Motion for new trial—Alleged bias and prejudice of trial judge — Failure to file counter-affidavit of judge.
 113. Objections to questions asked witnesses by court.
 114. Omission to serve amendment of complaint.

115. Order reciting that evidence given by witness was tissue of falsehoods.

116. Personal misconduct of judge.

III. MISCONDUCT OF JURY—SUBDIVISION 2.

117. At view—Observing breaks upon car.

118. "Chance"—Resort to by jury—Definition of terms.

119. Same—Average verdict.

120. Same—Same—No agreement to be bound by verdict.

121. Same—Same—Where average was not to control minds of jury.

122. Same—Drawing lots.

123. Same—Guessing heads or tails of coin.

124. Conduct of jurors—In conversing with parties to action.

125. Excessive damages—Distinguished.

126. Mere separation of jurors.

127, 128. Proof of misconduct of jury—Affidavits of jurors.

129. Same—Affidavits of others than jurors.

130. Same—Using magnifying glass.

131, 132. Trifling misconduct—Fairness of trial not affected.

133, 134. Verdict—Impeachment of.

135. Same—Average verdict.

136. Same—Misconduct by reading newspaper reports.

137. Same—Verdict not based on evidence.

138. Same—Same—Affidavit of third person showing admission made by juror.

139. Same—Same—Hearsay statements of juror regarding such misconduct.

140-143. Same—Same—Sufficiency of proof.

IV. ACCIDENT OR SURPRISE—SUBDIVISION 3.

144, 145. "Accident" and "surprise"—Not strictly synonymous.

146. Same—Acting upon advice of attorney—Erroneous conception of the law.

147. Same—Court leading party to believe certain fact sufficiently proved.

148. Attorney—Afflicted with brain trouble—Not ground for new trial, when.

149. Same—Diligence in averting consequences.

150. Same—Ignorance of the law.

151. Same—"Surprise"—At ruling of court on objection.

152. Erroneous views of law or advice of attorney.

153. Failure—To apply, at time, for continuance.

154. Same—To compel giving of testimony.

155. Same—To introduce deposition—Under erroneous belief induced by judge.

156. Going to trial without depositions.

157. Ignorance—Of act of agent.

158. Same—Of the term of lease sued on.

159, 160. Same—Of time for trial.

161, 162. That different result might have been reached—Must be made to appear.

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163. Affidavit and requisites of.

164. Same—Delay in filing affidavits—Exclusion of.

165-171. Courts look with distrust and disfavor—Unless evidence would change result.

172-180. Cumulative evidence—In general.

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182-185. Denial of new trial—Not abuse of discretion, when.

186. Different result probable—In general.

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188-197. Discretion of trial court—In general.

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199-206. Due diligence—Must be shown.

207. Same—Determination whether evidence could with reasonable diligence have been discovered.

208-210. Same—When evidence was in possession of moving party while cause was pending.

211. Duty of party—Before decision rendered—Procedure.

212, 213. Evidence designed to contradict witness.

214, 215. Failure to request postponement.

216. Lack of diligence in procuring—In general.

217. Same—Moving party must make clear case showing due diligence.

218. Same—Where newly discovered evidence was not of such character as to put defendant on inquiry.

219, 220. Same—Where newly discovered evidence was such as might have escaped extraordinary diligence.

221. Same—Where party had knowledge of materiality testimony of witness before trial.

222. Same—Where plaintiff must have been fully advised of materiality and bearing of evidence.

223. Lack of showing evidence could not have been procured.

224. Questions considered on hearing.

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227-231. Discretion of court.

232-237. Excessive verdict—Will not justify granting new trial, when.

238-248. Same—Illustrations.

249. Excessiveness of verdict—To be determined solely from consideration of evidence in cause.

250. Same—Waiver—Effect of.

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252, 253. Decision against weight of evidence—Makes it duty of trial court.

254-258. Discretion of court—In denying or granting new trial.

259, 260. Disregard of erroneous instruction.

261-272. Duty and right of court to grant new trial, when.

273, 274. Excessive damages—When distinguished.

275. Findings set aside.

276. Same—The “decision” of the court.

277. Insufficiency of evidence to justify judgment.

278. Jurisdiction to grant new trial—Notwithstanding conflict in evidence.

279. Proceedings after reversal.

280. Specifications in order granting new trial.

281. Succeeding judge—Stands in place of former judge.

282. Same—Duty of judge to grant motion for new trial.

VIII. ERRORS OF LAW—SUBDIVISION 7.

283. Amendment of judgment of dismissal—By consent.

284. Dismissal of action by consent—Error of law at trial—Amendment of judgment.

285. Same—Editorial note.

286. Error—In admission of testimony offered by defendant.

287. Same—In admitting immaterial evidence.

288, 289. Same—In instructions—Ignored by jury.

290. Same—In ruling on motion for nonsuit.

291-293. Failure to find upon issue of fact—Decision “against law.”

294. Wrong reason for right decision—Effect of.

IX. DECISION AGAINST LAW.

295, 296. As to generally.

297. Construed—Phrase “or that it is against the law.”

298. Same—“Verdict and decision.”

299. Decision against law.

300. Same—Failure to find.

301. Decision and findings of court.

302, 303. Erroneous conclusions of law.

304. Same—Where conclusion of law is logically drawn from facts.

305. Error of law committed resulting in erroneous decision.

306, 307. Failure to find on material issue.

308. Same—Where complaint sets forth two or more grounds for relief.

309. Judgment against law.

310. Judgment for return of property—Where no return is asked.

311. Objection that finding did not sustain decision.

312. Stipulated facts—Decision against law.

313. Verdict in disobedience to instructions.

I. IN GENERAL.

1. **As to right to a.**—Where a complete scheme of procedure is provided by statute, from the commencement of the action to the entry of judgment, and expressly provides for an appeal and makes no provision for a new trial, the latter is not available.—*People v. Bank of San Luis Obispo*, 152 Cal. 270, 92 Pac. 481.

As to discretion of court in granting or refusing new trial, see pars. 26-32, 68-74, 183-198, 227-231, this note.

As to duty of court to grant new trial, see pars. 261-272, this note.

2. **Same—As to part of issues.**—It is within the power of the trial court, where there is more than one issue of fact in a case, and such issues are distinct and separable in their nature, to order a new trial of one issue and refuse it as to another.—*Estate of Everts*, 163 Cal. 449, 125 Pac. 1058.

As to limiting of issues to be tried by the jury upon the granting of a new trial and the right of the appellate court so to limit, see note Ann. Cas. 1912D, 593.

3. A cause may be remanded with directions to the trial court to take evidence and make a finding upon a special issue involved therein, and to render a supplemental decree thereon, without the necessity of a retrial of the entire cause.—*Mayberry v. Whittier*, 144 Cal. 328, 78 Pac. 16.

4. Under the California practice a party may move for a new trial upon the whole or upon a part only of the issues; and the court may grant the motion as to the whole or a part, and if granted as to a part may leave the determination upon the remainder

to stand.—*Robinson v. Muir*, 151 Cal. 125, 90 Pac. 521.

5. Same.—As to one or more co-defendants.—In an action against three defendants for trespass to real estate, where the evidence shows that one of the defendants is clearly guilty of trespass but fails to implicate the other two, a verdict entered against the trespassing defendant must stand while as to the other two it will be set aside as without evidence to support it.—*Clark v. Torchiana*, 19 Cal. App. 786, sub nom. *Clark v. Van Torchiana*, 127 Pac. 831.

6. Agreed statement of facts—Stipulation waiving findings.—Jurisdiction of trial court to entertain a motion for a new trial where there was an agreed statement of facts, and a stipulation waiving findings, upheld, and an appeal from an order denying such motion will not be dismissed on the ground that it is frivolous, in advance of a hearing on the merits.—*Quist v. Michael*, 153 Cal. 367, 95 Pac. 658.

7. Where it is stipulated between the parties as to what the facts in controversy are and that those facts shall constitute the findings there is no room for demanding a new trial. It would be idle to grant a new trial and re-examine a question of fact when there has not only been no controversy from any issue of fact but where the facts are expressly agreed upon.—*Quist v. Sandman*, 154 Cal. 748, 753, 99 Pac. 204.

As to stipulated facts, "decision against law," see par. 312, this note.

8. Where the facts have been agreed upon the defeated party can not be heard to demand a new trial on the ground that the decision of the court was against law. That point could only be availed of on appeal.—*Quist v. Sandman*, 154 Cal. 748, 753, 99 Pac. 204.

9. Amendments and proceedings on new trial.—Where a new trial is granted the position occupied by the parties is identically the same as though no new trial had ever been had. They are free to make such proper amendments to the pleadings as the court might allow and upon the trial to introduce any and all competent evidence.—*Riley v. Loma Vista Ranch Co.*, 5 Cal. App. 25, 27, 89 Pac. 849.

As to proceedings on new trial, see pars. 65, 66, this note.

10. Amendment of pleadings — New trial to permit.—Where real purpose of plaintiff, in her motion for new trial, was to have decision and judgment set aside that she might amend her complaint, and thus be enabled to prove facts which, if they existed, were contradictory to averments of complaint on which trial was to be made, new trial was properly denied.—*Bates v. Bates*, 71 Cal. 307, 309, 12 Pac. 223.

11. Appeal from order granting new trial — As to generally.—Where a motion for new trial upon more than one ground is granted generally, it will be affirmed if

there is any ground upon which the order may be based.—*Hughes Bros. v. Rawhide Gold Min. Co.*, 16 Cal. App. 296, 116 Pac. 969.

12. Same—Insufficiency of evidence.—The trial court should grant a new trial for insufficiency of the evidence whenever in its opinion the evidence is insufficient to justify the decision, and its action in so doing is not reviewable on appeal where there is an appreciable conflict of evidence.—*Hughes Bros. v. Rawhide Min. Co.* 16 Cal. App. 296, 116 Pac. 969.

As to insufficiency of evidence, see Part VII, this note.

13. Where a motion for a new trial based upon more than one ground, one of which is insufficiency of the evidence, is granted on general grounds, on appeal it will be assumed that one of the grounds upon which it was granted was insufficiency of the evidence, and if there is a substantial conflict it will be affirmed.—*Hughes Bros. v. Rawhide Min. Co.*, 16 Cal. App. 297, 116 Pac. 969.

14. Same—Order overruling demurrer to cross-complaint in action for divorce is not reviewable on such appeal.—*Aston v. Aston*, 14 Cal. App. 324, 111 Pac. 1035.

15. Same—Presumption on, as to grounds of new trial.—Where there is no showing in the record of the grounds upon which a motion for a new trial was granted it will be presumed upon appeal that it was made upon sufficient and proper grounds.—*Thompson v. Wheeler*, 5 Cal. App. 195, 196, 89 Pac. 1065.

16. Same—What may be reviewed.—The appellate court is limited to the grounds upon which the motion was made, and questions relating to the sufficiency of the complaint, rulings upon demurrer, and the sufficiency of the findings to support the judgment, can not be considered on such an appeal.—*Great Western Gold Co. v. Chambers*, 153 Cal. 310, 95 Pac. 151; *Younger v. Moore*, 155 Cal. 775, 103 Pac. 221.

17. Conditional granting of new trial.—A cross-complainant in an action for the foreclosure of a mechanic's lien, who is not given notice of the trial and does not appear thereat, is entitled, upon motion for a new trial, to have the order made unconditionally, and it is irregular to order that the motion be denied upon condition of the deposit of the amount of the claim of such cross-complainant in court, thereby depriving such complainant of a hearing upon the question of the settlement of its legal costs.—*Martin v. Becker*, 169 Cal. 306, Ann. Cas. 1916D, 176, 146 Pac. 665.

18. An order made on motion for a new trial that, in the event of plaintiffs' filing, within twenty days, their consent that the judgment be modified by the insertion of the words "upon the payment to said defendant by said plaintiffs" of a certain sum of money, the motion for a new trial "shall be denied," otherwise the motion shall be granted, the order immediately becomes

effective on the filing of the consent.—*Taber v. Bailey*, 22 Cal. App. 617, 135 Pac. 975.

19. Construction of section—Applies to what.—The above section construed as applying to action against state to recover bounty on coyote scalps brought under act of March 23, 1901, and hence court had authority to grant new trial in such case.—*San Francisco L. & C. Co. v. State*, 141 Cal. 354, 356, 74 Pac. 1047.

20. Same—"Decision" which may be vacated is that which was given on original trial of question of fact and on which judgment is to be entered.—*Brison v. Brison*, 90 Cal. 323, 327, 27 Pac. 186.

21. Until findings are signed and filed, there is no decision, as under present system findings constitute decision, and nobody is aggrieved within meaning of this section, so that notice of motion for new trial before findings were signed was premature and ineffectual.—*Dominguez v. Mascotti*, 74 Cal. 269, 270, 15 Pac. 773. See *Mahoney v. Caperton*, 15 Cal. 313; *Bates v. Gage*, 49 Cal. 126; *Hinds v. Gage*, 56 Cal. 486, 487; *Spottiswood v. Weir*, 66 Cal. 525, 529, 6 Pac. 381.

22. Same—Not applicable, when.—The provisions of the code relating to new trials are not applicable to a judgment entered on motion against a surety on an undertaking given to stay execution on a judgment pending appeal.—*Gray v. Cotton*, 53 Cal. Dec. 98, 162 Pac. 1019.

23. Same—Party aggrieved.—Plaintiff who has been granted all relief she prayed for is not party aggrieved within meaning of this section (*Patterson, J.*, concurring).—*Cooper v. Cooper*, 88 Cal. 45, 49, 25 Pac. 1062.

24. Where in contest over an estate persons who claim kinship to deceased are not parties aggrieved within this section as to decisions declaring that as between other persons one of them was heir of deceased after court had decided that claimants were not related to deceased.—*Blythe v. Ayres*, 102 Cal. 254, 260, 36 Pac. 522.

25. Determination of motion—Absence of affidavits—Effect on jurisdiction.—In the case in which a motion for a new trial is filed with the trial court and that court proceeds to determine the motion without having before it the proper affidavits, and in the absence of proper specifications of errors of law occurring at the trial, and with no specifications of the evidence claimed to be insufficient to justify the court's decision, this at best constitutes but an irregularity in the proceedings of the court, and does not affect the jurisdiction conferred upon the court by the above and subsequent sections.—*McConnell v. Superior Court*, — Cal. App. —, 197 Pac. 680.

26. Discretion of court—As to generally.—Order granting new trial generally will not be reversed unless it appears that order itself was an abuse of discretion.—*Von Schroeder v. Spreckels*, 147 Cal. 186, 81 Pac.

515. See *Newell v. Desmond*, 63 Cal. 242, 245; *Anderson v. Hinshaw*, 110 Cal. 682, 687, 43 Pac. 389.

27. Even though if motion had been granted order would not have been disapproved.—*Anderson v. Hinshaw*, 110 Cal. 682, 687, 43 Pac. 389.

28. Motions for new trial are addressed to the sound discretion of the trial court, and its action will not be disturbed unless the record shows an abuse of such discretion, the presumption being that the discretion was properly exercised.—*People v. Kilfoil*, 27 Cal. App. 29, 148 Pac. 812.

29. In the granting of a motion for a new trial, the trial judge has a very broad discretion, and the order will be upheld on appeal if it may be supported upon any of the assigned grounds.—*Miller v. Logan*, 32 Cal. App. 28, 161 Pac. 1022.

30. Same—Abuse of.—For facts of case showing no abuse of discretion in dismissing proceedings for a new trial on account of lack of diligence, see *McConnell v. Imperial Water Co.*, 20 Cal. App. 8, 127 Pac. 1036.

31. Same—Conflict in evidence.—In granting a new trial, the trial judge is not bound by the verdict of the jury, where there is a conflict in the evidence.—*Briggs v. Hall*, 20 Cal. App. 372, 129 Pac. 288, 289, citing *Green v. Soule*, 145 Cal. 96, 78 Pac. 337.

32. Same—Where court grants new trial without any legal reasons, in so doing its discretion has been abused.—*Le Tourneux v. Gilliss*, 1 Cal. App. 546, 82 Pac. 627.

33. Dismissal of probate proceedings—For failure to appear.—Where there was no trial of any issue of fact, and the contest of the probate of the will was dismissed without any trial for failure of the contestants to appear, a motion for a new trial was not proper.—*Estate of Dean*, 149 Cal. 495, 87 Pac. 13.

As to new trial in probate proceedings, see par. 64, this note.

34. Duty of court to grant new trial, when.—Where the court is of the opinion that the weight or preponderance of the evidence is opposed to the findings, it is its duty to grant a motion for a new trial.—*Conwell v. Varian*, 20 Cal. App. 251, 130 Pac. 23, 25.

As to insufficiency of evidence to support findings or verdict, see Part VII, this note.

35. Excusable neglect—Is not one of grounds of motion for new trial under this section.—*McGuire v. Drew*, 83 Cal. 225, 228, 23 Pac. 312.

36. Same—Where neglect through wrongful procurement of other party, the rule is otherwise.—See *Piercy v. Piercy*, 149 Cal. 163, 86 Pac. 507.

As to vacating order refusing new trial on the ground of mistake, inadvertence, or excusable neglect, see, ante, § 473 and note.

37. Failure to file findings.—Until six months after case was submitted for decision and court had ordered judgment, is not one of grounds for new trial under this section.—*Kepfler v. Kepfler*, 134 Cal. 205, 206, 66 Pac. 208.

38. Filing bill of exceptions and statement of facts.—Section 639, ante, provides that when a statement is settled it should be filed with the clerk. To file a paper on the part of a party is to place it in the official custody of the clerk, to be by him permanently kept among the papers of the cause, subject to the inspection of parties entitled to inspect the same. Such act, accompanied by payment of any fee, due therefor, constitutes a sufficient filing of the papers.—*McCann v. McCann*, 20 Cal. App. 564, 129 Pac. 966, 967.

As to specification of issues, see pars. 37-97, this note.

39. Same.—Change or erasure of filing marks, effect of.—Where notice of intention to move for a new trial affecting two different causes is presented to the clerk, and payment of fees made as demanded, the fact that the clerk made a subsequent demand for an additional fee and by erasing his former file mark on the document caused it to read as if filed upon the subsequent payment, will not deprive such notice of its effect as of the first date stamped thereon.—*McCann v. McCann*, 20 Cal. App. 564, 129 Pac. 965.

40. Same.—Filing mark prima facie proof of filing.—The file mark indorsed on a paper by the clerk, while prima facie proof of the filing, is not the filing but evidence thereof. Where a paper has been deposited with the clerk, one can not be deprived of the use thereof in support of his motion thereon on account of the failure of the clerk to indorse thereon the word "filed," with the day and date of such indorsement.—*McCann v. McCann*, 20 Cal. App. 564, 129 Pac. 966, 967.

41. Finding outside of issues.—Does not warrant granting of motion for new trial since new trial is simply re-examination of an issue of fact, and where there is no issue of fact there is nothing to be retried.—*Power v. Fairbanks*, 146 Cal. 611, 80 Pac. 1075, 1076.

42. Grounds for granting.—As to generally.—The rule that a party to an action may not excuse the production of evidence relating to a conversation in which he himself participated, on the ground that he forgot it until after the trial, applies to a case where he forgets to impart his knowledge to his attorney.—*Converse v. Ferguson*, 166 Cal. 1, 134 Pac. 977.

43. Same.—Statutory provisions as to the grounds for a new trial are provided for in the above section, and are exclusive.—*Pacific Gas & Electric Co. v. Rollins*, 32 Cal. App. 782, 164 Pac. 53.

44. Insufficient damages, verdict for under influence of passion and prejudice, is

not ground for new trial.—*Benjamin v. Stewart*, 61 Cal. 605, 608.

As to granting new trial on ground damages insufficient under the evidence, see Part VII, this note.

45. Insufficiency of findings.—To support conclusions or judgment not reviewable on appeal from order on motion for new trial, but on appeal from judgment.—*Cargnani v. Cargnani*, 16 Cal. App. 99, 116 Pac. 306.

See, post, § 663a and note.

46. Judgment.—May be set aside and new trial granted.—Decision may be set aside and new trial granted for certain causes, and decision consists of findings of fact and conclusions of law, and hence judgment may not be set aside.—*Sawyer v. Sargent*, 35 Cal. 259, 3 Pac. 872.

47. Motion for new trial is application to have verdict or decision set aside, and is not addressed to judgment.—*Wittenbrock v. Bellmer*, 62 Cal. 558, 560.

48. Motion for new trial.—Character of proceeding.—A motion for a new trial can not be entertained where the cause is submitted for decision on the pleadings.—*Abbey Land & Impr. Co. v. San Mateo County*, 167 Cal. 434, 52 L. R. A. (N. S.) 408, 139 Pac. 1068.

49. A motion for a new trial is a "trial" and an independent proceeding.—*Keating v. Keating*, 169 Cal. 754, 147 Pac. 974.

50. A motion for a new trial, based upon a notice which fails to contain any specification of particulars in which the evidence is alleged to be insufficient, can not be granted upon that ground.—*Strange v. Strange*, 23 Cal. App. 281, 137 Pac. 1104.

51. A motion for a new trial is in the nature of a new and independent proceeding collateral to the judgment in the action.—*Coleman v. Coleman*, 23 Cal. App. 423, 138 Pac. 362.

52. A motion for a new trial is sufficiently made by the reading to the court of the notice of intention at the time fixed for the hearing of the motion.—*Taylor v. Northern Elec. Ry. Co.*, 26 Cal. App. 765, 148 Pac. 543.

As to notice of intention, see, post, § 663a and note.

53. Same.—Effect of.—Judgment merely suspended, and if motion denied the judgment stands as of the date of original entry; hence, it is held that while an action for negligent injury abates by the death of the plaintiff before judgment, such action does not abate after judgment and pending motion for a new trial.—*Fowden v. Pacific Coast S. S. Co.*, 149 Cal. 154, 86 Pac. 178.

54. Order denying a new trial.—Presumption on appeal.—In the absence of an affirmative showing of error the appellate court will presume that an order denying a new trial was properly made.—*Title Land Co. v. Schaefer*, 41 Cal. App. 294, 182 Pac. 463.

55. Order granting new trial—Appeal from—As to scope of review on.—In a case in which a notice for a new trial states that it will be made upon the ground that the evidence was insufficient to justify the verdict, that the verdict was against the law, and that errors were made by the court in its rulings at the trial, and the order granting the motion not specifying any particular ground as to the basis upon which the order was made, as required by the provisions of the above section, the appellate court can not consider whether the evidence was or was not sufficient to sustain the verdict unless it is insufficient in law and without conflict on any material point and if the court finds any other ground upon which the court was justified in granting the order, such order should be affirmed.—*Read v. Pacific Electric R. Co.*, 185 Cal. 520, 197 Pac. 791.

56. Same—Same—Order affirmed when.—Upon an appeal from an order granting a new trial, if it is found that the trial court erred in granting the motion, so far as the grounds upon which the court based the order are concerned, and that the new trial should have been granted because of some other ruling on a question of law, which the trial court believed was not erroneous, the order will be affirmed.—*Stell v. Sun Insurance Office*, 171 Cal. 795, 155 Pac. 72.

57. When no abuse of discretion is shown, the granting of an order granting a new trial will not be disturbed on appeal.—*McEwen v. Occidental Life Ins. Co.*, 172 Cal. 6, 155 Pac. 86.

58. An order granting a new trial must be affirmed, without regard to the ground upon which it is specifically based, if it could be rightfully granted upon any of the grounds upon which the motion was made; such rule, however, is subject to the exception that in passing upon the correctness of the order granting a new trial the appellate court may not consider the insufficiency of the evidence when the lower court "by direct language" expressly excludes that ground as a basis for its order.—*Meinberg v. Jordan*, 29 Cal. App. 760, 157 Pac. 1005.

59. An order granting a new trial must be affirmed without regard to the ground upon which it is specifically based if it could be rightfully granted upon any of the grounds upon which the motion was made, subject, however, to the exception that in passing upon the correctness of the order the appellate court may not consider the insufficiency of the evidence when the lower court by direct language expressly excludes such ground as a basis for its order.—*Meinberg v. Jordan*, 29 Cal. App. 760, 157 Pac. 1005.

60. An order granting a new trial will not be disturbed upon appeal save upon a showing of an abuse of the discretion vested in the trial court.—*Meinberg v. Jordan*, 29 Cal. App. 760, 157 Pac. 1005.

61. Same—In criminal cause—Presumption on.—The rule under the provisions of the above section requiring that when a new trial is granted upon the ground of the insufficiency of the evidence to sustain the verdict, the order granting the new trial shall so specify, and that if the order does not so specify an appellate court will presume that the order was not passed upon that ground, does not appeal in criminal case.—*People v. Dewar*, — Cal. App. —, 193 Pac. 156.

62. Order setting apart homestead and family allowance—Motion for new trial not proper procedure for reconsideration of such orders, the duty of the court being to make such orders ex parte and without petition.—*Shipman v. Unangst*, 150 Cal. 425, 88 Pac. 1090.

63. Plain disregard by jury of evidence in case, so as to satisfy court that verdict was rendered under influence of passion and prejudice, and such plain disregard by jury of instructions of court as to satisfy it that verdict was rendered under misapprehension of such instructions, are not grounds for motion for new trial under this section.—*Anglo-Nevada A. Corp. v. Ross*, 123 Cal. 520, 521, 56 Pac. 335.

64. Probate proceedings, in.—Where issues of fact are authorized, a new trial of such issues may be had, as in like issues in other proceedings.—*Carter v. Waste*, 159 Cal. 25, 112 Pac. 727.

As to dismissal in probate proceedings for failure to appeal, see par. 133, this note.

65. Proceedings at new trial—Scope of inquiry.—A new trial is a re-examination of an issue of fact, and the sufficiency of the pleadings to support a plaintiff's cause of action, or maintain any particular defense relied upon by a defendant, is not involved in a re-examination of an issue of fact; and therefore can not be considered upon an appeal from an order granting a new trial.—*Clark v. Torchiana*, 19 Cal. App. 786, sub nom. *Clark v. Van Torchiana*, 127 Pac. 831, 833, citing *Martin v. Matfield*, 49 Cal. 42; *Brison v. Brison*, 90 Cal. 323, 27 Pac. 186; *Crescent Feather Co. v. United Upholsterers' Union*, 153 Cal. 433, 95 Pac. 871; *Riverside Water Co. v. Gage*, 108 Cal. 240, 41 Pac. 299.

66. Same—When ordered upon one of several issues.—Where a new trial is granted as to one of several separate issues it opens for examination only the issue upon which it is ordered. The determinations of the other issues remain in the record, and they can not be retried. The only remedy of the moving party as to those issues is to appeal from the part of the order denying the motion for a new trial as to them.—*Estate of Everts*, 163 Cal. 449, 125 Pac. 1058.

67. Proceeding under section 10, Bank Commissioners Act.—In the absence of any special method of procedure motions for new trials of issues of fact in such proceed-

ings are hereby authorized.—*People v. Bank of San Luis Obispo*, 152 Cal. 269, 92 Pac. 481.

68. **Province and discretion of court.**—The above section, so far as providing for a new trial on the ground of insufficiency of the evidence to justify the verdict, is not violative of section 7 of article I of the constitution, which declares that "the right of trial by jury shall be secured to all," as the constitutional guarantee is fully observed when the verdict of the jury is rendered and recorded.—*Estate of Bainbridge*, 169 Cal. 151, 146 Pac. 427.

As to discretion of court in granting new trial, see pars. 26-32, 188-198, 227, 231, this note.

As to duty of court in determining motion for new trial, see pars. 34, 261-272, this note.

69. Motions for new trial are addressed to the sound discretion of the trial court, and its action will not be disturbed unless the record shows an abuse of such discretion, the presumption being that the discretion was properly exercised.—*People v. Kilfoil*, 27 Cal. App. 29, 148 Pac. 812.

70. The granting or denying of a new trial on the ground that the evidence is insufficient to justify the verdict, where there is a substantial conflict in the evidence, rests so fully in the discretion of the trial court that its action is conclusive upon an appellate court, unless it appears that there has been an abuse of discretion. The action of the trial court, in such a case, is so far a matter within its discretion that its decision, if there is an appreciable conflict in the evidence, is not open to review.—*People v. Petros*, 25 Cal. App. 236, 143 Pac. 246.

71. While a trial court will not be allowed to trespass upon the functions of the jury, it is nevertheless invested with a supervisory control over a trial before a jury and is legally authorized to grant a new trial where it entertains a well-founded opinion, or one which appears to be sufficiently well-founded to preclude a reviewing court from declaring it not to be, that the result reached by the jury is not justified by the evidence. And, in determining this question upon a motion for a new trial, the trial court may pass upon the probative value of the testimony submitted in proof of the charge against the accused.—*People v. Petros*, 25 Cal. App. 236, 143 Pac. 246.

72. The trial court did not commit reversible error in this case denying the defendants' motion for a new trial on the ground of newly discovered evidence; the granting or denying of the motion being within the sound discretion of the court and its action not being ground for reversal except when such discretion is abused.—*Koskela v. Albion Lumber Co.*, 25 Cal. App. 12, 142 Pac. 851.

73. When an order granting a new trial is general it is the well-settled rule that such order will not be reversed unless it appears that the order itself was an abuse

of discretion. The granting or denying of a new trial on the ground that the evidence is insufficient to justify the verdict, where there is a substantial conflict in the evidence, rests so fully in the discretion of the trial court that its action is conclusive upon the appellate court, unless it appears that there has been an abuse of such discretion, and it is immaterial whether the evidence is insufficient to sustain all or only a portion of the issues on which the judgment depends.—*Buckley v. Marin County*, 25 Cal. App. 577, 144 Pac. 545.

74. In the absence of any apparent abuse of discretion, it is the rule that an order granting a new trial grounded upon the insufficiency of the evidence is, in the presence of a substantial conflict in the evidence, conclusive upon the appellate court.—*Waltz v. Silveira*, 25 Cal. App. 717, 145 Pac. 169.

75. **Relative positions.—Of trial and appellate courts.**—The situation of the trial judge in passing upon a motion for a new trial is different from that of the appellate court. The latter court can not pass upon the credibility of witnesses, and hence can not interfere upon this ground; but that the trial court can not rest upon a conflict in the evidence, but must weigh and consider the evidence for both parties, and determine for itself the just conclusion to be drawn from it.—*Dunaway v. Anderson*, 22 Cal. App. 691, 136 Pac. 309.

76. It is the duty of the judge of a trial court to grant a new trial whenever he is not satisfied with the verdict, if tried by a jury, or with the findings, if tried by the court; and he is not bound by the rule as to conflicting evidence, as is an appellate court.—*Shilling v. Dodge*, 22 Cal. App. 517, 135 Pac. 299.

As to duty of trial judge, see pars. 34, 261-272, this note.

77. The motion for a new trial is addressed to the sound discretion of the trial judge, and under a general order granting a new trial, the appellate court must assume that in granting it he was satisfied that the verdict was contrary to the weight of the evidence.—*Shilling v. Dodge*, 22 Cal. App. 517, 135 Pac. 299.

78. Where the affidavits of the plaintiffs on their motion for a new trial on the ground of improper remarks by the court in the presence of the jury, are contradicted by the affidavits of ten of the jurors that they heard no such remarks, and the affidavits of the judge that he did not make them within the hearing of the jury, the decision of the trial court on the issue is conclusive on the appellate court.—*Dougherty v. Union Traction Co.*, 23 Cal. App. 17, 136 Pac. 722.

79. Where there is a conflict in the evidence, an order granting a new trial upon the ground of the insufficiency of the evidence to support the verdict is entirely within the legal discretion of the trial

court; and even in cases where there may not appear to be a conflict in the evidence, and where all the proofs seem to be favorable to one or the other of the parties litigant, the question as to the probative force of the testimony, on the motion for a new trial, is one whose determination is for the trial court.—*Otten v. Spreckels*, 24 Cal. App. 251, 141 Pac. 224.

80. Refusal of leave to amend—After issue joined.—The action of a trial court refusing a party leave to amend his pleading after issue joined can only be reviewed on a motion for a new trial, and in such case, in order that a review of such action may be had, the notice of intention must set forth the several grounds enumerated in the first subdivisions of section 657 of the Code of Civil Procedure—that is, that the court had thus abused its discretion, whereby the complaining party was prevented from having a fair trial.—*Cook v. Suburban Realty Co.*, 20 Cal. App. 538, 129 Pac. 801, 803.

As to amendments, see par. 9, this note.

As to new trial for purposes of amendment of pleadings, see par. 10, this note.

81. Where there is a conflict in the evidence, it is within the discretion of the trial court to grant a new trial upon the ground of the insufficiency of the evidence to support the decision.—*Shea-Bocqueraz Co. v. Hartman*, 20 Cal. App. 538, 129 Pac. 807, 808.

82. Where the question of excessive damages was first raised at the oral argument, but was not even stated as ground for the motion in the notice of intention to move for a new trial, such question could not be considered by the trial court upon the hearing of the motion for a new trial.—*Sebring v. Harris*, 20 Cal. App. 56, 128 Pac. 7.

83. Review—Of new trial order—Defects in the complaint can not be reviewed on appeal from a new trial order.—*Shaw v. Shaw*, 160 Cal. 740, 117 Pac. 1048.

84. Same—Same—That the findings contradict pleadings, or are at variance therewith, can not be reviewed on appeal from a new trial order.—*Shaw v. Shaw*, 160 Cal. 740, 117 Pac. 1048.

85. Same—Of questions as to pleadings and sufficiency of findings to support judgment must be by appeal from the judgment.—*Bennett v. Potter*, 16 Cal. App. 185, 116 Pac. 681.

86. Right to recover nominal damages, only.—Where object of an action is to determine precise question of permanent right, and through error plaintiff is deprived of judgment he is entitled to, fact that he can recover only nominal damages will not be reason for denying new trial.—*Arkley v. Union S. Co.*, 30 Cal. Dec. 1, 3. See *Hancock v. Hubbell*, 71 Cal. 537, 12 Pac. 618; *Kenyon v. Western U. T. Co.*, 100 Cal. 454, 35 Pac. 75.

87. Specifications and statements—Mandamus.—On a motion for a new trial in an action to establish the existence of a part-

nership to recover one-half the earnings thereof and for an accounting, the specification that the evidence is insufficient to sustain the finding that there is or was "due" from the defendant to said partnership the sum found by the court, or to sustain the finding that any sum whatsoever was or is "due" from such defendant to the partnership or to the plaintiffs, is sufficient to bring the matter of lack of accounting to the notice of the court, as to which a new trial was granted.—*Murphy v. Magee*, 169 Cal. 710, 147 Pac. 948.

88. The rules with reference to specifications are much broader and more liberal than those relating to pleading.—*Murphy v. Magee*, 169 Cal. 710, 147 Pac. 948.

89. A sufficient compliance with sections 650 and 659 of the Code of Civil Procedure in preparing and presenting a statement of the case of a motion for a new trial, is had where the moving party leaves his proposed statement with the clerk and the adverse party thereafter likewise leaves his proposed amendments thereto, and the judge subsequently receives all of the papers, either from the clerk or from the judge in whose place he presided at the trial, and thereupon in open court fixes a day for the settlement of the statement in the presence of both counsel, notwithstanding the failure of the moving party to give the notice of intention of presentation of the statement to the judge as provided by such sections.—*Keating v. Keating*, 169 Cal. 754, 147 Pac. 974.

90. Mandamus will lie to compel a judge of a superior court to settle a statement of the case on motion for a new trial, although no transcript is furnished to him of so much of the testimony of the witnesses as is necessary to explain the specifications of the insufficiency of the evidence attached to the motion where the proposed statement conflicts with the proposed amendments thereto.—*Johnson v. Works*, 25 Cal. App. 363, 143 Pac. 792.

91. It is the duty of the judge in such a case to settle the statement in some form, and to the best of his ability to remember what occurred at the trial.—*Johnson v. Works*, 25 Cal. App. 363, 143 Pac. 792.

92. But in view of the fact that the petitioner has not furnished the respondent with a transcript of the testimony, and in view of the delay which occurred between the time of the trial and the time of attempted settlement of the statement, the petitioner can not justly complain of the action of the court if the statement as approved by the respondents shall be in more general terms with respect to the evidence contained therein than it would be if the exact terms of the testimony were embodied in a transcript.—*Johnson v. Works*, 25 Cal. App. 363, 143 Pac. 792.

93. If the specification is sufficient to enable the opposing counsel to determine what evidence should be put in the state-

ment, and the judge to strike out redundant and useless matter, it is enough.—Taylor v. Northern Elec. R. Co., 26 Cal. App. 765, 148 Pac. 543.

94. Specifications of the insufficiency of the evidence on such a motion, stating in substance that the evidence produced by the defendant upon the questions of the extent and effect of the plaintiff's injuries, whether the result thereof was to permanently or only temporarily incapacitate him and the amount of money he was compelled to expend for medical treatment, etc., was not sufficient to overcome the effect of the evidence produced by the plaintiff upon those points, and that the evidence as to the character and extent of the injuries sustained by the plaintiff did not justify the jury in awarding to him damages in no greater sum than five hundred dollars, while inartfully expressed, sufficiently point to the particular respects in which it is claimed that the evidence warranted a verdict in a larger sum.—Taylor v. Northern Elec. R. Co., 26 Cal. App. 765, 148 Pac. 543.

95. Specification of issues — Decision against the law.—A party relying upon a failure to find upon material issues must make his motion for new trial on the ground that the decision is "against law." It is not necessary that a specification should be made of the particular issues on which findings were omitted.—Knoch v. Haizlip, 163 Cal. 146, 124 Pac. 998.

As to ground of new trial that decision or verdict against the law, see Part IX, this note.

96. In an action for money had and received by an attorney to plaintiff's use, in which the attorney pleaded and sustained a large deduction for the value of his services to plaintiff, and payment of the residue, and the verdict was for the defendant, and the plaintiff moved for a new trial on the minutes of the court, as provided in subdivision 4 of section 659 of the Code of Civil Procedure, but the notice of the motion failed to specify any particulars wherein the evidence was insufficient to prove the value of the services so deducted, as required by that section, it was error for the court to grant a new trial for insufficiency of the evidence to justify the verdict in that regard.—Western Pacific Land Co. v. Wilson, 19 Cal. App. 338, 125 Pac. 1076.

97. Same.—Requisites and sufficiency of.—In an action to quiet title to land held by defendant under a deed from the trustee in a deed of trust, where the court found that defendant had never demanded payment of the interest on the note secured by such deed of trust, and that plaintiff was not in default in the payment of the interest, that the declaration by defendant that such principal was due and the sale and deed in pursuance thereof were void; and, that the plaintiff was the owner of the land subject to the deed of trust executed by a

former owner, whereupon the defendant gave notice of intention to move for a new trial, which notice specified that the evidence was insufficient to justify the following findings: That the plaintiff is the owner of the premises; that the interest which defendant has in the premises is without right; that the money for the payment of the interest on said note was at all times ready at the place of payment. Although these are not in the customary form for such specifications of insufficiency they are sufficient to present the question whether or not the finding on the subject of default in the interest payments is sustained by the evidence.—Jose Realty Co. v. Pavlicevich, 164 Cal. 613, 130 Pac. 15, 16.

98. Statements in public journals.—Which do not appear to have been read by jury before rendition of verdict, though severe on defendant, charging him with subornation of perjury, could not justify new trial.—Sheehan v. Hammond, 2 Cal. App. 371, 848, 24 Pac. 340.

99. Sufficiency of complaint.—Can not be reviewed by new trial motion, or appeal therefrom, and upon such an appeal the complaint must be treated as sufficiently stating a cause of action.—Bennett v. Potter, 16 Cal. App. 185, 116 Pac. 681.

100. Sufficiency of complaint to state a cause of action not reviewable on appeal from order on motion for new trial, such subject being reviewable only on appeal from the judgment.—Spaeth v. Ocean Park etc. Inv. Co., 16 Cal. App. 332, 116 Pac. 980.

101. Support of judgment.—Findings can not be examined as to.—In a new trial proceeding the findings can not be examined for the purpose of determining whether they support the judgment or not.—Bennett v. Potter, 16 Cal. App. 185, 116 Pac. 681.

102. Where new trial of issue must result in same decision and judgment, new trial was properly denied.—Bates v. Bates, 71 Cal. 307, 309, 12 Cal. App. 223. See People v. Hager, 52 Cal. 171, 184.

II. IRREGULARITY IN PROCEEDINGS —SUBDIVISION 1.

As to misconduct of counsel as ground for a new trial, see notes 48 Am. Rep. 336; 56 Am. Rep. 814; 58 Am. Rep. 648; 9 Am. St. Rep. 559; 100 Am. St. Rep. 143.

103. Action for damages for death from electric shock.—Theory of defense as to cause of death.—Misconduct of counsel.—In a case in which an action was brought in which to recover damages for death alleged to be due to a shock of electricity resulting from defendant's negligence in maintaining a power line the theory of the defense being that the death was caused by heart dilation and not by an electric shock, in order to contravert the defense of death from acute dilation of the heart the plaintiff offered in evidence a claim presented to the county by physician that his services upon the inquest of the body showing a

nominal charge for the examination of the body, such evidence was hearsay and incompetent and the court should have prevented the introduction or reading of any portion as such document, but the plaintiff's attorney read enough to show that the claim was only five dollars and that it had been allowed and paid, over the objection to the admission of the document and its rejection as evidence; the court, at the close of the evidence, instructed the jury that by reason of the failure of the plaintiff to produce the doctor who rendered the bill to the county as a witness to contradict the recitals in the death certificate concerning the cause of death a presumption was raised that if produced he would testify in accordance with said recitals, the ruling of the court in rejecting the evidence and the giving of such an instruction, taken together, so far lessened the injurious effect of the misconduct of the counsel for the plaintiff that it can not be deemed sufficient to justify the reversal of the cause. Misconduct of counsel is no cause for reversal of a new trial, unless it has the effect of preventing the complaining party from having a fair trial, under the provisions of subdivision 1 of the above section.—*Robinson v. Western States Gas & Electric Co.*, 184 Cal. 401, 194 Pac. 39.

104. Appearance of minor—By guardian ad litem is an irregularity which may be raised by motion for new trial under subdivision 1.—*Emeric v. Alvarado*, 64 Cal. 529, 600, 2 Pac. 418.

105. Construction—Language of this subdivision is sufficiently broad to include any departure by court from due and orderly method of disposition of an action by which substantial rights of party have been materially affected where such departure is not evidence by ruling or order that may be made subject of an exception.—*Gay v. Torrance*, 145 Cal. 144, 149, 78 Pac. 540.

106. This ground for new trial is intended to refer to matters which an appellant can not fully present by exception taken during progress of trial and which therefore must appear by affidavit.—*Woods v. Jensen*, 130 Cal. 200, 205, 62 Pac. 473.

107. Same—Includes neglect induced through wrongful procurement of other party.—See *Piercy v. Piercy*, 149 Cal. 163, 86 Pac. 507.

108. Decision—Signing without reading—Irregularity.—In a proceeding under section 652, ante, to obtain insertion in a bill of exceptions to be used on appeal from judgment, of a statement going to show that the trial judge, in the manner of signing the findings of fact and conclusions of law constituting the written decision, requiring by law, left the matter of the contents of such findings entirely to the attorney for the prevailing party, and signed the same without reading, such act of the trial judge would constitute an irregularity in the proceedings of the court under subdivision 1 C. C. P.—103

of the above section entitling the party to have the insertion ordered, such party being entitled to the decisions of the judge, and not of the attorney for the plaintiff.—*Wagner v. Mienzer*, 182 Cal. 608, 189 Pac. 435.

109. Irregularities—In issuing execution—Not ground for new trial.—Under the provisions of the above section irregularities in relation to the issuance of an execution after the entry of judgment do not furnish a ground for a new trial, such irregularities not being specified in said section.—*Byron Jackson Iron Works Co. v. Hoge*, — Cal. App. —, 194 Pac. 45.

110. Same—Of presiding judge—Controlling conduct of cause.—Where court was not called upon to rule or make an order on any question of law, but judge interrupted counsel and undertook to and did, in an irregular way, control conduct of case on side of defendant by virtually threatening to prejudge testimony of defendant as witness, it was an irregularity within meaning of this section.—*Pratt v. Pratt*, 141 Cal. 247, 251, 74 Pac. 742.

As to personal misconduct of presiding judge, see par. 116, this note.

111. Same—Same—Language of in ruling upon evidence.—Where such language embodied a correct statement of the law, and did not go beyond a proper interpretation to be given the contract in controversy, it can not be held to be misconduct.—*Blaeholder v. Guthrie*, 17 Cal. App. 297, 300, 119 Pac. 524.

112. Motion for new trial—Alleged bias and prejudice of trial judge—Failure to file counter-affidavit of judge.—After the trial of a proceeding to determine heirship and judgment thereon, notice of intention to move for a new trial, among other things, on the ground of "irregularities" in the proceedings of the court by which the appellants were prevented from having a fair trial, under the provisions of subdivision 1 of the above section, and before that motion came on for hearing, the appellants made a motion on affidavits to prevent the trial judge from hearing such motion on the ground of alleged bias and prejudice, or which later motion counter-affidavits were filed, including one by the judge denying bias and prejudice, upon the hearing of which said later motion it was denied, and an appeal from the order denying transfer of the hearing of the first motion was affirmed by the supreme court, and while the motion for a transfer was pending the first motion for new trial was presented and denied, and upon that motion the appellants presented in support of the judge of "irregularities" the affidavits which had been used on the motion for a transfer on the ground of the bias of the judge, but the counter-affidavit of the judge denying the bias was not again offered in evidence, this failure to offer in evidence the counter-affidavit of the judge will not require a reversal of the order denying a new trial.

—Estate of Friedman, 178 Cal. 27, 172 Pac. 140, following Estate of Friedman, 171 Cal. 431, 153 Pac. 918.

113. Objections to questions asked witnesses by court can not be urged as ground for new trial as irregularity in proceedings of court.—Woods v. Jensen, 180 Cal. 200, 205, 62 Pac. 473.

114. Omission to serve amendment of complaint on defendant is no ground for new trial, if it does not appear that any prejudice or injury results to defendant.—Daly v. Ruddell, 137 Cal. 671, 676, 70 Pac. 784.

115. Order reciting that evidence given by witness was tissue of falsehoods, so plain and palpable as to be indisputable, and that witness had been suborned to testify as he did by defendant, and admitting defendant to custody of sheriff, will not justify granting new trial.—Sheehan v. Hammond, 2 Cal. App. 371, 84 Pac. 340.

116. Personal misconduct of judge having under advisement case tried in his court of such nature as to make it apparent that substantial right has been materially affected thereby, constitutes irregularity within meaning of this section.—Gay v. Torrance, 145 Cal. 144, 148, 78 Pac. 540.

As to misconduct of presiding judge, see pars. 110, 111, this note.

III. MISCONDUCT OF JURY—SUBDIVISION 2.

As to disqualification of juror as ground for new trial, see notes 9 Am. Dec. 31; 18 L. R. A. 473; 39 L. R. A. (N. S.) 967.

117. At view—Observing brakes upon car.—Where jurors upon being taken to view the scene of an accident observe brakes while riding upon a car, the brakes being of the same character as those claimed on the trial to have been defective and to have contributed to the action but made no examination thereof, it was held there was no such misconduct as could have influenced the verdict.—Kimick v. San Jose-Los Gatos Interurban R. Co., 156 Cal. 379, 399, 104 Pac. 986.

118. "Chance"—Resort to by jury—Definition of term.—"Chance" may be defined to be hazard, risk, or result or issue of uncertain and unknown conditions or forces.—Dixon v. Pluns, 98 Cal. 384, 387, 35 Am. St. Rep. 180, 20 L. R. A. 698, 33 Pac. 268.

119. Same—Average verdict arrived at by dividing sum of amounts which each juror believed proper by number of jurors under an agreement that such average verdict should be verdict of jury without further consultation, is chance verdict and should be set aside.—Dixon v. Pluns, 3 Cal. Unrep. 735, 31 Pac. 931; Dixon v. Pluns, 98 Cal. 384, 385, 35 Am. St. Rep. 180, 20 L. R. A. 698, 33 Pac. 268; Weinburg v. Soms, 4 Cal. 10, 33 Pac. 341, 342. See Turner v. Tuolumne County W. Co., 25 Cal. 397, 402; Boyce v. California S. Co., 25 Cal. 460, 473. See also

Schoolfield v. Burton, 20 Colo. 139, 36 Pac. 1103; Pewee Ditch & Imp. Co. v. Adams, 1 Colo. App. 250, 28 Pac. 662; St. Martin v. Desnoyer, 1 Minn. 156, 611 Am. Dec. 494; Sawyer v. Hannibal & St. J. R. Co., 37 Mo. 240, 90 Am. Dec. 382; Goodman v. Cody, 1 Wash. 329, 34 Am. Rep. 808.

See notes 85 Am. Dec. 259, 90 Am. Dec. 390, 34 Am. Rep. 808.

120. Same—Same—No agreement to be bound by verdict so arrived at, the rule seems to be different, for it has been held that where the jurors agree each to specify a sum as due the plaintiff, and when each has done so, add together the sums thus specified, divide it by twelve, and determine upon the quotient as their verdict, the verdict will be allowed to stand.—See Wilson v. Berryman, 5 Cal. 44, 63 Am. Dec. 78; Village of Ponca v. Crawford, 23 Neb. 662, 8 Am. St. Rep. 144, 37 N. W. 609.

See, also, par. 121, this note.

121. Same—Same—Where average was not to control minds of jury, nor to forestall their ultimate conclusion, but was merely basis from which to work in their effort to reach verdict, verdict was not chance verdict.—Hunt v. Elliott, 77 Cal. 588, 590, 20 Pac. 132; McDonnell v. Pescadero S. Co., 120 Cal. 476, 479, 52 Pac. 725. See Turner v. Tuolumne County W. Co., 25 Cal. 397, 402; Boyce v. California S. Co., 25 Cal. 460, 473.

See par. 120, this note.

122. Same—Drawing lots.—Where assent to verdict for sum of fifteen hundred dollars, instead of one thousand dollars, was secured by drawing lots, verdict should have been set aside.—Levy v. Brannan, 39 Cal. 485, 489.

123. Same—Guessing heads or tails of coin by juror to determine verdict renders it chance verdict, which will be set aside.—Donner v. Palmer, 23 Cal. 40, 48.

124. Conduct of jurors—In conversing with parties to action and drinking and carousing with one of parties is such misconduct as entitles losing party to new trial, notwithstanding counter-affidavits going to show that same conduct was indulged in by both parties to litigation, and that verdict was uninfluenced by misconduct complained of, justified granting new trial.—Wright v. Eastlick, 125 Cal. 517, 58 Pac. 87.

As to misconduct of jurors as ground for new trial, see notes 1 Am. Dec. 37; 9 Am. Dec. 764; 16 Am. Dec. 454; 35 Am. Dec. 254; 35 Am. Dec. 91; 48 Am. Rep. 347.

125. Excessive damages—Distinguished.—Granting new trial for misconduct of jury such as may be shown by affidavit, is something wholly different and apart from right which statute gives to grant such relief on ground of excessive damages; former contemplates some overt act of impropriety, such as receiving evidence out of court, reaching verdict by chance, and the

like, while excessive verdict implies no misconduct of jury necessarily, but simply that result has been induced through excited feelings or prejudice of which jury may not perhaps have been aware.—*Harrison v. Sutter St. R. Co.*, 116 Cal. 156, 162, 47 Pac. 1019.

126. Mere separation of jurors is not sufficient to set aside verdict; it must appear in addition thereto that some prejudice to moving party has occurred.—*Estate of McKenna*, 148 Cal. 580, 589, 77 Pac. 461.

As to proof of misconduct of jurors, see pars. 127-130, this note.

As to separation of jurors as grounds for new trial, see note 48 Am. Dec. 75; 31 Am. Dec. 576.

127. Proof of misconduct of jury—Affidavits of jurors.—Jurors can not be held to deny the prejudicial influence on their minds of knowledge acquired by misconduct. Affidavits of jurors may be used to disprove or explain the alleged misconduct but can not admit the misconduct to be used to show that the verdict was not influenced thereby.—*Kimick v. San Jose-Los Gatos Interurban R. Co.*, 156 Cal. 379, 397, 104 Pac. 986.

128. Juror is not permitted to impeach the verdict except upon the single ground that the verdict was the result of a resort to the determination of chance.—*Kimick v. San Jose-Los Gatos Interurban R. Co.*, 156 Cal. 379, 397, 104 Pac. 986.

129. Same—Affidavits of others than jurors detailing conversation with jurors after the verdict and showing statements made by the jurors in such conversations tending to impeach their verdict are inadmissible for, although not in any terms affidavits by jurors impeaching their own verdict, they are affidavits or admissions by jurors to the same effect.—*Kimick v. San Jose-Los Gatos Interurban R. Co.*, 156 Cal. 379, 397, 104 Pac. 986.

130. Same—Using magnifying glass in making an investigation and comparison of the handwriting of a memorandum book offered in evidence, and made an exhibit, by the jury after retiring, was held not to be misconduct justifying a new trial, even though the glass was not shown to have been employed in the court room in the examination of the exhibit.—*Estate of Thomas*, 155 Cal. 499, 101 Pac. 798.

131. Trifling misconduct—Fairness of trial not affected.—Misconduct of jury which was of such trifling nature that it could not in nature of things have been prejudicial to moving party is not sufficient to justify granting of new trial.—*Siemsen v. Oakland S. L. & H. E. R.*, 134 Cal. 494, 498, 66 Pac. 672.

132. Where misconduct of jurors is of so trifling a nature that the fairness of the trial could have been in no way affected or the moving party prejudiced thereby the judgment will not be reversed.—

Kimick v. San Jose-Los Gatos Interurban R. Co., 156 Cal. 379, 399, 104 Pac. 986.

133. Verdict—Impeachment of.—Affidavit of jurors is not admissible except on grounds specified in this section.—*People v. Azoff*, 105 Cal. 632, 635, 39 Pac. 59; *People v. Findley*, 132 Cal. 301, 308, 64 Pac. 472; *Saltzman v. Sunset T. & T. Co.*, 125 Cal. 501, 504, 58 Pac. 169. See *Turner v. Tuolumne County W. Co.*, 25 Cal. 397, 402.

134. It makes no difference that affidavit is made by juror who did not agree with verdict.—*Saltzman v. Sunset T. & T. Co.*, 125 Cal. 501, 504, 58 Pac. 169.

As to impeachment of verdict by jurors, see notes 53 Am. Dec. 102; 5 L. R. A. 523, 11 L. R. A. 706.

As to statements and affidavits of jurors to impeach their verdict, see notes 12 Am. Dec. 143; 34 Am. Dec. 617.

135. Same—Average verdict may be shown to be chance verdict by affidavit of juror.—*Weinburg v. Sompas*, 4 Cal. Unrep. 10, 33 Pac. 341, 342. See *Dixon v. Pluns*, 98 Cal. 384, 385, 35 Am. St. Rep. 180, 20 L. R. A. 698, 33 Pac. 268.

See pars. 119-121, this note.

136. Same—Misconduct by reading newspaper reports at trial can not be shown by affidavit of juror.—*People v. Azoff*, 105 Cal. 632, 635, 39 Pac. 59.

137. Same—Verdict not based on evidence.—Juror can not impeach his verdict on ground that principal grounds of verdict were matters which were stated in argument of counsel, and as to which there was no evidence—there being only one way in which verdict may be assailed by affidavit of juror.—*Fredericks v. Judah*, 73 Cal. 604, 607, 15 Pac. 305. See *Polhemus v. Heiman*, 50 Cal. 438.

138. Same—Same—Affidavit of third person showing admission made by juror which would tend to impeach verdict can not impeach verdict, and rule is no different whether misconduct of juror is before retiring or during retirement.—*Siemsen v. Oakland S. L. & H. E. R.*, 134 Cal. 494, 498, 66 Pac. 672. See *People v. Ritchie*, 12 Utah 180, 42 Pac. 209.

139. Same—Same—Hearsay statements of juror regarding such misconduct can not impeach verdict.—*People v. Findley*, 132 Cal. 301, 308, 64 Pac. 472.

140. Same—Same—Sufficiency of proof.—While affidavit of juror that verdict was obtained by chance, and that he was induced to consent to it by reason of that fact, must be taken as true as far as conduct was concerned in consenting to verdict, yet where court finds that verdict was not chance verdict such affidavit alone is not ground for setting verdict aside.—*Dixon v. Pluns*, 101 Cal. 511, 512, 35 Pac. 1030.

141. Where affidavit of juror as to obtaining an average verdict was overcome

by counter-affidavits by two other jurors, new trial was properly refused.—Hunt v. Elliott 77 Cal. 588, 590, 20 Pac. 132. See Hoare v. Hendley, 49 Cal. 274.

142. Affidavit of one juror showing that average verdict was intended to control jury may be overcome by counter-affidavits of other jurors.—McDonnell v. Pescadero S. Co., 120 Cal. 476, 479, 52 Pac. 725.

143. Order granting new trial on ground that verdict was chance verdict will not be disturbed, though affidavit of two non-concurring jurors that it was chance verdict is contradicted by seven concurring jurors.—King v. Elton, 2 Cal. App. 145, 83 Pac. 261.

IV. ACCIDENT OR SURPRISE—SUBDIVISION 3.

As to granting new trial on ground of surprise, see note 78 Am. Dec. 518.

As to inadvertence and surprise as grounds for vacating judgment, see, ante, § 473 and note.

144. "Accident" and "surprise" — Not strictly synonymous, have, as used in legal practice, substantially same meaning, as each is used to denote some condition or situation in which party to cause is unexpectedly placed to his injury without any default or negligence of his own which ordinary prudence could not have guarded against.—McGuire v. Drew, 83 Cal. 225, 229, 23 Pac. 312.

145. The "surprise" from the effect of which it is within the power of the court upon a satisfactory showing to relieve a party is confined to some condition or situation in which the party to a cause is unexpectedly placed to his injury without any fault or negligence of his own and which with ordinary prudence he could not have guarded against.—Porter v. Anderson, 14 Cal. 716, 113 Pac. 345.

146. Same.—Acting upon advice of attorney.—Erroneous conception of the law.—Where a party under the advice of his attorney has acted upon an erroneous conception of the law and suffers the injury which would be the natural and inevitable result thereof, he can not be relieved from his untoward situation upon the ground that he was taken by "surprise" by reason of the fatal error into which he had thus been led.—Porter v. Anderson, 14 Cal. App. 716, 113 Pac. 345.

See pars. 150, 152, this note.

147. Same.—Court leading party to believe certain fact sufficiently proved.—Objection that during the trial the court led a party to believe that a certain fact had been sufficiently proved and that findings inconsistent therewith were a surprise to him must be presented to the trial court upon motion for a new trial as an irregularity of the court under subdivision 1 or under the head of "accident or surprise" under subdivision 3 of this section.—Smith

v. Sinbad Devel. Co., 11 Cal. App. 253, 257, 104 Pac. 706.

See par. 155, this note.

148. Attorney — Afflicted with brain trouble.—Not ground for new trial, when.—A court does not err in denying the defendant a new trial on the ground that its attorney was afflicted with brain trouble at the time he prepared its answer, where it appears that, although the attorney died shortly afterward suffering from such malady, he exhibited his usual mental vigor in attending to other legal matters at the time of his alleged mental impairment.—Allen v. Los Molinos Land Co., 25 Cal. App. 206, 143 Pac. 253.

149. Same.—Diligence in averting consequences.—Where the record is silent as to what occurred upon granting the motion to amend the complaint, and all that appears is that defendant filed an answer to the amended complaint traversing the new facts therein set out, it must be assumed that no objection was made to the motion, and that defendants were content to submit the issues thus presented on the evidence already before the court. If defendants desired further time to meet these issues by evidence, or were surprised in any way, entitling them to terms or to delay, it was their duty to make it known to the court.—Dieckmann v. Merkh, 20 Cal. App. 655, 130 Pac. 27, 28.

150. Same.—Ignorance of the law on the part of a party to an action or of his attorney can not be made the basis of a "surprise" within the meaning of section 657 and the foundation of a motion for a new trial.—Fuller v. Hutchings, 10 Cal. 523, 526, 70 Am. Dec. 746.

See par. 146, this note.

See, also, note 78 Am. Dec. 518.

151. Same.—"Surprise of"—At ruling of court on objection to pleading of evidence is not the "surprise" contemplated by either section 473 or section 657, Code of Civil Procedure, and is, properly speaking a "disappointment" and not a "surprise" at all, at least not in the sense in which that word is used in the code.—Porter v. Anderson, 14 Cal. App. 716, 726, 113 Pac. 345. See Fuller v. Hutchings, 10 Cal. 526, 70 Am. Dec. 746; Klockenbaum v. Pierson, 22 Cal. 160; Dewey v. Frank Bros. & Co., 62 Cal. 343; Santa Cruz Rock Pav. Co. v. Bowie, 104 Cal. 286, 37 Pac. 934; Tourneux v. Gilliss, 1 Cal. App. 555, 82 Pac. 630; Allen v. Chambers, 18 Wash. 341, 51 Pac. 478.

152. Erroneous views of law or advice of attorney contrary to ruling of court is not surprise for which new trial will be granted.—Santa Cruz R. P. Co. v. Bowie, 104 Cal. 286, 287, 37 Pac. 934. See Klockenbaum v. Pierson, 22 Cal. 160.

See par. 146, this note.

153. Failure.—To apply, at time, for continuance of cause, or to resort to other testimony to ask for any relief to which he might be entitled under circumstances, by

party claiming to be surprised by introduction of testimony, renders his failure attributable to his own fault and constitutes no ground on which new trial would be granted.—*Heath v. Scott*, 65 Cal. 548, 550, 4 Pac. 557. See *Schellhouse v. Ball*, 29 Cal. 605, 608; *Turner v. Morrison*, 11 Cal. 21; *Delmas v. Martin*, 39 Cal. 555, as modified by *Ferrer v. Mutual Ins. Co.*, 47 Cal. 416.

154. Same.—To compel giving of testimony.—Refusal of cashier to testify in action against bank on ground that evidence might have tendency to incriminate him, is not ground for new trial on ground of surprise, where they did not attempt to enforce an answer or determine whether witness was justified in refusing, and it appeared that person who succeeded witness as cashier and several of directors of defendant were also witnesses.—*Nicholson v. Randall B. Co.*, 130 Cal. 533, 538, 62 Pac. 930.

155. Same.—To introduce deposition.—Under erroneous belief induced by judge and opposing counsel, that unless defendant assumed burden of proof and affirmatively showed certain facts judgment would be entered for plaintiff, does not authorize new trial on ground of surprise.—*Le Tourneux v. Gilliss*, 1 Cal. App. 546, 82 Pac. 627.

See par. 147, this note.

156. Going to trial without depositions which have been taken in case constitutes no legal surprise, and party taking deposition is not bound to offer them in evidence.—*Heath v. Scott*, 65 Cal. 548, 552, 4 Pac. 557.

157. Ignorance.—Of act of agent.—Where it appeared that defendants knew at commencement of action that it was brought to recover balance alleged to be due on account stated; that prior to that time their agent had been sent by them to plaintiff to make an adjustment of affairs between them and plaintiff, and that mission of such agent might be used by plaintiff in making out his case, and made no motion for continuance, or expressed any surprise when testimony of plaintiff, giving result of mission showing account stated in his favor, there was no surprise within meaning of this section.—*Dewey v. Frank Bros. & Co.*, 62 Cal. 343, 348.

158. Same.—Of the term of lease sued on.—Failure of plaintiff and counsel to acquaint themselves before end of trial with term of lease on which action was based, which was in their possession and produced in evidence by them, was not surprise within meaning of this section, and hence it was not error to refuse to grant new trial though they did not know term fixed by such lease until delivering argument in case.—*Borderre v. Den*, 106 Cal. 594, 601, 39 Pac. 946.

159. Same.—Of time for trial.—Attorney is presumed to know rule of court in which he appears, and his want of such knowledge does not authorize relief from judgment taken against him by reason of his not

knowing when case was set for trial on ground of surprise.—*Brooks v. Johnson*, 122 Cal. 569, 572, 55 Pac. 423.

160. Where it appears that one of defendant's attorneys was present in court on day case was called for trial, and was informed that it would soon be called for trial, and he made no objection to court to its being taken up and disposed of at that time, and on day of rendition of judgment requested clerk of court not to have fact of its rendition published, there was nothing to show case of accident or surprise within meaning of this section.—*Preston v. Eureka A. S. Co.*, 54 Cal. 198, 201.

161. That different result might have been reached.—Must be made to appear, or court is not authorized to set aside its decision on ground merely of surprise or failure of attorney to be present at trial.—*Brooks v. Johnson*, 122 Cal. 569, 572, 55 Pac. 423.

162. Where on hearing of motion for new trial on ground that certain statement of judge induced them to withhold certain testimony, and that subsequent ruling of court contrary to statement constituted legal surprise, no affidavits were introduced in evidence that would have been introduced or make it appear that a different finding would have been made, new trial was properly denied.—*Cohen v. City of Alameda*, 124 Cal. 504, 508, 57 Pac. 377. See *Fisk v. Casey*, 119 Cal. 643, 51 Pac. 1077.

V. NEWLY DISCOVERED EVIDENCE— SUBDIVISION 4.

As to newly discovered evidence as ground for new trial, see 38 Am. Dec. 105, 53 Am. Dec. 184, 9 Am. Rep. 764.

163. Affidavit and requisites of.—It is well settled that, in an application for a new trial on the ground of newly discovered evidence, a showing that the proposed evidence set forth in the affidavit was not known to the plaintiff at the time of the trial is essential to warrant the granting of a new trial.—*Olaine v. McGraw*, 164 Cal. 424, 129 Pac. 460, 461.

As to affidavit of newly discovered evidence, see note 12 Am. Dec. 143.

As to cumulative evidence as ground for new trial, see note 14 L. R. A. 649.

As to right to introduce counter-affidavits, see note Ann. Cas. 1912D, 1303.

164. Same.—Delay in filing affidavits.—Exclusion of.—Where affidavits as to newly discovered evidence are not served until more than ten days after the service and filing of the notice of intention to move for new trial, and no extension of time therefor is granted, they should be excluded from consideration on the hearing of the motion.—*Crofford v. Crofford*, 29 Cal. App. 662, 157 Pac. 561.

165. Courts look with distrust and disfavor.—Unless evidence would change result.—The courts look with distrust and dis-

favor upon motions for new trials based on the ground of newly discovered evidence, and such motions should not be granted by trial courts unless the new evidence is such as to make it reasonably probable that it would change the result upon another trial.—*Estate of Emerson*, 170 Cal. 81, 148 Pac. 523.

166. A new trial should be granted on the ground of newly discovered evidence only where such evidence is of a character as to render a different result probable, and the question as to the effect upon the case of such evidence is, from its nature, peculiarly one that is addressed to the discretion of the trial court.—*People v. Oxnam*, 170 Cal. 211, 149 Pac. 165.

167. A motion for a new trial on the ground of newly discovered evidence is properly denied where, in the opinion of the trial court, it is not probable that the additional evidence would have produced a different result.—*Atkinson v. Western Devel. Syndicate*, 170 Cal. 511, 150 Pac. 363.

168. Motions for a new trial, based upon the ground of newly discovered evidence, are not favorably regarded by courts, and appellate tribunals do not disturb the action of a trial court in refusing to grant such a motion, except where it clearly appears that there has been an abuse of discretion.—*Fresno Estate Co. v. Fiske*, 172 Cal. 583, 157 Pac. 1127.

169. In order to warrant the granting of a new trial on the ground of newly discovered evidence, it must satisfactorily appear, among other things, that reasonable diligence was used to discover and produce the evidence on the former trial, that the newly discovered evidence is not merely cumulative, and that it may be reasonably inferred that the result of the trial would have been different if the newly discovered evidence had been there presented.—*Cahill v. Stone Co.*, 167 Cal. 126, 138 Pac. 712.

170. In a prosecution for rape, a motion for a new trial was made on the grounds of newly discovered evidence to the effect that the complaining witness was over the age of consent at the time the offense was committed. It was held that this evidence was immaterial where presumably the verdict of the jury was founded, in part at least, upon evidence that the assault was committed with force and violence and against the will of the prosecutrix.—*People v. Maruyama*, 19 Cal. App. 290, 125 Pac. 924.

171. A motion for a new trial on the ground of newly discovered evidence is properly denied where in the opinion of the trial court it is not probable that the additional evidence would have produced a different result.—*Montgomery & Mullen Lumber Co. v. Ocean Park Scenic R. Co.*, 32 Cal. App. 32, 161 Pac. 1171.

172. Cumulative evidence.—In general.—Cumulative evidence merely is not sufficient

to justify granting new trial on ground of newly discovered evidence.—*Christensen v. McBride*, 4 Cal. Unrep. 542, 36 Pac. 398; *Shafer v. Willis*, 124 Cal. 36, 41, 56 Pac. 635; *Galvin v. Palmer*, 113 Cal. 46, 56, 45 Pac. 172; *Niosi v. Empire Steam Laundry*, 117 Cal. 257, 261, 49 Pac. 185; *Kuhlman v. Burns*, 117 Cal. 469, 472, 49 Pac. 585; *Chalmers v. Sheehy*, 132 Cal. 459, 462, 84 Am. St. Rep. 62, 64 Pac. 709; *Wood v. Moulton*, 146 Cal. 317, 80 Pac. 92, 94; *Patterson v. San Francisco & S. M. E. R. Co.*, 147 Cal. 178, 81 Pac. 531, 534; *Estate of Walker*, 148 Cal. 162, 82 Pac. 770.

173. Cumulative evidence, not so conclusive in its character as to raise reasonable presumption that it would change result, renders motion for new trial on ground of newly discovered evidence not abuse of discretion.—*O'Rourke v. Vennekohl*, 104 Cal. 254, 256, 37 Pac. 930; *Shafer v. Willis*, 124 Cal. 36, 41, 56 Pac. 635. See *Kuhlman v. Burns*, 117 Cal. 469, 472, 49 Pac. 585.

174. And hence where new evidence was that of but one witness, who, like several other witnesses at trial, witnessed accident, what probable result of evidence would be was question for lower court, and its discretion will not be disturbed on appeal.—*O'Rourke v. Vennekohl*, 104 Cal. 254, 256, 37 Pac. 930.

175. Where newly discovered evidence merely went to show which of two defendants was guilty of greater negligence, and did not tend to show that moving party was not guilty of negligence, which had been clearly shown at trial, new trial was properly refused, for while such evidence was not purely cumulative it was not likely to render different result on new trial probable.—*Howland v. Oakland C. S. R. Co.*, 110 Cal. 513, 517, 42 Pac. 983.

176. It was not an abuse of discretion for the trial court to refuse the defendant a new trial of such action on the ground of newly discovered evidence to the effect that by a series of experiments it was provable that complaints of the nuisance produced by the fumes of the smelter were made by residents of the district alleged to be affected thereby, on days when it was not in operation, and that the disagreeable odors complained of were traceable to other sources, if such facts were all such as might have been produced by due diligence before the trial, and were merely cumulative of similar evidence offered at the trial.—*People v. Selby Smelting & Lead Co.*, 163 Cal. 84, 124 Pac. 692, 1135.

177. Undoubtedly, affidavits presenting evidence of a cumulative character may, and often do, cause a trial judge to grant a motion for a new trial, but whether such motion receives favorable or adverse ruling, the whole matter is addressed to the judge, whose discretion will not be interfered with on appeal except in cases of manifest abuse.—*People v. Selby Smelting & Lead Co.*, 163 Cal. 84, 124 Pac. 692, 1135.

178. Where the newly discovered evidence offered in a motion for a new trial is merely cumulative, and not sufficient in itself, even if uncontradicted, to justify an acquittal of the defendant in the face of the other evidence offered, the motion for new trial should be denied.—*People v. Maruyama*, 19 Cal. App. 290, 125 Pac. 924.

179. While it is true generally that newly discovered evidence which is merely cumulative in effect will not suffice to support a motion for a new trial, nevertheless if such evidence, notwithstanding its cumulative character, possesses sufficient probative force to render probable a different result upon a retrial of the case, it will then warrant and require an order granting a new trial.—*Meinberg v. Jordan*, 29 Cal. App. 760, 157 Pac. 1005.

180. The fact that newly discovered evidence is merely cumulative does not preclude the granting of a new trial thereon. The question before the trial court, even where the newly discovered evidence is simply cumulative, is whether, if such evidence had been presented on the trial of the cause, it would probably have produced a different result. The determination of that question is addressed wholly to the discretion of the trial court, and as a general proposition, whether its ruling is favorable or unfavorable, that discretion will not be reviewed except for manifest abuse.—*Cahill v. Stone Co.*, 167 Cal. 126, 138 Pac. 712.

181. Same—Such as renders different result certain or probable justifies granting new trial.—*Oberlander v. Fixen & Co.*, 129 Cal. 690, 691, 62 Pac. 254. See *Levitsky v. Johnson*, 35 Cal. 41; *Von Glahn v. Brennan*, 81 Cal. 261, 264, 22 Pac. 596.

182. Denial of new trial—Not abuse of discretion, when.—Where the alleged newly discovered evidence, if presented, would be in contravention of the provisions of subdivision 4 of section 1881, post, the refusal of the motion will not be disturbed on appeal.—*Estate of Dolbeer*, 153 Cal. 663, 96 Pac. 266.

183. Where the witness who was an officer of appellant, was present during most of the trial, it is fair to assume that he had full knowledge of the importance of his testimony and his relations with appellant were such as to require him to act promptly, if he desired to contradict plaintiff's statement. It was, therefore, not error to refuse to grant a new trial on the ground of newly discovered evidence.—*Hawley v. Los Angeles Creamery Co.*, 16 Cal. App. 54, 116 Pac. 84.

184. The refusal to grant a new trial on the ground of newly discovered evidence is not erroneous, where it is not sufficiently shown that the testimony could not have with reasonable diligence been procured at the trial, and that it was in its nature cumulative.—*People v. Davis*, 26 Cal. App. 647, 147 Pac. 1185.

185. It is not an abuse of discretion to refuse to grant the defendant's motion for a new trial on the ground of newly discovered evidence consisting of a statement made by the prosecutrix to the district attorney about a month before the case was tried, where it appears that such statement came into the hands of the defendant's counsel after the prosecution had rested its case and before the close of the evidence.—*People v. Kilfoil*, 27 Cal. App. 29, 143 Pac. 812.

186. Different result probable—In general.—Provision that newly discovered evidence should be of character materially affecting substantial rights of party, seems to imply that newly discovered evidence should be of such character as to render different result probable on new trial, and such is established rule of court.—*Oberlander v. Fixen*, 129 Cal. 690, 691, 62 Pac. 254.

187. Same—Determination whether newly discovered evidence would probably affect result of new trial is within discretion of trial judge, and will not be interfered with on appeal.—*Oberlander v. Fixen*, 129 Cal. 690, 692, 62 Pac. 254.

188. Discretion of trial court—In general.—Newly discovered evidence after defeat is looked upon with suspicion and appellate court is always reluctant to interfere with ruling of trial court, and will not do so unless there has been clear abuse of discretion.—*O'Rourke v. Vennekohl*, 104 Cal. 254, 256, 37 Pac. 930; *Heintz v. Cooper*, 104 Cal. 668, 669, 38 Pac. 511; *Tibbet v. Sue*, 125 Cal. 544, 548, 58 Pac. 160. See *Harralson v. Barrett*, 99 Cal. 607, 34 Pac. 342.

189. The trial court may in its sound discretion refuse a new trial upon the ground of newly discovered evidence, where the same is merely cumulative, or where it tends merely to impair the credibility of the evidence of the prevailing party.—*Estate of Walden*, *Morio v. Latimer*, 166 Cal. 446, 137 Pac. 35.

190. While it is essential that such requirements shall be met by the party seeking a new trial on the ground of newly discovered evidence, still whether he has sufficiently done so is a matter committed for determination to the sound discretion of the trial court; and it is only where such a showing is entirely lacking that it can be said by an appellate court, as a matter of law, that such discretion was abused in granting the motion.—*Cahill v. Stone Co.*, 167 Cal. 126, 138 Pac. 712.

191. Where in a personal injury case a demurrer to the complaint was sustained, but on appeal the judgment was reversed and the case is then set for trial seven years after the accident which caused the injuries, and the defendant in the meantime, on the assurance of its attorneys that the judgment would be affirmed by the appellate court, made no attempt to preserve evidence but destroyed its records showing

the names of its employees at the time and place of the accident, so that upon the trial it was able to ascertain only two of such employees, but later it learns of other employees who can give material testimony, the trial court is justified in granting a new trial.—*Cahill v. Stone Co.*, 167 Cal. 126, 138 Pac. 712.

192. It is not an abuse of discretion to deny a motion for a new trial, made upon the ground of newly discovered evidence in a proceeding to admit to probate a destroyed will, where the new evidence consists of the testimony of a niece of the deceased who deposes that the deceased exhibited the instrument to her shortly before his death and that she read it, and in rebuttal thereto it is shown that the witness wrote a letter to the petitioner for the probate of the will shortly after the death of the alleged testator inquiring if he "had found anything" as to the matters of the deceased, but making no reference as to having seen or read a will.—*Estate of Emerson*, 170 Cal. 81, 148 Pac. 523.

193. Granting or refusing of a new trial on ground of newly discovered evidence is so far within the discretion of the trial court that its determination will not be interfered with unless there is a clear abuse of discretion, and the determination of the effect of newly discovered evidence which is cumulative is peculiarly within the province of the trial court.—*Smith v. Hyer*, 11 Cal. App. 597, 599, 105 Pac. 787.

194. A motion for new trial on the ground of newly discovered evidence is addressed to the discretion of the trial court, and where abuse of discretion does not affirmatively appear an order denying the motion will be sustained.—*Union Lumber Co. v. Webster*, 15 Cal. App. 166, 113 Pac. 891.

195. Where affidavits for a new trial are directed to a probative fact not conclusive upon the merits of the case, it is within the discretion of the trial court to determine whether the facts therein stated are sufficient to warrant the granting of a new trial.—*Crofford v. Crofford*, 29 Cal. App. 662, 157 Pac. 561.

196. Applications for a new trial on the ground of newly discovered evidence are addressed to the discretion of the court below, and the presumption is that the discretion was properly exercised, where affidavits in the record are conflicting.—*People v. Kawasaki*, 23 Cal. App. 92, 137 Pac. 287.

197. It is not an abuse of discretion to refuse to grant the defendant's motion for a new trial on the ground of newly discovered evidence consisting of a statement made by the prosecutrix to the district attorney about a month before the case was tried, where it appears that such statement came into the hands of the defendant's counsel after the prosecution had rested its case and before the close of the evidence.

—*People v. Kilfoill*, 27 Cal. App. 29, 148 Pac. 812.

198. Same—Where every material fact is contradicted by counter-affidavit, discretion of court in refusing new trial will not be interfered with on appeal.—*Shafer v. Willis*, 124 Cal. 36, 40, 56 Pac. 635. See *Doyle v. Sturla*, 38 Cal. 456; *Murke v. Gelzhauser*, 50 Cal. 631; *People v. Masa*, 93 Cal. 580, 29 Pac. 116.

199. Due diligence—Must be shown.—Diligence is relative term incapable of exact definition, and what should amount to due diligence under one state of facts would fall absolutely short of it under another and different state of facts, and ruling of lower court as to whether diligence has been used in particular instance will not be disturbed where it has any substance whatever on which to rest.—*Heintz v. Cooper*, 104 Cal. 668, 669, 38 Pac. 511.

As to lack of diligence in procuring new evidence, see pars. 216-222, this note.

200. A party is not entitled to a new trial on the ground of newly discovered evidence if he had information which would have enabled him to obtain the evidence before trial, and had full information relative to the evidence before the trial closed, and yet did not apply for a continuance to enable him to obtain the evidence.—*Champagne v. Hamburger*, 169 Cal. 500, 147 Pac. 954.

201. The court is not required to grant a new trial upon the ground of newly discovered evidence although of such a character as to raise a strong presumption that if it had been produced at the trial it may have or probably would have altered the decision unless the evidence could not have been discovered and produced by the moving party at the trial by the exercise of reasonable diligence. Due diligence must be shown and the action of the trial court will not be reversed except upon a clear showing of an abuse in the ruling.—*Rockwell v. Italian-Swiss Colony*, 10 Cal. App. 633, 636, 103 Pac. 162.

202. Want of diligence held to be fatal to the motion.—*Foley v. Northern California Power Co.*, 14 Cal. App. 409, 112 Pac. 467.

203. Want of a showing of diligence is fatal to such a motion.—*Brandt v. Krogh*, 14 Cal. App. 59, 111 Pac. 275.

204. On a motion for a new trial on the ground of newly discovered evidence, the motion should be denied where there is no showing made that with reasonable diligence or any diligence the testimony contained in the affidavit could not have been produced at the trial.—*People v. Maruyama*, 19 Cal. App. 290, 125 Pac. 924.

205. An order denying a motion for a new trial on the ground of newly discovered evidence is rightfully refused, notwithstanding the assertion in the affidavit

of the existence of such evidence is not contradicted, where the affidavit contains no showing of due diligence.—*Foster v. National Ice Cream Co.*, 29 Cal. App. 484, 156 Pac. 985.

206. In support of its motion for a new trial upon the ground of newly discovered evidence, it is incumbent upon the moving party to show the diligence employed by it in preparing for the first trial, how the alleged new evidence was discovered and why it was not discovered before the first trial, and such other facts as will make it clear to the court below that the failure to produce the alleged newly discovered evidence, and present it at the first trial of the case, was not attributable to the fault or want of diligence of such party.—*Foster v. National Ice Cream Co.*, 29 Cal. App. 484, 156 Pac. 985.

207. Same.—Determination whether evidence could with reasonable diligence have been discovered and produced at trial is question on which judgment of trial court is conclusive unless its discretion is abused.—*Oberlander v. Fixen*, 129 Cal. 690, 692, 62 Pac. 254.

208. Same.—When evidence was in possession of moving party while cause was pending, and he did not see fit to avail himself of it, new trial on ground was properly denied.—*County of Sonoma v. Stofen*, 125 Cal. 32, 40, 57 Pac. 681.

209. Where on motion for new trial on ground of newly discovered evidence it appeared that defendant must have known of existence of evidence at time plaintiff testified before noon of one day, and witnesses lived in city, but defendant made no effort to procure them but sent employee to try to find one of witnesses, and such employee found where such witness lived and learned that he was absent on business, and no subpoenas were issued or other attempts made to procure their attendance, reasonable diligence to procure such witnesses was not shown.—*Weinburg v. Somps*, 4 Cal. Unrep. 10, 33 Pac. 341, 342.

210. Where in action to recover property it appeared that plaintiff knew that property was purchased from manager of company, and in answer defendants set up their claim to such property, failure of plaintiff to produce such manager's witness, shows absence of diligence and his evidence would not be newly discovered evidence, especially as case was continued in order that he might return and testify at trial that no subpoena was issued for him.—*Butler v. Estrella R. V. Co.*, 124 Cal. 239, 243, 56 Pac. 1040.

211. Duty of party.—Before decision rendered.—Procedure.—Where subsequent to the decision of the case and before any decision is rendered the losing party discovers new or further evidence he should move to set aside the submission and reopen the case for the hearing of further testimony and not wait until after decision to present

the new evidence on motion for a new trial.—*Rockwell v. Italian-Swiss Colony*, 10 Cal. App. 633, 637, 103 Pac. 162.

212. Evidence designed to contradict witness is not of character to warrant new trial on ground of newly discovered evidence.—*Chalmers v. Sheehy*, 132 Cal. 459, 462, 84 Am. St. Rep. 62, 64 Pac. 709; *Wood v. Moulton*, 146 Cal. 317, 80 Pac. 92, 94. See *People v. Anthony*, 56 Cal. 397.

As to newly discovered evidence of contradictory statements made by a witness as ground for a new trial, see note Ann. Cas. 1912D, 856.

213. Newly discovered evidence whose only tendency is to contradict and impeach the testimony of a witness for the prosecution neither warrants nor requires the granting of a new trial.—*People v. Ong Glt.*, 23 Cal. App. 148, 137 Pac. 283.

214. Failure to request postponement.—Where the moving party knew how the witness would testify, although his whereabouts was not known, and did not ask for a postponement to enable the witness to be found, a motion for a new trial on the ground stated was properly denied.—*Broad v. Mead*, 159 Cal. 768, 116 Pac. 46.

215. A party is not entitled to a new trial on the ground of newly discovered evidence if he had information which would have enabled him to obtain the evidence before trial, and had full information relative to the evidence before the trial closed, and yet did not apply for a continuance to enable him to obtain the evidence.—*Champagne v. Hamburger*, 169 Cal. 683, 147 Pac. 954.

216. Lack of diligence in procuring.—In general.—Evidence can not be deemed newly discovered where there was ample time within which the plaintiffs might have ascertained all of the facts before the trial.—*Gallatin v. Corning Irr. Co.*, 163 Cal. 405, 126 Pac. 864, 870.

As to due diligence required to be shown, see pars. 199-209, this note.

217. Same.—Moving party must make clear case showing due diligence on his part and truth and materiality of evidence.—*Tibbet v. Sue*, 125 Cal. 544, 548, 58 Pac. 160.

218. Where newly discovered evidence was not of such character as to put defendant on inquiry reasonable diligence is shown.—*Oberlander v. Fixen & Co.*, 129 Cal. 690, 693, 62 Pac. 254. See *Heintz v. Cooper*, 104 Cal. 669, 671, 38 Pac. 511.

219. Same.—Where newly discovered evidence was such as might have escaped extraordinary diligence of parties, though known by opposing parties, or suppressed by them, and was of such character as would be likely to change result, new trial should have been granted.—*Blewett v. Miller*, 131 Cal. 149, 152, 63 Pac. 157.

220. Where defendant had been notified by plaintiff's testimony that new witnesses knew of truth of matters as to which plain-

tiff had testified and they would contradict him if testimony was false, fact that he did not know what witnesses would testify to is no excuse for failure to procure them during trial.—Weinburg v. Soms, 4 Cal. Unrep. 10, 33 Pac. 341, 342.

221. Same—Where party had knowledge of materiality of testimony of witness before trial and took steps to find him and procure his attendance, his testimony did not amount to newly discovered evidence, and party should have moved for continuance, and failing to do so, must be held to have entered upon trial at his peril.—Scanlan v. San Francisco & S. J. R. Co., 128 Cal. 586, 589, 61 Pac. 271. See Berry v. Metzler, 7 Cal. 418.

222. Same—Where plaintiff must have been fully advised of materiality and bearing of evidence claimed as newly discovered evidence, new trial was properly refused, no diligence having been shown.—Galvin v. Palmer, 113 Cal. 46, 56, 45 Pac. 172.

223. Lack of showing evidence could not have been procured.—The refusal to grant a new trial on the ground of newly discovered evidence is not erroneous, where it is not sufficiently shown that the testimony could not have with reasonable diligence been procured at the trial, and that it was in its nature cumulative.—People v. Davis, 26 Cal. App. 647, 147 Pac. 1185.

224. Questions considered on hearing.—On hearing of motion for new trial on ground of newly discovered evidence court can not determine issues of fact on affidavit and counter-affidavit, but issue is merely whether newly discovered evidence is relevant and important, but it can not try issue in case in such proceeding (Temple, J., concurring).—Shafer v. Willis, 124 Cal. 36, 41, 56 Pac. 635.

225. Tardy production of evidence—Forgetfulness of witness.—A new trial is not to be granted upon the tardy production of evidence not available at the trial because of the absolute forgetfulness of a witness.—Fresno Estate Co. v. Fiske, 172 Cal. 583, 157 Pac. 1127.

VI. EXCESSIVE DAMAGES—SUBDIVISION 5.

As to excessive damages as ground for new trial, see notes 38 Am. Dec. 106; 61 Am. Dec. 499.

Misconduct of jury distinguished, see Part III, this note.

226. Action for negligence—Verdict for plaintiff—Motion for new trial.—In an action for damages resulting from negligence of defendant on verdict for the plaintiff the question of damages is not alone the ground of motion for a new trial under the provisions of the above section for the reason that for the purposes of such a motion the verdict is to be regarded as a single and indivisible entity; the court has power to order a new trial on limited issues

and its discretion to grant a new trial generally or only as to part of the issues is properly invoked by a motion for a new trial of the entire causes, and it is doubted whether this discretion can be circumscribed by the means of a motion for a new trial on one issue alone.—Donatin v. Union Hardware & Metal Co., 38 Cal. App. 12, 177 Pac. 845.

227. Discretion of court.—Order granting new trial on ground that excessive damages were given under influence of passion and prejudice, will not be interfered with unless discretion of trial court was abused.—Doolin v. Omnibus C. Co., 125 Cal. 141, 144, 57 Pac. 774; Sherwood v. Kyle, 125 Cal. 652, 654, 58 Pac. 270. See Ingraham v. Weidler, 139 Cal. 588, 589, 73 Pac. 415. See Davis v. Southern Pac. Co., 98 Cal. 13, 17, 32 Pac. 646; Etchas v. Orena, 121 Cal. 270, 53 Pac. 798.

228. A court is justified in overturning a verdict as excessive only where its amount is "obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury."—Gomez v. Scanlan, 155 Cal. 528, 533, 102 Pac. 12.

229. The judge who presides over the trial of the cause and who has equal opportunity with the jury to hear the testimony as it comes directly from the lips of the witnesses and of observing the manner in which the latter testified, is in a much better position than the appellate court to say whether a verdict was or could have been inspired by or tainted with prejudice.—James v. Oakland Traction Co., 10 Cal. App. 785, 799, 103 Pac. 1082.

230. No reviewing court has any right to invade the province of a jury in cases of damages for personal injuries by cutting down or diminishing the amount of damages awarded unless it clearly and distinctly appears from the face of the record evidence itself that the sum assessed as compensation for the injuries sustained is so far beyond a reasonable and just admeasurement of damages under all the circumstances appearing as to impartially force upon the court the fact that such damages could not have been given except under the influence of passion or prejudice.—Scally v. W. T. Garratt Co., 11 Cal. App. 138, 144, 104 Pac. 325.

231. Excess must appear as matter of law or the verdict be such as to suggest prejudice, passion or corruption of the jury before an appellate court will review the amount awarded.—Bond v. United Railroads of San Francisco, 14 Cal. 693, 113 Pac. 366.

232. Excessive verdict—Will not justify granting new trial unless it is so excessive as to indicate that it is result of passion or prejudice.—Boyce v. California S. Co., 25 Cal. 460, 473; Lee v. Southern Pac. R. Co., 101 Cal. 118, 120, 35 Pac. 572; Redfield v. Oakland C. S. R. Co., 110 Cal. 277, 286, 42

Pac. 822; *Sherwood v. Kyle*, 125 Cal. 652, 58 Pac. 270.

233. Mere fact that verdict is larger than court if sitting as jury would have given is not sufficient to warrant disturbing verdict.—*Redfield v. Oakland C. S. R. Co.*, 110 Cal. 277, 286, 42 Pac. 822. See *Morgan v. Southern Pac. Co.*, 95 Cal. 501, 508, 30 Pac. 601; *Lee v. Southern Pac. R. Co.*, 101 Cal. 118, 120, 35 Pac. 572.

234. Where court deemed verdict wholly inadequate in amount, it was its right and duty to order new trial, and such order will not be disturbed on appeal.—*Hearne v. De Young*, 132 Cal. 357, 360, 64 Pac. 576.

235. The mere fact that verdict is excessive because of the inclusion therein of improper items does not show that it was the result of passion and prejudice.—*Conlin v. Emanuel Lewis Invest. Co.*, 26 Cal. App. 388, 147 Pac. 472.

236. The mere fact that a verdict is excessive because of the inclusion therein of improper items does not show that it was the result of passion and prejudice.—*Conlin v. Emanuel Lewis Investment Co.*, 26 Cal. App. 388, 147 Pac. 472.

237. An order granting a new trial upon "the sole ground that the damages awarded to the plaintiff . . . are excessive," carries with it the implication that it was granted upon a consideration of the insufficiency of the evidence to warrant and support the finding of the jury as to the amount of such damage.—*Meinberg v. Jordan*, 29 Cal. App. 760, 157 Pac. 1005.

238. Same.—*Illustrations*.—Five hundred dollar verdict for damages for wrongful taking under attachment of property valued at five hundred and eighty dollars was not set aside.—*Ingraham v. Weidler*, 139 Cal. 588, 589, 73 Pac. 415.

239. Two thousand dollar verdict in action for false imprisonment, the extent of the allowance must in a large measure be left to the sound discretion of the jury, and where the invasion of the right of personal liberty is accompanied by circumstances causing humiliation, shame and public disgrace, it can not be said that the verdict is so great as to show it to have been rendered "under the influence of passion or prejudice."—*Gomez v. Scanlan*, 155 Cal. 528, 533, 102 Pac. 12.

240. Three thousand five hundred dollars damages for overflowing land held not excessive under the evidence in the case.—*Sacchi v. Bayside Lumber Co.*, 13 Cal. App. 72, 87, 108 Pac. 885.

241. Four thousand dollar-verdict in an action by a youth of nineteen for injuries of a permanent character to his knees held not excessive under the circumstances.—*Kimball v. Northern Electric Co.*, 159 Cal. 232, 113 Pac. 156.

242. Seven thousand five hundred dollars can not be said as a matter of law to be excessive damages for permanent injury to the hand and arm of a boy twelve years old sustained from dangerous machinery in the premises of his employer.—*Scallly v. W. T. Garratt Co.*, 11 Cal. App. 138, 144, 104 Pac. 325.

243. Eight thousand dollar verdict for injuries resulting in death set aside.—*Harrison v. Sutter St. R. Co.*, 116 Cal. 156, 162, 47 Pac. 1019.

244. Fourteen thousand dollar verdict for death of wife and mother in action prosecuted by her husband and minor children was not set aside.—*Redfield v. Oakland C. S. R. Co.*, 110 Cal. 277, 286, 42 Pac. 822.

244a. Fifteen thousand dollar verdict for permanent injuries to woman rendering her unfit to labor, etc., sustained.—*Morgan v. Southern Pac. Co.*, 95 Cal. 501, 509, 30 Pac. 601.

245. Fifteen thousand dollars held not to be excessive in action for damages by girl of fifteen against railroad company where she was permanently disfigured and crippled.—*James v. Oakland Traction Co.*, 10 Cal. App. 785, 799, 103 Pac. 1082.

246. Sixteen thousand five hundred dollar verdict for injuries to laborer resulting in paralysis of side and arm was not set aside.—*Boyce v. California S. Co.*, 25 Cal. 460, 473.

247. Twenty thousand dollar verdict for concussion of spine and other injuries rendering plaintiff, a woman, a physical wreck, reduced to five thousand dollars.—*Doolin v. Omnibus C. Co.*, 125 Cal. 141, 144, 57 Pac. 774.

248. Twenty-five thousand dollar verdict for cutting off plaintiff's legs was set aside.—*Lee v. Southern Pac. R. Co.*, 101 Cal. 118, 120, 35 Pac. 572.

249. Excessiveness of verdict.—To be determined solely from consideration of evidence in cause, and whether it will fairly sustain conclusion of jury, question which can not be aided by showing of extrinsic facts by affidavit or otherwise.—*Harrison v. Sutter St. R. Co.*, 116 Cal. 156, 162, 47 Pac. 1019; *Doolin v. Omnibus C. Co.*, 125 Cal. 141, 144, 57 Pac. 774.

250. Same.—*Waiver—Effect of*.—Where pending a motion for a new trial, the successful party files a waiver of an excessive amount included in the judgment in his favor, the court may, by an order unconditional in form, recite such waiver, and deny the motion.—*Bentley v. Hurlburt*, 153 Cal. 803, 96 Pac. 890.

VII. INSUFFICIENCY OF EVIDENCE. — SUBDIVISION 6.

251. Construction of section.—Not unconstitutional as in violation of article I, section 7 of state constitution declaring that right of trial of jury shall be secured to all.

—Ingraham v. Weidler, 139 Cal. 588, 589, 73 Pac. 415.

As to setting aside verdict as against evidence, see notes 20 Am. Dec. 620; 76 Am. Dec. 65.

252. Decision against weight of evidence—Makes it duty of trial court to grant new trial. It can not rest on conflict of evidence but must weigh and consider evidence for both parties and determine for itself just conclusion to be drawn from it.—Hawkins v. Abbott, 40 Cal. 639; Mason v. Austin, 46 Cal. 385, 387; Irving v. Cunningham, 58 Cal. 306, 309; Bjorman v. Fort Bragg Co., 92 Cal. 500, 28 Pac. 591; Domico v. Casassa, 101 Cal. 411, 35 Pac. 1024; Jones v. Sanders, 103 Cal. 678, 679, 37 Pac. 649; Bates v. Howard, 105 Cal. 173, 178, 38 Pac. 715; Warner v. Thomas P. D. & C. W., 105 Cal. 409, 411, 38 Pac. 960; In matter of Martin, 113 Cal. 479, 481, 45 Pac. 813, 814; Etchas v. Orena, 121 Cal. 270, 272, 53 Pac. 798; Franz v. Mendonca, 131 Cal. 205, 209, 63 Pac. 361; Newman v. Overland Pac. R. Co., 132 Cal. 73, 74, 64 Pac. 110; Lyon v. Aronson, 140 Cal. 365, 367, 73 Pac. 1063; Green v. Soule, 145 Cal. 96, 102, 78 Pac. 337; Weissner v. Southern Pac. Co., 148 Cal. 426, 83 Pac. 439; Ruppel v. United Railroads, 1 Cal. App. 666, 82 Pac. 1073.

253. Where, though evidence tending to prove circumstances relied on by plaintiff to sustain his right to recover was uncontradicted, ultimate facts to be deduced therefrom depended largely and essentially upon inferences not in themselves obvious or certain, and order granting new trial will not be disturbed.—Cauhape v. Security Sav. Bank, 118 Cal. 82, 50 Pac. 310.

254. Discretion of court—In denying or granting new trial will not be interfered with in absence of an abuse of discretion.—Pico v. Cohn, 67 Cal. 258, 260, 7 Pac. 680; Warner v. Thomas P. D. & C. W., 105 Cal. 409, 411, 38 Pac. 960; In matter of Martin, 113 Cal. 479, 481, 45 Pac. 813, 814; Anglo-Nevada A. Corp. v. Ross, 123 Cal. 520, 521, 56 Pac. 335; Cutten v. Pearsall, 146 Cal. 690, 81 Pac. 25; Weissner v. Southern Pac. Co., 148 Cal. 426, 83 Pac. 439; Baldwin v. Napa & S. W. Co., 1 Cal. App. 215, 81 Pac. 1037; Houghton v. Market St. R. Co., 1 Cal. App. 576, 82 Pac. 972.

255. Where evidence is conflicting action of court in granting a new trial will not be reviewed on appeal, it being in discretion of trial court.—Domico v. Casassa, 101 Cal. 411, 413, 35 Pac. 1024; Lyon v. Aronson, 140 Cal. 365, 367, 73 Pac. 1063; Houghton v. Market St. R. Co., 1 Cal. App. 576, 82 Pac. 972; Martin v. Markarian & Co., 1 Cal. App. 687, 82 Pac. 1072; Frutig v. Trafton, 2 Cal. App. 47, 83 Pac. 70.

256. Where verdict is unsupported by evidence and contrary to law an order denying new trial will be reversed.—Koebig v. Southern Pac. Co., 108 Cal. 235, 240, 41 Pac. 469.

257. Where finding was not supported by any evidence but was in direct conflict with evidence and admission of defendant as shown by record, it was proper for court on discovering error to call upon defendant to consent to its correction with alternative of granting new trial upon refusal, and hence order granting such on refusal will be affirmed.—Eaton v. Jones, 107 Cal. 487, 491, 40 Pac. 798.

258. Under the provisions of the above section the trial court has the power to set aside a verdict and grant a new trial, in whole or in part, in every case where in its judgment the evidence is sufficient, and the action of the trial court in so doing will not be reviewed upon appeal, except in those cases in which a clear abuse of discretion is shown.—De Vall v. Perrin, 34 Cal. App. 676, 168 Pac. 584.

259. Disregard of erroneous instruction.—A new trial should not be granted simply because of the disregard by the jury of an erroneous instruction.—Western Pac. Land Co. v. Wilson, 19 Cal. App. 338, 125 Pac. 1076.

260. Where instructions are contradictory, but the verdict as rendered was authorized by one of them, a new trial will be denied where based simply on the ground that the jury disregarded another instruction.—Western Pac. Land Co. v. Wilson, 19 Cal. App. 338, 125 Pac. 1076.

261. Duty and right of court to grant new trial, when.—In the determination of a motion for a new trial, the verdict should be set aside if, in the opinion of the trial court, it is not supported by sufficient evidence; and this is equally true whether there be an absence of evidence or that the evidence received, in the individual judgment of the trial judge, is lacking in probative force to establish the proposition of fact to which it is addressed. This is the meaning of the terms "insufficiency of evidence" (under above section subd. 6) and ". . . contrary to . . . evidence" (under Pen. Code, § 1181, subd. 6).—Estate of Bainbridge, 169 Cal. 166, 146 Pac. 427.

262. A court is under compulsion to order a new trial and may do this of its own motion when the evidence is wholly insufficient to sustain the verdict.—Estate of Caspar, 172 Cal. 147, 155 Pac. 631.

263. The court may grant a new trial even when there is substantial evidence to sustain the verdict if it believes that the evidence preponderates against the verdict.—Estate of Caspar, 172 Cal. 147, 155 Pac. 631.

264. If the trial court is not satisfied that the verdict is sustained by the evidence, it is his duty to set it aside, even though there be a conflict in the testimony.—Witter v. Andrews, 14 Cal. App. 395, 112 Pac. 311.

265. The trial court, having heard the evidence, and having had ample opportunity

to observe the demeanor, manner and credibility of the witnesses, may, if dissatisfied with the verdict, and of opinion that it is clearly against the weight of the evidence, set it aside and grant a new trial even though there is a substantial conflict.—*Walker v. Beaumont Land etc. Co.*, 15 Cal. App. 727, 115 Pac. 766.

266. Where, in the opinion of the court, the verdict is contrary to the weight of the evidence, it was the right and the duty of the trial court to set it aside, notwithstanding a substantial conflict in the evidence.—*McCarthy v. Morris*, 17 Cal. App. 725, 121 Pac. 696.

267. Where the court is of the opinion that the weight of preponderance of the evidence is opposed to the finding, it is its duty to grant a motion for a new trial.—*Conwell v. Varain*, 20 Cal. App. 521; following doctrine in *Bjorman v. Fort Bragg Redwood Co.*, 92 Cal. 500, 20 Pac. 591; *Bledsoe v. Decrow*, 132 Cal. 313, 64 Pac. 397; *Clark v. Rauer*, 2 Cal. App. 259, 83 Pac. 291; *Central Trust Co. v. Stoddard*, 4 Cal. App. 648, 88 Pac. 806; *Thompson v. Wheeler*, 5 Cal. App. 196, 89 Pac. 1065; *Hughes Bros. v. Rawhide Min. Co.*, 16 Cal. App. 297, 116 Pac. 969.

268. In an action for damages for personal injuries a trial court, if of the opinion that under the evidence the amount awarded by the jury is not legally adequate or commensurate with the extent of the injuries received, may grant a new trial on the motion of the plaintiff on the ground that the evidence does not justify the verdict.—*Taylor v. Northern Elec. R. Co.*, 26 Cal. App. 765, 148 Pac. 543.

269. In an action for damages for personal injuries a trial court, if of the opinion that under the evidence the amount awarded by the jury is not legally adequate or commensurate with the extent of the injuries received, may grant a new trial on the motion of the plaintiff on the ground that the evidence does not justify the verdict.—*Taylor v. Northern Elec. R. Co.*, 26 Cal. App. 765, 148 Pac. 543.

270. The judge should, in order to warrant an order for a new trial, believe that the verdict is not sustained by the evidence, and that if allowed to stand it will result in unjust punishment being inflicted, and so believing, it becomes his duty to order a new trial, and such an order will not be disturbed unless an abuse of discretion is made manifest.—*People v. Mallicoat*, 27 Cal. App. 355, 149 Pac. 1000.

271. Upon a motion for a new trial in an action for damages for personal injuries, the probative force and effect of the evidence as to the nature and extent of the injuries and the damages resulting therefrom are for the determination of the trial court, notwithstanding there is no conflict in the evidence on the subject.—*Meinberg v. Jordan*, 29 Cal. App. 760, 157 Pac. 1005.

272. The trial court is not only authorized but in duty bound, on motions for a new trial, to scrutinize the evidence carefully, in cases where claimed to be insufficient, and to grant new trials whenever, in its opinion, the evidence on which the decision or verdict was based is insufficient to justify the conclusion.—*Estate of Bainbridge*, 6 Cal. Prob. Dec. 808.

273. **Excessive damages**—When distinguished.—That evidence is insufficient to justify verdict or other decision is ground distinct from that of damages appearing to have been given under influence of passion or prejudice, and court may grant new trial where in its judgment evidence is insufficient to justify verdict without regard to whether verdict was result of passion or prejudice.—*Swett v. Gray*, 141 Cal. 63, 69, 74 Pac. 439.

274. Ground of motion for new trial that excessive damages appear to have been given under influence of passion or prejudice is but another form of saying that evidence does not justify verdict.—*Graybill v. De Young*, 140 Cal. 323, 327, 73 Pac. 1067. See *Harrison v. Sutter St. R. Co.*, 116 Cal. 156, 162, 47 Pac. 1019; *Doolin v. Omnibus Co.*, 125 Cal. 141, 144, 57 Pac. 774.

275. **Findings set aside**.—Where a judgment is reversed upon the ground of the insufficiency of the evidence to justify the decision, the findings are set aside and it follows that there are no findings to support any judgment purported to be entered thereon.—*Riley v. Loma Vista Ranch Co.*, 5 Cal. App. 25, 28, 89 Pac. 849.

276. **Same**—The "decision" of the court is found in its findings and not in the giving of the judgment. The ground of motion for a new trial based upon the insufficiency of the evidence relates to the insufficiency of the evidence to justify the inferences of fact included in the verdict of the jury or "other decisions," i. e., finding of fact by the court, and a sufficiency or insufficiency of the evidence to support the judgment can not be considered.—*Elizalde v. Murphy*, 11 Cal. App. 32, 41, 103 Pac. 904.

277. **Insufficiency of evidence to justify judgment** is not statutory cause on which to base motion for new trial; motion must be directed at decision.—*Martin v. Matfield*, 49 Cal. 42, 44; *Sawyer v. Sargent*, 65 Cal. 259, 260, 3 Pac. 872; *Boston T. Co. v. McKenzie*, 67 Cal. 485, 486, 8 Pac. 22.

278. **Jurisdiction to grant new trial**.—Notwithstanding conflict in evidence where it is fully convinced that verdict was wrong is not destroyed by fact that jury was allowed to visit premises in which accident occurred.—*McQueen v. Mechanics' Institute*, 107 Cal. 163, 165, 40 Pac. 114.

279. **Proceedings after reversal**.—Where upon going down of remittitur upon reversal of judgment for insufficiency of the evidence to justify the decision, the trial court entered judgment without a new trial

or making any new findings, merely reciting the original findings, the appeal reversal of the judgment, etc., and that all issues were determined by the former findings, such judgment is erroneous and must be reversed, for the findings were set aside and rendered as no findings in the case by the reversal of the judgment.—*Riley v. Loma Vista Ranch Co.*, 5 Cal. App. 25, 27, 89 Pac. 849.

280. Specifications in order granting new trial.—An order of the court granting a new trial, specifying that such new trial was granted on "all of the grounds set forth in the notice," is based upon the ground of insufficient evidence, where there was one of the grounds specified in the notice and is sufficient, notwithstanding the provisions of the above section as amended by the legislature of 1919, requiring that an order granted upon the ground of insufficiency of evidence shall so specify.—*Marr v. Whistler*, — Cal. App. —, 193 Pac. 600.

281. Succeeding judge—Stands in place of former judge and has all his rights and powers for granting motion for new trial on ground of insufficiency of evidence and newly discovered evidence, and his discretion will not be interfered with except when abused.—*Hausman v. Sutter St. R. Co.*, 139 Cal. 174, 175, 72 Pac. 905.

282. Same—Duty of judge to grant motion for new trial when evidence is insufficient to support decision, is same whether he tried case originally or not.—*Jones v. Sanders*, 103 Cal. 678, 679, 37 Pac. 649; *Garton v. Stern*, 121 Cal. 347, 349, 53 Pac. 904.

VIII. ERRORS OF LAW—SUBDIVISION 7.

As to new trial for erroneous instructions, see note 99 Am. Dec. 129.

283. Amendment of judgment of dismissal.—By consent, so as to show that such dismissal was without prejudice, improperly sought by motion to amend after the lapse of six months. Motion for new trial proper procedure.—*Forrester v. Lawler*, 14 Cal. App. 174, 111 Pac. 284.

See, ante, § 656 and note.

284. Dismissal of action by consent—Error of law at trial—Amendment of judgment.—An error in the judgment upon order of dismissal, in the omission of a recital that such dismissal was without prejudice, is an error in law occurring at the trial which can not be corrected by motion to amend after the lapse of six months, unless shown to be a mere clerical misprision. The proper procedure was by motion for new trial (dictum).—*Forrester v. Lawler*, 14 Cal. App. 173, 111 Pac. 284, citing *Egan v. Egan*, 90 Cal. 15, 27 Pac. 22.

285. Same—Editorial note.—It is not clear that the court intended to say that a motion for a new trial was the proper procedure in the case at bar.—In the case cited (*Egan v. Egan*, 90 Cal. 15, 27 Pac. 22) there was a trial, and the decision that a motion for a new trial was proper was well

founded. In the case at bar no issue of fact raised by the pleadings appears to have been tried. There was no trial, in the well settled acceptance of that term as used in above section 657. (See §§ 1 and 100, *Hayne on New Trial*—Rev. Ed.) Hence, there could be no "error in law occurring at the trial." No principle is more firmly settled than that so often enunciated, in so many different forms, that there can be no new trial upon any ground whatever, trial or no trial, which does not contemplate a review of a decision upon an issue of fact properly raised by the pleadings in the action (*Hayne on New Trial*—Rev. Ed., § 1). It must therefore be assumed that the court did not intend to apply the language of *Egan v. Egan*, 90 Cal. 15, 27 Pac. 22, where there was a trial, and an issue of fact, and a decision thereon, to the case at bar, where there were neither, except in a general way.

286. Error—In admission of testimony offered by defendant is not ground for new trial on his behalf.—*Laver v. Hotaling*, 115 Cal. 613, 616, 47 Pac. 593.

287. Same—In admitting immaterial evidence is not sufficient to justify motion for new trial.—*Brownlee v. Reiner*, 147 Cal. 641, 82 Pac. 324.

As to admission of irrelevant or immaterial evidence as ground for new trial, see notes 66 Am. Dec. 718; 44 Am. Dec. 88; 41 Am. Dec. 747.

288. Same—In instructions—Ignored by jury.—The giving of conflicting instructions is not ground for a new trial, where it is plain that the jury did not follow the erroneous instruction, but completely ignored it, and gave a verdict which can be justified only under the instruction which states the correct rule applicable to the case.—*Lucas v. Walker*, 22 Cal. App. 296, 134 Pac. 374.

289. Where it is plain that the jury disregarded and ignored erroneous instructions given at appellant's request, no just ground for a new trial exists.—*Lucas v. Walker*, 22 Cal. App. 296, 134 Pac. 374.

290. Same—In ruling on motion for nonsuit with exception to denial thereof can be set forth in statement of bill of exceptions as error at law occurring at trial and there excepted to by defendant, and such ruling will be reviewed on hearing of motion even though motion for nonsuit was based on fact that complaint set up contract which could not be enforced, and hence whether court denied or granted new trial its action was subject to be revised on appeal.—*Alpers v. Hunt*, 86 Cal. 78, 82, 21 Am. St. Rep. 17, 9 L. R. A. 483, 24 Pac. 846; distinguishing *Spanagel v. Dellinger*, 38 Cal. 278, 283; *People v. Turner*, 39 Cal. 370, 372; *Mason v. Austin*, 46 Cal. 385; *Jacks v. Buell*, 47 Cal. 162; *Onderdonk v. San Francisco*, 75 Cal. 534, 17 Pac. 678; *Wheeler v. Kassabaum*, 76 Cal. 90, 18 Pac. 119, in which cases it was held that sufficiency of complaint

could not be considered on appeal from an order granting new trial, distinction being that by moving for nonsuit exception to sufficiency of complaint could be reviewed on motion for new trial.

291. Failure to find upon issue of fact—Decision "against law."—The failure of the trial court to make a finding of fact upon a material issue renders the decision one against law, and an error in overruling a motion for a new trial, made on that ground, may be reviewed on appeal from the order.—*Great Western Gold Co. v. Chambers*, 153 Cal. 310, 95 Pac. 151.

292. The failure of the court to find upon an issue raised by the pleadings is ground for a new trial.—*Lyden v. Spohn-Patrick Co.*, 155 Cal. 182, 100 Pac. 236.

293. The granting of a motion to strike out parts or all of a pleading is not one of the grounds for new trial.—*Stockton Iron Works v. Walters*, 18 Cal. App. 373, 378, 123 Pac. 240.

294. Wrong reason for right decision—Effect of.—Wrong reason for right decision does not entitle a party to a new trial.—See, ante, § 53, note pars. 326, 326a; also note 40 Am. Dec. 296.

IX. DECISION AGAINST LAW.

295. As to generally.—Where a new trial is sought on the ground that the decision is against law, and a new trial can afford no relief, and other and effective means of relief are provided in sections 663 and 663½, post, the motion for a new trial will be overruled.—*Bloxham v. Tehama County Tel. Co.*, 29 Cal. App. 326, 155 Pac. 654.

296. Order denying a new trial, the objection that the action should have been brought by the husband of the plaintiff can not be considered, where the cause was tried on the pleadings as they stood without objection to the evidence in support thereof.—*Bloxham v. Tehama County Tel. Co.*, 29 Cal. App. 326, 155 Pac. 654.

297. Construed.—Phrase "or that it is against the law" while not very clear or unambiguous expression as raised in connection with section 656, ante, is reason for re-examination of issue of fact and not an issue of law.—*Kaiser v. Dalto*, 140 Cal. 167, 169, 73 Pac. 828, 829.

298. Same.—"Verdict and decision" are appositional. What is predicated of one is also of other.—*Simmons v. Hamilton*, 56 Cal. 493, 495.

299. Decision against law.—A decision is not against law within the meaning of this section when the only fault in the findings is that they do not support the legal conclusions drawn from them and the judgment based thereon.—*Estate of Keating*, 162 Cal. 406, 412, 122 Pac. 1079.

300. Same.—Failure to find upon all material issues is a decision against law, and

ground for a new trial.—*Cargnani v. Cargnani*, 16 Cal. App. 99, 116 Pac. 306.

301. Decision and findings of court.—The trial judge, at the conclusion of all the testimony, weighs the evidence and makes his determination of the facts, and if he afterwards concludes that he has made an erroneous decision, it is his duty, where proper proceedings are had calling the matter to his attention, to grant a motion for a new trial.—*McCann v. McCann*, 20 Cal. App. 567, 129 Pac. 965.

302. Erroneous conclusions of law, drawn from findings of fact, is decision against law, for which new trial should be granted.—*Simmons v. Hamilton*, 56 Cal. 493, 495.

303. That conclusions from facts found are against law, that is, that judgment is not supported by findings of fact, is not ground for granting new trial.—In matter of *Doyle*, 73 Cal. 564, 571, 15 Pac. 125; *Brison v. Brison*, 90 Cal. 323, 327, 27 Pac. 186; *Pierce v. Willis*, 103 Cal. 91, 93, 36 Pac. 1080.

304. Same.—Where conclusion of law is logically drawn from facts, decision is not contrary to law, and new trial can not be granted on this ground.—*Heath v. Scott*, 65 Cal. 548, 550, 4 Pac. 557.

305. Error of law committed resulting in erroneous decision of fact renders verdict against law.—*Martin v. Matfield*, 49 Cal. 42, 44.

306. Failure to find on material issue renders decision one against law and may be reviewed on appeal from an order granting or refusing new trial.—*Adams v. Helbing*, 107 Cal. 298, 301, 40 Pac. 422. See *Knight v. Roche*, 56 Cal. 15; *Brown v. Burbank*, 59 Cal. 535; *Soto v. Irvine*, 60 Cal. 436; *Cummings v. Conlan*, 66 Cal. 403, 5 Pac. 796, 903; *Millard v. Supreme Council A. L. of H. 3* Cal. Unrep. 96, 21 Pac. 825; *Spotts v. Hanley*, 85 Cal. 155, 24 Pac. 738; *Langan v. Langan*, 89 Cal. 186, 26 Pac. 764; *Nuttall v. Lovejoy*, 90 Cal. 163, 27 Pac. 69; *Brison v. Brison*, 90 Cal. 323, 328, 27 Pac. 186; *Haight v. Tryon*, 112 Cal. 4, 6, 44 Pac. 318; *Polk v. Boggs*, 122 Cal. 114, 117, 54 Pac. 536; *Kaiser v. Dalto*, 140 Cal. 167, 169, 73 Pac. 828; *Swift v. Occidental M. & P. Co.*, 141 Cal. 161, 167, 74 Pac. 700.

307. In such case there has been mistrial, and decision is to be considered as decision against law; but such rule only applies where issues, upon which there is no finding, are material, that is, where finding on such issue would have effect to countervail or destroy effect of other findings.—*Brison v. Brison*, 90 Cal. 323, 328, 27 Pac. 186. See *McCourtney v. Fortune*, 57 Cal. 617, 619.

308. Same.—Where complaint sets forth two or more grounds for relief, either of which is sufficient to support judgment, finding on one of such issues is sufficient, and failure to find on other does not constitute mistrial or render decision against law.—*Adams v. Helbing*, 107 Cal. 298, 302, 40 Pac. 422.

309. Judgment against law is not statutory cause for motion for new trial. Motion must be directed at decision.—*Sawyer v. Sargent*, 65 Cal. 259, 260, 3 Pac. 872. See *Martin v. Matfield*, 49 Cal. 42, 44.

310. Judgment for return of property—Where no return is asked for in complaint in replevin as ground for new trial.—See, ante, § 627, post, § 677 and notes; also *Banning v. Marleau*, 101 Cal. 238, 239, 35 Pac. 772.

311. Objection that finding did not sustain decision, that complaint does not state cause of action, and that state law is unconstitutional can not be considered on motion for new trial on ground that decision is against law.—*Petaluma P. Co. v. Singley*, 136 Cal. 616, 618, 69 Pac. 426.

312. Stipulated facts—Decision against law.—A motion for a new trial is proper only where there has been a trial of an issue of fact, and is not proper where the case was tried upon stipulated facts. The exception to the decision on the ground that it is one against law, can not be availed of by motion for a new trial, where the facts were stipulated, but only by an appeal from the judgment.—*Quist v. Sandman*, 154 Cal. 753, 99 Pac. 204.

As to agreed facts, see pars. 6-8, this note.

313. Verdict in disobedience to instructions of court, on point of law, is verdict "against law" and should be set aside, even though instruction disobeyed is erroneous in point of law.—*Emerson v. Santa Clara Co.*, 40 Cal. 543, 545.

§ 658. ON WHAT PAPERS MOVED FOR. When the application is made for a cause mentioned in the first, second, third and fourth subdivisions of the last section, it must be made upon affidavits; otherwise it must be made on the minutes of the court.

History: Enacted March 11, 1872; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 314; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 149, held unconstitutional, see history, § 5 ante; April 24, 1915, Stats. and Amdts. 1915, p. 201. In effect immediately.

APPLICATION FOR NEW TRIAL—ON WHAT PAPERS MOVED.

1. Editorial note—In entering upon new trials.
2. As to construction of section—Amendment of 1915.
3. Absence of bill of exceptions.
4. Absence of statement.
- 4a. Accident or surprise.
- 5-10. Affidavits to procure—As to requisites and sufficiency.
 11. Same—Excessive damages.
 12. Same—Failure to file counter-affidavits—Effect of.
 13. Conduct of judge—Whether it amounts to an error of law.
 14. Findings of fact and conclusions of law—Signing without reading—Irregularities presented how.
- 15, 16. Misconduct of jury.
17. Motion for new trial—Appeal—Effect on jurisdiction to hear and determine.
18. Necessary papers.
19. Newly discovered evidence—Motion on ground of for new trial.
20. Order directing conveyance of real estate—By executor.
21. Record on appeal—Motion made on affidavits.
22. Refusal to allow supplemental answer.

23. Right to have affidavit considered.

24. Sufficiency of affidavit—Affidavit on information and belief.

25. Same—Deposition of deputy sheriff taken in open court.

1. Editorial note—In entering upon New Trials, and the annotations as to requisites and procedure on application therefor, and the requisites and procedure on appeals from orders granting and refusing new trials, it is well to caution the patrons of this work that the amendments of 1915 and 1917 and 1919 are so many and so radical that much of the former adjudications under the various sections has become academic merely: yet it is not thought wise to omit these former adjudications, for the reason that they may still have some value in certain respects, and the profession may still have use for them for certain purposes of reference, comparison, and the like, both as to the amended sections in the Article on New Trials, and also in connection with sections 951 and 952, post, which now govern on appeals from new-trial orders, as is pointed out in the "editorial note" to section 661, post.

2. As to construction of section—Amendment of 1915.—The amendment of 1915 requiring motions for new trials to be made only on affidavits in certain cases and the minutes of the court in other cases, was not intended to affect proceedings for a new trial pending at the time of such amendment, and such proceedings must be determined on the record specified in the notice of intention.—*Schmitt v. White*, 172 Cal. 554, 158 Pac. 216.

3. Absence of bill of exceptions.—Where the notice of intention to move for a new trial stated that the motion will be made for bill of exceptions and no proper bill of exceptions was presented, the court below was not in position to review its action as to alleged errors of law, or as to whether the verdict was justified by the evidence, and the court on appeal is in the same position.—*Pereira v. City Sav. Bank*, 128 Cal. 45, 47, 60 Pac. 524.

4. Absence of statement on motion for new trial renders denial proper, and this is so though the statement has been stricken from the files.—*Sutton v. Symons*, 100 Cal. 576, 35 Pac. 158; *Symons v. Bunnell*, 101 Cal. 223, 224, 35 Pac. 770.

4a. Accident or surprise, when ground of motion for new trial, must be shown by affidavits.—*Melde v. Reynolds*, 120 Cal. 234, 237, 52 Pac. 491.

5. Affidavits to procure—As to requisites and sufficiency.—Where misconduct or irregularity of this character is relied on as a ground for a new trial, the affidavits of the moving party must show affirmatively that both he and his counsel were ignorant of the facts constituting the misconduct or irregularity charged until the rendition of the verdict.—*Sherwin v. Southern Pacific Co.*, 168 Cal. 722, 145 Pac. 92.

6. An order granting a new trial on the ground that one of the jurors gave untrue answers to questions asked him on his voir dire as to whether he had ever had any suits against the defendant railroad company, is erroneous, if the affidavits in support of the motion merely show that the attorneys for the defendant were not aware of the falsity at the time the impanelment of the jury was completed, but fail to show that they did not discover such facts afterward during the trial and before the rendition of the verdict.—*Sherwin v. Southern Pacific Co.*, 168 Cal. 722, 145 Pac. 92.

7. A motion for a new trial on the ground of "irregularity in the proceedings of the court," based upon affidavits charging the judge with bias and prejudice, is improperly denied where no counter-affidavit is filed by the judge.—*Keating v. Keating*, 169 Cal. 754, 147 Pac. 974.

8. The moving party must state in his affidavits facts which show that he exercised reasonable diligence, from the beginning in endeavoring to discover the evidence before the first trial, and the decision of such questions rests in the sound discretion of the trial court, and will not be reversed on appeal unless an abuse of that discretion clearly appears.—*Estate of Emerson*, 170 Cal. 81, 148 Pac. 523.

9. Where one moves for a new trial upon the grounds of accident, surprise, and newly discovered evidence, it is incumbent upon him, within ten days after the date of the service and filing of his notice of C. C. P.—104

intention, to serve and file his affidavits in support of the proposed motion.—*Strange v. Strange*, 23 Cal. App. 281, 137 Pac. 1104.

10. An order refusing the defendant sixty days' time within which to secure affidavits in support of his motion for a new trial is warranted, in the absence of any showing of what was expected to be set forth in the affidavits or of any reason why the affidavits had not already been secured.—*People v. Burrows*, 27 Cal. App. 420, 150 Pac. 382.

11. Same—Excessive damages.—In an action to recover damages for injuries due to the fall of an elevator in the building occupied as a law school, brought by one of the professors in the school, on motion for a new trial on the ground of excessive damages, affidavits to the effect that during the trial the court room was crowded with law students, who were pupils of the plaintiff, and that during the trial there was laughter and other manifestations of approval or disapproval of the proceedings by such students, were inadmissible, on the question of excessive damages, under the provisions of the above section.—*Campbell v. Bradbury*, 179 Cal. 364, 176 Pac. 685, applying the doctrine in *Harrison v. Sutter Street R. Co.*, 116 Cal. 157, 161, 47 Pac. 1019; *Doolin v. Omnibus Cable Co.*, 125 Cal. 141, 144, 57 Pac. 774.

12. Same—Failure to file counter-affidavits—Effect of.—A motion for a new trial on the ground of "irregularity in the proceedings of the court," based upon affidavits charging the judge with bias and prejudice, is improperly denied where no counter-affidavit is filed by the judge.—*Keating v. Keating*, 169 Cal. 754, 147 Pac. 974.

13. Conduct of judge — Whether it amounts to an error of law or not, may be conceded to have been an error of law, and yet, possessing all aspects of an irregularity, it was not amiss to treat it as ground for new trial under subdivision 1 of section 657, ante, and present objection by affidavit.—*Pratt v. Pratt*, 141 Cal. 247, 251, 74 Pac. 742.

14. Findings of fact and conclusions of law—Signing without reading—Irregularities presented, how.—In a case in which it is claimed that the trial judge left the matter of the contents of the finding of facts and conclusion of law entirely to the attorney of the prevailing party and signed such findings and conclusions without reading such contention can be urged only on motion for new trial on this ground and only on affidavits setting forth the alleged facts, under the provisions of the above section.—*Wagner v. Meinzer*, 182 Cal. 608, 189 Pac. 435, approving the doctrine in *Woods v. Jensen*, 130 Cal. 205, 62 Pac. 474, and in *Gay v. Torrance*, 145 Cal. 144, 78 Pac. 504.

15. Misconduct of jury.—Notice of motion for new trial stating that the motion would be made on statement and affidavits

was improper when motion was made upon ground of misconduct, statement in such case being unauthorized.—*Saltzman v. Sunset T. & T. Co.*, 125 Cal. 501, 503, 58 Pac. 169.

16. Where motion for new trial on ground of irregularity of proceedings of jury, and misconduct of jury, is not supported by any affidavit purporting to set forth facts constituting irregularity or misconduct within meaning of these words as used in subdivisions 1 and 2 of section 657, ante, motion was properly denied.—*Benjamin v. Stewart*, 61 Cal. 605, 608.

17. Motion for new trial—Appeal—Effect on jurisdiction to hear and determine.—In no case does the fact that an appeal has been taken from a judgment operate to divest the trial court of powers to entertain and determine a motion for a new trial in the matter in which the judgment was given. The amendments of 1915 to the above section and following sections relating to motions for new trial have in no respect changed the established law in this regard.—*Estate of Waters*, 181 Cal. 584, 588, 185 Pac. 951, 953.

18. Necessary papers.—If the grounds of the motion are such as can be presented only by bill of exceptions or statement, and the bill asked for can not be considered, an order granting the motion is erroneous, and will be reversed on appeal.—*Pollitz v. Wickersham*, 150 Cal. 242, 88 Pac. 911.

19. Newly discovered evidence.—Motion on ground of for new trial must be made on affidavits.—*Schroeder v. Mauzy*, 16 Cal. App. 451, 118 Pac. 459.

20. Order directing conveyance of real estate—By executor, is properly brought up on appeal by bill of exceptions.—*Estate of Corwin*, 61 Cal. 160, 163.

21. Record on appeal—Motion made on affidavits.—Where a motion for a new trial is made on the ground of newly discovered evidence the affidavits used on the hearing with a copy of the order made shall constitute the record on appeal therefrom.—*Schroeder v. Mauzy*, 16 Cal. App. 451, 118 Pac. 459.

22. Refusal to allow supplemental answer, though it were an abuse of discretion, can be incorporated in a bill of exceptions, it being deemed excepted to under section 647, ante, and need not be presented by affidavit.—*Seehorn v. Big Meadows & B. W. R. Co.*, 60 Cal. 240, 252.

23. Right to have affidavit considered.—Moving party is entitled to have such competent affidavits as are material to motion and are seasonably served and filed considered on hearing of the motion.—*Gay v. Torrance*, 145 Cal. 144, 146, 78 Pac. 540.

24. Sufficiency of affidavit—Affidavit made on information and belief on motion for new trial on the ground of irregularity was properly stricken from the files, there being no authority for such an affidavit.—*Gay v. Torrance*, 145 Cal. 144, 150, 78 Pac. 540.

25. Same—Deposition of deputy sheriff taken in open court must be regarded as affidavit on motion for new trial, where deputy refused to make affidavit.—*Saltzman v. Sunset T. & T. Co.*, 125 Cal. 501, 503, 58 Pac. 169.

§ 659. NOTICE OF MOTION, UPON WHOM TO BE SERVED, AND WHAT TO CONTAIN. The party intending to move for a new trial must, within ten days after receiving notice of the entry of the judgment, or within ten days after verdict, if the trial was by jury, file with the clerk and serve upon the adverse party a notice of his intention to move for a new trial, designating the grounds upon which the motion will be made and whether the same will be made upon affidavits or the minutes of the court or both. The time above specified shall not be extended by order or stipulation.

[Filing of affidavits.] If the motion is to be made upon affidavits, the moving party must, within ten days after serving the notice, or such further time as the court in which the action is pending, or a judge thereof, may allow (but not to exceed twenty days' additional time) file such affidavits with the clerk and serve a copy thereof upon the adverse party, who shall have ten days thereafter, or such further time as the court may allow (not exceeding twenty days' additional time) to file counter affidavits and serve a copy thereof upon the moving party.

History: Enacted March 11, 1872; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 315; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 149, held unconstitutional, see history, § 5 ante; March 20, 1907, Stats. and Amdts. 1907, p. 717, Kerr's Stats. and Amdts. 1906-7, p. 451; April 24, 1915, Stats. and Amdts. 1915, p. 201. In effect August 8, 1915.

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11. Dismissal of new trial proceedings.
12. Judgment affirmed — Order denying new trial reversed — Status of case.
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14. Same — Must state the particular grounds on which it is based.
15. Proceedings for new trial — Are entirely independent of the entry of judgment.
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20. Same — Eminent domain proceedings — Verdict of jury on single issue.
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22. Same — Same — Diligence in making and prosecuting.
- 23, 24. Same — Same — Dismissal for want of diligence in prosecution.
- 25-32. "Adverse party" — As to who is, within provisions.
33. Same — Each landowner.
34. Same — Executrix of partner.
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- 37, 38. Amendment of notice of intention.
- 39-42. Decision — Necessity of.
- 43, 44. Form of notice — Need not contain, what.
45. Same — Signing by an attorney not attorney of record.
46. Same — Same — Waiver of objection that such attorney does not appear as attorney of record.
- 47, 48. Same — Specification of errors.
- 49-51. Same — Objection on grounds at length.
52. Same — Same — "Grounds."
53. Same — Same — Irregularity.
- 54, 55. Same — Same — Objection that decision is against law.
- 56, 57. Same — Specifications of insufficiency of evidence.
- 58, 59. Same — Same — Where notice of intention stated that motion was based on minutes of court.
60. Same — Same — Same — "Notice of motion."
- 61, 62. Same — Statement of what based on.
63. Same — Same — Waiver.
- 64, 65. Same — Waiver of defects in notice.
- 66-68. Notice of decision — Necessary to limit time of appeal.
69. Same — No particular form required.
70. Same — Notice of assignment of judgment — Insufficient notice of entry.
71. Same — What constitutes — Filing additional findings.
72. Same — Same — Notice of intention to move court to set aside and vacate judgment.
73. Same — Same — Notice that "you will please take notice that a decree has been this day entered," etc.
74. Same — Same — Notice of decision addressed to plaintiffs and to attorneys of record.
- 75, 76. Same — Same — Rendition of special verdict.
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78. Same — Same — Verdict of jury in probate proceedings.
79. Same — Same — Where all issues necessary to final judgment had been tried.
- 80-84. Same — Same — Waiver of formal notice of decision.
- 85-88. Same — Same — Same — Actual notice of decision.
- 89, 90. Same — Same — Same — Application of appellant for stay of execution on judgment.
91. Same — Same — Same — Consent to entry of judgment.
92. Same — Same — Same — Evidence of waiver must be clear and uncontradicted.
93. Same — Same — Same — Moving for dismissal of action.
94. Same — Same — Same — Moving to modify and set aside findings.
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96. Same—Same—Same—Service of notice of intention to move for new trial.
 97. Same—Same—Same—That plaintiffs were minors at time of judgment does not affect question of waiver.
 - 98-102. Notice of intention—Necessity of service of.
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 - 107, 108. Same—Necessity of service of notice of intention upon adverse parties.
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 - 112, 113. Same—Same—Same—Effect of failure to serve notice.
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 - 115-117. Same—Sufficiency of notice of intention.
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 - 123, 124. Same—Same—Extension of time.
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218. Same—Office of specification of errors.
219. Same—Rulings on the admission of evidence.
- 220, 221. Same—Ruling on demurrer.
- 222, 223. Same—Specifications of insufficiency.
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- 237-240. Same—Same—Purpose of requiring particulars.
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245. Same—Same—Same—“Court should have found.”
- 246, 247. Same—Same—Same—Evidence insufficient to show facts.
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- 251-255. Same—Same—Same—Findings as whole.
- 256, 257. Same—Same—Same—First finding of court is not sustained by evidence.
258. Same—Same—Same—Ignoring part of evidence.
259. Same—Same—“It clearly appears from evidence.”
260. Same—Same—Same—Items of account.
261. Same—Same—Same—Narration of evidence.
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- 274, 275. Same—Same—Same—Probative or ultimate facts.
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277. Same—Same—Same—“Result of testimony.”
278. Same—Same—Same—Specification in assignment of error that evidence is insufficient to justify.
279. Same—Same—Same—Statement of all evidence.
280. Same—Same—Same—Waiver of insufficiency.
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- 317. Specifications of particulars—Insufficiency of evidence.
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- 319. Same—Same—Necessity for.
- 320, 321. Same—Same—Sufficiency of.
- 322. Statement on motion for new trial.
- 323-326. Same—Editorial note.

I. IN GENERAL.

See, also, ante, § 650, and "Editorial notes" 657, ante, and, post, § 661.

1. **Editorial note—Amendments to above section** since first edition have radically changed the provisions and requirements thereof, and have rendered many of the decisions heretofore rendered under the above section, and the other sections relating to new trial purely academic; but the former annotations and decisions on the above section before the amendments are retained here for whatever interest and importance they may have. While no longer applicable under the language and requirements of the above section, such decisions may still be of service as showing reasonings of court in the matters under consideration, and for that reason may have some bearing in the consideration of other sections of the code in the chapters on appeal, in which same or similar things are provided for; but under which sections the decisions can not be placed without the danger of leading to confusion and error.

2. **As to construction of section—In general.**—In changing the phraseology in the amendment of 1915 we can not believe that the legislature intended the word "trial" should mean anything different from the words "the action was tried" found in the former statute. When the legislature used the term "trial" it must have intended to refer to the action being tried, and not alone to some one or more issues of fact to be submitted to the jury not decisive of the case; it was not intended to introduce a rule at variance with the procedure of half a century.—*San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 30 Cal. App. 405, 158 Pac. 768.

3. The determination of a jury of some single isolated issue of fact in a case is not "the trial by jury" referred to in this section where there remains other issues undisposed of.—*San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 30 Cal. App. 405, 158 Pac. 768.

4. In condemnation proceedings the questions of use and necessity are exclusively for the court to determine and these are issues of fact, though withheld from the jury, and must be determined by the court before final judgment of condemnation can be entered, and until found upon by the court there is no "trial" as contemplated by this section.—*San Joaquin & Kings River*

Canal & Irr. Co. v. Stevinson, 30 Cal. App. 405, 158 Pac. 768.

5. **Same—Amendment of 1915—Presumption as to time of filing notice.**—When a notice of intention was served two days before the effective date of the 1915 amendment, but it does not appear from the bill of exceptions when it was filed, it will be presumed, in support of the order granting the motion, that it was filed prior to the amendment.—*Cormond v. United Railroads*, 41 Cal. App. 682, 183 Pac. 218.

6. **Abandonment of motion for new trial**—By one of defendants did not preclude another defendant from prosecuting his own motion therefor or appealing from judgment therein.—*Johnson v. Reed*, 125 Cal. 74, 76, 57 Pac. 680.

7. **Affidavits in support of—Service of.**—In the case where an appellant moves for a new trial and in support thereof files affidavits intended to show that there was no consideration for the trust deed in litigation, and that such trust deed should not be given priority over appellant's mortgage these affidavits must be served and filed within ten days after serving the notice of motion, under the provisions of the above section.—*W. P. Fuller & Co. v. McClure*, — Cal. App. —, 191 Pac. 1027.

As to the right of the adverse party, on motion for a new trial, to introduce counter-affidavits, see note Ann. Cas. 1912D, 1303.

8. **Same—Time for filing affidavits.**—Where motion for new trial was based on affidavits showing the disqualification of judge, but the affidavits were not filed within ten days after notice of intention, they can not be considered.—*Estate of Kasson*, 141 Cal. 33, 41, 74 Pac. 436.

8a. **Same—Same—Extension of time** within which affidavits on motion for new trial may be filed for more than thirty days beyond statutory time is authorized by this section.—*Oberlander v. Fixen & Co.*, 129 Cal. 690, 691, 62 Pac. 254.

9. **Alternative method of appeal—Bill of exceptions** to be used on appeal taken pursuant to sections 941a et seq., post, must be settled and notice of settlement given as prescribed in this section.—*Ford v. Braslan Seed Growers Co.*, 10 Cal. App. 762, 766, 103 Pac. 946.

As to bill of exceptions or statement, see pars. 153-169, this note; also, post, § 661, note 1.

10. **Same—Bill of exceptions and statement—Distinction between,** as to, see *Pease v. Fink*, 3 Cal. App. 371, 85 Pac. 657.

11. **Dismissal of new trial proceedings.**—The court has jurisdiction to dismiss proceedings on motion for new trial for inexcusable neglect for failing to present the statement on motion for new trial for settlement for more than a year after the making of the motion.—*Kokole v. Superior Court*, 17 Cal. App. 457, 120 Pac. 67.

As to necessity for diligence in making and prosecuting motion for new trial, etc., see pars. 22-24, this note.

12. Judgment affirmed—Order denying new trial reversed—Status of case.—Where on a judgment recovered an appeal is taken from the judgment which is affirmed and an order denying a motion for a new trial is denied, which order, on appeal, is reversed and a new trial having been taken prior to the amendment to the above section of 1915, the new trial order was entirely independent of the entry order judgment and having been properly instituted, while the appeal from the judgment was pending a new trial could have been granted by the lower court, even after the judgment was affirmed on appeal. The effect was that the affirmance of the judgment was vacated by the judgment reversing the order appealed from and awarding a new trial, and the original judgment could not be carried into execution, under the provisions of section 685, post.—*Labique v. Walsh*, — Cal. App. —, 196 Pac. 512.

13. Motion for new trial—Is in nature of a distinct proceeding, and is to be heard on an independent record distinct from record on which judgment depends.—*Bode v. Lee*, 102 Cal. 583, 586, 36 Pac. 936; *Kaltschmidt v. Weber*, 136 Cal. 675, 676, 69 Pac. 497.

14. Same—Must state the particular grounds on which it is based, but this may be done by reference to notice of intention.—*Williams v. Hawley*, 144 Cal. 97, 99, 77 Pac. 762. See *Holverstot v. Bugby*, 13 Cal. 43; *People v. Ah Sam*, 41 Cal. 645, 650; *Herrlich v. McDonald*, 80 Cal. 472, 22 Pac. 299.

15. Proceedings for new trial—Are entirely independent of the entry of judgment, and may be instituted before or after its entry, and even while appeal from judgment is pending.—*Brison v. Brison*, 90 Cal. 323, 327, 27 Pac. 186. See *Spanagel v. Dellinger*, 34 Cal. 476.

16. Right to move for a new trial—Is statutory and must be pursued in the manner pointed out by statute.—*California Imp. Co. v. Baroteau*, 116 Cal. 136, 138, 44 Pac. 1018.

II. NOTICE OF INTENTION.

17. As to time in which to serve notice.—Where all the issues in a case are tried by a jury, the time for serving and filing the notice of intention to move for a new trial begins to run when the verdict was rendered, but where some special issue, not determinative of the case, has been tried by a jury, the time does not begin to run upon the rendition of the verdict upon such special issue, but from the entry of judgment.—*San Joaquin etc. Irr. Co. v. Stevinson*, 30 Cal. App. 405, 158 Pac. 768.

18. In a proceeding for the condemnation of an easement, where the issue of public use and the issue of public necessity

were first heard and determined by the court, and the issue of damages thereafter determined by a jury, the time to file and serve a notice of intention to move for a new trial runs from the time of entry of the findings and judgment, and not from the date of the verdict.—*San Joaquin etc. Irr. Co. v. Stevinson*, 30 Cal. App. 405, 158 Pac. 768.

19. Same—Amendment of 1915.—The time to serve a motion for new trial depends upon the service of notice of entry of judgment.—*Bates v. Ransome-Crummey Co.*, 42 Cal. App. 699, 184 Pac. 39.

See, also, pars. 66-97, this note.

20. Same—Eminent domain proceedings—Verdict of jury on single issue, under submission in accordance with the provisions of section 1241, post, does not constitute a "decision," within the provisions of the above section setting in motion the running of the time within which a notice of intention to move for a new trial must be given.—*Henshaw v. Superior Court*, 45 Cal. App. 105, 187 Pac. 41, following the doctrine in *San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 30 Cal. App. 405, 158 Pac. 768.

21. Same—Motion for new trial—Attacks verdict and not the judgment, and may be made prior to entry of the latter; and the question as to who is the "adverse" party or parties, requiring to be served with notice of intention, is to be determined from the verdict rather than the judgment.—*Johnson v. Phenix Ins. Co.*, 152 Cal. 199, 92 Pac. 182.

As to motion for new trial on minutes of court, see pars. 58 and 59, this note.

22. Same—Same—Diligence in making and prosecuting.—The motion is an independent proceeding in an action, in which the burden of acting is at all times upon the moving party, and it devolves upon him to proceed with diligence.—*Dorcy v. Brodis*, 153 Cal. 675, 96 Pac. 278.

23. Same—Same—Dismissal for want of diligence in prosecution.—The right of the prevailing party to have the motion dismissed for failure to prosecute it diligently is not affected by the action of the court of its own motion in fixing a date of settlement of the statement, or by the ex parte application of the attorney for the moving party; and an inexcusable delay for four months to take the necessary steps to have the statement settled justifies its dismissal on the ground stated.—*Dorcy v. Brodis*, 153 Cal. 676, 96 Pac. 278.

24. The motion may be dismissed for want of diligence in its prosecution, and the determination of the question as to whether it has been prosecuted diligently or not is one resting largely in the discretion of the trial court.—*Dorcy v. Brodis*, 153 Cal. 676, 96 Pac. 278.

25. "Adverse party"—As to who is, within provisions.—The adverse party on

whom notice of intention to move for new trial is to be served is to be determined by same rules as is adverse party on whom notice of appeal is to be served; that is, every party in interest when subject-matter of motion is adverse to or will be affected by granting of motion or changing former decision of court.—*Herriman v. Menzies*, 115 Cal. 16, 26, 56 Am. St. Rep. 82, 35 L. R. A. 318, 44 Pac. 660, 46 Pac. 730; *United States v. Crooks*, 116 Cal. 43, 45, 47 Pac. 870.

As to adverse party, see, ante, § 650, and note pars. 1, 83; also pars. 23-36, this note.

26. Where the effect of granting a new trial would be to vacate the former findings in favor of one of the parties and compelling such party to again litigate the controversy decided in his favor, he is an adverse party upon a motion for a new trial and must be served with the notice of intention or the court has no jurisdiction of the motion.—*Niles v. Gonzalez*, 155 Cal. 359, 363, 100 Pac. 1080.

27. The term "adverse party" upon whom the notice prescribed by this section is to be served, is determined by the same rules as is the "adverse party" upon whom the notice of appeal is to be served, viz., every party who has interest in the subject-matter of the motion is adverse to or will be affected by the granting of the motion or changing the former decision of the court, and a failure to serve such adverse party with a notice of an intention to move for the new trial will be attended with the same consequences as the failure to serve an adverse party with a notice of appeal from the judgment.—*Niles v. Gonzalez*, 155 Cal. 359, 363, 100 Pac. 1080.

28. The adverse party upon whom notice is to be served is determined by the same rules as is the adverse party upon whom a notice of appeal is to be served, viz., every party whose interest in the subject-matter of the motion is adverse or will be affected by the granting of the motion or change the former decision of the court.—*Ford & Sanborn Co. v. Braslan Seed Growers Co.*, 10 Cal. App. 762, 768, 103 Pac. 946.

29. An adverse party is one whose interest in the subject-matter of the motion is adverse to or will be affected by the granting of the motion or changing the former decision of the court.—*Title Ins. & Trust Co. v. California Devel. Co.*, 171 Cal. 174, 152 Pac. 542.

30. "Adverse party," upon whom notice must be served under the provisions of the above section, is every party whose interest in the subject-matter of the motion is adverse to or will be affected by the granting of the motion or changing the form of decision of the court.—*Carruthers Building Co. v. Johnson*, 174 Cal. 20, 24, 161 Pac. 985, following *Herriman v. Menzies*, 115 Cal. 16, 56 Am. St. Rep. 81, 35 L. R. A. 318, 44 Pac. 660, 46 Pac. 730.

31. The "adverse party" upon whom the notice is to be served is "every party whose interest in the subject-matter of the motion is adverse to or will be affected by the granting of the motion or changing the former decision of the court."—*Carruthers Building Co. v. Johnson*, 174 Cal. 20, 161 Pac. 985.

32. The party in whom the title to the property had been vested before the motion for new trial was presented has the right to question the service of such notice, although not a party to the action.—*Carruthers Building Co. v. Johnson*, 174 Cal. 20, 161 Pac. 985.

33. Same—Each landowner.—In condemnation proceedings, where number of different landowners were made parties defendant to same suit, notice of intention to move for new trial which was served on plaintiffs alone is insufficient; it must also be served on other defendants.—*United States v. Crooks*, 116 Cal. 43, 45, 57 Pac. 870.

34. Same—Executrix of partner who had appeared by answer in action for partnership accounting and judgment had been rendered in her favor, so that new trial of issues could not be had without affecting her interest, was an adverse party, to be served with notice.—*Herriman v. Menzies*, 115 Cal. 16, 26, 56 Am. St. Rep. 82, 35 L. R. A. 318, 44 Pac. 660, 46 Pac. 730.

35. Same—Mortgagee co-defendant in an action by the mortgagee insured against the insurer and such mortgagee upon a policy of fire insurance, alleging a loss of one thousand dollars, and praying for judgment for that amount, and that the sum of four hundred dollars of that amount be paid the mortgagee in settlement of his mortgage-lien, is held to be an "adverse" party, requiring to be served with notice of intention on a motion for a new trial by the insurer, a verdict for the plaintiff for the full amount of the policy, as prayed for, being construed, in the light of the pleadings and the case made, as giving the mortgagee a beneficial interest in the verdict to the extent of the mortgage indebtedness.—*Johnson v. Phenix Ins. Co.*, 152 Cal. 200, 92 Pac. 182.

36. Same—Party not mentioned in judgment.—Where interest of the party would not be adversely affected by granting of new trial and he was made defendant only because he refused to join as plaintiff, which is not mentioned in judgment, he was not an adverse party upon whom notice of new trial must be served.—*Sprague v. Walton*, 145 Cal. 228, 232, 78 Pac. 645.

37. Amendment of notice of intention to move for new trial made after statutory time for giving of notice had expired, is ineffectual to put in motion jurisdiction of court to grant new trial.—*Cooney v. Furlong*, 66 Cal. 520, 522, 6 Pac. 388. See *People ex rel. Allen v. Hill*, 16 Cal. 113; *Bear River & A. W. & M. Co. v. Boles*, 24 Cal.

354; *Ellsasser v. Hunter*, 26 Cal. 279; *Le Roy v. Rasette*, 32 Cal. 171.

38. Amendment of notice of intention to move for new trial, which failed to specify the error of law on which the motion would be based, can not be amended after statutory time for filing such notice has expired by inserting specification of such errors.—*Packer v. Doray*, 98 Cal. 315, 316, 33 Pac. 118; *Packer v. Doray*, 4 Cal. Unrep. 297, 34 Pac. 628, 629. See *Little v. Jacks*, 67 Cal. 165, 7 Pac. 449.

39. **Decision—Necessity of.**—No proceedings for new trial can be had until after trial and decision by jury or court, and in equity cases the case has not been tried until all issues have been disposed of; there has been no decision until court has passed on facts and drawn its conclusions therefrom.—*Bell v. Marsh*, 80 Cal. 411, 414, 22 Pac. 170.

As to notice of decision necessary to limit time in which to serve notice of intention to move for a new trial or appeal, see pars. 19, 66-97, this note.

40. Proceedings on motion for new trial based on minute entry of decision unsigned by judge and not entered in judgment-book, and also where it appears that after verdict was filed case was reserved and submitted for further consideration and decision, was premature.—*Fountain W. Co. v. Dougherty*, 134 Cal. 376, 377, 66 Pac. 316.

41. Notice in writing of filing a decision is in all cases required unless waived by facts appearing in the records, files or minutes of court.—*Mallory v. See*, 129 Cal. 356, 358, 61 Pac. 1123.

42. Party intending to move for new trial is authorized to wait for notice in writing of decision from adverse party before giving notice of intention to move for new trial, although he is present in court when decision is rendered, waives findings and asks for stay of proceedings on judgment.—*Blagi v. Howes*, 66 Cal. 469, 470, 6 Pac. 100. See *Carpentier v. Thurston*, 30 Cal. 123, 125; *Roussin v. Stewart*, 33 Cal. 208, 210; *Sawyer v. San Francisco*, 50 Cal. 370, 375.

43. **Form of notice.—Need not contain what.**—Notice of intention need not in terms contain a notice of motion that decision be vacated.—*Bauder v. Tyrrel*, 59 Cal. 99, 100. See *Fulton v. Hanna*, 40 Cal. 278; *Wittenbrock v. Bellmer*, 57 Cal. 12; *Heinlen v. Hellbron*, 71 Cal. 557, 558, 12 Pac. 673.

44. Notice that defendant would make and submit motion for new trial of said cause is sufficient.—*Heinlen v. Hellbron*, 71 Cal. 557, 558, 12 Pac. 673. See *Kimple v. Conway*, 69 Cal. 71, 10 Pac. 189.

45. **Same—Signing by an attorney not attorney of record for party, is of no avail.**—*McMahon v. Thomas*, 114 Cal. 588, 591, 46 Pac. 732.

46. **Same—Same—Waiver of objection that such attorney does not appear as attorney of record** is not shown by consent by attorney for opposing party to continuance asked by attorney not of record, of hearing of motion for new trial signed by him.—*McMahon v. Thomas*, 114 Cal. 588, 592, 46 Pac. 732.

47. **Same—Specification of errors** where the notice of intention stated that motion was to be based on minutes of the court, and failed to specify error of law which would be relied upon, motion was properly denied.—*Packer v. Doray*, 4 Cal. Unrep. 297, 34 Pac. 628, 629. See *In matter of Cahill*, 74 Cal. 52, 59, 15 Pac. 364; *Jue Fook Sam v. Lord*, 83 Cal. 159, 162, 23 Pac. 225.

As to sufficiency of specification of errors, see Part III, this note.

48. Notice of intention to move for new trial, which specified as ground for motion errors in law occurring at trial and excepted to by plaintiff, is insufficient.—*Salisbury v. Burr*, 5 Cal. Unrep. 314, 44 Pac. 461.

49. **Same—Specification of grounds at length.**—Where grounds of motion for new trial are stated in notice of intention to move for new trial on bill of exceptions or statement, it is not necessary to state grounds at length, but specifications of errors and insufficiency of evidence set forth in bill or statement may be referred to.—*Williams v. Hawley*, 144 Cal. 97, 99, 77 Pac. 762. See *Nishkian v. Chisholm*, 2 Cal. App. 496, 84 Pac. 312.

50. Notice that defendant will move to set aside the decision stating that it was based on three of the grounds set out in section 657, ante, is sufficient, since in no other case is motion to set aside decision authorized, and while there might be motion to vacate judgment on various grounds, it is not based upon grounds prescribed by section 657, ante.—*O'Connell v. Main & T. S. H. Co.*, 90 Cal. 515, 518, 27 Pac. 373.

51. In passing on motion for new trial court below can not go beyond grounds on which new trial is asked, and where action of court had reference only to contract set out in complaint, court is limited to character of such contract and evidence introduced on trial can not be considered.—*Alpers v. Hunt*, 86 Cal. 78, 81, 21 Am. St. Rep. 17, 9 L. R. A. 483, 24 Pac. 846. See *Nishkian v. Chisholm*, 2 Cal. App. 496, 84 Pac. 312.

52. **Same—Same—"Grounds"** in provision requiring a notice of intention to move for new trial to designate grounds upon which motion will be made are causes designated in section 657, ante.—*De Molera v. Martin*, 120 Cal. 544, 545, 52 Pac. 825.

53. **Same—Same—Irregularity** complained of when it does not appear in record as one of grounds on which motion for new trial is made, will not be considered on appeal.—*Wilcoxson v. Burton*, 27 Cal.

228, 238, 87 Am. Dec. 56. See *Nishkian v. Chisholm*, 2 Cal. App. 496, 84 Pac. 312.

54. **Same—Same—Objection that decision is against law** must be designated as ground for new trial in notice of intention in order to be considered.—*Polk v. Boggs*, 122 Cal. 114, 117, 54 Pac. 536.

55. Designation that evidence is against law as ground for new trial precludes consideration of failure of court to make finding of fact on material averments, that being decision against law.—*Polk v. Boggs*, 122 Cal. 114, 117, 54 Pac. 536.

56. **Same—Specifications of insufficiency of evidence** is not required by provision requiring notice of intention to move for new trial to designate ground on which motion shall be made when this is made ground of motion, but it is time sufficient to state that ground of motion is to state insufficiency of evidence.—*De Molera v. Martin*, 120 Cal. 544, 545, 52 Pac. 825.

57. Specification of ground for new trial, as insufficiency of evidence to support and justify finding of court, is sufficient.—*Boston T. Co. v. McKenzie*, 67 Cal. 485, 486, 8 Pac. 22.

58. **Same—Same—Where notice of intention stated that motion was based on minutes of court**, motion must be denied where such notice did not specify particulars of insufficiency of evidence.—*Weyl v. Sonoma Valley R. Co.*, 69 Cal. 202, 204, 10 Pac. 510; *In matter of Cahill*, 74 Cal. 52, 59, 15 Pac. 364; *Neale v. Depot R. Co.*, 94 Cal. 425, 428, 29 Pac. 954; *Salisbury v. Burr*, 5 Cal. Unrep. 314, 44 Pac. 461. See *Jue Fook Sam v. Lord*, 83 Cal. 159, 162, 23 Pac. 225; *Buckley v. Althorf*, 86 Cal. 643, 645, 25 Pac. 134; *McLennan v. Wilcox*, 126 Cal. 51, 52, 58 Pac. 305.

59. Specification in notice of intention that evidence is insufficient to justify decision is insufficient, particulars not being pointed out, and hence court on appeal will not examine evidence.—*McLennan v. Wilcox*, 126 Cal. 51, 53, 58 Pac. 305.

60. **Same—Same—Same—"Notice of motion"** in subdivision 4 of section as it originally stood means notice of intention to move for new trial, and hence notice annexed to motion for new trial, that he would bring on for hearing his motion for new trial, given long after expiration of time for giving notice of his intention to make motion, which motion specified particulars of insufficiency of evidence, is insufficient to entitle such motion to be heard.—*Neale v. Depot R. Co.*, 94 Cal. 425, 428, 29 Pac. 954.

61. **Same—Statement of what based on.**—Notice of motion for new trial, which does not state whether it would be made on affidavit, minutes of court, bill of exceptions or statement, as required by this section, is insufficient.—*Hughes v. Alsip*, 112 Cal. 587, 590, 44 Pac. 1027. See *Hill v. Beatty*, 61 Cal. 292, 295.

As to statement generally, see Part III, this note.

62. Notice of intention to move for new trial, reciting that it would be made upon a statement or bill of exceptions and upon record of the court and the minutes, is not defective merely because motion was actually based on bill of exceptions.—*Duncan v. Times-Mirror Co.*, 120 Cal. 402, 52 Pac. 652.

63. **Same—Same—Waiver.**—Failure of notice of intention to move for new trial, to state on what it will be based, can be taken advantage of by respondents, though they presented amendment to bill of exceptions and took part in settlement of such bill, since appellant had right to bill of exceptions to be used on his appeal from judgment.—*Hughes v. Alsip*, 112 Cal. 587, 590, 44 Pac. 1027.

64. **Same—Waiver of defects in notice.**—Where motion for new trial was contested and submitted for decision without objecting or reserving any right to object that notice of motion was not made or given according to law, any irregularity in notice was waived.—*Christy v. Spring Valley W. W.*, 68 Cal. 73, 8 Pac. 849.

65. Where respondent's attorneys were not misled by notice of intention to move for new trial by absence of such notice to specify that new trial will be asked for, since they stipulated giving further time to defendant within which to prepare and serve its statement on motion for new trial, objection to such notice will not be sustained.—*O'Connell v. Main & T. S. H. Co.*, 90 Cal. 515, 518, 27 Pac. 373.

66. **Notice of decision—Necessary to limit time of appeal.**—In order to set the time in motion within which a notice of intention must be served and filed, it is necessary that the successful party shall serve upon the attorney for the moving party a written notice of the decision.—*Estate of Richards*, 154 Cal. 482, 98 Pac. 528.

As to necessity of notice of decision, see pars. 19, 39-42, this note.

67. While a notice of decision is necessary to set the time in motion within which notice of intention must be served and filed, such notice may be waived; but the rule as to the conditions under which a notice of decision is deemed to have been waived, has no application where an actual written notice has been given, there being nothing in such a case to waive.—*Estate of Richards*, 154 Cal. 482, 98 Pac. 528.

68. Where written notice of decision is required to be served upon an attorney for a party the party personally applying for and obtaining an order for a stay of execution does not amount to a waiver of the written notice or to a taking of notice of the decision so as to affect the time within which notice of intention to move for a new trial must be served and filed.—*Estate of Richards*, 154 Cal. 478, 483, 98 Pac. 528.

69. Same—No particular form required, nor does code require notice of what decision was.—*Waddingham v. Tubbs*, 95 Cal. 249, 251, 30 Pac. 527.

70. Same—Notice of assignment of judgment.—Insufficient notice of entry.—In a case in which the party to an action has given notice of assignment of a portion of his interest in the judgment to his attorney, which notice is served on the defendant, assigned by plaintiff, and not by his attorney, this does not constitute a sufficient notice of entry of judgment under the provisions of the above section.—*Jansson v. Nat. Steamship Co.*, 34 Cal. App. 483, 168 Pac. 151.

71. Same—What constitutes—Filing additional findings upon two issues by court of its own motion deciding that such findings had been inadvertently omitted does not render notice of intention to move for new trial premature where it was made after findings and conclusions of law were made.—*Bell v. Staacke*, 141 Cal. 186, 189, 74 Pac. 774.

72. Same—Same—Notice of intention to move court to set aside and vacate judgment heretofore rendered and entered herein constitutes sufficient notice to other party of rendition of such decision, and time within which to serve notice of intention to move for new trial on his part begins to run at such time, and notice made more than ten days after such time is too late.—*Waddington v. Tubbs*, 95 Cal. 249, 250, 30 Pac. 527.

73. Same—Same—Notice that "you will please take notice that a decree has been this day entered in this action in accordance with decision," etc., "copy of which is herewith served upon you," giving substance of decree, is sufficient notice of decision under this section.—*Gumpel v. Castagnetto*, 97 Cal. 15, 16, 31 Pac. 898.

74. Same—Same—Notice of decision addressed to plaintiff, and to attorneys of record, which was accepted by attorney for plaintiffs and defendants to cross-complaint, held sufficient notice of rendition of decision as to defendants in cross-complaint, and hence time in which notice of intention to move for new trial commenced to run at time of service of such notice, and notice of intention made and entered thereafter was too late.—*Scott v. Glenn*, 97 Cal. 513, 515, 32 Pac. 573.

75. Same—Same—Rendition of special verdict in action treated as action in equity is not time from which time to give notice of intention begins to run.—*Bell v. Marsh*, 80 Cal. 511, 514, 22 Pac. 170.

76. Where certain special issues in case were submitted to jury and remaining issues were tried by court and findings of fact made by it thereon, actions were tried by court, and until court rendered its decision it was not competent for either party to give notice of its intention to move for new trial, and hence where notice was

given within ten days after jury had given their answer to special issues, but before decision of court, such notice was premature and gave court no power to act upon motion thereafter to be made.—*Reclamation Dist. v. Thisby*, 131 Cal. 572, 574, 63 Pac. 918. See *Bates v. Gage*, 49 Cal. 126.

77. Same—Same—Substitution of guardian for other guardians does render notice of intention served immediately after such substitution, but several years after judgment, in time.—*San Fernando F. H. Assoc. v. Porter*, 58 Cal. 81, 82.

78. Same—Same—Verdict of jury in probate proceedings as to some issues which were submitted to them, but on which verdict court took no further action in matter, is not verdict of jury in action tried by jury, but was merely advisory to judge, and had no force and effect until adopted by him; hence notice of intention to move for new trial and presentation of statement of settlement before such decision was premature.—*James v. Superior Court*, 78 Cal. 107, 108, sub nom. *James v. McCann*, 20 Pac. 241.

79. Same—Same—Where all issues necessary to final judgment had been tried and determined, and all that remained was to carry the judgment into effect, motion for new trial is proper, though reference had been ordered to be determined in division of community property—new trial being re-examination of issue of fact, after trial and decision.—*Sharon v. Sharon*, 79 Cal. 633, 703, 22 Pac. 26, 131.

80. Same—Same—Waiver of formal notice of decision may be made by party entitled to such notice.—*Gray v. Winder*, 77 Cal. 525, 527, 20 Pac. 47. See *Cottle v. Leitch*, 43 Cal. 320; *Thorne v. Finn*, 69 Cal. 251, 10 Pac. 414.

81. Where a notice of decision is actually served upon the attorney for the losing party, and such party makes application in person for a stay of execution, such application would not constitute waiver of the notice of decision, whether made before or after the service of the notice upon his attorney.—*Estate of Richards*, 154 Cal. 483, 98 Pac. 528.

82. Where, on a certain date, the attorney for the losing party was served with a notice of decision, and on the same date, the party himself applied for a stay of execution, such application would not constitute a waiver of the notice of decision.—*Estate of Richards*, 154 Cal. 483, 98 Pac. 528.

83. Written notice of decision may be waived and such waiver may appear from some act of acquiescence of the party entitled to the notice in open court or in the proceedings in the case as disclosed by the records or files of the case or the minutes of the court, and where the conduct of the party in the case as appears from such records or minutes is inconsistent with any theory other than that he had formal notice of the decision under such

circumstances, he is deemed to have waived written notice.—*Estate of Richards*, 154 Cal. 478, 482, 98 Pac. 528.

84. Notice of intention may be waived by stipulation, and the court may thereupon make an order granting the motion.—*Gibson v. Berryman*, 14 Cal. App. 333, 111 Pac. 926.

85. Same—Same—Same—Actual notice of decision renders formal service of written notice of such decision unnecessary.—*California Imp. Co. v. Baroteau*, 116 Cal. 136, 138, 47 Pac. 1018.

86. As to whether actual notice of decision of court, and action on such notice constituted waiver of formal notice of decision, see *San Fernando F. H. Assoc. v. Porter*, 58 Cal. 81; *Barron v. Deleval*, 58 Cal. 95; *Blagi v. Howes*, 66 Cal. 469, 6 Pac. 100; *Mullally v. Benevolent Soc.*, 69 Cal. 559, 11 Pac. 215; *Gray v. Winder*, 77 Cal. 525, 527, 20 Pac. 47; *Dow v. Ross*, 90 Cal. 562, 27 Pac. 409.

87. Actual notice or knowledge other than written is insufficient in any case unless it appears from the facts that written notice was waived.—*Mallory v. See*, 129 Cal. 356, 358, 61 Pac. 1123.

88. Where defendant's counsel knew of rendition of judgment from date thereof, motion for new trial, dated more than year after judgment was rendered, was properly denied, though it was technically within time allowed by law—no formal notice of rendition of judgment having been served in meantime.—*Preston v. Eureka A. S. Co.*, 54 Cal. 198, 201.

89. Same—Same—Same—Application of appellant for stay of execution on judgment was waiver by her as of that date of giving of notice of decision, and hence her notice of intention to move for new trial which was not filed within ten days from that date was too late, and this is not affected by fact that one of defendants gave appellant notice of decision later.—*Gardner v. Stare*, 135 Cal. 118, 119, 67 Pac. 5; *Gray v. Winder*, 77 Cal. 525, 527, 20 Pac. 47.

90. Compare: *Blagi v. Howes*, 66 Cal. 469, 470, 6 Pac. 100.

91. Same—Same—Same—Consent to entry of judgment given by guardians, which was authorized, renders notice of judgment unnecessary.—*San Fernando F. H. Assoc. v. Porter*, 58 Cal. 81, 82.

92. Same—Same—Same—Evidence of waiver must be clear and uncontradicted, and not dependent on oral testimony or ex parte affidavits.—*Gardner v. Stare*, 135 Cal. 118, 119, 67 Pac. 5.

93. Same—Same—Same—Moving for dismissal of action on ground that findings had been made more than one year prior, and no judgment had been entered in favor of plaintiff, shows notice of decision and prosecution of such notice and motion to decision, and hence notice of intention to move

for new trial, served more than ten days after decision on motion to dismiss, was too late.—*Forni v. Yoell*, 99 Cal. 173, 175, 178, 33 Pac. 887.

94. Same—Same—Same—Moving to modify and set aside findings shows that party had actual notice that such findings had been made and filed so that written notice was unnecessary.—*Wall v. Heald*, 95 Cal. 364, 365, 36 Pac. 551; *California Imp. Co. v. Baroteau*, 116 Cal. 136, 138, 47 Pac. 1018.

95. Same—Same—Same—Proceeding to act under decision giving plaintiff right to use water certain number of days of week, and right of defendant to use water certain other days of week, which fact is shown by affidavit, is not sufficient to show such actual notice of rendition of decision as to amount to waiver by plaintiff.—*Mallory v. See*, 129 Cal. 356, 358, 61 Pac. 1123.

96. Same—Same—Same—Service of notice of intention to move for new trial shows waiver of notice of decision.—*Girdner v. Beswick*, 2 Cal. Unrep. 535, 8 Pac. 11. See *Cottle v. Leitch*, 43 Cal. 320, 322.

97. Same—Same—Same—That plaintiffs were minors at time of judgment does not affect question of waiver of notice of decision, since they had commenced and prosecuted action for final judgment and must abide consequences.—*Gray v. Winder*, 77 Cal. 525, 528, 20 Pac. 47.

98. Notice of intention—Necessity of service of.—Failure to serve adverse party with notice of intention to move for new trial will be attended with same consequences as failure to serve adverse party with notice of appeal from judgment. Court will have no jurisdiction to re-examine an issue of fact that it has tried and change its decision thereon unless all parties to the issue and former decision are properly before it.—*Herriman v. Menzies*, 115 Cal. 16, 26, 56 Am. St. Rep. 82, 35 L. R. A. 318, 44 Pac. 660, 46 Pac. 730; *United States v. Crooks*, 116 Cal. 43, 45, 47 Pac. 870.

99. Motion for new trial is special proceeding within case and court has no jurisdiction to entertain the motion unless notice of intention is given substantially as prescribed.—*Calderwood v. Brooks*, 28 Cal. 151, 154; *Wright v. Snowball*, 45 Cal. 654; *Kelly v. Larkin*, 47 Cal. 58, 59; *Dominguez v. Mascotti*, 74 Cal. 269, 270, 15 Pac. 773; *O'Connell v. Main & T. S. H. Co.*, 90 Cal. 515, 518, 27 Pac. 373.

100. The filing and service of the notice is the initiation of a new statutory proceeding, collateral to the main action, the parties to which are determined by the notice, and the jurisdiction of the court, obtained by such service, is not ousted by the death of a party, who has been properly served, prior to the hearing of the motion.—*Bell v. San Francisco Sav. Union*, 153 Cal. 69, 94 Pac. 225.

101. A notice of intention to move for a new trial served before entry of judgment is premature and a nullity, and does not forbid the appellant from giving a later and proper one. A similar and proper notice served within the ten days, whether or not the appellant had notice of entry of judgment, is not affected by the previous void notice.—*The Yamato v. Bank of So. Cal.*, 170 Cal. 351, 149 Pac. 826.

102. In an action for money had and received, the defendant answered and set up a counter-claim for services, and alleged that the difference between the sum demanded by the plaintiff and the value of the services had been paid, and the verdict was rendered for the defendant. It was held that such verdict constituted an implied finding that the reasonable value of the services was as alleged in the counter-claim, and that the defendant had paid the difference between the amount demanded by the plaintiff and the value of the services. It was further held that since Code of Civil Procedure, section 659, provides that the notice of intention to move for a trial on the ground of insufficiency of evidence must specify the particulars in which the evidence is claimed to be insufficient, the court had no power to grant a new trial where the notice of the motion on the ground of the insufficiency of the evidence alleged simply that the undisputed evidence and admissions on the part of defendant showed that at the time of the commencement of the action the defendant had in his hands more than a sufficient sum to cover his claim for legal services, as this specification of the insufficiency of the evidence was not sufficient to cover the implied findings, as above stated.—*Western Pac. Land Co. v. Wilson*, 19 Cal. App. 338, 125 Pac. 1076.

103. Same—As to time of making.—Under the provisions of the above section and of sections 939, 941b, 956, and 963, post, a party whose right to appeal from a judgment has expired by the lapse of time with the service of a notice of motion of intention to move for a new trial, he can not revive that right of appeal by subsequently giving notice of intention to move for new trial, even in those cases where there was no notice of the entry of judgment served upon him.—*Pacific Light & Power Corp. v. Kauffman*, 39 Cal. App. 499, 179 Pac. 452.

See pars. 118-122, this note.

104. Same—Delay in service—Relief from.—While the court can not relieve from a failure to make timely service of notice of intention to move for a new trial, it may relieve from the effect of delay in serving a bill of exceptions.—*Haviland v. Southern Cal. Edison Co.*, 172 Cal. 601, 158 Pac. 328.

105. Same—Judgment not affecting other defendants—Service of notice.—The necessity for serving a notice of intention to move for a new trial under the provisions

of the above section is governed by the actual, and not by the mere nominal relations of the parties and the persons to be served with such notice and those whose rights could have been affected by an order made either granting or refusing such motion; and when there are several defendants, and the judgment against some of the defendants is not questioned, a notice of motion by any other defendant need not be served upon the defendants as to whom the judgment is final.—*Ferrell v. City of Ontario*, — Cal. App. —, 194 Pac. 69.

106. Same—Pendency of proceeding for a new trial.—Under the provisions of the above section notice of intention to move for new trial must be filed within ten days after verdict, if the trial was by jury, and if a new trial proceedings is not so instituted within that time, no proceeding on a motion for new trial can be held to be "pending" within the meaning of sections 934 and 941b, post, and an appeal from the final judgment, to be effective, must be taken within sixty days from the entry of such judgment.—*Whiting-Mead Commercial Co. v. Bayside Land Co.*, 178 Cal. 93, 172 Pac. 598.

107. Same—Necessity of service of notice of intention upon adverse parties.—A notice of intention on motion for a new trial, however made, must, in order to be effectual, be served upon all adverse parties.—*National Bank of California v. Mulford*, 17 Cal. App. 555, 120 Pac. 446.

As to "adverse party," see pars. 25-36, this note.

108. Where the motion is made on the minutes the notice of intention must specify the particulars in which the evidence is insufficient to justify the decisions, and the particular errors relied upon, and a failure to make such specification is ground for a denial of the motion.—*National Bank of California v. Mulford*, 17 Cal. App. 554, 120 Pac. 446.

109. Same — Same — Adverse party.—Where the contention of the moving party was such that the granting of the motion, and the sustaining of his claim would result in an increase of the judgment against his co-defendant, such co-defendant is an adverse party within the meaning of this section, and must be served with notice of intention.—*National Bank of California v. Mulford*, 17 Cal. App. 555, 120 Pac. 446.

As to "adverse party," see pars. 25-36, this note.

110. Same—Same—Failure to serve on adverse party.—An appeal from an order denying the motion will not be dismissed for failure to serve with the notice of appeal an adverse party who had not been made a party to the motion; but the failure to serve an adverse party with the notice of intention is ground for the denial of the motion, and for the affirmance on appeal of an order of denial.—*Johnson v. Phenix Ins. Co.*, 152 Cal. 198, 92 Pac. 182.

111. In the absence of service on the adverse party of notice of intention to move for a new trial, the lower court has no authority to grant such motion, and the voluntary appearance and consent to the hearing of the motion, given months after the expiration of the time to serve such notice, does not cure the defect.—*Title Ins. & Trust Co. v. California Devel. Co.*, 171 Cal. 174, 152 Pac. 542.

112. **Same—Same—Same—Effect of failure to serve notice upon all adverse parties,** as required by above section, is to deprive the court of jurisdiction to grant the motion.—*Caruthers Building Co. v. Johnson*, 174 Cal. 26, 24, 161 Pac. 985, following *Herriman v. Menzies*, 115 Cal. 16, 56 Am. St. Rep. 81, 35 L. R. A. 318, 44 Pac. 660, 46 Pac. 730; *Johnson v. Phenix Ins. Co.*, 146 Cal. 571, 80 Pac. 719; *Niles v. Gonzales*, 155 Cal. 359, 100 Pac. 1080.

113. A proceeding for a new trial is initiated by filing and serving upon the adverse party within a given time a notice of intention to move for a new trial, and the failure to serve the notice upon all adverse parties deprives the superior court of jurisdiction to grant the motion; the failure, however, to serve a given party will not deprive the court of jurisdiction to grant the motion in so far as it can be granted, without affecting the rights of the party not served.—*Caruthers Building Co. v. Johnson*, 174 Cal. 20, 161 Pac. 985.

114. **Same—Payment of fees.**—Where notice of intention to move for new trial was left with clerk on last day allowed by law, but no fees therefor were paid, and clerk did not file it until thereafter, notice was too late.—*Davis v. Hurgren*, 125 Cal. 48, 50, 57 Pac. 684.

115. **Same—Sufficiency of notice of intention.**—A notice stating the intention to move "to vacate and set aside the judgment," etc., and specifying four of the grounds mentioned herein is sufficient notwithstanding it is directed against the judgment rather than the decision.—*Hoover v. Wolfe*, 167 Cal. 337, 139 Pac. 794.

116. A notice of intention to move for a new trial is not ineffectual because the intention as stated was "to move the above entitled court to vacate the judgment entered," etc., whereas the word "decision" instead of "judgment" is used in the code.—*Fearon v. Fodera*, 169 Cal. 370, Ann. Cas. 1916D, 312, 148 Pac. 200.

117. Where the plaintiff moved for a new trial because of the inadequacy of the damages under the evidence, if the specification of the ground was sufficient to enable the opposing counsel to determine what evidence should be put in the statement, and the judge to strike out redundant and useless matter, it is enough.—*Taylor v. Northern Elec. R. Co.*, 26 Cal. App. 765, 148 Pac. 543.

118. **Same—Time for filing.**—Failure to file notice of intention to move for new

trial within ten days after notice of decision, renders denial of motion proper, though such notice of intention was served on adverse party within due time.—*Sutton v. Symons*, 100 Cal. 576, 577, 35 Pac. 158.

As to computation of time within which to move for a new trial, see note 49 L. R. A. 225.

119. A notice of intention to move for a new trial must be filed as well as served within the time prescribed by the code, and the trial court is without jurisdiction, under section 473 of the Code of Civil Procedure, to relieve a party from the consequences of such a failure.—*Neale v. Morrow*, 174 Cal. 49, 161 Pac. 1165.

120. **Same—Time for service.**—Party intending to move for new trial must, within ten days after verdict, file with clerk and serve on adverse party notice of such intention.—*Brichman v. Ross*, 67 Cal. 601, 602, 8 Pac. 316; *San Fernando F. H. Assoc. v. Porter*, 58 Cal. 81, 82.

121. This provision is mandatory.—*Clark v. Crane*, 57 Cal. 629, 632.

122. This section as originally enacted governed giving of notice of motion for new trial from time it went into effect, and hence notice made over three years afterwards was too late.—*Hodgdon v. Griffin*, 56 Cal. 610.

123. **Same—Same—Extension of time in which to serve notice of intention to move for new trial** may be made under section 1054, post, when such extension is asked for before expiration of statutory ten days in which said notice is required to be served.—*Burton v. Todd*, 68 Cal. 485, 487, 9 Pac. 663. Overruling *Brichman v. Ross*, 67 Cal. 601, 602, 8 Pac. 316; See *Clark v. Crane*, 57 Cal. 629, 632; *Hook v. Hall*, 2 Cal. Unrep. 459, 6 Pac. 422.

As to extension of time to file notice of intention to move for new trial and to prepare and serve bill of exceptions or statement, see, post, § 1054 and note.

124. Extension of thirty days in addition to time allowed by this section is authorized under section 1054, post.—*Moffat v. Cook*, 65 Cal. 236, 3 Pac. 805.

125. **Same—Same—Same—May be made by stipulation of attorneys for parties.**—*Simpson v. Budd*, 91 Cal. 488, 489, 27 Pac. 758.

126. **Same—Same—Same—Motion to modify and set aside findings will not extend time within which motion for new trial can be made,** and hence notice of motion for new trial served within ten days after motion to modify and set aside findings is too late where more than ten days have elapsed since such findings were filed, they constituting decision.—*California Imp. Co. v. Baroteau*, 116 Cal. 136, 138, 47 Pac. 1018.

127. **Same—Same—Failure to file notice within ten days,** after verdict renders such notice ineffective.—*Hook v. Hall*, 2 Cal.

459, 6 Pac. 422; *Girdner v. Beswick*, 2 Cal. Unrep. 535, 8 Pac. 11. See *Coveny v. Hale*, 49 Cal. 552, 555; *Brady v. Felsil*, 54 Cal. 180, 182; *Clark v. Crane*, 57 Cal. 629, 633; *Jue Fook Sam v. Lord*, 83 Cal. 159, 161, 23 Pac. 225.

128. Motion was properly denied for such failure.—*Coveny v. Hale*, 49 Cal. 552, 555.

129. Such failure renders refusal to settle statement proper.—*Clark v. Crane*, 57 Cal. 629, 633; *Jue Fook Sam v. Lord*, 83 Cal. 159, 161, 23 Pac. 225.

130. Judge can not be required to settle such statement merely to be used on appeal.—*Jue Fook Sam v. Lord*, 83 Cal. 159, 161, 23 Pac. 225.

131. Such failure will prevent appellant from impeaching findings.—*Brady v. Felsil*, 54 Cal. 180, 182.

132. Same—Same—Presumption as to time of giving notice of intention.—Where record is silent as to when notice was given, it will be assumed on appeal that notice was given within proper time, but where it appears in record that notice was not given at proper time it becomes duty of appellant to have it appear by record that defect was overcome or waived.—*Reclamation Dist. v. Thisby*, 131 Cal. 572, 574, 63 Pac. 918. See *Patrick v. Morse*, 64 Cal. 63, 68, 74 Pac. 439.

133. Same—Same—Restoration of right to move for new trial.—Order of court permitting amendment of original notice made after right to move for new trial on original notice had been waived by defendants, and lost, is void, and does not restore right to move for new trial.—*Cooney v. Furlong*, 66 Cal. 520, 522, 6 Pac. 388. See *Bear River & A. W. & M. Co. v. Boles*, 24 Cal. 354; *Thompson v. Lynch*, 43 Cal. 482.

134. Same—Same—Statement in bill of exceptions that notice was seasonably served will prevail over notice of intention found in record showing it was filed one day too late; notice of intention to move for new trial not being part of record.—*Mendocino County v. Peters*, 2 Cal. App. 24, 82 Pac. 1122; *Nye v. Marysville & Y. C. St. R. Co.*, 97 Cal. 461, 462, 32 Pac. 530; *Downing v. Le Du*, 82 Cal. 471, 472, 23 Pac. 202; *Monterey County v. Cushing*, 83 Cal. 507, 509, 23 Pac. 700.

135. Same—Same—Waiver of delay.—Failure to object that notice of motion for new trial was not given in time waives such defect that time will be deemed extended by consent of parties, and such objection can not be taken for first time on appeal.—*Brichman v. Ross*, 67 Cal. 601, 602, 8 Pac. 316. See *Hobbs v. Duff*, 43 Cal. 485; *Hodgdon v. Griffin*, 56 Cal. 610, 612; *Gray v. Nunan*, 63 Cal. 220; *Patrick v. Morse*, 64 Cal. 462, 2 Pac. 49; *Schleffery v. Tapia*, 68 Cal. 184, 185, 8 Pac. 878; *Girdner v. Beswick*, 69 Cal. 112, 116, 10 Pac. 278; *Simpson v. Budd*, 91 Cal. 488, 491, 27 Pac. 758; *Mendocino County v. Peters*, 2 Cal. App. 24, 82 Pac. 1122.

136. Where it does not appear in the record that any notice of decision was ever served on plaintiff or his attorney, appeal will not be dismissed because notice of intention to move for new trial was not filed until twelve days had elapsed from day on which decision of case was made, and where no objection was made in court below to settlement of case on such motion.—*Carpenter v. Hewel*, 67 Cal. 589, 590, 8 Pac. 314.

137. Objection that the notice of intention to move for new trial was not served in time will be overruled where facts alleged do not appear in record and statement was settled by judge.—*Nippert v. Warneke*, 128 Cal. 501, 503, 61 Pac. 96, 270, and cases cited.

138. Same—Same—Same—Reservation of objection.—Where counsel accepted service of notice of intention to move for new trial, with reservation of objection that notice was not served within time allowed by law, and bill of exceptions shows that time to serve such notice had not been extended, and that at time amendments were presented same reservation was made, and that at time of settlement of bill of exceptions same objection was made, no waiver of failure to serve notice within time fixed by statute was made.—*Gumpel v. Castagnetto*, 97 Cal. 15, 16, 31 Pac. 898.

139. Recital in statement on motion for new trial that plaintiff does not waive any rights that she may have, to object and except to hearing of motion for new trial on ground that notice of such motion was not filed with clerk within statutory time, does not amount to bill of exceptions so as to enable it to be considered on appeal.—*Hook v. Hall*, 68 Cal. 22, 23, 8 Pac. 596.

III. STATEMENT AND SPECIFICATIONS.

The matter contained under this subdivision is largely academic, since the repeal of section 661.—See, post, § 661, note par. 1

As to statement on appeal, see, post, § 661, note pars. 84 et seq.

As to specification of errors and objections, see, post, § 661, note pars. 92-97.

140. Amendment.—When judge becomes satisfied that statement as settled did not truly state case, he was authorized and it was his duty to make such corrections therein as would cause it to conform to facts.—*Fountain W. Co. v. Superior Court*, 139 Cal. 648, 652, 73 Pac. 590.

141. Same—By inserting exhibits which were omitted therefrom by inadvertence of attorney may be allowed, especially where proposed statement indicated that such exhibits were to be inserted so that opposing counsel was not misled.—*Warner v. Thomas Parisian Dyeing & Cleaning Works*, 1 Cal. Unrep. 680, 37 Pac. 153.

142. Same—By inserting specification of error and particulars, so that motion for new trial might be presented on its merits,

was proper.—*Clark v. Rauer*, 2 Cal. App. 259, 83 Pac. 291.

143. Same—By inserting specifications of insufficiency of evidence, was properly allowed where statement as originally served did not contain such specification and opposing party did not object to matter proposed to be added to statement.—*Swett v. Gray*, 141 Cal. 63, 68, 74 Pac. 439.

144. Same—Failure to serve plaintiff with notice of motion to amend statement was not prejudicial to plaintiff where proposed amendments were served, and plaintiff being present at hearing offered no amendments and did not object to matter proposed to be added.—*Swett v. Gray*, 141 Cal. 63, 68, 74 Pac. 439.

145. Failure to give any notice in reference to rejection of proposed amendments is admission that they were to be allowed.—*Black v. Hilliker*, 130 Cal. 190, 192, 62 Pac. 481.

146. Failure to notify opposing party of refusal to adopt amendments to statement does not amount to adoption of such amendments where moving party has delivered statements and amendments to clerk or judge—no other method being prescribed signifying refusal to adopt.—*Mellor v. Crouch*, 76 Cal. 594, 595, 18 Pac. 685.

147. Same—Non-acceptance of—Notice of presentation.—Where the moving party upon non-acceptance of amendments notified the adverse party that it would present the statement to the judge for settlement "in due time" such notice is not to be construed that the proposed statement and amendments would be presented on actual notice but that the course prescribed by this section would be followed, which course permitted either presentation to the judge on actual notice, or a delivery to the clerk for the judge without notice.—*Douglas v. Southern Pac. Co.*, 151 Cal. 245, 90 Pac. 538.

148. Same—Presumption of adoption of amendments to statement, where moving party does not indicate his non-adoption of them by serving notice that statement and amendment would be presented to judge for settlement, as prescribed by this section.—*Pendergrass v. Cross*, 73 Cal. 475, 15 Pac. 63.

149. Same—Refusal to settle statement.—Remedy is not by appeal from order denying the motion for new trial, but by proper proceedings to compel settlement.—*Estudillo v. Security Loan & T. Co.*, 153 Cal. 66, 70, 109 Pac. 384.

150. Same—Settlement of statement.—The paper is ultimately used as a basis for presenting the merits of a case upon appeal, the right to which is constitutionally conferred, and no narrow construction should be placed upon a rule of procedure which would defeat that right.—*Douglas v. Southern Pac. Co.*, 151 Cal. 245, 90 Pac. 538.

151. Provisions of section are to be liberally construed with a view to promoting the rights of the parties and in the interests of justice.—*Douglas v. Southern Pac. Co.*, 151 Cal. 245, 90 Pac. 538.

152. Same—Same—Amendments rejected—Presentation to judge—Delivery to clerk—Five days' notice.—When, upon rejection of amendments, the statement is delivered to the clerk for the judge, the moving party is not required to give the five days' notice to the adverse party, required when the statement is presented directly to the judge, it being held that the clause relating to five days' notice is intended to qualify the preceding sentence only, and not that which follows.—*Curtin v. Ingle*, 155 Cal. 54, 99 Pac. 480.

153. Bill of exceptions or proposed statement—In general.—Where the record on appeal shows that the bill of exceptions used on the motion was not prepared or served in time, and shows no relief from the default, it can not be considered on such appeal.—*Johnson v. German-American Ins. Co.*, 150 Cal. 337, 88 Pac. 985.

See, also, post, § 660 and note.

As to when bill of exceptions on motion for new trial may be used on appeal, see, post, § 661 and note.

As to bill of exceptions in alternative appeal, see par. 6, this note.

As to incorporation of bill of exceptions and statement of the case in the same paper, see, ante, § 650 and note.

154. Same—Amendments to.—Where proposed statement or bill of exceptions fails to present sufficient evidence it was duty of opposing party to propose amendments, and not by failing to do so throw labor of proposed amendments on judge trying case.—*Vatcher v. Wilbur*, 144 Cal. 536, 540, 78 Pac. 14.

155. Where the proposed statement merely stated that defendant gave evidence tending to disprove allegations of complaint and sustain allegation of his answer, and as part of such evidence offered deposition and set out questions and answer which were claimed to have been erroneously excluded, it was right of opposite party to propose amendment incorporating in statement so much of evidence as would show that exclusion of testimony sought to be stricken out would not have changed result, and hence costs will not be taxed against them though such amendment required insertion of greater portion of evidence.—*Duffy v. Duffy*, 104 Cal. 602, 607, 38 Pac. 443.

156. Same—Same—Insertion of exhibits.—Where certain exhibits claimed to have been used in evidence are referred to in the body of the statement on motion for new trial as plaintiff's exhibit No. — at end of statement, and such exhibits are set out in appendix to such statement, properly numbered, preceded by title "the following

are the exhibits offered and read on behalf of plaintiff's motion in the foregoing statement," they are thereby sufficiently identified and incorporated in and made part of such statement.—*Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131.

As to papers to be included in bill of exceptions, see, ante, § 648 and note.

As to skeleton form of bill of exceptions, see, ante, § 648 and note.

157. Practice in preparing proposed statements in reference to document or record with remark "here insert" is sufficient, since it notifies opposite party that such document is to become part of statement, but such would not be sufficient in engrossed statement.—*Reclamation Dist. v. Hamilton*, 112 Cal. 603, 607, 44 Pac. 1074.

157a. Depositions being on file, may be made part of statement by calling for them by words "here insert" at proper place, and when transcript is made up they should be copied in full where called for.—*Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131.

158. Where certificate to engrossed statement on motion for new trial states that it is but skeleton and does not contain all evidence, statement will be disregarded.—*Brind v. Gregory*, 122 Cal. 480, 482, 55 Pac. 250.

159. Same—Construction of.—Where the proposed bill of exceptions or statement is presented by the party proposing it to the judge, the five days' notice provided for must be given, but this provision qualifies only the preceding clause of the sentence and is not applicable to the case where the statement or bill and amendment are delivered to the clerk for the judge, for in the latter case the judge must designate a time for the settlement and the clerk give notice of it.—*Curtin v. Ingle*, 155 Cal. 53, 56, 99 Pac. 480.

160. Same—Diligence in settlement of.—Under the rule of the supreme court extending the time to file a transcript until forty days after the settlement of a bill of exceptions, that court will not inquire into, upon motion to dismiss an appeal, the question of diligence or negligence of the appellant in procuring the settlement of the statement or bill. If the respondent is agreed in that respect his remedy is by objection to the settlement by the trial judge, and if the decision be unfavorable to him, he may have it incorporated in the record and reviewed on appeal from the judgment, and this applies whether the bill or statement be one prepared before or after the hearing of the motion upon which it is prepared.—*Curtin v. Ingle*, 155 Cal. 53, 57, 99 Pac. 480.

161. Same—Presumptions.—Where statement on motion for new trial does not purport to contain all evidence it will not be presumed that evidence admitted was adverse to finding of court.—*Harris v. Duarte*, 141 Cal. 497, 498, 70 Pac. 298, 75 Pac. 58. C. C. P.—105

162. Same—Reporter's notes.—Duty devolving on party moving for new trial to prepare and serve statement or bill of exceptions so as to sustain his contention of insufficiency of evidence, does not mean that statement or bill of exceptions should embody all reporter's notes.—*Vatcher v. Wilbur*, 144 Cal. 536, 540, 78 Pac. 14.

163. Practice of embodying in a statement or bill of exceptions reporter's notes of trial in bulk is not justified by law or good practice, code requiring so much of evidence or other matter as is necessary to explain objection or points sought to be presented.—*City of Santa Ana v. Ballard*, 126 Cal. 677, 678, 59 Pac. 133.

164. Where whole amounts involved in case were only five or six hundred dollars, and it would cost six hundred dollars to have reporter's notes of evidence transcribed, order requiring moving party to procure such transcript as condition of settlement of proposed statement, to which no amendments were proposed, was unreasonable, and failure to do so would justify refusal to settle statement.—*Vatcher v. Wilbur*, 144 Cal. 536, 540, 78 Pac. 14.

165. Same—Same—Refusal to settle.—Where statement contains reporter's notes of evidence in bulk court should not refuse to settle statement but should permit amendment so as to set out substance of such statement or cause redundant and useless matter therein to be stricken out and mandamus will lie to compel judge to do so.—*City of Santa Ana v. Ballard*, 126 Cal. 677, 678, 59 Pac. 133. See *Kruse v. Chester*, 66 Cal. 353, 5 Pac. 613; *Leach v. Pierce*, 93 Cal. 614, 618, 29 Pac. 235; *Tibbets v. Riverside B. Co.*, 97 Cal. 258, 32 Pac. 174; *Winters v. Buck*, 121 Cal. 279, 53 Pac. 799.

166. Same—Settlement of—Waiver of objection.—Where upon notice of rejection of amendments and of presentation for settlement, the attorney for the moving party inadvertently fails to appear, and the opposing counsel makes no objection to a suggestion of the court that counsel confer and dispose of objections to amendments, and agreed for a meeting at a later date for settlement of the bill, it is too late at the subsequent hearing to object that the bill was not presented in time, and such objection was waived.—*Bollinger v. Bollinger*, 153 Cal. 192, 94 Pac. 770.

167. Same—Same—Waiver of omission.—Where exhibit is omitted from statement, and no objection is made, and attorneys for respondent indorse on statement "foregoing statement agreed to by us," and same is thereupon signed by judge, objection that such exhibits have been omitted is waived, and presents no cause for striking out statement or any part of it.—*Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131.

168. Same—Vacation of certificate to permit amendment.—Where statement, as engrossed, did not contain certain exhibits which had been used in evidence, while pro-

posed statement had included therein reference to these exhibits, by inserting words at place where they were referred to "here insert plaintiff's exhibit," so that plaintiff's attorney was not misled in preparing amendments thereto, judge properly vacated certificate of settlement and directed that exhibit be engrossed in such statement so that certificate might conform to facts, whether omission to engross such exhibits was result of inadvertence or carelessness on part of defendant's attorney, it did not deprive court of discretion to settle it correctly, and court was authorized to investigate whether exhibits were in reality referred to in statement.—*Warner v. Thomas*, P. D. & C. Wks., 105 Cal. 409, 412, 38 Pac. 960.

As to power of court to set aside a re-settled statement on motion for new trial, see, ante, § 473 and note.

169. Same—Waiver of right to propose amendments is effected by stipulation that foregoing statement is correct and authorized defendant to present it to judge for settlement without notice.—*Perry v. Noonan Loan Co.*, 1 Cal. App. 609, 82 Pac. 623.

170. Engrossment—As to failure to re-engross statement and place proposed amendments therein will not be considered as error where no injury was done to plaintiff by failing to embody amendments in re-engrossed statement where they were treated by court and parties as part of amendments.—*Swett v. Gray*, 141 Cal. 63, 68, 74 Pac. 439.

171. Where statement was short one, and could have been engrossed in two or three days, and more than five months elapsed after party was ordered to have it engrossed, and no showing was made explaining or excusing delay, except that few orders were procured extending defendant's time to engross statement, and it did not appear why these orders were required or what right defendant had to make them, and they did not cover last two or three months of period, order dismissing motion was not abuse of discretion.—*Descalso v. Duane*, 3 Cal. 890, 33 Pac. 328.

172. Same—Amendment to statement should be incorporated in engrossed statement and not merely attached thereto.—*Marlow v. Marsh*, 9 Cal. 259; *Skellman v. Riley*, 10 Cal. 300; *Baldwin v. Ferre*, 23 Cal. 461; *Kimball v. Semple*, 31 Cal. 657.

173. Extension of time—In which to prepare and serve proposed statement for thirty days is authorized.—*Reclamation Dist. v. Hamilton*, 112 Cal. 603, 607, 44 Pac. 1074.

174. Order extending time within which to prepare, serve, and file statement of case and affidavits on appeal held not to have misled opposing party, where notice of intention to move for new trial had been given and stipulation extending time for preparing statement referred to statement

on motion for new trial.—*Reclamation Dist. v. Hamilton*, 122 Cal. 603, 608, 44 Pac. 1074.

175. Same—Same—After expiration of time as previously extended, though within time which law authorizes extension, extension is invalid.—*Freese v. Freese*, 134 Cal. 48, 49, 66 Pac. 43.

176. Same—Same—Can be made by judge who tried the case, at chambers, and out of county in which case was tried—he having been called into such county for purpose of trying such case.—*Matthews v. Superior Court*, 68 Cal. 638, 641, 10 Pac. 128.

177. Same—Extension of time to serve statement is carried by extension of time to prepare statement on motion for new trial.—*Bryant v. Sternfeld*, 89 Cal. 611, 612, 26 Pac. 1091. See *Curtis v. Superior Court*, 70 Cal. 390, 11 Pac. 652; *Burton v. Todd*, 68 Cal. 485, 9 Pac. 663.

178. Same—Further extension without consent of adverse party unauthorized, where time in which to prepare and serve statement was extended for thirty days by judge, and afterwards by consent of adverse party extended another twenty days, and statement not filed until expiration of last extension was too late, and hence motion for new trial was properly denied.—*Bunnel v. Stockton*, 83 Cal. 319, 320, 23 Pac. 301.

179. Same—Stipulation of parties extending time for less than thirty days does not affect power of court to extend the time for such period.—*Reclamation Dist. v. Hamilton*, 112 Cal. 603, 607, 44 Pac. 1074.

180. Same—Where order extending time in which to serve notice of intention was without jurisdiction and void, order extending time in which to prepare and file statement was also without jurisdiction and void.—*Clark v. Crane*, 57 Cal. 629, 633.

181. Filing statement on motion for new trial is not required to be filed until it has been signed by judge with certificate that it is allowed, and when filed, and not before, it became part of record.—*Blagi v. Howes*, 66 Cal. 469, 472, 6 Pac. 100.

182. Stipulation that statement has been served in time as correct and might be presented for settlement without further notice, does not stop opposing counsel from claiming that it was not filed.—*Mills v. Dearborn*, 82 Cal. 51, 55, 22 Pac. 1114.

183. Same—Failure to file in time.—Statement not filed within time allowed by law will be disregarded where time had not been extended either by stipulation or order of court, and no amendments had been proposed.—*Wheeler v. Karnes*, 125 Cal. 51, 52, 57 Pac. 893.

184. Same—Necessity of.—Motion for new trial can not be passed on by court until bill of exceptions or statement has been filed.—*Wells v. Kreyenhagen*, 117 Cal. 329, 331, 49 Pac. 128.

185. Failure to file statement of case after notice of intention to move for new

trial, waives right to move for new trial.—*Cooney v. Furlong*, 66 Cal. 520, 521, 6 Pac. 388. See *Stoyell v. Cole*, 19 Cal. 602; *Campbell v. Jones*, 41 Cal. 515; *Thompson v. Lynch*, 43 Cal. 482.

186. Statement on motion for new trial which has never been filed is no part of record, and can not be considered on appeal.—*Wells v. Kreyenhagen*, 117 Cal. 327, 330, 49 Pac. 128; *Mills v. Dearborn*, 82 Cal. 51, 22 Pac. 1114; *Mix v. San Diego & C. R. Co.*, 86 Cal. 235, 24 Pac. 1027.

187. Insertion of evidence.—In preparing statement or bill of exceptions for use on appeal it is not necessary to give evidence in full where questions to be presented are solely as to sufficiency of evidence to sustain particular finding. All that is required is that sufficient amount of evidence be inserted bearing on each side of question to show substantial conflict, for in such case court will not interfere with decision of court below.—*Vatcher v. Wilbur*, 144 Cal. 536, 539, 78 Pac. 14.

As to statements of evidence in bill of exceptions, see, ante, § 648 and note.

188. Insufficiency of evidence.—Specifications of particulars held to be necessary to authorize consideration of insufficiency of evidence on appeal from order on motion for new trial.—*Coghlan v. Quartararo*, 15 Cal. App. 665, 115 Pac. 664.

As to specifications of particulars, see pars. 49-52, this note.

189. Judge who tried cause.—Proper judge to settle statement, and could take all necessary steps to have it properly settled.—*Matthews v. Superior Court*, 68 Cal. 638, 641, 10 Pac. 128.

190. Minutes of court.—Motion for new trial on.—Specifying particulars.—Where the motion is on the minutes of the court, the notice of motion must specify the particulars in which the evidence is insufficient, if such insufficiency be a ground of the motion, and must specify the particular errors of law upon which the moving party will rely.—*Estudillo v. Security Loan & T. Co. of South. Cal.* 158 Cal. 66, 109 Pac. 884.

As to specifications of particulars, see pars. 49-54, this note.

191. In an action for money had and received by an attorney to plaintiff's use, in which the attorney pleaded a sustained and large deduction for the value of his services to plaintiff, a payment of the residue and the verdict was for the defendant, and plaintiff moved for a new trial on the minutes of the court, as provided in subdivision 4 of this section, but the notice of the motion failed to specify any particulars wherein the evidence was insufficient to prove the value of the services so deducted, as required by this section, it was error for the court to grant a new trial for insufficiency of the evidence to justify the verdict in that regard.—*Western Pacific Land Co. v. Wilson*, 19 Cal. App. 338, 340, 125 Pac. 1076.

192. Notice of settlement.—Provision requiring five days' notice to be given to adverse party of hearing of settlement of bill of exceptions, where amendments have been served but not adopted, and statement and amendments have been delivered to judge, requires such notice to be given by party and not by clerk.—*Mellor v. Crouch*, 76 Cal. 594, 595, 18 Pac. 685.

193. Same.—Settlement of statement by judge by adoption of proposed amendment without any express notice from moving party that he adopted amendment, was proper.—*Black v. Hilliker*, 130 Cal. 190, 192, 62 Pac. 481.

194. Where record fails to show amendments proposed to statement were not all adopted, objection that no notice of time and place of settlement was given to parties making proposed amendments, is without merit.—*Standard Quicksilver Co. v. Habishaw*, 132 Cal. 115, 124, 64 Pac. 113.

195. Statement, with proposed amendments, when delivered to clerk for judge, requires no previous notice of settlement to be given by moving party.—*Mellor v. Crouch*, 76 Cal. 594, 595, 18 Pac. 685.

196. Same.—Waiver of notice of settlement of proposed statement with amendments is effected by stipulation that statement might be settled by judge at his convenience, that is, at his place of residence, and after settlement motion for new trial might be heard and determined there, judge being one from another county.—*Cooper v. Burch*, 140 Cal. 548, 553, 74 Pac. 37.

197. Object of statement or bill of exceptions is to make that of record which before was not recorded but rested only on recollection of court or counsel or minutes of clerk.—*Williams v. Southern Pac. R. Co.*, 2 Cal. Unrep. 613, 9 Pac. 152. See *De Johnson v. Sepulbeda*, 5 Cal. 149.

198. Office of statement on motion for new trial is to bring into record those matters which have risen in progress of trial, and matters which constitute basis of motion are grounds for new trial out of which arises whatever question appellant desires to have reviewed on appeal from order granting or refusing new trial.—*Graham v. Stewart*, 68 Cal. 374, 376, 9 Pac. 555.

199. Refusal to settle statement.—Made after judgment has been ordered is not justified by settlement of premature statement, though such judgment was entered after denial of motion of premature statement.—*Fountain W. Co. v. Dougherty*, 134 Cal. 376, 377, 66 Pac. 316.

200. Same.—Remedy for refusal to settle.—On refusal to settle statement on motion for new trial after decision against petition to revoke probate of will the proper remedy is by mandamus to compel settlement and not on appeal from order denying new trial.—*Hartmann v. Smith*, 140 Cal. 461, 467, 74 Pac. 7.

201. Appeal lies to order refusing application to settle statement on case where party seeking settlement has not fully complied with statutory requirements, and appeals to court for relief on ground that his failure has been caused by surprise, accident, or excusable neglect when relief rests in discretion of court.—*Murphy v. Stelling*, 138 Cal. 641, 642, 72 Pac. 176.

202. Service of proposed statement—On legal holiday does not render such service invalid.—*Reclamation Dist. v. Hamilton*, 112 Cal. 603, 611, 44 Pac. 1074.

203. Signature and certificate of judge—Are indispensable to statement of case on motion for new trial.—*Adams v. Dohrmann*, 63 Cal. 417, 418.

204. Statement on motion for new trial which was neither signed nor certified by judge of trial court can not be considered.—*Sawyer v. Sargent*, 65 Cal. 259, 260, 3 Pac. 872; *Schreiber v. Whitney*, 60 Cal. 431, 432; *Martin v. Vanderhoff*, 2 Cal. Unrep. 485, 7 Pac. 307; *Douglass v. McFarland*, 92 Cal. 656, 657, 28 Pac. 687.

205. Fact that it was certified to be correct by attorneys for both parties does not render it proper.—*Schreiber v. Whitney*, 60 Cal. 431, 432.

206. Paper printed in record appearing to be copy of specification to alleged insufficiency of evidence, but was no part of statement and was without authentication and signed by appellant's attorney only, can not be considered as any part of statement of record.—*O'Leary v. Castle*, 133 Cal. 508, 509, 65 Pac. 950.

207. Same—Statement signed by attorney for respondent only is not part of record and has no part in transcript.—*Barclay v. Blackinton*, 127 Cal. 189, 196, 59 Pac. 834.

208. Same — Sufficiency of.—Certificate that "foregoing statement of case, on motion for new trial, is statement settled and allowed by my attorney" conforms to statute.—*Girdner v. Beswick*, 69 Cal. 112, 116, 10 Pac. 278.

209. Certificate of judge that "foregoing statement on motion for new trial has been settled and allowed by me" includes authenticated exhibits as part of such statement, although certificate is attached to body of statement, and precedes exhibits.—*Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26. Distinguishing *Kimball v. Semple*, 31 Cal. 657; *People v. Bartlett*, 40 Cal. 142, 146; *Bush v. Taylor*, 45 Cal. 112; *Thompson v. Patterson*, 54 Cal. 542.

210. Same — Same — Paper appended to statement, but forming no part of it, which is designated as assignment of error, but which is not authenticated as part of record, and is excepted from stipulation certifying to contents of transcripts, and there is nothing to show that it was considered on motion for new trial, can not be considered on appeal as specification of errors.

—*Ackley v. Fishbeck*, 124 Cal. 409, 410, 57 Pac. 207.

211. Same—Same—Specifications should conform to notice of intention to move for new trial, and if they do not opposite party should move such amendments thereto as well remove matter therefrom foreign to grounds stated in notice.—*Pico v. Cohn*, 78 Cal. 384, 385, 20 Pac. 706.

212. Same—Time for.—Signature and certificate of judge to statement on motion for new trial made after motion has been heard and determined, and appeal taken from order, though made nunc pro tunc, will not aid statement, code requiring it to be certified before filing.—*Adams v. Dohrmann*, 63 Cal. 417, 418. See *Keller v. Lewis*, 56 Cal. 466.

213. Specification of error may be made after time has expired for preparing and settling statement on motion for new trial.—*Alameda M. Co. v. Williams*, 70 Cal. 534, 538, 12 Pac. 530. See *Low v. McCallan*, 64 Cal. 2, 27 Pac. 787.

214. Specification of error—Necessity of.—Specification of error is essence of statement or bill of exceptions on motion for new trial, without which it has no legal existence.—*Thompson v. Patterson*, 54 Cal. 542, 546. See *Crowther v. Rowlandson*, 27 Cal. 376, 385; *Burnett v. Pacheco*, 27 Cal. 408; *Partridge v. San Francisco*, 27 Cal. 415, 416; *Beans v. Emanuelli*, 36 Cal. 117; *Ferrer v. Home Mut. Ins. Co.*, 47 Cal. 416; *Hill v. Beatty*, 61 Cal. 292, 295; *Alameda M. Co. v. Williams*, 70 Cal. 534, 538, 12 Pac. 530.

215. Necessity for under the provisions of the above section, party moving for a new trial is required to designate in his notice of intention the grounds upon which the motion will be based, and where the notice of motion sets forth as one of the grounds upon which the motion will be made, the "insufficiency of the evidence to justify the verdict" and the motion for the new trial is made upon the ground set forth in the notice of intention, containing a statement of the grounds upon which the motion is made as set forth in the notice of intention, is sufficient.—*Pacific Gas & Electric Co. v. Rollins*, 32 Cal. App. 782, 164 Pac. 53.

216. Same—Failure of court to find on all issues raised by pleading need not be specified in statement as ground of motion for new trial.—*Millard v. Supreme Council A. L. of H.*, 3 Cal. Unrep. 96, 21 Pac. 825.

As to preventing consideration on appeal, see par. 311, this note.

217. Same—Objection that judgment is in favor of party, on cause of action for which he is not sued, being apparent on face of record, will be considered on appeal, though it is not specified in statement for new trial.—*Heinlen v. Heilbron*, 71 Cal. 557, 564, 12 Pac. 673. See *Putnam v. Lamphier*, 36 Cal. 151.

218. Same—Office of specification of errors is to call attention to precise ground relied on and not to fortify alleged error by statement of facts in its support. Hence statement in specification of errors on which defendant would rely on his motion for new trial, to effect that he objected to testimony and excepted to decision, admitting it in evidence, can not be received as properly authenticated exception, especially where statement does not show any exception.—*Alameda M. Co. v. Williams*, 70 Cal. 534, 538, 12 Pac. 530.

219. Same—Rulings on the admission of evidence not specified as error in statement can not be considered, and fact that counsel discussed rulings in their brief does not authorize court to consider them.—*Smith v. Smith*, 119 Cal. 183, 186, 48 Pac. 730, 51 Pac. 183; citing *Bagnall v. Roach*, 76 Cal. 106, 18 Pac. 137 (in this case it was afterwards called to attention of court that motion for new trial was based on bill of exceptions instead of statement, and it was then held that errors of law need not be specified in bill).

220. Same—Ruling on demurrer not specified or referred to in statement presented on appeal, will not be considered, since on appeal from order refusing to grant new trial, only such errors can be considered as are specified in statement.—*Heilbron v. Centerville & K. I. D. Co.*, 76 Cal. 8, 9, 17 Pac. 932.

221. Object of provision requiring statement on motion for new trial to specify errors relied on, is to enable adverse party to prepare his amendment without necessity of going through statement proposed by moving party to ascertain what objection, rulings, and exceptions are incorporated therein, and unless the alleged errors are specifically pointed out they are deemed waived by moving party.—*Bohnert v. Bohnert*, 95 Cal. 444, 445, 30 Pac. 590.

222. Same—Specifications of insufficiency.—The strict rule by which specifications of insufficiency were adjudged has latterly given place to a more liberal rule than whenever there is a reasonably successful effort to state the particulars and they are such as may have been sufficient to inform the opposing counsel and the court of the grounds of the objection the appellate court ought not to refuse to consider the case, especially where the transcript shows all the evidence has been brought up.—*Porter v. Russ*, 6 Cal. App. 650, 652, 92 Pac. 655.

223. The following specification "the court erred in giving each and every instruction requested by the plaintiff" held good as a specification of error, the court saying "while the omnibus method followed here is not a method that it would be always safe to adopt, we can not say but that in this case it as clearly notified the plaintiff as to the particular errors relied on as would a several specification as to each in-

struction."—*Light v. Stephens*, 159 Cal. 288, 113 Pac. 659.

224. Same—Specification of insufficiency of evidence—Form of.—Not required to be made in any particular form of words, but in some form should distinguish each particular proposition of fact excepted to from all others found by court to be involved in general verdict of jury.—*Dawson v. Schloss*, 93 Cal. 194, 200, 29 Pac. 31; *Smith v. Ellis*, 103 Cal. 294, 296, 37 Pac. 400; *De Molera v. Martin*, 120 Cal. 544, 546, 52 Pac. 825. See *Du Brutz v. Jessup*, 54 Cal. 118; *Brenot v. Brenot*, 102 Cal. 294, 36 Pac. 672.

As to specification of insufficiency of evidence in bill of exceptions, see, ante, § 648 and note.

225. Same—Same—Insufficient specification of insufficiency of the evidence.—A statement in a notice of motion for new trial that "there is no evidence to sustain the verdict in favor of the defendant and against the plaintiff" was insufficient as a specification of the insufficiency of the evidence.—*Cormond v. United Railroads*, 41 Cal. App. 683, 183 Pac. 218.

226. But where the defendant tacitly consented to the hearing of the motion, it must be held to have waived the defect in the specifications.—*Cormond v. United Railroads*, 41 Cal. App. 683, 183 Pac. 218.

227. Same—Same—Necessity of.—Where statement fails to specify any particular in which evidence is insufficient it must be disregarded as far as notice of motion for new trial specifies insufficiency of evidence as one of its grounds.—*Hill v. Beatty*, 61 Cal. 292, 295; *Benjamin v. Stewart*, 61 Cal. 605, 608; *Bate v. Miller*, 63 Cal. 233; *Donohoe v. Mariposa L. & M. Co.*, 66 Cal. 317, 318, 5 Pac. 495; *Hartman v. Rogers*, 69 Cal. 643, 644, 11 Pac. 581; *Heinlen v. Heilbron*, 71 Cal. 557, 563, 12 Pac. 673; *Silva v. Holland*, 74 Cal. 530, 532, 16 Pac. 385; *Lowrie v. Salz*, 75 Cal. 349, 352, 17 Pac. 332; *Heilbron v. Kings River & F. C. Co.*, 76 Cal. 11, 15, 17 Pac. 933; *Millan v. Hood*, 3 Cal. Unrep. 548, 30 Pac. 1107; *Gregory v. Gregory*, 102 Cal. 50, 52, 36 Pac. 364; *Green v. Green*, 103 Cal. 108, 111, 37 Pac. 188; *Citizens Bank v. Jones*, 121 Cal. 30, 32, 53 Pac. 354; *Thompson v. City of Los Angeles*, 125 Cal. 270, 271, 57 Pac. 1015; *Rauer v. Fay*, 128 Cal. 523, 525, 61 Pac. 90; *O'Leary v. Castle*, 133 Cal. 508, 509, 65 Pac. 950; *Liurette v. Hiller*, 139 Cal. 729, 730, 73 Pac. 836; *Graybill v. De Young*, 140 Cal. 323, 327, 73 Pac. 1067; *Ben Lomond W. Co. v. Sladky*, 141 Cal. 619, 621, 75 Pac. 332; *Estate of Antoldi*, 7 Cal. Unrep. 211, 81 Pac. 278.

228. And since decision includes facts found, findings must be taken as absolutely true.—*Donohoe v. Mariposa L. & M. Co.*, 66 Cal. 317, 318, 5 Pac. 495; *Estate of Antoldi*, 7 Cal. Unrep. 211, 81 Pac. 278.

229. Hence question as to whether excessive damages appear to have been given under influence of passion or prejudice can

not be considered it being but another form of saying that evidence does not justify verdict.—*Graybill v. De Young*, 140 Cal. 323, 327, 73 Pac. 1067.

230. Where finding as to amount of damage is not attacked in specification of insufficiency of evidence, it will not be considered on appeal.—*Fitzhugh v. Mason*, 2 Cal. App. 220, 83 Pac. 282.

231. Where statement for new trial fails to specify particulars of insufficiency of evidence, decision of court on motion for new trial will not be considered on appeal.—*Preston v. Hearst*, 54 Cal. 595, 596; *Phillips v. Lowrey*, 54 Cal. 584.

232. Where specification of insufficiency of evidence on motion for new trial was directed to portions of findings that certain amount was due and not that principal on notes had ever been paid except certain sum on account of interest which was also part of finding, no contention can be made on appeal that there was no evidence in support of finding that note had not been paid.—*First Nat. Bank v. Kelso*, 5 Cal. Unrep. 40, 40 Pac. 427.

233. Where there was no specification in statement of insufficiency of evidence or error at law occurring at trial claim that decision is against law will be limited to errors occurring in judgment-roll and questions as to sufficiency or insufficiency of evidence can not be considered.—*Thompson v. Los Angeles*, 125 Cal. 270, 271, 57 Pac. 1015.

234. Same—Same—Same—On appeal from order denying an application for order where court made no findings of fact and there was no motion for new trial, as specification of sufficiency is not necessary.—*Estate of Fath*, 132 Cal. 609, 614, 64 Pac. 995.

235. Same—Same—Not to be regarded as a pleading, as sort of complaint in error, but is in nature of notice, sufficiency of which should be tested by inquiring whether opposite party is injured by defendants.—*American Type F. Co., v. Packer*, 130 Cal. 459, 461, 62 Pac. 744.

236. Same—Same—Place of specification.—There is nothing in statute which requires specification of insufficiency of evidence to be inserted in any particular place in statement or under any particular sub-heading.—*Stuart v. Lord*, 138 Cal. 672, 675, 72 Pac. 142.

237. Same—Same—Purpose of requiring particulars in which evidence is alleged to be insufficient to be specified in statement is to direct attention of court and counsel to particulars relied on by moving party to end that evidence bearing on specifications of error might be inserted in statement and considered by court.—*Eddeibuttel v. Durrell*, 55 Cal. 277, 279; *Spotts v. Hanley*, 85 Cal. 155, 165, 24 Pac. 738; *Cummings v. Ross*, 90 Cal. 68, 71, 27 Pac. 62; *Brenot v. Brenot*, 102 Cal. 294, 297, 36 Pac. 672; *De Molera v. Martin*, 120 Cal. 544, 545, 52 Pac. 825; *Standard*

Quicksilver Co. v. Habishaw, 132 Cal. 115, 124, 64 Pac. 113.

238. And so that court may strike out useless and redundant matters and opposite party propose amendments.—*De Molera v. Martin*, 120 Cal. 544, 545, 52 Pac. 825.

239. Object of specifications required by this subdivision is to clearly direct attention of court to particular point on which evidence is claimed to be insufficient.—*In re Yoakam*, 103 Cal. 503, 505, 37 Pac. 485. See *McCullough v. Clark*, 41 Cal. 298; *Brenot v. Brenot*, 102 Cal. 294, 297, 36 Pac. 672.

240. Principal object of requiring specifications of particulars of insufficiency of evidence is to provide statement of evidence by restricting it to such as is relevant and material to prove or disprove specified facts.—*Dawson v. Schloss*, 93 Cal. 194, 200, 29 Pac. 31.

241. Same—Same—Sufficiency of specification.—Provision requiring the statement to specify particulars in which evidence is alleged to be insufficient requires statement to state reasons differently and at greater length than is required in giving notice of intention. Mere repetition in statement of ground of motion which is designated in notice is not compliance with this provision.—*De Molera v. Martin*, 120 Cal. 544, 545, 52 Pac. 825.

242. Where specifications in statement fully informed opposing counsel and court as to point on which plaintiff proposed to rely in his contention that decision was contrary to evidence, and it appears that all evidence is contained in record, specifications are sufficient.—*Gwin v. Calegaris*, 139 Cal. 384, 391, 73 Pac. 851; *Estate of Motz*, 136 Cal. 558, 561, 69 Pac. 294. See *Standard Quicksilver Co. v. Habishaw*, 132 Cal. 115, 124, 64 Pac. 113.

243. Specification of particulars in which evidence was alleged to be insufficient in statement on motion for new trial full enough to enable court to understand question presented is sufficient, this being substantial part of statute.—*Newell v. Desmond*, 63 Cal. 242, 245.

244. If specification of insufficiency of evidence is sufficient to enable opposing counsel to determine what evidence should be put in statement, and judge to strike out redundant and useless matter, it is enough.—*American Type F. Co. v. Packer*, 130 Cal. 459, 461, 62 Pac. 744.

245. Same—Same—Same—"Court should have found," in specification, is only another mode of stating that "evidence shows," a form of specification which has been repeatedly held to be insufficient.—*Taylor v. Bell*, 128 Cal. 306, 308, 60 Pac. 853.

246. Same—Same—Same—Evidence insufficient to show facts (naming them) set forth in particular finding, is only repetition in another form of declaration of insufficiency of evidence to justify decision,

and is in no respect to be considered specification of any particular in which it is insufficient. What evidence shows is but argument upon result to be deduced from consideration of entire evidence in case and is not specification of particular in which it is insufficient.—*De Molera v. Martin*, 120 Cal. 544, 547, 548, 52 Pac. 825.

247. Rule in *De Molera v. Martin*, 120 Cal. 544, 52 Pac. 825, if capable of stringent construction placed on it by respondents, is now being relaxed in harmony with more liberal view which will afford hearing on appeal where reasonable and ordinarily careful precautions have been taken to present specifications rather than to defeat right to be heard upon purely technical grounds.—*Bell v. Staacke*, 141 Cal. 186, 194, 74 Pac. 774.

248. Same—Same—Same—“Evidence shows” in specification is in effect only statement that upon all evidence court should have come to different conclusion is insufficient, being mere repetition of what was previously stated in notice of intention to move for new trial.—*Taylor v. Bell*, 128 Cal. 306, 308, 60 Pac. 853. See *Adams v. Helbing*, 107 Cal. 298, 301, 40 Pac. 422; *Haught v. Tryon*, 112 Cal. 4, 6, 44 Pac. 318; *Love v. Anchor Raisin Vineyard Co.*, 5 Cal. Unrep. 425, 45 Pac. 1044, 1046.

249. Allegation as to what evidence shows is unnecessary and out of place in specification required by this section.—*Dawson v. Schloss*, 93 Cal. 194, 200, 29 Pac. 31. See *Adams v. Helbing*, 107 Cal. 298, 301, 40 Pac. 422.

250. Specification of insufficiency of evidence in notice of intention, which stated that evidence was insufficient to justify verdict in this that evidence showed certain specific facts, was sufficient.—*In re Yoakam*, 103 Cal. 503, 505, 37 Pac. 485. See *Harnett v. Central Pac. R. Co.*, 78 Cal. 31, 32, 20 Pac. 154.

251. Same—Same—Same—Findings as whole.—Specification of statement as to insufficiency of evidence, which was not directed to any particular one of numerous findings of fact, but at all of them, at verdict, which was adopted and findings made thereon, and at judgment, is insufficient.—*Cummings v. Ross*, 90 Cal. 68, 71, 27 Pac. 62.

252. Specification that evidence is insufficient to sustain verdict, findings, or judgment, for reason that there is no testimony showing what was value of work, or that same was ever performed, and that it shows entire amount due plaintiff was not more than certain sum, all of which had been paid, was insufficient specification where it was contended that evidence was insufficient to show extra work performed on each story of building. Such specifications relating to whole work, and not to any particular portion of it.—*Cummings v. Ross*, 90 Cal. 68, 70, 27 Pac. 62.

253. Specification in statement that the court erred in finding and deciding in favor

of defendant, when finding and decision should have been in favor of plaintiff, and that court erred in rendering judgment in favor of defendant, when judgment should have been in favor of plaintiff, did not amount to assignment on any error of law occurring at trial for any part in which evidence was insufficient, and statement must have been disregarded and motion properly denied.—*Lower King's River Reclamation Dist. v. Phillips*, 5 Cal. Unrep. 776, 39 Pac. 634, 635.

254. Specification of insufficiency of evidence that evidence is wholly insufficient to justify or sustain verdict and, on contrary, shows that verdict should have been in favor of petitioners, is insufficient, and objection on such ground will be disregarded.—*In re Strock*, 128 Cal. 658, 659, 61 Pac. 282.

255. Specification in statement that evidence is insufficient to justify decision that the plaintiff was at any time the owner and possessed and entitled to possession of property, etc., is insufficient specification in an action to recover possession of land as it relates to whole issue. Thus statement in brief that evidence was insufficient because of failure on part of plaintiff to show that she was distributee of estate, failure to show tract described in complaint was tract distributed to plaintiff, and failure to show that tract was part of larger tract owned by plaintiff's father were proper specifications to insert in statement instead of general one given.—*De Molera v. Martin*, 120 Cal. 544, 547, 52 Pac. 825.

256. Same—Same—Same—First finding of court is not sustained by evidence and is contrary thereto, with a repetition in regard to second and third findings, is insufficient specification.—*Eddeibuttel v. Durrell*, 55 Cal. 277, 279; *Parker v. Reay*, 76 Cal. 103, 105, 18 Pac. 124.

257. Specification that court erred in finding in its findings of fact certain facts and not finding to contrary thereon, is not insufficient specification to meet requirements of code, and must be disregarded.—*Heilbron v. Centerville & K. I. D. Co.*, 76 Cal. 8, 9, 17 Pac. 932. See *Smith v. Christian*, 47 Cal. 18; *Shepherd v. Jones*, 71 Cal. 223, 16 Pac. 711.

258. Same—Same—Same—Ignoring part of evidence.—Where specifications of the insufficiency of evidence ignored release of property by sheriff, but are based on statement that such property was never taken by sheriff, court can not consider question as to sufficiency of evidence in regard to release.—*Rider v. Edgar*, 54 Cal. 127, 130.

259. Same—Same—Same—“It clearly appears from evidence” that plaintiff knew that work was attended with danger, etc., is sufficient without stating that it appears that evidence was insufficient to prove allegation that plaintiff was ignorant of dangers of work, although latter form is preferable; criticism goes to form rather than

to statement.—*Drathman v. Cohen*, 139 Cal. 310, 312, 73 Pac. 181.

260. Same—Same—Same—Items of account.—Specification in statement that evidence was insufficient for jury to find that plaintiffs were only entitled to judgment for certain sum, is insufficient specification since it might have been made to state what items of credit in their favor they deemed established.—*Wise v. Wakefield*, 118 Cal. 107, 109, 50 Pac. 310.

261. Same—Same—Same—Narration of evidence.—Specifications of insufficiency of evidence need not state what evidence itself showed, and hence specifications which are simply narrations of what evidence was, are therefore insufficient.—*Spotts v. Hanley*, 85 Cal. 155, 165, 24 Pac. 738.

262. Same—Same—Same—“No evidence to support” verdict against defendant, is insufficient specification.—*Dawson v. Schloss*, 93 Cal. 194, 200, 29 Pac. 31.

263. Specifications in statement that there has been no evidence introduced at trial tending to show that plaintiff was injured by any acts of defendant, or that plaintiff has sustained loss by reason of any act of defendant, is sufficient.—*Clark v. Rauer*, 2 Cal. App. 259, 83 Pac. 291.

264. Specification that there is no evidence to support finding is proper, even where there is slight but insufficient evidence to support it.—*Owen v. Pomona L. & W. Co.*, 131 Cal. 530, 539, 63 Pac. 850, 64 Pac. 253.

265. Specification in statement that findings are unsupported by evidence is insufficient specification and will not be considered.—*Knott v. Peden*, 84 Cal. 299, 300, 24 Pac. 160.

266. Specification in statement that there was no evidence to sustain and justify certain findings is insufficient.—*Spotts v. Hanley*, 85 Cal. 155, 165, 24 Pac. 738. See *Parker v. Reay*, 76 Cal. 103, 105, 18 Pac. 124.

267. Same—Same—Same—Pointing out particular findings objected to, and calling attention to claim that neither of these findings is supported by evidence, is sufficient specification.—*Standard Quicksilver Co. v. Habishaw*, 132 Cal. 115, 124, 64 Pac. 113.

268. Where there was but single issue of fact and attention of plaintiff was directed to this by specification in various ways and no evidence on this question was admitted, specification was sufficient.—*Pendola v. Ramm*, 138 Cal. 517, 521, 71 Pac. 624.

269. Specification that decision is against law in this, that evidence in such action shows that plaintiff had been paid nothing on account of her work done for and services rendered to plaintiff, is sufficient specification of insufficiency of evidence, being amply sufficient to inform defendant of exact finding of fact which it claimed evidence did not justify.—*Stuart v. Lord*, 138 Cal. 672, 675, 72 Pac. 142.

270. Where specification points out particular findings or parts of findings which it is claimed evidence does not justify, is sufficient though language is—“there is no evidence to justify.”—*Owen v. Pomona L. & W. Co.*, 131 Cal. 530, 539, 63 Pac. 850, 64 Pac. 253.

271. Specification in statement is sufficient when it points to particular finding, or if motion is directed against general verdict or omnibus finding, that all certain designated allegations of complaint or answer are true, or judgment is without findings in any such case it need not be more specific than issues made by pleadings.—*Harris v. Duarte*, 141 Cal. 497, 499, 70 Pac. 298, 75 Pac. 58.

272. Statement on motion for new trial which states that evidence fails to show that defendant at times stated was guilty of adultery, being directly responsive to finding of fact, it is sufficient specification of insufficiency of evidence. Object of statement requiring such specification is for purpose of bringing directly to mind of court particular point aggrieved party desires to have reviewed, and also to give notice to adverse party of point of attack and thereby enable him to produce any additional evidence found in record which may support finding of fact assailed by specification.—*Brenot v. Brenot*, 102 Cal. 294, 297, 36 Pac. 672.

273. Same—Same—Same—Pointing out with considerable detail the particular facts which it is claimed are not proven is sufficient.—*Holmes v. Hoppe*, 140 Cal. 212, 73 Pac. 1002.

274. Same—Same—Same—Probative or ultimate facts.—Where fact found by court is conclusion from number of probative facts—an ultimate fact—specification which only says that finding of this ultimate fact is only sustained by evidence is insufficient, but where finding consists of particular probative facts or series of facts from which ultimate fact in issue is to be found, specification is sufficient if it is leveled directly against any of such particular probative facts thus found or particular finding contained in same.—*Bell v. Staacke*, 141 Cal. 186, 191, 74 Pac. 774; but see concurring opinion by Shaw, J.

275. Specification that evidence was insufficient to prove that defendant waived payment of premium and extended time is sufficient, as such finding did not involve finding that agent had authority to waive conditions and that such conditions were waived, the facts in regard to agent being merely probative.—*Blake v. National L. Ins. Co.*, 123 Cal. 470, 473, 56 Pac. 101.

276. Same—Same—Same—Reasonably successful effort to state particulars and they are such as may have been cited to inform opposing counsel and court of grounds, and trial court has entertained and passed upon motion, court will not re-

fuse to consider case on appeal, especially where transcript shows that all evidence has been brought up.—*American Type Founders Co. v. Packer*, 130 Cal. 459, 62 Pac. 744; *Drathman v. Cohen*, 139 Cal. 310, 313, 73 Pac. 181.

277. Same—Same—Same—“Result of testimony” is not sufficient specification of insufficiency of evidence; nor was statement that verdict on special issue “Number 1” was error.—*Kumle v. Grand Lodge A. O. U. W.*, 110 Cal. 204, 213, 42 Pac. 634. See *Menk v. Home Ins. Co.*, 76 Cal. 50, 9 Am. St. Rep. 158, 14 Pac. 837, 18 Pac. 117; *Baird v. Peall*, 92 Cal. 235, 28 Pac. 285.

278. Same—Same—Same—Specification in assignment of error that evidence is insufficient to justify, etc., is insufficient. Particulars in which evidence is said to be insufficient must be pointed out in assignment of error.—*Kyle v. Craig*, 125 Cal. 107, 116, 57 Pac. 791; *Kumle v. Grand Lodge A. O. U. W.*, 110 Cal. 204, 213, 42 Pac. 634.

279. Same—Same—Same—Statement of all evidence.—Where statement on motion for new trial states that foregoing constitutes substantially all evidence given on trial objection that statement does not sufficiently specify particulars in which evidence is insufficient to justify decision will be overruled.—*Di Nola v. Allison*, 143 Cal. 106, 115, 101 Am. St. Rep. 84, 76 Pac. 976. See *American Type Founders Co. v. Packer*, 130 Cal. 459, 462, 62 Pac. 744; *In matter of Motz*, 136 Cal. 558, 69 Pac. 294; *Laidlaw v. Pacific Bank*, 137 Cal. 392, 398, 70 Pac. 277; *Drathman v. Cohen*, 139 Cal. 310, 313, 73 Pac. 181; *Jones v. Goldtree Bros. Co.*, 142 Cal. 383, 387, 77 Pac. 939.

280. Same—Same—Same—Waiver of insufficiency.—Where respondent's counsel did not object on ground that specification of insufficiency was insufficient and treated it as sufficient, court on appeal examined evidence.—*Knott v. Peden*, 84 Cal. 299, 300, 24 Pac. 160. See *Jones v. Goldtree Bros. Co.*, 142 Cal. 383, 387, 77 Pac. 939.

281. Same—Sufficiency of specification.—Specification in statement of errors in rulings regarding admission of evidence that they are pointed out and designated in foregoing transcript by certain numbered exceptions and that court erred in each of its said rulings, is insufficient.—*Hall v. Susskind*, 120 Cal. 559, 566, 53 Pac. 46.

282. Same—Same—Incorporation of instruction complained of in assignment of errors, coupled with statement that it was given against objection of appellant, is not sufficient to show that such instruction was given or excepted to.—*Braverman v. Fresno C. & I. Co.*, 101 Cal. 644, 645, 36 Pac. 386.

283. Stipulation as to correctness of transcript does not preclude or estop respondent on appeal from order denying a motion for new trial from objecting to the sufficiency of the statement. The denial of the motion may have been based upon that

very fact.—*Carver v. San Joaquin etc. Co.*, 16 Cal. App. 765, 118 Pac. 92.

284. Statement—When sufficient.—Where the statement which had been prepared by defendant's counsel represented as correctly as possible proceedings had on trial of cause, proper course was for courts to settle same.—*Storke v. Storke*, 116 Cal. 47, 52, 47 Pac. 869, 48 Pac. 121.

285. Striking out redundant matter.—It is duty of judge in settling statement to strike out of it all redundant and useless matter, notwithstanding consent of parties to such matter or to any inaccurate statement.—*Arnold v. Producers' F. Co.*, 141 Cal. 738, 740, 73 Pac. 326.

286. Time of service—Presentment, etc.—Objection that proposed statement and amendments were not presented within the time prescribed by this section is not available where the party has been relieved from the failure to so file them under the provisions of section 473, ante (on rehearing).—*Grubb v. Chase*, 158 Cal. 352, 111 Pac. 90.

287. Time to present for settlement.—When amendments are adopted by moving party time within which statement shall be presented to the judge or delivered to the clerk is not limited by this section, and it may be done within reasonable time.—*Pendergrass v. Cross*, 73 Cal. 475, 476, 15 Pac. 63.

288. Failure of plaintiff to present statement to judge within ten days after receipt of proposed amendment did not deprive judge of power to settle statement as so amended.—*Black v. Hilliker*, 130 Cal. 190, 192, 62 Pac. 481.

289. Same—Failure to present in time.—Where statement, with proposed amendments, is not presented until after ten days from time such amendments were presented, court was not authorized to settle such statement, and on it to grant motion for new trial.—*Henry v. Merguire*, 106 Cal. 142, 146, 39 Pac. 599.

290. Unexplained delay of seven months in presenting statement and amendments to judge for settlement requires that such statement be disregarded on appeal.—*Connor v. Southern Cal. M. R. Co.*, 101 Cal. 429, 430, 35 Pac. 990. See *Wills v. Rhen Kong*, 70 Cal. 548, 11 Pac. 780.

291. Failure of moving party to present statement and proposed amendments to court for settlement for period of years after amendments had been served, without any satisfactory explanation, justifies order dismissing proceedings for new trial.—*Lee Doon v. Tesh*, 131 Cal. 406, 409, 63 Pac. 764.

292. It being duty of moving party to prepare statement on motion for new trial and present for settlement, he will be required to use due diligence in so doing, though such matter had been continued from time to time by consent of both parties until proposed statement had been lost, even though by fault of adverse party and

failure to prepare redraft of proposed statement within time granted for that purpose, justifies granting of motion to dismiss proceedings for new trial.—*Moore v. Kendall*, 121 Cal. 145, 146, 53 Pac. 647.

293. Same — Same — Excuse for delay should have been set out in statement when it was settled, for without it court had no jurisdiction to settle and certify statement.—*Estate of Kruger*, 130 Cal. 621, 625, 63 Pac. 31. See *Higgins v. Mahoney*, 50 Cal. 444; *Tregambo v. Comanche M. & M. Co.*, 57 Cal. 501, 503; *Connor v. Southern Cal. M. R. Co.*, 101 Cal. 429, 35 Pac. 990.

294. Same—Failure to serve in time.—Where statement on appeal was not served until six days after expiration of time allowed by law, and by all extensions given, court could not be required to settle it, nor could it be used on appeal.—*Buckley v. Althorff*, 86 Cal. 643, 645, 25 Pac. 134.

295. Same—Same—Objection that proposed statement has not been presented to judge in time must be urged when statement is presented for settlement, and if objection is overruled party must have such objection incorporated in his statement, so as to appeal himself, as reason why motion for new trial should be denied, or in order to present objections in the court on appeal from order refusing or granting motion.—See *Estate of Kruger*, 130 Cal. 261, 265, 63 Pac. 31; *Henry v. Merguire*, 106 Cal. 142, 145, 39 Pac. 599; *Kaltschmidt v. Weber*, 136 Cal. 675, 676, 69 Pac. 497. But this only applies to objections urged at time proposed statement comes up for settlement, and has no application to objection or motion made subsequent to order settling statement, and when statement as settled is presented for certification. But such matter must be supported by bill of exceptions.—*Ryer v. Rio L. & I. Co.*, 147 Cal. 462, 82 Pac. 62.

As to exception to objection that statement on motion for new trial was not presented in time, see, ante, § 647 and note par. 18.

296. Same—Same—Where it does not appear when amendments were served on plaintiff's attorney, if ever, and objection made by respondents that statement and their amendments were not presented to judge for settlement within ten days after service of amendments on plaintiff's attorney and upon five days' notice will not be considered.—*Abbott v. Jack*, 136 Cal. 510, 512, 69 Pac. 257.

297. Same—Relief from effect of failure.—Where appellants made motion in due form to be relieved from their failure to serve statement in time on ground of excusable neglect, which motion was granted and statement duly settled and certified by court, it will not be presumed that new trial was refused on ground of any delay in service of proposed statement.—*Bally v. Kreutzmann*, 141 Cal. 519, 520, 75 Pac. 104.

298. Ignorance of time in which statement or bill of exceptions must be prepared and served can not be held to be result of mistake or surprise, or inadvertence, so as to justify relief therefrom.—*Ingrim v. Epperson*, 137 Cal. 370, 371, 70 Pac. 165.

As to power of court to relieve defendants from their failure to deliver proposed statement and amendments for settlement within time allowed by law, see, ante, § 473 and note.

299. Same—Waiver of delay.—Where statement in bill of exceptions was settled and allowed, and stipulation appears signed by attorney for respondent that foregoing is true and correct statement of bill of exceptions, without any objection on his part that it was not prepared and served in time, he will not be allowed to make such objection for first time on appeal.—*Estate of Dougherty*, 139 Cal. 14, 15, 72 Pac. 357.

IV. MATTERS CONSIDERED.

300. Assignment of errors—Necessity for.—Prejudice of jury can not be considered where no assignment of error on that ground appears in the notice of intention to move for a new trial.—*Kirk v. Santa Barbara Ice Co.*, 157 Cal. 591, 594, 108 Pac. 509.

As to scope of inquiry on appeals from orders granting or refusing new trials, see, post, § 661, note pars. 53-83.

As to specification of particulars, etc., see pars. 150-152, this note.

301. Paper designated bill of exceptions by judge in his statement thereon may be considered statement of the case specified in notice of motion for new trial and whether it be entitled a statement of a bill of exceptions the specifications of error are sufficient if they have enabled the trial court to properly consider them and enabled the appellate court to review them without difficulty or inconvenience.—*Northwestern Redwood Co. v. Dicken*, 13 Cal. App. 689, 692, 110 Pac. 591.

302. Where the statement on motion for new trial contains no specifications of errors it must be disregarded.—*Johnston v. Blanchard*, 16 Cal. App. 328, 116 Pac. 973.

303. Specifications of errors are required in statements of the case.—*Martin v. Southern Pac. Co.*, 150 Cal. 131, 88 Pac. 701.

304. Errors not specified in statement—Will not be considered on appeal.—*Budd v. Drals*, 50 Cal. 120; *Thompson v. Patterson*, 54 Cal. 542, 546; *Heinlen v. Heilbron*, 71 Cal. 557, 563, 12 Pac. 673; *Hershey v. Kness*, 75 Cal. 115, 16 Pac. 548; *Bohnert v. Bohnert*, 95 Cal. 444, 445, 30 Pac. 590; *Leonard v. Shaw*, 114 Cal. 69, 71, 45 Pac. 1012; *Lambert v. Marcuse*, 137 Cal. 44, 45, 69 Pac. 620. See *Ferrer v. Home Mut. Ins. Co.*, 47 Cal. 416, 427; *Fleming v. Albeck*, 67 Cal. 227, 7 Pac. 659; *Pico v. Cohn*, 67 Cal. 258, 7 Pac. 680; *Sprigg v. Barber*, 122 Cal. 573, 55 Pac. 419; *Ackley v. Fishbeck*, 124 Cal. 409, 410, 57 Pac. 207.

305. Where no errors of law were specified they will be presumed to have been disregarded on hearing of motion for new trial, though notice of motion stated that it could be made on errors of law.—Pico v. Cohn, 67 Cal. 258, 7 Pac. 680.

306. Where statement for new trial contained no specifications of error motion for new trial was properly denied.—Nye v. Marysville & Y. C. St. R. Co., 97 Cal. 461, 462, 32 Pac. 530.

307. Statement not specifying any error of fact on which motion for new trial was made, decision of court will be regarded as conclusive of facts of case.—Graham v. Stewart, 68 Cal. 374, 376, 9 Pac. 555.

308. Same — Error in instruction not specified as ground of motion for new trial renders no support to order granting new trial.—Laver v. Hotaling, 115 Cal. 613, 616, 47 Pac. 593.

309. Essential parties. — The superior court can have no jurisdiction to re-examine an issue of fact which it has tried and change its decision thereon unless all the parties to the issue and former decision are before it.—Niles v. Gonzalez, 155 Cal. 359, 363, 100 Pac. 1080.

310. Same principle held in almost same language in Ford & Sanborn Co. v. Braslan Seed Growers Co., 10 Cal. App. 762, 768, 103 Pac. 946.

311. Failure to specify that court did not find on issue raised by pleadings in statement on motion for new trial will prevent its consideration and appeal.—Kaiser v. Dalto, 140 Cal. 167, 170, 73 Pac. 828. See Haight v. Tryon, 112 Cal. 4, 6, 44 Pac. 318. See par. 216, this note.

312. Same—Appellate court will confine its attention to the specifications in which evidence alleged to be insufficient.—Nishkian v. Chisholm, 2 Cal. App. 496, 84 Pac. 312.

313. Notice not a part of the judgment-roll.—The notice is not a part of the judgment-roll and must be embodied in a bill of exceptions to entitle it to consideration.—Cormond v. United Railroads, 41 Cal. App. 683, 183 Pac. 218.

314. Order on motion for new trial.—On appeal from such order a motion striking out an amendment to answer can not be reviewed.—Reclamation District v. Hershey, 160 Cal. 693, 117 Pac. 904.

315. Record on appeal.—Where a motion for a new trial on the ground of newly discovered evidence is based solely upon a single affidavit, and the statement or bill of exceptions does not present the evidence upon which the findings of the court were made, it will be presumed that there is nothing in the affidavit inconsistent with those findings, and an order denying the motion will be affirmed.—Serpiglio v. Downing, 14 Cal. App. 684, 112 Pac. 905.

As to record on appeal, see par. 315, this note; also post, § 661 and note.

316. Specifications in statement for new trial setting forth wherein evidence alleged to be insufficient, on appeal consideration of evidence confined to specifications.—See Nishkian v. Chisholm, 2 Cal. App. 496, 84 Pac. 312.

317. Specifications of particulars — Insufficiency of evidence.—Questions as to correctness of findings of trial court can not be considered in the absence of specifications of insufficiency of the evidence.—Anglo-California Bank v. Cerf, 147 Cal. 392, 81 Pac. 1077.

As to specifications of insufficiency, see pars. 222, et seq., this note.

As to specification of particulars of insufficiency of evidence, see pars. 224, et seq., this note.

As to specifying particulars on motion on minutes of court, see pars. 190 and 191, this note.

318. Same—Same—All evidence considered, when.—On an appeal by the defendant from an order granting a new trial he can not complain that evidence was improperly admitted in favor of plaintiff, and in determining the sufficiency of the evidence all the testimony must be considered.—Globe Grain & Milling Co. v. Drenth, 41 Cal. App. 604, 183 Pac. 285.

319. Same—Same—Necessity for.—Where the statement contains no specifications of the errors of law relied upon, or of particulars in which the evidence fails to support the findings, that is, the grounds relied upon, the order denying the motion can not be reviewed.—Carver v. San Joaquin Cigar Co., 16 Cal. App. 765, 118 Pac. 92.

320. Same—Same—Sufficiency of.—In an action for services as attorney, in which the plea of the statute of limitations was interposed and found by the jury against the bar, a specification in the statement on motion for new trial upon the insufficiency of the evidence, that "the evidence shows that the statute of limitations has run as to the services alleged to have been rendered by the attorney" was held sufficient.—Osborn v. Hopkins, 160 Cal. 504, 117 Pac. 519.

321. A specification is sufficient if it is of such a nature as to fully inform the trial court and opposing party of the point to be made in regard to the insufficiency of the evidence.—Osborn v. Hopkins, 160 Cal. 505, 117 Pac. 519.

322. Statement on motion for new trial.—Where the statement of the case used upon the hearing is absolutely silent upon the subject of the motion, and fails to show the motion, the order can not be reviewed.—Carver v. San Joaquin Cigar Co., 16 Cal. App. 769, 118 Pac. 92.

As to statement and specifications of error generally, see Part III, this note.

323. Same—Editorial note: If the court meant to decide that the statement must show that a motion was made, or anything

in reference to what was done or said upon the hearing, it is wrong on principle. The statement having been prepared and settled before the hearing of the motion can not be expected to contain matter relating to that event. The proper place for such a record is the minutes of the court. The motion in this case was not made upon the minutes of the court with a subsequently prepared statement, and this fact may be said to explain the absence of reference to the motion. The order of the court denying the motion is the only record of that paper required to be presented to the appellate court (§ 661, post), and if the motion were in the transcript it could not be considered by the court.—Hayne Appeal § 230.

324. If the court, on the other hand, meant to decide that a motion must be made in writing the decision is not only wrong on principle but is also a departure from precedent. That such motion may be made orally is well recognized. The matter is fully discussed and the cases collected in § 164 of Hayne, *New Trial*, revised edition.

325. The court correctly decided in the same connection that the statement must contain the grounds of the motion, and it must be assumed that the reference to the necessity of including the motion itself in

the statement was a mere inadvertence. The report of the case does not say enough about the contents of the statement to enable us to form any idea as to what it really did contain. That it contained some specifications of error, or some statements of error, upon which the action of the trial court could be reviewed, however, is apparent from the fact that the court, under the authority of section 950, post, considered the appeal from the judgment upon the same statement. Specifications of error are not required in bills of exceptions, it is true (§ 650, post, and *Martin v. Southern Pac. Co.*, 150 Cal. 124, 88 Pac. 701; *Hayne New Trial Appeal*, rev. ed., § 259), and the statement is used as a bill of exceptions. Nevertheless, it is always a statement and never a bill of exceptions; and without specifications it is not a paper recognized as a statement, or any other lawful paper, except a bill of exceptions prepared after the trial as provided by section 650, post.

326. Under the circumstances it is not easy to understand the action of the court in declining to consider the paper referred to as a valid paper on the new trial appeal, and, yet, making full use of its statements of error in the appeal from the judgment.

§ 660. MOTION TO BE HEARD AT TIME SPECIFIED, OR DISMISSED.

The motion for a new trial must be heard at the earliest practicable time after the filing of affidavits and counter-affidavits, in case the motion is made on affidavits, in other cases after the filing of the notice. On such hearing reference may be had in all cases to the pleadings and orders of the court on file, and when the motion is made on the minutes, reference may also be had to any depositions and documentary evidence offered at the trial and to the report of the proceedings on the trial taken by the phonographic reporter, or to any certified transcript of such report, or if there be no such report or certified transcript, to such proceedings occurring at the trial as are within the recollection of the judge; when the proceedings at the trial have been phonographically reported, but the reporter's notes have not been transcribed, the reporter must, upon request of the court, or either party, attend the hearing of the motion, and shall read his notes, or such parts thereof as the court, or either party, may require.

[*New trial hearing has precedence.*] The hearing and disposition of the motion for a new trial shall have precedence over all other matters except criminal cases, probate matters and cases actually on trial, and it shall be the duty of the court to determine the same at the earliest possible moment. The power of the court to pass on motion for new trial shall expire within three months after the verdict of the jury or service on the moving party of notice of the entry of the judgment. If such motion is not determined within said three months, the effect shall be a denial of the motion without further order of the court.

History: Enacted March 11, 1872; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 317; by Code Commission, Act March 8,

1901, Stats. and Amdts. 1900-1, p. 149, held unconstitutional, see history, § 5 ante; March 20, 1907, Stats. and Amdts. 1907, p. 718, Kerr's Stats. and Amdts. 1906-7, p. 452; April 24, 1915, Stats. and Amdts. 1915, p. 202; May 5, 1917, Stats. and Amdts. 1917, p. 240. In effect July 27, 1917.

**MOTION FOR NEW TRIAL — TO BE
HEARD AT TIME SPECIFIED
OR DISMISSED.**

1. As to construction of section—In general.
2. Same—Amendment of 1915.
3. Bill of exceptions—Time of serving and filing—Notice of intention and motion for new trial not heard.
- 4, 5. Bringing on for hearing—Motion for new trial.
6. Conclusions not supported by findings—Order vacating judgment on ground of—No direction for new judgment.
7. Constitutionality of section.
8. Denial proper, when—Affidavits not tending to prove any of matters set up.
- 9-11. Dismissal of motion—For failure to bring on for hearing.
12. Same—Nothing more than denial.
13. Failure to bring to trial—Effect where no decision within three months.
14. Same—No notice of termination of—Effect of.
- 15, 16. Failure to serve notice—Effect of.
17. Hearing and decision—As to order showing date of entry—Sufficiency of.
18. Same—By the court, not by the judge as an individual.
19. Same—Failure to hear within three months—Effect of.
20. Same—Same—Equivalent to denial of motion.
21. Same—Same—Order too late, when.
22. Same—Same—Three months' limitation not affected by section 12, ante.
23. Imposing terms and condition—In granting or denying motion.
24. Same—Failure to perform condition.
- 25, 26. Same—Payment of costs as condition.
27. Same—Remission of portion of verdict.
28. Same—Unwarranted conditions imposed.
29. Motion for new trial—Time to pass on—Intervening holiday—Construction of code provisions.
30. Motion to vacate judgment—As having been entered through inadvertence.
- 31-33. New trial—As part of issues.
34. Same—As to right of appellate court to limit scope of new trial.
35. Same—Denial of by operation of law—Notice presumed.

36. Notice of intention to move for new trial—Not notice of appeal.
37. Order—Amending order granting new trial.
38. Same—Granting new trial.
39. Same—Same—Specification of grounds on which court grants or refuses to grant new trial is not required.
- 40, 41. Same—Granting or denying motion—Can not be vacated.
- 42, 43. Same—Granting new trial vacates judgment.
44. Party moving for new trial—Must prosecute motion.
- 45, 46. Power of court.
47. Recitals in order—Denying motion for new trial.
48. Record on which new trial motion heard—Bill of exceptions.
49. Reference to pleadings.
50. Same—Enumeration of depositions, documentary evidence, and phonographic report of testimony.
51. Right to be heard—Involves right to get facts properly before court.
52. Second motion—After motion for new trial in cause has been denied.

1. As to construction of section—In general.—The last two sentences of this section were added by amendment and designed to secure a speedy determination of the motion. The effect of the statute being that the trial court must determine the motion "at the earliest possible moment," it is the court's duty to do so. The court may, however, grant or deny a new trial within three months.—*Lancel v. Postlethwaite*, 172 Cal. 326, 156 Pac. 486.

2. Same — Amendment of 1915. — The amendment of 1915 to this section can not be construed as applicable to proceedings on motions pending at the time it became operative.—*San Francisco-Oakland Terminal Railways v. Superior Court*, 172 Cal. 541, 157 Pac. 604.

3. Bill of exceptions—Time of serving and filing—Notice of intention and motion for new trial not heard.—Under the provisions of the above section where notice of entry of judgment was served March 31, notice of intention to move for new trial filed April 7, and notice of appeal from judgment filed April 10, but the motion for new trial was never brought on for hearing, the power of the court to grant a new trial expired on June 30 and the time within which the defendant could serve and file proposed bill of exceptions expired July 10, in the absence of further time having been granted, and the fourth day's time for filing the transcript began to run on

the expiration of the time within which the court could grant a new trial.—Rath v. Vaughan, — Cal. App. —, 187 Pac. 44.

As to bill of exceptions, see, ante, § 659, note pars. 153-169.

4. **Bringing on for hearing**—Motion for new trial may be brought on for hearing after notice, and after full opportunity to adverse party to meet contentions of moving party.—Eades v. Trowbridge, 143 Cal. 25, 27, 76 Pac. 714.

As to failure to bring on to hearing, see pars. 13, 14, this note.

5. Where objection that motion for new trial was not heard within reasonable time was first made on appeal, it will be presumed that time was extended by consent of parties.—Churchill v. Flournoy, 127 Cal. 355, 357, 59 Pac. 791. See Boggs v. Clark, 37 Cal. 236; Patrick v. Morse, 64 Cal. 462, 2 Pac. 49; Horton v. Jack, 115 Cal. 29, 46 Pac. 920.

6. **Conclusions not supported by findings**—Order vacating judgment on ground of—No direction for new judgment.—The provisions of the above section requiring the court on vacating a judgment because the conclusions of law are not supported by the findings or are inconsistent with the findings to contain a direction for an entry of a new judgment, where an order setting aside a judgment on this ground fails to contain a direction for the entry of a new judgment it is void.—Dolan v. Superior Court, — Cal. App. —, 190 Pac. 469.

7. **Constitutionality of section.**—This section is a valid exercise of legislative power.—Lancel v. Postlethwaite, 172 Cal. 326, 156 Pac. 486; San Francisco-Oakland Terminal Railways v. Superior Court, 172 Cal. 541, 157 Pac. 604.

8. **Denial proper, when**—Affidavits not tending to prove any of matters set up in action as grounds for motion, motion was properly denied.—Bates v. Bates, 71 Cal. 307, 309, 12 Pac. 223.

9. **Dismissal of motion**—For failure to bring on for hearing.—Before either party can bring a motion for new trial on to be heard, it must be in condition in which it can be submitted, and if it is not, simply because of inexcusable neglect of moving party, opposite party may apply for dismissal.—Descalso v. Duane, 3 Cal. Unrep. 890, 33 Pac. 328.

10. Where motion for new trial is not ready to be heard, because of inexcusable neglect of moving party, it may be dismissed on motion of opposite party; order denying and dismissing motion for new trial, though inconsistent, will not be reversed on that ground.—Descalso v. Duane, 3 Cal. Unrep. 890, 33 Pac. 328, overruling Quivey v. Gambert, 32 Cal. 304, 305; Calderwood v. Peyser, 42 Cal. 110. See, also, McDonald v. McConkey, 57 Cal. 325; Chase v. Evox, 58 Cal. 348.

11. Order denying motion to dismiss motion for new trial, on ground of delay in

presenting it, is not res judicata on renewed motion made long after order denying former motion, where it did not appear that same facts which existed when first motion was made existed at time last motion was made. Then burden was on plaintiff to show that facts were same. And where this was not done, it was an abuse of discretion not to dismiss motion for new trial.—Lee Doon v. Tesh, 131 Cal. 406, 409, 63 Pac. 764.

12. **Same**—Nothing more than denial of it.—Davis v. Hurgren, 125 Cal. 48, 50, 57 Pac. 684; Warden v. Mendocino Co., 32 Cal. 655.

13. **Failure to bring to trial**—Effect where no decision within three months.—In a case in which the defendants gave notice of motion for a new trial but the motion was not brought in for hearing nor was any action taken by the trial court in the matter within three months after the service of the entry of the judgment, the effect of all over which was a denial of the motion without further order, and amounting to a termination of the proceedings on the motion for a new trial under the provisions of the above section.—Stoner v. Security Trust Co., — Cal. App. —, 190 Pac. 500.

As to bringing on to hearing, see pars. 4, 5, this note.

14. **Same**—No notice of termination of—Effect of.—In a case in which there is no notice given of the termination of a motion for a new trial or all "other terminations thereof," as provided for in section 953a, post, and there is nothing in the record to indicate that the appellants either waived such notification, or acted in the proceedings of the cause as if they had received formal and binding notice, and to cause no undue delay, the trial court acted within its discretion in approving the transcript offered where the appellants did not file their notice with the clerk below requesting a transcript of the record, within the time required after notice had been served.—Stoner v. Security Trust Co., — Cal. App. —, 190 Pac. 500.

15. **Failure to serve notice**—Effect of.—There is no authority to grant relief from the consequences of a failure to serve a notice of intention to move for a new trial within the time allowed by law.—Haviland v. Southern Cal. Edison Co., 172 Cal. 601, 158 Pac. 328.

16. A party who fails to serve its notice of intention to move for a new trial within time is entitled to relief from its default in serving its proposed bill of exceptions due to an inadvertent entry in its attorneys' journal of the last day to serve its notice of intention to move for a new trial, where the affidavits of the moving party justify the inference that such party intended at all times to appeal from the judgment, as well as from any order which might be made denying a new trial, and that its purpose

was to make up a record upon which both the judgment and order might be reviewed.—*Haviland v. Southern Cal. Edison Co.*, 172 Cal. 601, 158 Pac. 328.

17. Hearing and decisions—As to order showing date of entry—Sufficiency of.—In an action for a divorce a judgment was entered granting the prayer and making certain provisions for maintenance of children and the disposition of community property set aside to the wife; in due course after the decree was made and entered a notice for motion for a new trial was served and filed, and on the same day a single notice of motion to vacate the judgment was served on the ground that the conclusions of law were not consistent with, nor supported by the findings, and also on the grounds that the findings were signed inadvertently, in that they were not first presented to the defendant or his counsel and was also filing a cross-motion by the plaintiff for additional attorney's fees and three causes were presented to the court at the same time. The minute-order made by the court on the day of the presentation did not mention the presentation or submission of the defendant's motion for a new trial; a month later the court directed to be entered an order reading "It appearing to the satisfaction of the court that the order heretofore made herein," giving the date, "submitting the defendant's motion for a new trial having been inadvertently not entered, it is by the court ordered that the entry of said order be made this day nunc pro tunc" as of the day of the hearing, assuming that there was a merely ministerial inadvertence in omitting the order of submission of the motion for a new trial, it not appearing at the judicial function of determining that motion had been exercised in any way until the day on which the nunc pro tunc order was directed, which was more than three months after the service of notice of the entry of the judgment, the failure of the court to determine the motion for a new trial before the expiration of the statutory period had the effect of a denial of the motion, under the provisions of the above section.—*Dolan v. Superior Court*, — Cal. App. —, 190 Pac. 469, following the doctrine in *San Francisco O. Terminal Rys. Co. v. Superior Court*, 172 Cal. 541, 157 Pac. 604; *Estate of Waters*, 181 Cal. 584, 185 Pac. 951.

18. Same—By the court, not by the judge as an individual.—A motion for a new trial is not heard by the judge as an individual, but by the court, and need not necessarily be heard by the judge who tried the case.—*Campbell v. Genshlea*, 180 Cal. 213, 180 Pac. 336.

19. Same—Failure to hear within three months—Effect of.—In those cases in which a motion for a new trial is not brought to trial and determined within three months from the date of the verdict of the jury or service of notice of decision under the requirements of the provisions of the above

section, the time within which to serve a notice of intention to appeal commences to run immediately upon the failure of the trial court to pass upon the motion within said three months.—*Bernschein v. Whitaker*, 175 Cal. 130, sub nom. *Bornschein v. Whitaker*, 175 Cal. 153.

20. Same—Same—Equivalent to denial of motion, and it is therefore immaterial that a notice of intention to move for a new trial be filed before notice of decision of the court.—*Moore v. Strayer*, 175 Cal. 171, 165 Pac. 530.

21. Same—Same—Order too late, when.—Where the order granting the motion for new trial was made on the last day of the three-month period, and delivered to the shorthand reporter with direction to file it the following day, it was too late.—*Bidwell v. Sonoma County Transportation Co.*, 39 Cal. App. 330, 178 Pac. 722.

22. Same—Same—Three months' limitation not affected by section 12, ante.—The three months' limitation on the power of the court to pass on a motion for a new trial is not affected by section 12, ante, as to extension of time where last day on which an act may be done falls on a holiday.—*Bidwell v. Sonoma County Transportation Co.*, 39 Cal. App. 330, 178 Pac. 722.

23. Imposing terms and conditions—In granting or denying motion for new trial is within power of trial court.—*Garoutte v. Haley*, 104 Cal. 497, 501, 88 Pac. 194; *Brooks v. San Francisco & M. P. R. Co.*, 110 Cal. 173, 176, 42 Pac. 570, and cases cited.

24. Same—Failure to perform condition converts the order into denial of motion.—*Garoutte v. Haley*, 104 Cal. 497, 38 Pac. 194; *Eaton v. Jones*, 107 Cal. 487, 491, 40 Pac. 798; *Garoutte v. Williamson*, 108 Cal. 135, 138, 41 Pac. 35, 413; *Brown v. Cline*, 109 Cal. 156, 159, 41 Pac. 862; *Holtum v. Greif*, 144 Cal. 521, 524, 78 Pac. 11.

25. Same—Payment of costs as condition on which it will grant new trial is within discretion of court.—*Garoutte v. Haley*, 104 Cal. 497, 501, 38 Pac. 194. See *Rice v. Gas-hirle*, 13 Cal. 53; *Cordor v. Morse*, 57 Cal. 301; *Brown v. Cline*, 109 Cal. 156, 159, 41 Pac. 862; *Holtum v. Greif*, 144 Cal. 521, 524, 78 Pac. 11.

26. Condition that plaintiff pay certain amount as costs, attached to order granting new trial, can not be complained of by defendant, it not being imposed on him.—*Anglo-Nevada A. Corp. v. Ross*, 123 Cal. 520, 521, 56 Pac. 335. See *Brooks v. San Francisco & N. P. R. Co.*, 110 Cal. 173, 42 Pac. 570.

27. Same—Remission of portion of verdict if, in its opinion, verdict is for more than evidence will justify, may be imposed as condition for denying new trial.—*Etches v. Orena*, 121 Cal. 270, 272, 53 Pac. 798; *Sherwood v. Kyle*, 125 Cal. 652, 654, 58 Pac. 270; *Swett v. Gray*, 141 Cal. 63, 69, 74 Pac. 439. See *Gregg v. San Francisco & N. P. R.*

Co., 59 Cal. 312; Doolin v. Omnibus C. Co., 125 Cal. 141, 144, 57 Pac. 774.

28. Same—Unwarranted conditions imposed in granting new trial do not render such order void.—Bledsoe v. Decrow, 132 Cal., 312, 314, 64 Pac. 397.

29. Motion for new trial—Time to pass on—Intervening holiday—Construction of code provisions.—The provisions of the above section requiring the court to pass on a motion for a new trial within three months after verdict is not extended by the provisions of section 12, ante, in those cases in which the last day falls on a holiday; in concluding the three-month limitation the holiday must be excluded.—Bidwell v. Sonoma County Transp. Co., 39 Cal. App. 330, 178 Pac. 722.

30. Motion to vacate judgment—As having been entered through inadvertence.—A motion to vacate a judgment on the ground that the findings had been signed through inadvertence without first submitting them to the defendant or his attorney the motion must be made under section 473, ante, as the above section and section 663a, post, do not make provisions for relief in cases of inadvertence.—Dolan v. Superior Court, — Cal. App. —, 190 Pac. 469.

31. New trial—As to part of issues, is permissible where such issues are separable.—San Diego L. & T. Co., v. Neale, 78 Cal. 63, 65, 3 L. R. A. 83; 20 Pac. 372; Duff v. Duff, 101 Cal. 1, 4, 35 Pac. 437; Flinn & Treacy v. Mowry, 131 Cal. 481, 487, 63 Pac. 724. See Lake v. Bender, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74.

32. New trial may be granted as to issues raised by cross-complaint setting up indebtedness from plaintiff to defendant and at same time denied as to those raised by complaint in ejectment.—Jacob v. Carter, 4 Cal. Unrep. 543, 36 Pac. 381, 382.

33. Where motion for new trial was made by all parties defendant, though portion of them had disclaimed any interest, granting of motion being proper as to one, it was immaterial to plaintiff whether it was granted to all or as to one.—Boehmer v. Big Rock Irr. Dist., 117 Cal. 19, 24, 48 Pac. 908.

34. Same—As to right of appellate court to limit scope of new trial, see Marziou v. Ploche, 10 Cal. 545; Soule v. Dawes, 14 Cal. 247; Argenti v. San Francisco, 30 Cal. 458, 463; Kinsey v. Green, 51 Cal. 379; Glascock v. Ashman, 52 Cal. 420; Billings v. Everett, 52 Cal. 661; Goodlett v. St. Elmo I. Co., 94 Cal. 297, 303, 29 Pac. 505; Tunis v. Lake Port A. P. Assoc., 98 Cal. 285, 33 Pac. 63.

35. Same—Denial of by operation of law—Notice presumed.—Where the time for serving for settlement a proposed bill of exceptions on appeal has elapsed and is a denial of the right of appeal by operation of law, and the moving party is chargeable with notice of that effect.—McArthur v. Paxton, 39 Cal. App. 608, 179 Pac. 521.

36. Notice of intention to move for new trial—Not notice of appeal.—The service of filing by the party against whom judgment has been entered of a notice of intention to move for a new trial under the provisions of the above section does not constitute the notice of appeal required by section 941b, post, and was not sufficient to give the appellate court jurisdiction, in the absence of a notice of appeal.—Eddy v. Hunter, — Cal. App. —, 189 Pac. 291.

37. Order—Amending order granting new trial supersedes original order, and becomes the only order of court on motion for new trial.—Garoutte v. Haley, 104 Cal. 497, 500, 39 Pac. 194.

38. Same—Granting new trial.—In granting new trial as to certain particular issues only trial court should with great certainty recite issues in terms on which new trial is to be had.—Mountain T. G. M. Co. v. Bryan, 111 Cal. 36, 38, 43 Pac. 410.

39. Same — Same — Specification of grounds on which court grants or refuses to grant new trial is not required.—In matter of Martin, 113 Cal. 479, 481, 45 Pac. 813, 814.

40. Same—Granting or denying motion—Can not be vacated by court after it has been once regularly made and entered.—Holtum v. Greif, 144 Cal. 521, 524, 78 Pac. 11.

41. Where payment of costs imposed as condition for granting new trial were not paid within time specified in order, motion for new trial will be denied, and court has no power thereafter to make order granting motion without such payment.—Brown v. Cline, 109 Cal. 156, 159, 41 Pac. 862.

42. Same—Granting new trial vacates judgment theretofore rendered and entered.—Etchas v. Orena, 121 Cal. 270, 272, 53 Pac. 798.

43. Whole judgment falls when new trial is granted as to all parties, as incident to vacation of verdict or decision. When it is granted as to some of parties, findings are set aside which determine rights of such parties, and as to them case stands as if it had never been tried; but is so far as judgment and findings purport to determine rights of moving party, and those as to whom new trial had been denied, they continue to exist and judgment is appealable.—Whittenbrock v. Belmer, 62 Cal. 558, 560.

44. Party moving for new trial—Must prosecute motion.—It is not the duty of defendant, who has served proposed amendment to plaintiff's statement, to take any further proceedings towards its settlement.—Lee Doon v. Tesh, 131 Cal. 406, 409, 63 Pac. 764.

45. Power of court.—The court may dismiss a motion for a new trial when the moving party fails to prosecute. A motion for a new trial may be brought on for hearing by either party.—Robson v. Superior Court, 171 Cal. 588, 154 Pac. 8.

46. The superior court upon the ex parte application of the moving party has jurisdiction to vacate an order denying a motion for a new trial, where the order was made upon the submission of the motion, in the absence of counsel for the moving party, by a representative of the firm of opposing counsel, who had no knowledge of the fact that it was agreed by his firm that the motion should be continued.—*Robson v. Superior Court*, 171 Cal. 588, 154 Pac. 8.

47. **Recitals in order—Denying motion for new trial**, though contradictory to findings in case, do not have result of changing such findings, there being but one method by which such findings can be changed, which is by granting new trial.—*Hawxhurst v. Rathgeb*, 119 Cal. 531, 533, 63 Am. St. Rep. 142, 51 Pac. 846. See *Thompson v. White*, 63 Cal. 505; *Pico v. Sepulveda*, 66 Cal. 386, 5 Pac. 515.

48. **Record on which new trial motion heard—Bill of exceptions.**—When the motion is made on a bill of exceptions, previously settled, certified, and filed, it must be heard and determined solely upon the bill so certified and filed, or previously corrected, if corrected after being engrossed, certified, and filed, under section 473, ante, —*Merced Bank v. Price*, 152 Cal. 699, 93 Pac. 866.

As to bill of exceptions, see, ante, § 659, note pars. 153-169.

49. **Reference to pleadings is for purpose of ascertaining issues in case, and determining correctness of any ruling of court on objection to introduction of evidence**

on ground that it was not within issues, but where complaint is sufficient to support judgment, or whether court erred in overruling demurrer to complaint can only be considered on appeal from judgment.—*Bode v. Lee*, 102 Cal. 583, 586, 36 Pac. 936; *Byrbee v. Dewey*, 128 Cal. 322, 325, 60 Pac. 847; *Lambert v. Marcuse*, 137 Cal. 44, 45, 69 Pac. 620. See *Onderdonk v. San Francisco*, 75 Cal. 534, 17 Pac. 678; *Wheeler v. Kassabaum*, 76 Cal. 90, 18 Pac. 119; *Evans v. Paige*, 102 Cal. 132, 36 Pac. 406.

As to presentation of reference to pleadings on hearing of motion for new trial by bill of exceptions, see, ante, § 650 and note par. 38.

50. **Same—Enumeration of depositions, documentary evidence, and phonographic report of testimony** as matters to which reference may be had on hearing motion is not necessarily exclusive, and hence judge may consider evidence which was not taken down by reporter but rests alone in his own recollection.—*Macolmson v. Harris*, 90 Cal. 262, 265, 27 Pac. 206.

51. **Right to be heard—Involves right to get facts properly before court, and to aid and assist the court by argument and authority on questions of law.**—*Eades v. Trowbridge*, 143 Cal. 25, 27, 76 Pac. 714.

52. **Second motion—After motion for new trial in cause has been denied by court, party is not at liberty to make second motion therefor, either on any grounds on which court has once denied it, or upon any grounds which might have been presented in first instance.**—*Egan v. Egan*, 90 Cal. 15, 21, 27 Pac. 22.

§ 661. RECORD ON APPEAL. [Repealed.]

History: Enacted March 11, 1872, founded on § 195 Practice Act, as amended 1866, Stats. 1865-6, p. 845; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 318; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 150, held unconstitutional, see history, § 5 ante; repeal approved April 24, 1915, Stats. and Amdts. 1915, p. 202. In effect August 8, 1915.

RECORD ON APPEAL—ANNOTATION ACADEMIC ONLY.

1. Editorial note—Repeal of section renders academic.
- 2, 3. Affidavits—Can not be considered on appeal from order denying motion.
4. Same—Authentication of affidavits as part of record.
5. Same—Same—Affidavits and documentary matters used on motion to set aside default.
- 6, 7. Same—Same—Affidavit for publication of summons.
8. Same—Same—Affidavit made after motion for new trial is denied.
- 9, 10. Same—Same—Affidavit merely certified to by clerk.
11. Same—Same—Affidavits of misconduct of jury.
12. Same—Same—Affidavit showing surprise.
13. Same—Same—Affidavit showing that appellant was by deed successor in interest to defendant.
- 14-17. Same—Same—Affidavits used on motion for new trial.
18. Same—Same—Same—Presumptions.
19. Same—Same—Same—Same—That respondent had no opportunity to propose bill of exceptions.
20. Appeal on judgment-roll alone.
21. Application for partial distribution—Heard and order granted.
22. Authentication—Of order refusing new trial.
23. Same—Of order dissolving an attachment.
24. Same—Of statement.

25. Bill of exceptions—Can not be amended by way of diminution of record.
26. Same—Regularly settled and filed prior to the hearing.
27. Grounds of motion for new trial—Failure to state in record on appeal.
- 28, 29. Same—Editorial note.
30. Judgment-roll—Must appear in and constitute part of record.
31. Same—In probate proceedings.
32. Same—Motion to strike out portion of answer.
33. Same—Notice of affidavit and motion on which an order striking out demurrer was made.
34. Same—Notices which are not embraced in statement or bill of exceptions.
35. Motion for new trial—Made on affidavits.
36. Same—Made on minutes of court.
37. Same — Same — Previously prepared statement.
38. New trial order.
39. Same—Appeal from.
40. Same—Same—Order granting motion for new trial.
41. Same—Same—Specifications showing grounds—The notice of intention.
42. Same—Newly discovered evidence.
- 43-49. Notice of intention—Not part of record on appeal.
50. Presumption from failure to state grounds argued.
- 51, 52. Record on appeal.
- 53-57. Scope of inquiry on appeal—From order denying new trial.
- 58-62. Same—Court will not be limited to the grounds stated in opinion.
- 63, 64. Same—Matters considered by trial court on motion, only.
65. Same—Order properly granting new trial on any of grounds assigned.
66. Same—Reasons given by court.
- 67-69. Same—Where no bill of exceptions or statement.
- 70, 71. Same—Same—Allowance of costs.
72. Same—Same—Appeal from order refusing to settle bill of exceptions.
73. Same—Same—Error in allowing cross-complaint to be filed.
74. Same—Same—Error in denying motion for new trial.
75. Same—Same—Error in making second order for judgment.
76. Same—Same—Error in rejecting ballots.
77. Same—Same—Errors of law.
78. Same—Same—Failure to find on issue.
- 79, 80. Same—Same—Findings of fact must be taken as absolutely true.
81. Same—Same—Further instructions.
82. Same—Same—Order sustaining motion to set aside judgment.
83. Same—Same—Want of notice of intention to move for new trial.
84. Statement on appeal—Authentication.
- 85, 86. Same—Matters to be included.
- 87, 88. Same—Necessity for.
- 89, 90. Same—Same—Where no errors and particulars were specified in notice of intention.
91. Same—Right to.
- 92, 93. Same—Specifications of errors and objections.
- 94, 95. Same—Sufficiency of.
96. Same—Time for serving.
97. Same—Same—Service of notice of making order denying new trial is not necessary.
98. Unauthenticated papers.

1. **Editorial note**—Repeal of section renders academic all questions relating to the record on appeal from orders granting or denying motions for a new trial, as that record obtained under above section while in force. Under section 956, post, such orders refusing new trials are now reviewable on appeal from the judgment, and the record is prepared as in the case of other intermediate orders, as provided in section 951, post. Independent appeals from orders granting new trials may still be taken, and the records thereof prepared as provided in section 952, post. All annotations drawn from new cases since the repeal of the above section relating to appeals from new-trial orders granting new trials, are collected and arranged under section 952, post, and those denying new trials under section 951, post. This applies, alike, whether the appeal was taken under the old method of appeal, or under the new and alternative method, because in so far as relates to the record on appeal for the review of such orders there is no substantial difference in the two methods of appeal, except that, while a bill of exceptions is not required it is permissible, where the appeal is by the new and alternative method, under section 953a, post. While the question involved is an academic one, as the law now stands, yet the decisions under the former section may still have an interest and possible value for that reason, and to prevent confusion, the decisions under that section as it formerly existed are retained in this place.

2. **Affidavits**—Can not be considered on appeal from order denying motion for new trial where it is not included in statement or appears in the record to have been on the motion, or otherwise presented to the trial court for its consideration.—*Broads v. Mead*, 159 Cal. 768, 116 Pac. 46.

3. **Affidavits** used on motion to vacate judgment of dismissal and for new trial, not incorporated in a bill of exceptions, are not

a part of the record on appeal from the order and can not be considered, even if properly authenticated.—*Estate of Dean*, 149 Cal. 495, 87 Pac. 13.

4. **Same—Authentication of affidavits as part of record.**—On appeal from order heard on affidavits, only proper method of authenticating such affidavits is by bill of exceptions.—*Herrlich v. McDonald*, 80 Cal. 472, 22 Pac. 299; *Somers v. Somers*, 81 Cal. 608, 610, 22 Pac. 967.

As to consideration on appeal of the affidavit on motion for new trial not in record, see note 83 Am. Dec. 443.

5. **Same—Same—Affidavits and documentary matter used on motion to set aside fault** that are not embodied in bill of exceptions or identified or made part of record can not be considered on appeal though printed in transcript.—*Le Fetra v. Gleason*, 101 Cal. 246, 249, 35 Pac. 765.

6. **Same—Same—Affidavit for publication of summons**, not included in bill of exceptions nor certified in any way by certificate of clerk of trial court, can not be considered on appeal from motion to set aside judgment because of defective affidavit and publication of summons.—*People v. Gay*, 141 Cal. 41, 42, 74 Pac., 443.

7. Papers in evidence used at hearing of motion to set aside service of summons by publication must be authenticated by incorporation in bill of exceptions.—*San Diego Sav. Bank v. Goodsell*, 137 Cal. 420, 423, 70 Pac. 299.

8. **Same—Same—Affidavits made after motion for new trial is denied**, and printed in transcript, form no part of record, and can not be considered.—*Williams v. Harter*, 121 Cal. 47, 52, 53 Pac. 405.

9. **Same—Same—Affidavit merely certified to by clerk** does not constitute part of record.—*Melde v. Reynolds*, 120 Cal. 234, 236, 52 Pac. 491.

10. Affidavit certified by clerk as having been used on motion to vacate judgment, can not be considered where it is not contained in any bill of exceptions or otherwise certified as required by law under rule 29 of supreme court.—*People v. Wrin*, 143 Cal. 11, 14, 76 Pac. 646.

11. **Same—Same—Affidavits of misconduct of jury**, which are not incorporated in bill of exceptions as required by rule 29 of supreme court, cannot be considered.—*Cahill v. Baird*, 138 Cal. 691, 692, 72 Pac. 342.

12. **Same—Same—Affidavit showing surprise**, by reason of which certain testimony was not introduced which affidavit was not contained in bill of exceptions, or evidence authenticated as having been used at hearing of motion for new trial, except by certificate of clerk, can not be considered on appeal.—*Cohen v. City of Alameda*, 124 Cal. 504, 508, 57 Pac. 377.

13. **Same—Same—Affidavit showing that appellant was by deed successor in interest**

to defendant to land involved in action is not included in any bill of exceptions, or certified in any way except by certificate of trial court. It can not be considered on appeal under rule 29 of supreme court.—*People v. Gay*, 141 Cal. 41, 42, 74 Pac. 443.

14. **Same—Same—Affidavits used on motion for new trial** can not be authenticated except by being incorporated in bill of exceptions, and whether they are set out in transcript or certified by clerk of superior court they cannot be considered on appeal, not being part of record.—*Skinner v. Horn*, 144 Cal. 278, 279, 77 Pac. 904. See *Von Glahn v. Brennan*, 81 Cal. 261, 264, 22 Pac. 596; *Spreckels v. Spreckels*, 114 Cal. 60, 45 Pac. 1022; *Melde v. Reynolds*, 120 Cal. 234, 237, 52 Pac. 491; *Cahill v. Baird*, 138 Cal. 691, 72 Pac. 342.

15. Under rule 29 of supreme court, affidavits or other evidence taken on hearing of motion for new trial should be incorporated in bill of exceptions, and where there is nothing in judge's certificate to show that affidavit in transcript constituted all evidence taken in reference to irregularity, such irregularity can not be considered.—*Melde v. Reynolds*, 120 Cal. 234, 237, 52 Pac. 491; *Perreira v. City Sav. Bank*, 128 Cal. 45, 47, 60 Pac. 524. See *Shain v. Erkerenkotter*, 88 Cal. 13, 25 Pac. 966.

16. Where affidavits used on motion for new trial were not authenticated by incorporation in bill of exceptions, order granting new trial will not be reviewed.—*Esert v. Glock*, 137 Cal. 683, 70 Pac. 479.

17. Where affidavits printed in transcript are not identified as having been affidavits used on hearing of motion for new trial, nor does transcript show they were filed in court below, they can not be considered on appeal, and court denying motion refers to fact but in such way as but identifies these as affidavits referred to.—*Fish v. Benson*, 71 Cal. 428, 431; *Whipple v. Hopkins*, 119 Cal. 349, 350, 51 Pac. 535.

18. **Same—Same—Same—Presumptions.**—In absence of bill of exceptions showing what was used on motion for new trial, unless record on appeal established contrary, it will be conclusively presumed in favor of order that motion was in particular based on some ground on which affidavits could be used, and such affidavits were in fact used on hearing and were sufficient to justify court in making order appealed from.—*Wyckoff v. Pajaro, V. C. R. Co.*, 146 Cal. 681, 682, 81 Pac. 17. See *Skinner v. Horn*, 144 Cal. 278, 280, 77 Pac. 904.

19. **Same—Same—Same—Same—That respondent had no opportunity to propose bill of exceptions**, inasmuch as decision on his motion for new trial was in his favor, and appellant did not propose any bill of exceptions, does not enable him to have such affidavits considered in absence of their having been incorporated in bill of exceptions.—*Skinner v. Horn*, 144 Cal. 278, 279, 77 Pac. 904.

20. Appeal on judgment-roll alone.—Where the appeal is on the judgment-roll alone and there is no statement or bill of exceptions the appellate court will assume that the evidence is sufficient to support the findings, and that no objections to rulings on the introduction of evidence were made.—*California Portland Cement Co. v. Wentworth Hotel Co.*, 16 Cal. App. 699, 118 Pac. 103, 113.

21. Application for partial distribution.—Heard and ordered granted by the court, but the formal written order therefor is not signed or entered at length in the minutes of the court until some time later, the order would not be "taken" within the meaning of section 437, ante, for the purpose of moving for relief therefrom until the formal order was signed and filed.—*Brownell v. Superior Court*, 157 Cal. 703, 708, 109 Pac. 91.

22. Authentication.—Of order refusing new trial by certificate attached to transcript reciting that true and correct copy of order refusing new trial is therein contained is sufficient.—*Mendocino County v. Peters*, 2 Cal. App. 24, 82 Pac. 1122.

As to unauthenticated papers forming no part of the record on appeal, see par. 98, this note.

23. Same.—Of order dissolving an attachment should be by bill of exceptions under rule 29 of supreme court.—*Smith v. Jordan*, 122 Cal. 68, 69, 54 Pac. 368, 369.

24. Same.—Of statement.—Statement prepared, settled, authenticated by judge, and filed in due time, will be presumed to have been used on hearing of motion for new trial, and hence is entitled to consideration without further identification or proof that it was used on motion for new trial.—*Williams v. Southern Pac. R. Co.*, 2 Cal. Unrep. 613, 9 Pac. 152, 154.

25. Bill of exceptions.—Can not be amended by way of diminution of record, since record authenticated by trial court can not be changed by appellate court.—*Mendocino County v. Peters*, 2 Cal. App. 24, 82 Pac. 1122. See *Bonds v. Hickman*, 29 Cal. 460, 465; *Boston v. Haynes*, 31 Cal. 107; *Satterlee v. Bliss*, 36 Cal. 489, 521; *Boyd v. Burrel*, 60 Cal. 280, 284; *In matter of Lamb*, 95 Cal. 397, 408, 29 Am. St. Rep. 121, 30 Pac. 568.

As to bill of exceptions on motion for new trial, see, ante, § 659, note pars. 153-169.

26. Same.—Regularly settled and filed prior to the hearing of the motion, it is "used" on such motion so as to allow its "use" upon appeal.—*Boin v. Spreckels Sugar Co.*, 155 Cal. 612, 615, 102 Pac. 937.

27. Grounds of motion for new trial.—**Failure to state in record on appeal.**—Where the record on appeal from an order denying a motion for a new trial contained merely the order of the court "wherein it is stated that the motion was presented

upon the grounds set forth in the notice of intention on file, but this notice of intention is not made a part of the record; nor does the order of court show that the motion was presented on the bill of exceptions," and "It is nowhere shown in the record upon what grounds that motion was made," the evidence can not "be reviewed to determine the question as to whether or not it is sufficient to sustain the judgment," and the decision in *Williams v. Hawley*, 144 Cal. 99, 77 Pac. 762, was held in point to the effect that in a case where the record is in the state of that here presented, the order on motion for new trial can not be reviewed.—*Morcom v. Batersky*, 16 Cal. App. 481, 117 Pac. 560.

28. Same.—**Editorial note:** It would be difficult to find a case less in point than that cited. Without pointing out the distinguishing features of the two cases, it is sufficient that when the motion is made on a bill of exceptions the notice need not state the grounds (*Hayne on New Trial*, § 23). It is only when the motion is made on the minutes of the court that it becomes necessary to have the notice of intention set forth the grounds upon which the motion is made (*Hayne* § 23). Nor is the notice any part of the record on appeal (*Hayne* § 14, *Cases and References*). So far as the trial court is concerned, the notice and all other records are before him (*Hayne* § 162). As to the presentation of the bill of exceptions at the hearing, there being no other way, the errors of law could not have been reviewed otherwise. Errors of law can be presented only by statement, bill of exceptions, or minutes of court.—*Code Civ. Proc.*, § 658.

29. Under the circumstances it is difficult to understand why it should not be presumed that the trial court heard and considered the motion on the grounds stated, and denied the same because they were insufficient. It would therefore be the duty of the court, if there were a conflict, to sustain the decision as to insufficiency of the evidence, always bearing in mind that such question as insufficiency of the evidence to sustain the judgment is not recognized as ground for a new trial in any event, or as ground for anything else.

30. Judgment-roll.—Must appear in and constitute part of record in all cases on appeal.—*Thomas v. Anderson*, 55 Cal. 43, 44.

As to what constitutes judgment-roll, see post, § 670, and note.

31. Same.—In probate proceedings, whenever proceedings are so akin to civil action as to necessitate papers which are declared by section 670, post, to constitute judgment-roll in civil action, they may be held to constitute judgment-roll referred to by this section, though there is no judgment-roll, strictly speaking, in such proceedings.—*Estate of Ryer*, 110 Cal. 556, 561, 42 Pac. 1082.

32. Same—Motion to strike out portion of answer not embodied in any statement or bill of exceptions, cannot be considered, it not constituting any part of judgment-roll.—*Sutton v. Stephan*, 101 Cal. 545, 547, 36 Pac. 106.

33. Same—Notice of affidavit and motion on which an order striking out demurrer was made can not be considered, in absence of bill of exceptions, they not being part of judgment-roll.—*Orange Growers' Bank v. Duncan*, 133 Cal. 254, 255, 65 Pac. 469. See *Dimick v. Campbell*, 31 Cal. 238, 240; *Catanich v. Hayes*, 52 Cal. 338.

34. Same—Notices which are not embraced in statement or bill of exceptions can not be considered, as they are no part of judgment-roll.—*Girder v. Beswick*, 69 Cal. 112, 114, 10 Pac. 278.

35. Motion for new trial—Made on affidavits.—Where a motion for a new trial is made on the ground of newly discovered evidence, the affidavits used on the hearing, with a copy of the order made shall constitute the record on appeal therefrom.—*Schroeder v. Mauzy*, 16 Cal. App. 451, 118 Pac. 459.

36. Same—Made on minutes of court.—Where a notice of intention to move for a new trial is not filed in time, and the motion is made on the minutes of the court and denied, a statement of the case attempted to be prepared under former section can not be used on an appeal taken from the judgment.—*Neale v. Morrow*, 174 Cal. 49, 161 Pac. 1165.

37. Same—Same—Previously prepared statement.—Where the notice stated that the motion would be made on a statement and on the minutes, as well as on the other papers provided, and an attempt is made to prepare a statement in advance, the motion may nevertheless be regarded as made on the minutes, and the bill of exceptions treated as a subsequently prepared statement as herein described.—*Estudillo v. Security Loan etc. Co.*, 158 Cal. 71, 109 Pac. 884.

38. New trial order.—Order must be reviewed on the same record upon which the motion was heard and determined and the order made.—*Merced Bank v. Price*, 152 Cal. 699, 93 Pac. 866.

39. Same—Appeal from.—Where, in an action to foreclose a mortgage, the statement on motion for new trial does not embody the note and mortgage sued on, it can not be determined on appeal whether there was a variance therein, as claimed.—*West v. Mears*, 17 Cal. App. 719, 121 Pac. 700.

40. Same—Same—Order granting motion for new trial.—Where the bill of exceptions shows the notice of intention and the grounds of the motion, that the motion came on for hearing, both counsel being present, was submitted, and the motion granted, and a new trial ordered, the record on appeal is

sufficiently complete to authorize a review without considering the motion entered nunc pro tunc by the trial court pending appeal.—*Hovey v. Thorp*, 17 Cal. App. 678, 121 Pac. 303.

41. Same—Same—Specifications showing grounds.—The notice of intention is not required to be incorporated in the statement or bill of exceptions, but it must appear from the record that the grounds presented for appellate review were duly presented on the motion by the notice of intention.—*Great Western Gold Co. v. Chambers*, 153 Cal. 310, 95 Pac. 151.

42. Same—Newly discovered evidence.—Where the record on appeal contains none of the newly discovered evidence the contention that the court erred in denying the motion on the ground of newly discovered evidence can not be considered.—*West v. Mears*, 17 Cal. App. 720, 121 Pac. 700.

As to newly discovered evidence, and the record on appeal, see, ante, § 657, note Part V.

43. Notice of intention—Not part of record on appeal.—Notice of intention to move for new trial is no part of record on appeal.—*Dominguez v. Mascotti*, 74 Cal. 269, 270, 15 Pac. 773; *Pico v. Cohn*, 78 Cal. 384, 20 Pac. 706; *Richardson v. Eureka*, 92 Cal. 64, 28 Pac. 102; *Reclamation Dist. v. Thisby*, 131 Cal. 572, 574, 63 Pac. 918; *Williams v. Hawley*, 144 Cal. 97, 100, 77 Pac. 762; *Power v. Fairbanks*, 146 Cal. 611, 80 Pac. 1075, 1076; *Roberts v. Hall*, 147 Cal. 434, 82 Pac. 66; *Mendocino County v. Peters*, 2 Cal. App. 24, 82 Pac. 1122.

As to notice of intention generally, see, ante, § 659, note pars. 153-169.

44. Notice of intention to move for new trial, which is not embodied in statement or bill of exceptions, and is not certified in any way, forms no part of record, and can not be recognized.—*Leonard v. Shaw*, 114 Cal. 69, 71, 45 Pac. 1012; *Williams v. Hawley*, 144 Cal. 97, 99, 77 Pac. 762; *Skinner v. Horn*, 146 Cal. 62, 63, 79 Pac. 597. See *Hook v. Hall*, 68 Cal. 22, 23, 8 Pac. 596; *Girdner v. Beswick*, 69 Cal. 112, 10 Pac. 278; *Dominguez v. Mascotti*, 74 Cal. 269, 270, 15 Pac. 773.

45. Where notice of intention to move for new trial was inserted in record after statement, but was not incorporated in statement, its insertion was improper, and it forms no part of record.—*Nye v. Marysville & Y. C. St. R. Co.*, 97 Cal. 461, 462, 32 Pac. 530.

46. It need not be incorporated in statement or bill of exceptions therefor.—*Pico v. Cohn*, 78 Cal. 384, 20 Pac. 706; *Southern Pac. R. Co. v. Superior Court*, 105 Cal. 84, 86, 33 Pac. 627; *Reclamation Dist. v. Thisby*, 131 Cal. 572, 574, 63 Pac. 918.

47. Unless opposite party insists that it is insufficient.—*Southern Pac. R. Co. v. Superior Court*, 105 Cal. 84, 86, 33 Pac. 627.

48. Where notice of intention to move for new trial is not authenticated in any man-

ner, and motion is based on minutes of court, record and evidence without any statement or specifications of error in minutes can not be considered on appeal; they must be embodied in statement.—*Sprigg v. Barber*, 122 Cal. 573, 576, 577, 55 Pac. 419.

49. Notice of intention is not a part of record on appeal, and can not be considered for any purpose, when printed in the transcript, unless incorporated in a statement or bill of exceptions.—*Carver v. San Joaquin etc. Co.*, 16 Cal. App. 765, 118 Pac. 92.

50. **Presumption from failure to state grounds argued.**—Ordinarily it would be presumed that the grounds mentioned in the minute order were all argued; but where a statement on appeal, settled two years after the motion was denied, contains a statement referring to the evidence on one point only, the doubt will be resolved in appellant's favor, and in the absence of an objection on the part of the respondent, that will be regarded as the only point argued, notwithstanding the fact that the notice of intention (the motion being made on the minutes) contained voluminous specifications covering the grounds of the motion.—*Forsyth v. Butler*, 152 Cal. 405, 93 Pac. 90.

51. **Record on appeal.**—Where record on appeal from an order refusing new trial contains judgment-roll, bill of exceptions used at hearing, and copy of order refusing new trial, it is sufficient.—*Mendocino County v. Peters*, 2 Cal. App. 24, 82 Pac. 1122.

52. When appeal is taken from an order granting or refusing new trial on minutes of court, statement prepared subsequently to such rule, with judgment-roll, and copy of order, constitute papers on which same are to be heard. Transcripts of these papers are only furnished to appellate court in cases of appeal from such orders.—*Emeric v. Alvarado*, 64 Cal. 529, 594, 2 Pac. 418.

53. **Scope of inquiry on appeal.**—From order denying new trial is limited to order appealed from, and judgment-roll, and affidavit, or bill of exceptions, or statement used on hearing.—*Emeric v. Alvarado*, 64 Cal. 529, 594, 2 Pac. 418.

As to matters inquired into on appeal from order granting or refusing new trial, see, ante, § 659, note Part IV.

54. On appeal from order denying or granting new trial, court will look to statement, or bill of exceptions, and specifications in which decision of court below is not sustained by evidence, and specifications of errors of law, in reviewing case, and to these alone. Where question is presented by such specifications, and is properly saved in statement or bill of exceptions, it will be presumed that questions were properly presented to court below, and passed upon in its ruling on motion for new trial.—*Pico v. Cohn*, 78 Cal. 384, 385, 20 Pac. 706; *Richardson v. Eureka*, 92 Cal. 64, 28 Pac. 102.

55. Order denying motion for nonsuit and findings as not being supported by evidence, and alleged errors at law occurring at trial can only be reviewed on properly authenticated statement or bill of exceptions.—*Wheeler v. Karnes*, 125 Cal. 51, 52, 57 Pac. 893.

56. Where notice of intention to move for new trial stated that motion would be made on bill of exceptions, but none was presented to trial court, or to court on appeal, neither court can review the case as to alleged errors of law, or as to whether verdict was justified by evidence.—*Pereira v. City Sav. Bank*, 128 Cal. 45, 47, 60 Pac. 524. See *Larkin v. Larkin*, 76 Cal. 323, 18 Pac. 396.

57. Where motion for new trial is submitted on minutes of court, no matters other than those appearing on judgment-roll, bill of exceptions, or statement of case, subsequently prepared, can be brought to court on appeal.—*Buckley v. Althorf*, 86 Cal. 643, 645, 25 Pac. 134.

As to matters considered on appeal from order on motion for new trial, see, ante, § 656, and note.

As to necessity of exceptions for review on appeal, see, ante, § 646, and note.

58. **Same.**—Court will not be limited to the ground stated in opinion as ground on which order granting new trial was based.—*Thomas v. California Const. Co.*, 148 Cal. 35, 82 Pac. 367; *Weisser v. Southern Pac. Co.*, 148 Cal. 426, 83 Pac. 439; *Houghton v. Market St. R. Co.*, 1 Cal. App. 576, 82 Pac. 972; *Martin v. Markarian & Co.*, 1 Cal. App. 687, 82 Pac. 1072.

59. Except as to sufficiency of evidence, where it is conflicting.—*Thomas v. California Const. Co.*, 148 Cal. 35, 82 Pac. 367.

60. Where motion for new trial is made on several grounds, and record does not disclose for which one it was granted, order will not be reversed if it could have been granted on any one of grounds assigned.—*Tibbetts Bros. v. Bower*, 121 Cal. 7, 8, 53 Pac. 359.

61. Limitation of ground on which an order granting new trial was made, to insufficiency of notice of mechanics' lien, precludes defendant from contending that order may have been granted on ground that evidence was insufficient to support findings.—*McGinty v. Morgan*, 122 Cal. 103, 105, 54 Pac. 392.

62. On appeal from order granting motion for new trial on ground of misconduct of juror, which order stated that all other grounds of motion had been examined and found insufficient, sufficiency of evidence will not be considered.—*Siemsen v. Oakland S. L. & H. E. R.*, 134 Cal. 494, 498, 66 Pac. 672. See *Kauffman v. Maier*, 94 Cal. 269, 18 L. R. A. 124, 29 Pac. 481.

63. **Same.**—Matters considered by trial court on motion, only can be considered on appeal from order granting motion for new

trial.—*Marsteller v. Leavitt*, 130 Cal. 149, 151, 62 Pac. 384.

64. In determining question as to insufficiency of evidence on appeal from motion for new trial, based on minutes, court is confined to particulars specified in statement, which are presumably particulars presented to, and argued before trial court, on hearing of motion.—*Roberts v. Hall*, 147 Cal. 434, 82 Pac. 66.

65. Same—Order properly granting new trial on any of grounds assigned will not be disturbed.—*Mock v. Los Angeles T. Co.*, 139 Cal. 616, 617, 73 Pac. 455; *Swett v. Gray*, 141 Cal. 63, 69, 74 Pac. 439; *Baldwin v. Napa & S. W. Co.*, 1 Cal. App. 215, 81 Pac. 1037.

66. Same—Reasons given by court for its action on motion for new trial are immaterial, since decisions may have been bad for reasons given, and yet correct for other reasons.—*Power v. Fairbanks*, 146 Cal. 611, 80 Pac. 1075, 1076. See *Skinner v. Horn*, 144 Cal. 278, 77 Pac. 904.

As to opinion by court below as part of record on appeal, see note 15 L. R. A. 798.

67. Same—Where no bill of exceptions or statement is brought up with judgment, appeal must be determined by what is disclosed by judgment-roll alone, that is, pleadings and judgment.—*Johnston v. Callahan*, 146 Cal. 212, 213, 79 Pac. 870.

68. Where party aggrieved desires to rely on insufficiency of evidence or errors not appearing on judgment-roll, he must either secure bill of exceptions under section 649 or section 650 ante, or take proper steps to complete motion for new trial under section 659 ante.—*Jue Fook Sam v. Lord*, 83 Cal. 159, 162, 23 Pac. 225.

69. Where appeal is taken from judgment on judgment-roll, without any bill of exceptions, appellant necessarily admitted that no errors were committed in admission or rejection of evidence.—*Mock v. City of Santa Rosa*, 128 Cal. 330, 340, 58 Pac. 826. See *Poladori v. Newmark*, 116 Cal. 375, 377, 48 Pac. 25.

70. Same—Same—Allowance of costs being within discretion of trial court in equity, such discretion cannot be reviewed without statement or bill of exceptions.—*Faulkner v. Hendy*, 103 Cal. 15, 26, 36 Pac. 1021.

71. Question of costs cannot be considered on appeal where there is no bill of exceptions showing any ruling on such question.—*People v. County of Marin*, 103 Cal. 223, 233, 37 Pac. 203, 26 L. R. A. 659.

72. Same—Same—Appeal from order refusing to settle bill of exceptions, if such order is appealable, must be disregarded in absence of bill of exceptions.—*Williamson v. Joyce*, 137 Cal. 151, 152, 69 Pac. 980.

73. Same—Same—Error in allowing cross-complaint to be filed can not be considered where there is no bill of exceptions in record saving and presenting exceptions

taken to this order.—*Bell v. Southern Pac. R. Co.*, 144 Cal. 560, 562, 77 Pac. 1124.

74. Same—Same—Error in denying motion for new trial without hearing or considering grounds presented and urged in support thereof should be presented by exceptions taken to act of court, and facts embodied and settled in bill of exceptions.—*Williams v. Harter*, 121 Cal. 47, 52, 53 Pac. 405.

75. Same—Same—Error in making second order for judgment without setting aside or modifying first can not be considered on appeal from judgment on judgment-roll alone, but should be presented on bill of exceptions.—*Rooney v. Gray Brothers*, 145 Cal. 753, 758, 79 Pac. 523. See *Paige v. Roeding*, 96 Cal. 388, 391, 31 Pac. 264; *Von Schmidt v. Von Schmidt*, 104 Cal. 547, 550, 38 Pac. 361.

76. Same—Same—Error in rejecting ballots for reason that same were not marked as required by law, cannot be considered on appeal from election contest, unless such ballots are properly authenticated and referred to in bill of exceptions and accompany record, or copy by photograph or other process by which fac simile can be produced is in bill of exceptions.—*Lay v. Parsons*, 104 Cal. 661, 663, 38 Pac. 447.

77. Same—Same—Errors of law committed at trial will not be considered in absence of bill of exceptions.—*Pereira v. City Sav. Bank*, 128 Cal. 45, 47, 60 Pac. 524; *Williams v. Savings & L. Soc.*, 133 Cal. 360, 361, 65 Pac. 822. See *Thompson v. Patterson*, 54 Cal. 542, 546.

78. Same—Same—Failure to find on issue is not ground for reversing judgment otherwise correct, unless it appears by statement or bill of exceptions that evidence was given on such issue.—*Kaiser v. Dalto*, 140 Cal. 167, 170, 73 Pac. 828. See *Himmelman v. Henry*, 84 Cal. 104, 23 Pac. 1098.

79. Same—Same—Findings of fact must be taken as absolutely true where there is no bill of exceptions showing evidence, and it will be presumed that evidence necessary to sustain findings was presented to court below.—*Mock v. City of Santa Rosa*, 126 Cal. 330, 340, 58 Pac. 826; *Williams v. Savings & L. Soc.*, 133 Cal. 360, 361, 65 Pac. 822; *Alexander v. Welcker*, 141 Cal. 302, 303, 74 Pac. 845; *Estate of Brown*, 143 Cal. 450, 454, 77 Pac. 160; *Castagnetto v. Coppertown M. & S. Co.*, 146 Cal. 329, 331, 80 Pac. 74; *Mahoney v. American Land and Water Co.*, 2 Cal. App. 185, 83 Pac. 267.

80. Findings of fact, so far as they are self-consistent, must be accepted as true on appeal where there is no bill of exceptions or statement of evidence.—*Estate of Smith*, 4 Cal. Unrep. 919, 38 Pac. 950.

81. Same—Same—Further instructions given by court to jury, if erroneous, constituted error at law occurring at trial, and should have been excepted to and embodied in bill of exceptions under section 650 ante, and can not be set up in affidavit to be used

on motion for new trial and then embodied in bill of exceptions on ruling of such motion.—*Southern Pac. R. Co. v. Superior Court*, 105 Cal. 84, 86, 38 Pac. 627.

82. Same—Same—Order sustaining motion to set aside judgment was not considered where there was no bill of exceptions, for whether party accepted decision of court in person at time decision was made or is deemed in law to have excepted, he must in statutory or reasonable time after his exception avail himself of right to reduce same to writing and take steps required by law to have bill of exceptions settled and signed by judge.—*Nash v. Harris*, 57 Cal. 242, 243.

83. Same—Same—Want of notice of intention to move for new trial must be affirmatively shown by appellant, and must be included in statement or proper bill of exceptions.—*Kahn v. Wilson*, 120 Cal. 643, 644, 53 Pac. 24.

84. Statement on appeal—Authentication.—Statement in transcript purporting to give motion for new trial on grounds stated in notice, which was authenticated only by clerk's certificate, can not be considered on appeal—it constituting no part of record.—*Sprigg v. Barber*, 122 Cal. 573, 576, 54 Pac. 899, 55 Pac. 419. See *Kent v. Williams*, 146 Cal. 3, 11, 79 Pac. 627, 531.

As to statement generally, see, ante, § 659, note Part III.

As to who shall settle statement made after denial of motion for new trial, based on minutes of court, see, ante, § 653 and note.

85. Same—Matters to be included.—Construed not to require statement on appeal to show that notice of motion for new trial which was made on minutes of court was duly given, or if given as to its contents, presumption being that notice was duly given and that specifications contained in statement conformed to those in notice, and this rule applies equally whether order appealed from was on statement of case or on minutes of court.—*Schneider v. Market St. R. Co.*, 134 Cal. 482, 484, 66 Pac. 734.

86. Requirement that statement shall contain only grounds argued before court for new trial, refers to specifications of grounds mentioned in subdivision 4 of section 659, ante, or such of them as are in fact argued, and when specifications are set out in statement, it will be presumed, without formal statement to that effect, that they were contained in notice and were in fact argued.—*Schneider v. Market St. R. Co.*, 134 Cal. 482, 484, 66 Pac. 734.

87. Same—Necessity for.—Order granting motion for new trial, made in minutes of court, can not be considered on appeal, where no statement was subsequently prepared.—*Oakland G. L. Co. v. Dameron*, 57 Cal. 292, 293.

88. Where no statement upon motion for new trial was prepared after dismissal of

motion, court will not consider such question on appeal.—*Davis v. Hurgren*, 125 Cal. 48, 50, 57 Pac. 684.

89. Same—Same—Where no errors and particulars were specified in notice of intention to move for new trial on minutes of court, no subsequent statement of case was required or authorized.—*Buckley v. Althoff*, 86 Cal. 643, 645, 25 Pac. 134.

90. Where notice of motion for new trial states that it is to be made on minutes of court, but contains no specification of insufficiency of evidence, motion must be denied, and hence contestant in will case is not required to insert any evidence in bill of exceptions settled after order granting motion.—*Estate of Cahill*, 74 Cal. 52, 59, 15 Pac. 364.

91. Same—Right to.—Where motion for new trial is based on minutes of court, and moving party relies on recollection of judge as to evidence and proceeding, he can thereafter secure statement of case, including evidence material to motion, for purpose of appeal from order made on motion, and mandamus will lie to compel settlement of such statement.—*Malcolmson v. Harris*, 90 Cal. 262, 264, 27 Pac. 206.

92. Same—Specifications of errors and objections in statement to be made after hearing on motion for new trial, is not obviated by fact that notice is required to state particular errors and objections relied on.—*Leonard v. Shaw*, 114 Cal. 69, 71, 45 Pac. 1012.

93. Where statement made after motion for new trial had been decided contained no copy of notice of motion for new trial, or its specifications, and no copy of motion itself, and no specification of errors in any form, it is insufficient, and order denying motion will not be reviewed on appeal.—*Sprigg v. Barber*, 122 Cal. 573, 574, 54 Pac. 899, 55 Pac. 419. See *Kent v. Williams*, 146 Cal. 3, 11, 79 Pac. 627, 531.

94. Same—Sufficiency of.—Where document, purporting to be statement made subsequently to motion for new trial, though signed by attorneys and filed by clerk, does not appear to have been settled or authenticated by judge, and does not contain any specifications of error, or purport to show what grounds were argued before court on motion for new trial, order denying new trial is not subject to review.—*Kent v. Williams*, 146 Cal. 3, 11, 79 Pac. 627, 531.

95. Better practice, in stating specifications of errors and objections in statement to be made after hearing of motion for new trial, is to make formal statement of causes relied on and argued at hearing, and not merely to insert copy of notice of motion containing such statement, as it is only formal objection stated in notice and argued at hearing of motion that is entitled to be included in statement.—*Leonard v. Shaw*, 114 Cal. 69, 71, 45 Pac. 1012.

96. **Same—Time for serving.**—Where statement in case made subsequent to order denying motion for new trial was not served until after expiration of last extension of time, there was no statement which court could be called upon to settle, or which could be used on appeal.—*Buckley v. Althorf*, 86 Cal. 643, 645, 25 Pac. 134.

97. **Same—Same—Service of notice of making order denying new trial is not necessary,** and hence time in which to prepare statement on case begins to run from mak-

ing of order.—*Vinson v. Los Angeles Pac. R. Co.*, 147 Cal. 479, 82 Pac. 53.

98. **Unauthenticated papers** in transcript in which there is no bill of exceptions constitute no part of record which can be considered on appeal.—*Nash v. Harris*, 57 Cal. 242, 244.

As to authentication of affidavits on appeal, see pars. 4-19, this note.

As to authentication of papers and orders on appeal, see pars. 22-24, this note.

§ 662. VACATION OF JUDGMENT. [Repealed.]

History: Enactment approved March 24, 1874, Code Amdts. 1873-4, p. 319; repeal approved April 24, 1915, Stats. and Amdts. 1915, p. 202. In effect August 8, 1915.

VACATION OF JUDGMENT—REPEALED SECTION.

1. Editorial note—Repeal of section, as to effect of.
2. Action of unlawful detainer.
- 3, 4. Construction of section—As limiting power of court—To grant new trial of its own motion.
5. Findings directly contrary to verdict—Has effect to vacate and set aside verdict.
6. Frivolous appeal.
7. Instructions disregarded—Must be as to some matter, etc.
- 8, 9. Motion by counsel—Made without notice.
10. Order of court's own motion vacating verdict—Equivalent of order granting new trial.
11. Plain disregard of evidence—Must be made to appear in order.
12. Recital in order granting new trial—That the same was granted by the court of its own motion.
13. Time for order.
14. Two sets of circumstances under which court, of its own motion, may vacate.
- 15, 16. Verdict not supported by evidence—And contrary to instructions.
17. Same—Influence of passion or prejudice.

1. **Editorial note—Repeal of section** simply leaves the power of the court to vacate a judgment under the following two sections, and the power conferred by section 473, ante, under which latter section numerous decisions are collected in the annotation. For reasons assigned in annotation to preceding section, the decisions made under the former section 662 are retained in this place.

2. **Action of unlawful detainer** where uncontradicted evidence showed that ten months' rent was due and unpaid, the court is justified in, on its own motion, setting aside a verdict for the defendant.—*Occiden-*

tal Real Estate Co. v. Gantner, 7 Cal. App. 727, 730, 95 Pac. 1042.

3. **Construction of section—As limiting power of court—To grant new trial of its own motion** to cases where there has been, first, plain disregard by jury as to evidence to satisfy court that verdict was rendered under disapprehension, or under influence of passion and prejudice, or, second, that there has been such plain disregard of instructions as to satisfy court that verdict was so rendered.—*Townley v. Adams*, 118 Cal. 382, 383, 50 Pac. 550.

4. With section 657, ante, limits power of court in granting new trial.—*Townley v. Adams*, 118 Cal. 382, 383, 50 Pac. 550.

5. **Findings directly contrary to verdict—Has effect to vacate and set aside verdict,** and it is immaterial whether action was had by reason of defects and irregularities in verdict, or whether evidence was such as to indicate that it was rendered through passion or prejudice, and hence new trial should have been ordered.—*Montgomery v. Sayre*, 91 Cal. 206, 212, 27 Pac. 648.

6. **Frivolous appeal.**—In view of provisions of this section, appeal taken on ground that trial courts have no authority to set aside verdict on ground of prejudice of jury, is frivolous, and will be affirmed with damages as part of costs.—*Footte v. Hayes*, 4 Cal. Unrep. 976, 39 Pac. 601.

7. **Instructions disregarded—Must be as to some matter,** or of such nature, that jury grossly disobeyed judge, and where it is not pointed out that any positive instruction was disregarded, new trial is not authorized under this section.—*Townley v. Adams*, 118 Cal. 382, 50 Pac. 550; *Mizener v. Bradbury*, 128 Cal. 340, 344, 60 Pac. 928; *Eades v. Trowbridge*, 143 Cal. 25, 28, 76 Pac. 714.

8. **Motion by counsel—Made without notice** to vacate and set aside verdict and grant new trial on ground that there has been such plain disregard of evidence in case as to satisfy court that verdict was rendered under influence of passion and prejudice, and on further ground that there had been such plain disregard by jury of instructions, as to satisfy court that ver-

dict was rendered under misapprehension of such instructions, construed to be merely calling attention of court to right of court to order new trial on its own motion, and hence order denying such motion was not res judicata as to another motion for new trial on grounds authorized by section 657, ante.—*Anglo-Nevada Assur. Corp. v. Ross*, 123 Cal. 520, 521, 56 Pac. 335.

9. Where it appears on bill of exceptions that order setting aside verdict was not made at time of rendition of verdict, nor was it made on court's own motion, but on formal written application, and opinion of court shows grounds on which it acted, verdict was not set aside under this section on grounds that jury acted under misapprehension of instruction or under influence of passion or prejudice.—*Estate of Cahill*, 74 Cal. 52, 59, 15 Pac. 364.

10. Order of court's own motion vacating verdict—Equivalent of order granting new trial, and being in legal discretion of court will not be interfered with on appeal unless circumstances of case and principles of law applicable to them show that there has been an abuse of discretion.—*Hynes v. Nelson*, 5 Cal. Unrep. 746, 2 Pac. 36.

11. Plain disregard of evidence.—Must be made to appear in order to justify court setting aside verdict of its own motion, and this does not mean that court thinks verdict not correct conclusion from evidence, but means that rule should apply only where jury plainly, palpably, and grossly disregard evidence.—*Eades v. Trowbridge*, 143 Cal. 25, 28, 76 Pac. 714. See *Townley v. Adams*, 118 Cal. 382, 50 Pac. 550; *Mizener v. Bradbury*, 128 Cal. 340, 343, 344, 60 Pac. 928.

12. Recital in order granting new trial—That the same was granted by the court of its own motion is conclusive. The fact that the attorney for the party in whose favor the order was, informally called the atten-

tion of the court to its power to grant a new trial of its own motion and suggested that the case was a proper one for the exercise of such power does not render the order one made upon motion of that party.—*Occidental Real Estate Co. v. Gantner*, 7 Cal. App. 727, 729, 95 Pac. 1042.

13. Time for order.—Question as to whether court can set aside verdict and grant new trial of its own motion, after rendition of judgment, and time for motion for new trial has expired, though an order had been made granting stay of proceedings until further order of court, raised, but not decided.—*Mizener v. Bradbury*, 128 Cal. 340, 343, 60 Pac. 928. See *Estate of Cahill*, 74 Cal. 52, 59, 15 Pac. 364.

14. Two sets of circumstances under which the court, of its own motion, may vacate a verdict: (1) Where there has been a plain and palpable disregard of the instructions; and (2) where there has been a plain and palpable disregard of the evidence.—*Occidental Real Estate Co. v. Gantner*, 7 Cal. App. 727, 730, 95 Pac. 1042.

15. Verdict not supported by evidence.—And contrary to instructions of court given to jury, is good ground for setting verdict aside.—*Hynes v. Nelson*, 5 Cal. Unrep. 746, 2 Pac. 36.

16. Order setting aside verdict, and granting new trial, on ground that evidence does not justify verdict as rendered; that said verdict is against law and evidence, made by court on its own motion, is unauthorized and void.—*Townley v. Adams*, 118 Cal. 382, 383, 50 Pac. 550.

17. Same.—Influence of passion or prejudice.—Order setting aside verdict on ground that verdict is in violation of instructions and contrary to evidence, is unauthorized by this section, where there is no claim that verdict was rendered under influence of passion or prejudice.—*Eades v. Trowbridge*, 143 Cal. 25, 27, 76 Pac. 714.

§ 663. VACATION OF JUDGMENT. A judgment or decree of a superior court, when based upon findings of fact made by the court, or the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of such party and entitling him to a different judgment:

1. **Incorrect or erroneous conclusions of law** not consistent with or not supported by the findings of fact; and in such case when the judgment is set aside, the conclusions of law shall be amended and corrected.

2. **A judgment or decree not consistent with or not supported by the special verdict.**

History: Enacted March 24, 1874, Code Amdts. 1873-4, p. 319; amendment approved March 9, 1878, Code Amdts. 1877-8, p. 100; repeal approved April 15, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 64; enactment of present section approved March 3, 1897, Stats. and Amdts. 1897, p. 58.

VACATION OF JUDGMENT.

1. Competency of motion under this section—Does not extend or postpone the time.
2. Construction of section—As directory only.
- 3-5. Same—As not permitting amendment or change.
6. Same—As to purpose of section.
7. Same—With section 663a, post, not to repeal or in any way modify section 963, post.
- 8, 9. Erroneous conclusion of law from facts found.
10. Same—Unavailable, when.
11. Error in admission of evidence—Finding adverse to plaintiff.
12. Failure to present evidence—Concession that findings are correct.
13. Same — Same — Findings construed against appellant.
14. General verdict for plaintiff—Notice of motion for new trial—Vacating judgment and directing judgment to be entered.
15. Inconsistency of judgment with findings—Incorrect conclusions of law—Vacation of judgment.
16. Judgment of superior court—Vacating, when.
17. Motion for vacation of judgment will not lie, when.
18. Motion to amend conclusions of law—And vacate that part of judgment disallowing costs.
19. Motion to amend judgment—Waiver by failure to make motion.
20. Motion to set aside judgment—Extension of time for appeal.
21. Objection that findings do not support judgment.
22. Order denying new trial—Appeal from—Review of conclusions of law.
23. Order made—Upon motion for change of conclusions of law.
- 24-26. Same—Upon motion herein provided for.
27. Proceeding authorized by this section—Has absolutely no connection with an appeal.
28. Review of conclusions of law.
29. Right to have evidence reviewed.
30. Sufficiency of findings to support judgment.
31. Vacation as to one defendant.
- 32-34. Where conclusions of law were not authorized by finding of fact.

See, also, note 663a, post.

1. Competency of motion under this section—Does not extend or postpone the time for the preparation and filing of the transcript on an appeal from the judgment.—*Modoc Co-operative Assoc. v. Porter*, 11 Cal. App. 270, 274, 104 Pac. 710.

2. Construction of section—As directory only.—The provisions of the above section requiring the court, on setting aside a judgment, to correct findings, is directory and not mandatory, and where a judgment for the plaintiff was properly set aside, he can not complain that the findings were not correct.—*Wilkins v. Grant*, — Cal. App. —, 189 Pac. 319, following the doctrine in *Shain v. Forbes*, 82 Cal. 577, 23 Pac. 198.

3. Same—As not permitting amendment or change.—A motion to amend or to change any finding of fact is unauthorized and can not be granted. Neither this nor the following section authorize it. The language of these sections is entirely free from ambiguity and leaves no room for doubt as to what is authorized thereby. As applied to a judgment based upon findings of fact made by a trial court, the sections simply authorize a motion to vacate the judgment to make it and the conclusions of law consistent with and supported by the findings of fact, and do not authorize any change in any finding of fact. This section simply authorizes the substitution of the judgment that should have been given as a matter of law upon the findings of fact in a case where the judgment already given is an incorrect conclusion for such findings. The court can not change any finding of fact.—*Hole v. Takekawa*, 165 Cal. 372, 132 Pac. 445.

4. Where the findings of the court, fully supported by the evidence, sustain the judgment, the motion under this section is properly denied.—*Sprague Canning Mach. Co. v. Western Ranching Corp.*, 29 Cal. App. 374, 155 Pac. 1017.

5. Whether a party by first taking an appeal from the judgment deprives himself of his recourse to the remedy herein is raised but not decided.—*Sprague Canning Mach. Co. v. Western Ranching Corp.*, 29 Cal. App. 374, 155 Pac. 1017.

6. Same—As to purpose of section being to furnish a more speedy and summary method for attacking a judgment unsupported by the findings than by an appeal therefrom, but the remedy is merely cumulative and was not designed to supersede the remedy by appeal.—*Modoc Co-operative Assoc. v. Porter*, 11 Cal. App. 270, 274, 104 Pac. 710.

7. Same—With section 663a, post, not to repeal or in any way modify section 963, post, providing for appeal from final judgment, but intended to provide remedy in addition thereto.—*Patch v. Miller*, 125 Cal. 240, 241, 57 Pac. 986.

8. Erroneous conclusion of law from the facts found, while held by the earlier cases a decision against law for which a new trial would be granted, it is now held otherwise, such a matter being said to be reviewable properly on a motion under above section and section 663a, post.—*Elizalde v. Murphy*, 11 Cal. App. 32, 39, 103 Pac. 904.

As to objection that findings do not support judgment, see pars. 21, 32, this note.

9. Earlier cases held an erroneous conclusion of law from the facts found was a decision against law for which a new trial might be granted, but it is now held otherwise and that such a matter is reviewable properly on a motion under above section, or by appeal from the judgment.—*Elizalde v. Murphy*, 11 Cal. App. 32, 39, 103 Pac. 904.

10. Same—Unavailable when.—The contention of a litigant on an appeal that the conclusions of law by the trial court are not supported by the findings will not be available on an appeal from an order denying a motion for new trial, where there have been no proceedings under the provisions of the above and the following section.—*Cameron v. Ah Quong*, 175 Cal. 377, 165 Pac. 961, following the doctrine in *Shafer v. Lacy*, 121 Cal. 574, 154 Pac. 72; *Patch v. Miller*, 125 Cal. 240, 57 Pac. 986; *Swift v. Occidental Min. & Petroleum Co.*, 141 Cal. 161, 74 Pac. 700.

11. Error in admission of evidence.—Finding adverse to plaintiff.—In a case in which the court admitted evidences on the assumption that the defendant's answer would be admitted, and passed on the assumption of certain findings which were adverse to the plaintiff the defendant can not on that ground move for a vacation of the judgment, under the provisions of the above section, and the entering of a new trial on the ground of the admission of the evidence under such an assumption it being admitted by the defendant that the findings objected to were adverse to the plaintiff.—*Marr v. City of Glendale*, — Cal. App. —, 179 Pac. 712.

12. Failure to present evidence.—Concession that findings are correct.—On appeal from an order denying a motion to vacate a judgment under authority of the above section, the failure of the appellant to present any of the evidence is a concession that the findings are correct and responsive to the issues.—*Spotton v. Dyer*, 42 Cal. App. 585, 184 Pac. 23.

13. Same—Same—Findings construed against appellant.—On such an appeal the findings are to be construed most strongly in favor of the respondent, and uncertainties are to be resolved against the appellant.—*Spotton v. Dyer*, 42 Cal. App. 585, 184 Pac. 23.

14. General verdict for plaintiff.—Notice of motion for new trial.—Vacating judgment and directing judgment to be entered.—In a case in which an action is brought against a city and others charged with having constructed and having maintained a ditch or waterway through and by means of which said city and other defendants wrongfully and without right diverted storm waters upon plaintiff's land to his damage in a named sum and the jury returned a general verdict in favor of the plaintiff for the amount claimed against the defendant city alone; and the clerk thereupon, of his own motion, entered judg-

ment for the plaintiff against the city on such general verdict, within ten days thereafter the defendant city served and filed its notice of intention to move for a new trial, and notice of a judgment for defendant on special findings of fact, under the provisions of subdivision 2 of the above section, and the court without passing upon either of said motions ordered findings and judgment for the defendant. From the judgment entered on this order the plaintiff appealed and served notice upon the defendant city alone and on appeal it was held that this was an insufficient service under the provisions of section 659, ante, and the interests of the other defendants having been disposed of on the first judgment and having no further interest in the case and not being "adverse parties" under the provisions of the code.—*Farrell v. City of Ontario*, — Cal. App. —, 194 Pac. 69.

15. Inconsistency of judgment with findings.—Incorrect conclusions of law.—Vacation of judgment.—The superior court has jurisdiction on motion under the above section and the succeeding section to vacate a judgment as entered, where the judgment is inconsistent with and not supported by the findings of fact, and may direct the entry of a proper judgment according to the facts, and where the conclusions of law also are incorrect or erroneous and not consistent with the findings of fact.—*Potter v. Pigg*, 35 Cal. App. 707, 170 Pac. 1066, following the doctrine in *Tyrrell v. Baldwin*, 67 Cal. 1, 6 Pac. 867; *Shafer v. Lacy*, 121 Cal. 574, 54 Pac. 72; *Dahlberg v. Grisch*, 157 Cal. 324, 107 Pac. 616.

16. Judgment of the superior court.—Vacated, when incorrect or erroneous conclusions of law not consistent with, or not supported by, the findings of fact.—*Tyrrell v. Baldwin*, 67 Cal. 1, 6 Pac. 867; *Colton L. & W. Co. v. Swartz*, 99 Cal. 278, 33 Pac. 878; *Galvin v. Palmer*, 134 Cal. 426, 66 Pac. 572; *Ballerino v. Superior Court*, 2 Cal. App. 759, 84 Pac. 275.

17. Motion for vacation of judgment will not lie, when.—After a defendant has moved for a new trial because of the insufficiency of the evidence to sustain the verdict and had his motion overruled, he can not move to set aside the judgment on the same ground.—*Treat v. Treat*, 170 Cal. 337, 150 Pac. 57.

18. Motion to amend conclusions of law.—And vacate that part of judgment disallowing costs, and to enter judgment for costs, is authorized by this section.—*Gibson v. Hammang*, 145 Cal. 454, 456, 78 Pac. 953.

19. Motion to amend judgment.—Waiver by failure to make motion.—The objection that the findings do not support the judgment is not waived by the failure of the party to proceed under the authority of this and the following section to have a proper judgment entered.—*Worth v. Worth*, 155 Cal. 603, 102 Pac. 663.

20. Motion to set aside judgment—Extension of time for appeal.—Under the provisions of the above section the time for appeal from a judgment is limited to thirty days after entry in the trial court of the order of a denial of a new trial and the pendency of a motion to set aside a judgment and enter a different judgment on the findings of fact under the above section and section 663a, post, does not extend the time within which an appeal from the judgment may be taken, such motion not being a proceeding on motion for a new trial, and a separate appeal being given by law from an order made under the provisions of the above section and section 663a, post.—*Spotton v. Superior Court*, 177 Cal. 719, 171 Pac. 801.

21. Objection that findings do not support judgment is not waived by failure to proceed in the lower court by motion under this section.—*Worth v. Worth*, 155 Cal. 599, 603, 102 Pac. 663.

As to erroneous conclusions of law from the facts found, see pars. 8, 32, this note.

22. Order denying new trial—Appeal from—Review of conclusions of law.—In an application from an order denying a new trial the conclusions of law of the trial court are merged in and superseded by the judgment, and, even if necessary thereto, they can not be reviewed on appeal from the judgment, or from an order made under the above section and the following section.—*Keller v. Cliver*, 34 Cal. App. 390, 167 Pac. 551, following the rule in *Redlands Electric Light & Power Co.*, 155 Cal. 323, 17 Ann. Cas. 1222, 22 L. R. A. (N. S.) 382, 100 Pac. 1082.

23. Order made—Upon motion for change of conclusions of law.—This section makes express provision for an appeal from such order only when the motion is granted. When the order is a denial of the motion it may be reviewed on appeal as an order after judgment.—*Condon v. Donohue*, 160 Cal. 760, 118 Pac. 113.

24. Same—Upon motion herein provided for is a special order after final judgment, from which under the provisions of above section an appeal may be taken.—*Bond v. United Railroads of San Francisco*, 159 Cal. 270, 113 Pac. 366.

25. Not necessary to move under this section in order to review evidence on appeal from order denying motion for new trial. Whether necessary to review evidence on appeal from judgment not decided.—*J. F. Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 586, 98 Pac. 1027.

26. This section authorizes simply the substitution of the judgment which should have been given as a matter of law upon the findings of fact in a case where the judgment already given is an incorrect conclusion from such findings. The court can

not on such a motion in any way change any finding of fact. The sole remedy of a trial court of a party who is aggrieved by any finding of fact is a motion for a new trial.—*Dahlberg v. Girsch*, 157 Cal. 324, 326, 327, 107 Pac. 616.

27. Proceeding authorized by this section—Has absolutely no connection with an appeal from a judgment, and in no manner or degree affects or controls the latter proceeding. The two remedies are distinct and independent of each other, and it was not the intention of the legislature to by this section repeal or in any way modify section 963, post, providing for an appeal from a final judgment.—*Modoc Co-operative Assoc. v. Porter*, 11 Cal. App. 270, 274, 104 Pac. 710.

28. Review of conclusions of law.—The conclusions of law are merged in the judgment, and, even if necessary thereto, can be reviewed on appeal from the judgment, or from an order made under the provisions of this section, and can not be reviewed on an appeal from a new trial order, upon specifications that they are erroneous.—*Mentone Irr. Co. v. Redlands Electric Light & P. Co.*, 155 Cal. 323, 17 Ann. Cas. 1222, 22 L. R. A. (N. S.) 382, 100 Pac. 1082.

29. Right to have evidence reviewed upon appeal from order denying motion for new trial is not affected by failure to move under this section.—*J. F. Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 586, 98 Pac. 1027.

30. Sufficiency of findings to support judgment.—The right of an appellant to have the sufficiency of the evidence to sustain the findings reviewed on an appeal from a new trial order, is not affected by the failure on his part to move to set aside the judgment under this section.—*Parkinson Co. v. Building Trades Council*, 154 Cal. 586, 98 Pac. 1027.

31. Vacation as to one defendant.—If a judgment be given against several defendants who have been sued as joint tortfeasors, the judgment, if found to be erroneous as to any one of the defendants, may be vacated as to that one only, and be continued in full force and effect as to the remaining defendants who have not appealed.—*Fearon v. Fodera*, 169 Cal. 370, Ann. Cas. 1916D, 312, 148 Pac. 200.

32. Where conclusions of law were not authorized by finding of fact, plaintiff's motion to vacate judgment and enter up different judgment was authorized by this section.—*Shafer v. Lacy*, 121 Cal. 574, 578, 54 Pac. 72; *Swift v. Occidental M. & P. Co.*, 141 Cal. 161, 165, 74 Pac. 700; *Sharp v. Bowle*, 142 Cal. 462, 468, 76 Pac. 62.

See pars. 8, 21, this note.

33. Question of law as to whether or not judgment is correct, legal conclusions from facts found might be raised and determined

by motion in court below under this section.
—*Fountain W. Co. v. Dougherty*, 134 Cal. 376, 377, 66 Pac. 316.

34. Where conclusion that the plaintiff is entitled to judgment is in conflict with

findings, remedy is not new trial of an issue which has been correctly decided, but motion under this section, or an appeal from judgment.—*Sharp v. Bowles*, 142 Cal. 462, 468, 76 Pac. 62.

§ 663a. NOTICE OF INTENTION TO MOVE. WHEN TO BE GIVEN, AND WHAT TO CONTAIN. The party intending to make the motion mentioned in the last section must, within ten days after notice of the entry of judgment, serve upon the adverse party and file with the clerk of the court a notice of his intention, designating the grounds upon which, and the time at which the motion will be made, and specifying the particulars in which the conclusions of law are not consistent with the finding of facts, or in which the judgment or decree is not consistent with the special verdict.

[Time for making motion.] The time designated for the making of the motion must not be more than sixty days from the time of the service of the notice. An order of the court granting such motion may be reviewed on appeal in the same manner as a special order made after final judgment and a bill of exceptions to be used on such appeal may be prepared as provided in section six hundred and forty-nine.

History: Enactment approved as § 663½, March 3, 1897, Stats. and Amdts. 1897, p. 59; re-numbering § 663a and amendment approved March 20, 1907, Stats. and Amdts. 1907, p. 719, Kerr's Stats. and Amdts. 1906-7, p. 452; April 24, 1915, Stats. and Amdts. 1915, p. 203. In effect August 8, 1915.

**NOTICE OF INTENTION TO MOVE TO
VACATE JUDGMENT—SERVICE
AND CONTENTS OF.**

1, 2. Appeal provided for in section.

3. Insufficiency of findings—To support conclusions or judgment.

4-10. Notice of intention—Sufficiency of.

11. Same—Amendment of.

12. Same—When to be given.

13. Review of question as to whether findings support judgment.

14. Time of making motion.

See, ante, § 663 and note.

As to limitation of section 939, post, to cases where new trial proceedings have been regularly commenced, see, post, § 939 and note.

1. Appeal provided for in section was intended either to authorize a review from the order on appeal from the judgment afterward made in pursuance of it or to authorize a direct appeal from the order itself. In either case it should not be construed so as to affect the right given by section 963, ante, to appeal from an order denying the motion as from an order made after judgment.—*Bond v. United Railroads of San Francisco*, 159 Cal. 270, 273, 113 Pac. 266.

2. This section makes no provision for an appeal from an order denying the motion, for the obvious reason that on an appeal from the judgment, the very same proposition may be reviewed and a re-

versal could be ordered and the court below directed to enter the judgment which the findings alone justify.—*Modoc Co-operative Assoc. v. Porter*, 11 Cal. App. 270, 274, 104 Pac. 710.

3. Insufficiency of findings—To support conclusions or judgment is not reviewable on appeal from a new trial order, and is reviewable on appeal from the judgment, as the court holds, but not exclusively so, in view of the provision of this section, and the special procedure provided here and in the preceding section.—*Cargnani v. Cargnani*, 16 Cal. App. 99, 116 Pac. 306.

4. Notice of intention—Sufficiency of.—A notice of intention to move for a new trial which states an intention to move to vacate the judgment instead of the decision is sufficient where it is also stated to be the intention to move for a new trial.—*Hoover v. Wolfe*, 167 Cal. 337, 139 Pac. 794.

5. An order denying a motion for a new trial will be affirmed on appeal where the notice of intention to move for the new trial is not served upon all the interested parties, and the right to raise the question of want of such service is not waived by the failure to present the point in the lower court, for such failure involves a jurisdictional defect which is available at any time and in any court in which the cause may be pending.—*Marshall & Stearns Co. v. Deneen Bldg. Co.*, 169 Cal. 229, 146 Pac. 684.

6. Where in an action for the foreclosure of a lien for materials furnished in

the construction of a building, the right to a foreclosure is denied and a money judgment rendered against the contractor, and notice of intention to move for a new trial is not served upon the persons who are alleged in the complaint to be the owners of the property and to have contracted with the contractor to erect the building, but only upon certain persons who intervened as owners, and the motion for a new trial is denied, such order must be affirmed on appeal, notwithstanding such unserved parties did not appear at the trial.—*Marshall & Stearns Co. v. Deneen Bldg. Co.*, 169 Cal. 229, 146 Pac. 684.

7. Where a judgment entered upon motion of the defendant after verdict of the jury is reversed upon appeal and the trial court directed to enter judgment upon the verdict, the time for filing and serving the notice of intention to move for a new trial runs from notice of the entry of the latter judgment, and the fact that the first judgment, like the second, was in favor of the plaintiff, although for a smaller sum, does not change the rule.—*Bond v. United Railroads*, 169 Cal. 273, 146 Pac. 688.

8. A notice of intention to move for a new trial stating an intention to move to vacate the judgment and to grant a new trial, instead of an intention to vacate the decision, is sufficient.—*Fearon v. Fodera*, 169 Cal. 370, Ann. Cas. 1916D, 312, 403, 148 Pac. 200.

9. The alternative method of appeal provided by above section does not relieve the moving party for a new trial from the necessity of specifying in his notice of intention the particulars in which he intends to urge that during the trial the court has erred in matters of law.—*Strange v. Strange*, 23 Cal. App. 281, 137 Pac. 1104.

10. The trial court is without power, under section 473, ante, to relieve a party

from the consequences of his failure to serve and file his notice of intention to move for a new trial within the time allowed by law.—*Coleman v. Coleman*, 23 Cal. App. 423, 138 Pac. 362.

11. **Same—Amendment of.**—The moving party for a new trial is not entitled, thirty-three days after receiving notice of the entry of judgment and twenty-one days after filing and serving his notice of intention to move for a new trial, to amend his notice of intention by supplying specifications of the particulars in which the evidence is alleged to be insufficient, and also specifications of error of law upon which he will rely, both of which specifications were entirely omitted from his original notice.—*Strange v. Strange*, 23 Cal. App. 281, 137 Pac. 1104.

12. **Same—When to be given.**—In the case of the amendment of a judgment in the absence of a showing by the record that any notice of entry of judgment it will be presumed that the notice to amend was given within the time prescribed by the above section and that the court had jurisdiction to make the amendment complained of.—*Israel v. Bryan*, — Cal. App. —, 197 Pac. 121.

13. **Review of question as to whether findings support judgment.**—While the question can not be considered by new trial proceeding, and is properly reviewable on appeal from the judgment, as the court states, this later method of review is not exclusive. It may be reviewed by a proceeding under this and preceding section.—*Bennett v. Potter*, 16 Cal. App. 185, 116 Pac. 681.

14. **Time of making motion.**—A motion for a new trial is sufficiently made by the reading to the court of the notice of intention at the time fixed for the hearing of the motion.—*Taylor v. Northern Elec. R. Co.*, 26 Cal. App. 765, 148 Pac. 543.

CHAPTER VIII.

THE MANNER OF GIVING AND ENTERING JUDGMENT.

- § 664. Judgment to be entered in twenty-four hours, etc.
- § 665. Case may be brought before the court for argument.
- § 666. When counter-claim established exceeds plaintiff's demand.
- § 667. In replevin, judgment to be in the alternative, and with damages.
- § 668. Judgment-book to be kept by the clerk.
- § 669. If a party die after verdict, judgment may be entered, but not to be a lien.
- § 670. Judgment-roll, what to contain.
- § 671. Judgment-lien, when it begins and when it expires.
- § 671a. Filing judgments of United States courts.
- § 672. Docket, how kept, and what to contain.
- § 673. Docket to be open for inspection without charge.
- § 674. Transcript to be filed in any county, and judgment to become a lien there.
- § 675. Satisfaction of a judgment, how made.
- § 675a. Satisfaction of mortgage recorded.
- § 676. Undertaking in action to set aside transfer of property.
- § 677. Conditions of undertaking and amount of.
- § 677½. Filing and service of undertaking.
- § 678. Exceptions to sureties.
- § 678½. Justification of sureties. Approval and disapproval of bond.
- § 679. Objection because estimated value in bond less than market value. New undertaking.
- § 679½. Justification of sureties.
- § 680. When undertaking becomes effective.
- § 680½. Judgment against sureties on bond, when.

§ 664. JUDGMENT TO BE ENTERED IN TWENTY-FOUR HOURS, ETC.

When trial by jury has been had, judgment must be entered by the clerk, in conformity to the verdict, within twenty-four hours after the rendition of the verdict, unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings. If the trial has been had by the court, judgment must be entered by the clerk, in conformity to the decision of the court, immediately upon the filing of such decision. In no case is a judgment effectual for any purpose until so entered.

History: Enacted March 11, 1872, re-enactment of § 197 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 150, act held unconstitutional, see history, § 5 ante; amendment approved March 20, 1907, Stats. and Amdts. 1907, p. 719, Kerr's Stats. and Amdts. 1906-7, p. 453.

JUDGMENT—ENTRY OF.

- 1. As to whether must be several.
- 2. Action to quiet title to water-rights—Decree by stipulation.
- 3, 4. Amendment of findings and judgment.
- 5, 6. Same—Nunc pro tunc.
- 7. Authentication—Judgment is not required to be signed by judge.
- 8-13. Collateral attack—As to generally.
- 14. Community property—Judgment regarding.
- 15, 16. Correction of mistake in judgment.
- 17. Date of judgment.
- 18. Decree void as to joint contractor.
- 19-31. Default judgment—As to generally.
- 32-53. Opening or setting aside default—Generally.
- 54-57. Directory—Provisions of section are.
- 58. Same—Provision for immediate entry of judgment on return of verdict.
- 59, 60. Effect of recital of service of summons.
- 61, 62. "Entry of judgment"—And "rendition of judgment"—As used in code.
- 63, 64. Same—Entry of judgment—In general.
- 65. Same—Same—Certificate of clerk of court of sister state.
- 66-73. Same—Same—Editorial note.
- 74. Same—Same—Entry nunc pro tunc.
- 75. Same—Same—Signature of judge.
- 76. Same—Same—Sufficiency of.
- 77. Equity cases—Where issues are submitted to jury are not included in section.
- 78, 79. Same—Where verdict decisive.

- 80-85. Same—Same—Finality and conclusiveness—*Res judicata*.
- 86. Heirship—Proceedings to determine.
- 87. Interest—Provision that judgment shall bear.
- 88. Same—Before, not after, verdict included.
- 89-92. Interpretation and application of judgment.
- 93. Judgment must conform to verdict.
- 94. Mandate to compel entry of judgment—When lies.
- 95-97. Mandamus to compel entry of default—When lies.
- 98. Ministerial duty.
- 99. Motion—For new trial, does not stay proceedings.
- 100, 101. Same—For order compelling clerk to enter judgment.
- 102-104. Same—Neglect of clerk to enter judgment.
- 105. New trial—Effect of order setting aside verdict.
- 106. On pleadings.
- 107. Order in probate.
- 108. Party who may procure entry.
- 109. Presumption of duty performed.
- 110. Quieting title.
- 111. Relief from judgment in equity on motion.
- 112-120. Same—Under section 473, ante.
- 121. Rendition of judgment—What is a.
- 122. Same—By what judge made.
- 123. Same—Clerk's entry in minutes of trial, does not constitute judgment.
- 124, 125. Same—Prior to code, findings were not essential to entry or validity of judgment.
- 126-142. *Res judicata* in general.
- 143. Rough minutes—No provision for.
- 144. Several judgments against defendants.
- 145. Statute of limitations—Runs from entry.
- 146. Same—Judgment-debtor may at any time himself cause judgment to be entered.
- 147. Suit on foreign judgment.
- 148. Time of entry.
- 149, 150. Vacation of judgment—Generally.
- 151. Same—As to one defendant.
- 152-155. Same—For mistake and excusable neglect.
- 156, 157. Validity of judgment—Does not depend upon entry.
- 158. Void judgment.

As to setting aside dismissal of an action before the order of dismissal is entered, see, ante, § 581 and note.

1. As to whether must be several.—In an action to recover for services in laying

track in the construction of a railroad, brought by the contractor and his assignee of a half interest therein, the defendant can not complain that a several judgment is not given specifying the amount to which each plaintiff is entitled, when it is not claimed that there has been a misjoinder of parties plaintiff, and the amount of the award is not questioned, and no substantial right of the defendant is impaired.—*Fairchild v. Bay Point & Clayton R. R. Co.*, 22 Cal. App. 328, 134 Pac. 338.

See par. 144, this note.

2. Action to quiet title to water-rights—Decree by stipulation.—Where all the parties enter into an agreement to settle and adjust their respective claims, and stipulate for a decree to be entered in conformity with such agreement, the court is empowered to enter a decree strictly in accordance with the agreement only, and can not embody therein matters not covered by the stipulation.—*People's Ditch Co. v. Fresno C. & Irr. Co.*, 152 Cal. 87, 89, 92 Pac. 77.

As to action to quiet title generally, see par. 110, this note.

3. Amendment of findings and judgment.—A trial court may, with the consent of the parties, amend its findings and judgment before a motion for a new trial has been made or an appeal taken, and while it still has jurisdiction of the case.—*Scanlon v. Jacobs*, 24 Cal. App. 101, 140 Pac. 292.

As to correcting mistakes in judgments, see pars. 15, 16, this note.

4. The amended findings and judgment thus supplant the original findings and judgment in the case and are the only proper subjects of appeal.—*Scanlon v. Jacobs*, 24 Cal. App. 101, 140 Pac. 292.

5. Same—Nunc pro tunc.—In a case where it is made to appear that the entry in the minutes does not correctly embody the judgment given by the court, the court may at any time amend the judgment nunc pro tunc to make the entry conform to the true judgment.—*Kowalsky v. Nicholson*, 23 Cal. App. 160, 137 Pac. 607.

6. The power of courts to amend their judgments is not wholly confined to such cases; it extends also to cases where, as here, the order was inadvertently made and entered.—*Kowalsky v. Nicholson*, 23 Cal. App. 160, 137 Pac. 607.

7. Authentication—Judgment is not required to be signed by judge, and if produced from original records of the court in which it was rendered needs no signature or authentication. Signature by judge is merely to give clerk surer means of entering what has been adjudged.—*Crim v. Kessing*, 89 Cal. 478, 489, 23 Am. St. Rep. 491, 26 Pac. 1074.

See par. 75, this note.

8. Collateral attack—As to generally.—A judgment in an action for the foreclosure of a street assessment lien can not be held void upon collateral attack by the owner, unless the judgment-roll shows that it is

void upon its face, and in determining that question the court is restricted to the evidence afforded by the judgment-roll.—*Crouch v. H. L. Miller Co.*, 169 Cal. 341, 146 Pac. 880.

9. Where upon such an attack it is recited in the judgment itself that the defendant was regularly served with a copy of the summons and complaint in the action and suffered default to be entered against him, such recitals must be taken as true, notwithstanding it also appears from other portions of the judgment-roll that the proof of service of summons was insufficient, and that the complaint failed to state a cause of action.—*Crouch v. H. L. Miller Co.*, 169 Cal. 341, 146 Pac. 880.

10. On a collateral attack upon a judgment it is immaterial whether the complaint states a cause of action or not, for such question in no way affects the jurisdiction of the court.—*Crouch v. H. L. Miller Co.*, 169 Cal. 341, 146 Pac. 880.

11. It is likewise immaterial that the true name of the defendant was not substituted for that of the fictitious name under which it was sued and served.—*Crouch v. H. L. Miller Co.*, 169 Cal. 341, 146 Pac. 880.

12. Defendant has no right on this collateral attack to introduce evidence outside the record of the judgment to show that it was not, in fact, served with summons.—*Crouch v. H. L. Miller Co.*, 169 Cal. 341, 146 Pac. 880.

13. The true inquiry is not as to whether jurisdiction has been irregularly exercised.—*Crouch v. H. L. Miller Co.*, 169 Cal. 341, 146 Pac. 880.

14. **Community property—Judgment regarding.**—Damages arising from personal injuries to married woman are community property, and judgment in favor of both her and her husband is properly entered upon finding of injury to her alone.—*Palne v. San Bernardino V. T. Co.*, 143 Cal. 654, 658, 77 Pac. 659.

15. **Correction of mistake in judgment.**—Decision or findings of court, when filed, amounts in law to rendition of judgment which clerk can thereafter, at any time, enter at length in record. Entry is but ministerial act of clerk. Judgment, when entered, becomes record of court as determined and then becomes as binding upon parties as if entered immediately upon its rendition. Rendition of judgment is judicial act; its entry on record is merely ministerial. If clerk had been guilty of mistake of entering judgment not authorized by decision such mistake can be corrected by motion, or by court of its own motion, for the error will be apparent upon face of record, and rule is universal that when mistake is made in entry of judgment, and that fact is plainly apparent from record itself, such mistake may be rectified at any time, and this rule arises by reason of inherent power of court over its own pro-

ceedings.—*San Joaquin L. & W. Co. v. West*, 99 Cal. 345, 347, 33 Pac. 928.

As to amending judgment, see pars. 3, 4, this note.

16. Clerical error in computation appearing on face of record may be corrected at any time without vacating judgment.—*Erickson v. Stockton & T. C. R. Co.*, 148 Cal. 206, 82 Pac. 961.

17. **Date of judgment** is date of its filing.—*Warner v. Miner*, 41 Wash. 98, 82 Pac. 1033.

18. **Decree void as to joint contractor.**—A judgment rendered upon a joint contract which is void as to one joint contractor is not necessarily a nullity as to the other contractors.—*Cellulose Package Co. v. Calhoun*, 166 Cal. 513, 137 Pac. 238.

19. **Default judgment—As to generally.**—Entry of judgment on default before time allowed for answer has expired renders judgment erroneous simply, not void. Judgment thus rendered can be attacked only upon motion or by appeal, and only by parties in interest.—*In re Newman*, 75 Cal. 213, 221, 7 Am. St. Rep. 146, 16 Pac. 887.

See, ante, § 636 and note.

As to judgment upon failure to answer, see, ante, § 585 and note.

As to relief from default judgment, see, ante, § 473 and note.

20. Judgment may be entered upon failure to answer after overruling demurrer against one defendant without at same time entering judgment against his co-defendant who had not been served.—*Edwards v. Hollings*, 103 Cal. 204, 207, 37 Pac. 218.

21. A default entered by the clerk for failure to answer within the time allowed by law and stipulation of counsel is unauthorized, and may be set aside by the court of its own motion at any time, where there is an answer on file at the time of the entry of such default.—*Reher v. Reed*, 166 Cal. 525, 137 Pac. 263.

22. When a party, after the time expressly granted for filing a pleading against him has expired, suffers further time to elapse without taking any action thereon, and in the meantime the pleading is served and filed, he, by such conduct, in effect grants the additional time and the party is not strictly in default.—*Reher v. Reed*, 166 Cal. 525, 137 Pac. 263.

23. It is not an abuse of discretion to deny a motion to enter a second default, taken upon failure to answer after the setting aside of the first default, and to direct that the answer, filed with the motion to vacate the first default, stand as defendant's answer.—*Kinard v. Kaelin*, 22 Cal. App. 383, 134 Pac. 370.

24. But if it were otherwise, the error is not available to the plaintiffs on appeal, if the order complained of and the proceedings leading up to it were not preserved and presented in a bill of exceptions;

prepared and authenticated within the time and in the manner prescribed by sections 649 and 650 of the Code of Civil Procedure.—*Kinard v. Kaelin*, 22 Cal. App. 383, 134 Pac. 370.

25. It is irregular to enter a judgment against a defendant in whose behalf a demurrer has been filed, without disposing of the demurrer, and a judgment so entered will be reversed on appeal.—*Davidson v. Graham*, 25 Cal. App. 484, 144 Pac. 147.

26. It is the policy of the law that every case should be tried upon its merits, and where it is sought to prevent this upon a showing which presents no circumstances of hardship to the party asking the relief, and the case is one where the right to the relief is doubtful, the parties should be remitted to a trial on the merits.—*Davidson v. Graham*, 25 Cal. App. 484, 144 Pac. 147.

27. A demurrer filed by a defendant is an appearance, and is an answer within the meaning of the provisions of section 585, post.—*Davidson v. Graham*, 25 Cal. App. 484, 144 Pac. 147.

28. An order setting aside a default for failure to plead within the time prescribed by law, based upon the forgetfulness and neglect of the defendant's business partner who had been requested by the defendant to have the action defended, is erroneous.—*Slater v. Selover*, 25 Cal. App. 525, 144 Pac. 298.

29. An affidavit of merits which states "that affiant has a good and meritorious defense to said action, and wishes to defend same, and that affiant has stated his defense to his attorney, who informs him that he has a good defense to said action," is insufficient.—*Slater v. Selover*, 25 Cal. App. 525, 144 Pac. 298.

30. An answer after the expiration of the time fixed therefor is not a pleading the filing of which is allowed by law, as the same can be filed only by virtue of an order of court made in the exercise of the discretion vested in it by the provisions of sections 472 and 473, ante.—*Hayes v. Butler*, 25 Cal. App. 743, 145 Pac. 553.

31. Sections 472 and 473, ante, provide that the court may, in the exercise of its discretion and upon such terms as may be just, permit certain things to be done which under the law the party has no right, as of course, to do.—*Hayes v. Butler*, 25 Cal. App. 743, 145 Pac. 553.

32. **Same.—Opening or setting aside default.—Generally.**—An order setting aside a default for failure to answer a second amended complaint within the time required by law will not be reversed on appeal where the default occurred through the mistake of a clerk in the office of counsel for the defendant in placing the copy of the answer with the papers in another pending suit relating to the same subject-matter, and noting the time to answer thereto in the office calendar under the number of the

other suit.—*Downing v. Klondike Min. & Mill. Co.*, 165 Cal. 786, 134 Pac. 970.

As to opening default judgments, see, ante, § 473, note Part XXV.

33. Where the court has opened a default and placed the cause in a condition for trial on the merits, an appellate tribunal is slow to interfere with the discretion therein exercised, even when the showing made in support of the motion is not of the strongest character.—*Downing v. Klondike Min. & Mill. Co.*, 165 Cal. 786, 134 Pac. 970.

34. A verified answer stating a good defense to the cause of action set forth in the complaint is a sufficient affidavit of merits on a motion to set aside a default judgment.—*Reher v. Reed*, 166 Cal. 525, 137 Pac. 263.

35. It is an abuse of discretion to refuse to grant an application for relief from a default judgment, where the affidavits present a strong showing of excusable neglect and no answering affidavits are filed, and such affidavits allege a substantial defense as against the unverified complaints of the plaintiff.—*Hughes Mfg. & Lumber Co. v. Elliott*, 167 Cal. 494, 140 Pac. 17.

36. An affidavit of merits, which is filed on motion to open a default judgment, that the defendant "has fairly, fully and truly stated all the facts and grounds of defense to the complaint and cause of action" in the suit to his attorney, is not insufficient because it fails to allege that the defendant stated "the facts of the case."—*Hughes Mfg. & Lumber Co. v. Elliott*, 167 Cal. 494, 140 Pac. 17.

37. An order vacating a default judgment entered in an action to recover damages for the malicious prosecution of a civil action will not be disturbed on appeal where it appears that the affidavits used on the motion, which were uncontradicted, declare that the defendants were foreigners unable to read or write the English language, and that although they called on an attorney and requested him to defend the action, they did not know that another call upon him was necessary to verify the answer; and it further appears, from the recital in the order and judgment setting aside the default, that oral evidence, not disclosed in the record, was introduced at the hearing of the motion.—*Berri v. Rogero*, 168 Cal. 736, 145 Pac. 95.

38. Since it appears from such order itself that, in addition to the affidavits of the defendant, oral evidence was heard upon the motion to vacate the default, and that upon this evidence, as well as upon the affidavits, the order was made, the appellate court must presume, even if it is conceded that the affidavits in themselves were insufficient to sustain the order, that the oral testimony, introduced upon the hearing warranted the trial court in setting aside the default and judgment.—*Berri v. Rogero*, 168 Cal. 736, 145 Pac. 95.

39. The law does not favor snap judgments. The policy of the law is to have every litigated case tried upon its merits, and it looks with disfavor upon a party who, regardless of the merits of his case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary.—*Berri v. Rogero*, 168 Cal. 736, 145 Pac. 95.

40. Where a party in default makes a seasonable application to be relieved therefrom, and files an affidavit of merits alleging a good defense, and the plaintiff files no counter-affidavit and makes no showing that he has suffered any prejudice or that injustice will result from the trial of the case upon its merits, very slight evidence will be required to justify a court in setting aside the default.—*Berri v. Rogero*, 168 Cal. 736, 145 Pac. 95.

41. Granting relief against a default is largely a matter of discretion, to be liberally exercised by the court in the furtherance of justice, and where the action of the trial court will result in a trial upon the merits, the appellate courts are very reluctant to interfere with the exercise of such discretion, and will do so only where it clearly appears that there has been a plain abuse of discretion.—*Berri v. Rogero*, 168 Cal. 736, 145 Pac. 95.

42. It is not essential to the entry of a valid judgment against a defendant that its default should have been actually entered by the clerk; a valid judgment by default may be rendered by the court, though no formal default has been entered.—*Crouch v. H. L. Miller Co.*, 169 Cal. 341, 146 Pac. 880.

43. Where a father is deprived of the custody and control of a minor child without knowledge of any proceeding in that behalf and without a hearing, he is entitled to be relieved from the judgment or order taken against him because of surprise and through his excusable neglect.—*Bell v. Krauss*, 169 Cal. 387, 146 Pac. 874.

44. The action of a trial court, upon an application to set aside a default and grant relief from the judgment based thereon, rests so largely in the discretion of that court that its action in refusing to grant the application will not be disturbed on appeal unless the record clearly shows that such discretion has been abused.—*Brown v. Martin*, 23 Cal. App. 736, 139 Pac. 823.

45. Trial courts should be liberal in the application of the remedial provisions of section 473 of the Code of Civil Procedure, to litigants in default, to the end that cause may be presented and tried upon their merits; and where the parties in default have appeared promptly, apparently in good faith, and have tendered proper pleadings, raising issues going to the merits of the action, applications to set aside their default arising from their excusable neglect ought to be granted.—*Brown v. Martin*, 23 Cal. App. 736, 139 Pac. 823.

46. It is not an abuse of discretion to refuse to set aside a default in an action for forcible entry and unlawful detainer, notwithstanding the defendant is a foreigner without ability to read or write English and appears promptly and shows that his default occurred through his ignorance of the importance of the precise date of service of process upon him, where there is no showing that he possesses or pleads a sufficient defense to the action upon the merits.—*Brown v. Martin*, 23 Cal. App. 736, 139 Pac. 823.

47. The fact that a default judgment is satisfied before application is made to set aside the default does not bar the remedy.—*Brown v. Martin*, 23 Cal. App. 736, 139 Pac. 823.

48. After perfecting of an appeal from an order setting aside a default judgment, the superior court is without jurisdiction to permit the matter to be opened upon fortified affidavits or any new showing.—*Durbrow v. Chesley*, 24 Cal. App. 416, 141 Pac. 631.

49. Although an order setting aside a default judgment for inadvertence will not be reversed except where an abuse of discretion is shown in making it, and any doubt that may exist should be resolved in favor of the application, to the end of securing a trial upon the merits, yet if no valid excuse for the inadvertence is made, the order will be vacated on appeal.—*Durbrow v. Chesley*, 24 Cal. App. 416, 141 Pac. 631.

50. An affidavit of the defendant's attorney reciting that he did not file an answer in time because there were other actions pending between the parties, and that he had a conversation with the plaintiff's attorney relative to the consolidation of all the actions, does not warrant the court in vacating a default judgment, when it does not appear that the plaintiff's attorney consented to the consolidation, but it does appear, by his uncontradicted affidavit, that the suggested consolidation came before the court on the defendant's motion and was denied seven days before the last day given the defendant by law in which to answer.—*Durbrow v. Chesley*, 24 Cal. App. 416, 141 Pac. 631.

51. It is not an abuse of discretion to deny a motion to vacate and set aside a default judgment on the alleged ground that the defendant was sick on the day he was served with a copy of the summons and complaint, and that he was delirious and out of his mind from that date until the day on which the default was entered, where such claim is contradicted by the affidavit of the process server, and the default was not taken until four days after the time to plead had elapsed and the motion for relief not made until six days after knowledge of the default.—*Morton v. Shannon*, 26 Cal. App. 689, 147 Pac. 1179.

52. The granting or denying of a motion made under the terms of section 473 of the Code of Civil Procedure is a matter that rests so largely in the discretion of the trial court that its action will not be disturbed on appeal unless it is made clearly to appear that there was an abuse of discretion.—*Morton v. Shannon*, 26 Cal. App. 689, 147 Pac. 1179.

53. Where a corporation is substituted as a party defendant in place of another corporation, a judgment entered against it, when there has been no service upon or appearance in behalf of it, may be vacated under section 473, ante.—*Altpeter v. Postal Telegraph Cable Co.*, 26 Cal. App. 1705, 148 Pac. 241.

54. **Directory—Provisions of section are.**—Section is directory only, and failure to obey injunction thereof does not affect legality or validity of judgment afterwards entered.—*First Nat. Bank v. Wolff*, 79 Cal. 69, 73, 21 Pac. 551, 748.

55. Section is purely directory and not mandatory.—*Bundy v. Maginess*, 76 Cal. 532, 534, 18 Pac. 668; *Churchill v. Louie*, 135 Cal. 608, 612, 67 Pac. 1052.

56. Provision that clerk must enter judgment "immediately" after entering default, is merely directory. His failure to do so may render him liable to action by judgment-creditor, but does not render void judgment subsequently entered upon such default, nor can defendant against whom judgment is entered invoke such failure for purpose of annulling judgment to which he has no other defense.—*Edwards v. Hellings*, 103 Cal. 204, 207, 37 Pac. 218.

57. Jurisdiction is not lost by failure of clerk to enter judgment within twenty-four hours. Only penalty is that provided by subdivision 6 of section 581, ante, which authorizes dismissal of action where for six months after verdict party entitled to judgment neglects to demand or have same entered.—*Waters v. Dumas*, 75 Cal. 563, 565, 17 Pac. 685.

58. **Same—Provision for immediate entry of judgment on return of verdict** is directory, and judgment signed by judge and filed with clerk is not void. Omission of clerk to enter judgment is but neglect of ministerial duty, which may be performed at any time.—*Harris v. Fidalgo Mill. Co.*, 38 Wash. 169, 80 Pac. 289.

59. **Effect of recital of service of summons.**—It is prejudicial error, in an action to quiet title to a mining claim where the question of performance of assessment work by the defendant as prior locator is the material issue, to exclude evidence of a judgment annulling such a deed by the locator to the company on the ground that it appeared from the judgment-roll that the affidavit of service of summons was insufficient, where the judgment itself recited that the defendant "was duly served with summons."—*Musser v. Fitting*, 26 Cal. App. 746, 148 Pac. 536.

60. The recital as to due service of process in a judgment is conclusive of such fact upon collateral attack, unless it be positively contradicted by the record itself, and such contradiction must be explicit and irreconcilable.—*Musser v. Fitting*, 26 Cal. App. 746, 148 Pac. 536.

61. **"Entry of judgment"—And "rendition of judgment"—As used in code**, have distinct meanings. "Rendition" is the pronouncement of verdict of jury or decision of court, while the "entry" is but ministerial act of clerk.—*Gray v. Palmer*, 28 Cal. 416, 418, 423.

As to rendition of judgment, see pars. 121-125, this note.

62. Whether formal judgment signed by court and filed with clerk may be considered in legal contemplation as having been entered from time of filing, suggested but not decided.—*Gray v. Palmer*, 28 Cal. 416, 423.

63. **Same—Entry of judgment—in general.**—Under our procedure the court pronounces its decision, which in fact is the oral judgment in the case. This judgment is to derive its support from written findings of fact and conclusions of law signed by the court. The ministerial duty of the clerk is to enter a judgment in conformity with the decision of the court, evidenced by the signed findings and conclusions. In the generality of cases, to an intelligent clerk, the conclusions of law will be sufficient guidance for the entry of a correct judgment. But it is eminently proper for the court to give to the clerk for his direction the form of judgment which the decision or oral judgment calls for.—*Takekawa v. Hole*, 170 Cal. 323, 149 Pac. 593.

As to what entry of record is necessary to complete judgment or order, see note 28 L. R. A. 621.

64. The entry here provided for is purely a ministerial act.—*Hoover v. Lester*, 16 Cal. App. 153, 116 Pac. 382.

65. **Same—Same—Certificate of clerk of court of sister state** reciting that he finds, on inspection of the records of the court, an original record of judgment, a copy of which is set out, without showing from what book of the court records taken, shows that the judgment is of record, and in effect shows the entry of the judgment within the provisions of above section and section 668, post, Court of Civil Procedure.—*Wilson v. Durkee*, 20 Cal. App. 492, 129 Pac. 617, rehearing denied.

66. **Same—Same—Editorial note:** It is to be regretted that the supreme court failed to look into this case, because the above holding, under the circumstances of the case and the condition of the pleadings, is not thought to be warranted by sound principles of law and procedure, and may establish a precedent of bad law. The action was on a foreign judgment, commenced after the amendment of 1907 to above section went into effect, and the complaint

is thought to have been insufficient to confer jurisdiction on the court to hear and determine the cause; and that the document passed upon was inadmissible in evidence over the objection of the defendant.

67. The complaint merely alleges (1) that the judgment sued on "was duly made and given," and did not allege (2) that the judgment awarded was duly entered in the judgment-book, which latter fact is a necessary and indispensable affirmative act under the amendment to above section, which provides, among other things, that "in no case is a judgment effectual for any purpose until so entered."

68. Before the amendment of 1907 to above section the complaint was good (see *City of Los Angeles v. Mellus*, 59 Cal. 444, 451), but it is submitted that since that amendment the affirmative fact of entry is a jurisdictional fact which must be set out in the complaint in an action founded upon a judgment, and that a complaint following the provisions of section 456, ante, is no longer sufficient.

69. Under above section as it stood prior to the amendment of 1907 the simple allegation that the judgment was "duly given and made," as provided in section 456, ante, raised the rebuttable presumption that the clerk of the trial court had done his public duty and that the judgment had been duly and properly entered in the proper book, to wit, in the judgment-book. But the amendment of 1907 introduces a new element, and makes a specific affirmative act necessary, without which affirmative act the judgment is "in no case effectual for any purpose," and is insufficient to confer jurisdiction upon another court in an action founded upon such judgment. This amendment does away with the presumption which formerly prevailed in such cases for the reason that there can be no presumption (1) as to affirmative acts or facts necessary to confer a right, or (2) as to acts or facts necessary to confer jurisdiction. Until this affirmative act required by the amendment of 1907 has been performed the judgment (1) can not be made the basis of a suit, and (2) can not confer jurisdiction upon another court to entertain an action based or founded upon such judgment.

70. It is absolutely essential, under the amendment of 1907, that the complaint upon a judgment shall aver in direct and distinct terms that the judgment sued on was duly and regularly entered in the judgment-book, before the court can take cognizance of and have jurisdiction over the action. No presumption arises as to such essential affirmative fact and act. The burden is upon the plaintiff to allege and prove this affirmative fact and act, and that burden remains upon him throughout—that is, the defendant is not required to prove a negative. This principle is luminously discussed in *Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142. See *Jackson Paper*

Mfg. Co. v. Commercial Nat. Bank, 99 Ill. App. 108; *Carver v. Carver*, 97 Ind. 497; *Cunningham v. Hoff*, 118 Ind. 263, 20 N. E. 756; *Adams v. Bailey*, 169 Ind. 518, 124 Am. St. Rep. 240, 13 L. R. A. (N. S.) 1003, 82 N. E. 1057; *Simpson v. Davis*, 119 Mass. 269, 20 Am. Rep. 324; *Murray v. Norwood*, 192 N. Y. 172, 84 N. E. 958; *Wright v. Bragg*, 106 Fed. 25, 45 C. C. A. 205.

71. The principles are well established and never questioned in any court of record until the case of *Wilson v. Durkee* (1) that the presumptions of regularity and that a public officer has done his public duty do not apply to supply proof of independent and substantive facts (*DuPont v. Sanitary Dist.*, 203 Ill. 170, 67 N. E. 815; *United States v. Ross*, 92 U. S. 281, 23 L. ed. 707; *Herron v. Dater*, 120 U. S. 464, 30 L. ed. 748, 7 Sup. Ct. 620; *Sabariego v. Maverick*, 124 U. S. 261, 31 L. ed. 430, 8 Sup. Ct. 461; *United States v. Carr*, 132 U. S. 644, 33 L. ed. 483, 10 Sup. Ct. 182), and (2) the presumption of regularity does not extend to jurisdictional facts.—*Sheldon v. Wright*, 7 Barb. (N. Y.) 39.

72. There is no presumption of law or of fact that a public officer has executed all of his public duties in relation to a matter in controversy, arising from proof of prior circumstances which placed him in a position of obligation and ability to perform the same.—*United States v. Ross*, 92 U. S. 281, 23 L. ed. 707; *Johnson's Admr. v. United States*, 14 Ct. of Cl. 276.

73. A person claiming a particular and peculiar right not common to all, given by statute, which is given when a particular state of facts exist, only, must show the existence of the state of facts required to confer the right, and of all the facts, as provided in the statute giving the right.—*San Bernardino Inv. Co. v. Merrill*, 108 Cal. 490, 41 Pac. 487; *Brown v. Peters*, 71 Me. 765; *Poole v. Tyler*, 94 U. S. 518, 24 L. ed. 167; *The Illinois*, 2 Flipp. 405, Fed. Cas. No. 7005; *The Minnie R. Childs*, 10 Ben. 553, 556, Fed. Cas. No. 9640; *The Menominee*, 36 Fed. 200; *The A. W. Thompson*, 39 Fed. 117; *The H. N. Emile*, 70 Fed. 512; *Woodward v. Dillworth*, 75 Fed. 418, 21 C. C. A. 420, 41 U. S. App. 191; *The John S. Parsons*, 110 Fed. 995; *Stern v. La Compagnie Generale Transatlantique*, 110 Fed. 998.

74. *Same—Same—Entry nunc pro tunc.*—Where a judgment has been rendered and its entry omitted, it may be subsequently entered and, if justice requires, may be made to take effect nunc pro tunc as of the date when it was actually made.—*Nolte v. Nolte*, 29 Cal. App. 126, 154 Pac. 873.

75. *Same—Same—Signature of judge.*—The fact that the signature of the judge appears on the entry of judgment in the judgment-book adds nothing to the record; nor does the want thereof detract from its sufficiency.—*Hoover v. Lester*, 16 Cal. App. 153, 116 Pac. 382.

As to signature of judge not being essential, see par. 7, this note.

76. Same—Same—Sufficiency of.—The entry of judgment as herein provided is sufficient when its sets forth the substance of the findings and conclusions written and filed by the judge as required by section 652 Code Civil Procedure.—*Hoover v. Lester*, 16 Cal. App. 154, 116 Pac. 382.

77. Equity cases—Where issues are submitted to jury are not included in this section and clerk has no power to enter judgment upon such verdict.—*Churchill v. Louie*, 135 Cal. 608, 612, 67 Pac. 1052.

78. Same—Where verdict decisive of case is rendered in equity action, is orally adopted by court upon which court orally orders judgment entered, which in fact was never entered, court may at any time thereafter render judgment *nunc pro tunc*, cause same to be entered notwithstanding that in meantime his term of office had expired and he had been re-elected thereto.—*Holt v. Holt*, 107 Cal. 258, 261, 40 Pac. 390.

79. Verdict in equitable action is only advisory, but when it is decisive of action, is regularly returned, and entered in minutes of court, and thereupon court orally orders judgment to be entered, it constitutes verbal adoption of verdict and rendition of judgment. It then became duty of clerk to transcribe it into minute-book of court and enter judgment as ordered; failure of clerk to do so is failure to perform ministerial duty which can afterwards be performed at his own instance, or by direction of court at any time.—*Holt v. Holt*, 107 Cal. 258, 261, 40 Pac. 390.

80. Same—Same—Finality and conclusiveness—Res judicata.—Until a judgment becomes final by affirmance on appeal, or by the lapse of the time within which an appeal might be taken, the judgment is not admissible in evidence and can not be relied upon as the foundation of rights declared in it.—*Sewell v. Johnson*, 165 Cal. 762, 134 Pac. 704.

As to *res judicata*, see pars. 126-142, this note.

81. A cause of action between parties can be litigated to judgment but once, and when a subsequent suit is brought for identically or substantially the same cause of action that was set up and litigated in the former suit, the former judgment is a bar.—*Krzepicki v. Krzepicki*, 167 Cal. 449, 140 Pac. 13.

82. Whether or not such prior judgment is a bar to a subsequent suit does not depend on the difference in relief sought in the two actions, but upon the question whether the same matter put in issue in the second suit between the same parties was actually in issue in the first and adjudicated.—*Krzepicki v. Krzepicki*, 167 Cal. 449, 140 Pac. 13.

83. The rule that a "judgment is final and conclusive between the parties not only as to matters actually determined," but as

to every matter which the parties might have litigated and have decided as incident to or essentially connected with the subject-matter of the litigation within the purview of the original action," can not properly be invoked as to an issue which affirmatively appears not to have been determined by the judgment; as to that issue there is no judgment, and necessarily there can be no estoppel by something that does not exist.—*Jacoby v. Peck*, 23 Cal. App. 363, 138 Pac. 104.

84. When a judgment is once entered of record, it must stand as the judgment until it is vacated, modified, or disposed of by some means provided by law, and entering additional judgments is not one of them.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 18 Cal. App. Dec. 235, 367, 140 Advance Sheets Pac. 955; appealed to supreme court and withdrawn from permanent Pacific Reporter. See supreme court decision, 169 Cal. 645, 147 Pac. 238.

85. This suit in equity in a federal court to have it established that the defendants held title to an undivided interest in real estate in trust for the plaintiff is held to be a collateral attack upon a former decree of a state court foreclosing the interest of the predecessors of the plaintiff and not maintainable.—*Carpenter v. M. J. & M. & M. Consolidated*, 212 Fed. 868.

86. Helmslip—Proceedings to determine under section 1664, post, is not proceeding in which judgment contemplated by this section is rendered.—*In re Blythe*, 110 Cal. 226, 228, 40 Pac. 641.

87. Interest—Provision that judgment shall bear, is made by law, and may therefore be included in judgment as entered by clerk, although decision be silent upon question of interest.—*San Joaquin L. & W. Co. v. West*, 99 Cal. 345, 347, 33 Pac. 928.

88. Same—Before, not after, verdict included.—Interest should be provided for in judgment from day of rendition of verdict, the two sums should be separately stated and entered; clerk can not include in judgment sum equal to interest from rendition of verdict to entry of judgment.—*Alpers v. Schammel*, 75 Cal. 590, 593, 17 Pac. 708.

89. Interpretation and application of judgment.—In applying a judgment, if the language is in any degree uncertain, the circumstances surrounding its making may be referred to.—*Watson v. Lawson*, 166 Cal. 235, 135 Pac. 961.

90. A judgment must be construed with reference to the law regulating the rights of the parties.—*Watson v. Lawson*, 166 Cal. 235, 135 Pac. 961.

91. In case of doubt regarding the signification of a judgment, or any part thereof, the whole record may be examined for the purpose of removing the doubt; and when it admits of two constructions, that one will be adopted that is consonant with the judgment that should have been rendered on the facts and the law of the

case.—*Watson v. Lawson*, 166 Cal. 235, 135 Pac. 961.

92. In an action to recover a balance alleged to be due upon the purchase price of hogs, wherein the answer alleges that the plaintiff expressly agreed that the animals were in a sound and healthy condition and made false representations as to such condition, a finding that all of the allegations of the complaint were true and that there was no express warranty as to such condition fairly and fully responds to the issues presented by the allegations of the answer.—*Scanlon v. Jacobs*, 24 Cal. App. 101, 140 Pac. 292.

93. Judgment must conform to verdict, but if verdict goes beyond issues raised by pleading, and passes upon extraneous fact not embraced therein, it is void *pro tanto*, and surplus matter may be disregarded in entering judgment.—*Watson v. San Francisco & H. B. R. Co.*, 50 Cal. 523, 524.

As to action which may be taken by supreme court on appeal, see, post, § 956 and note.

As to confession of judgment without action and entering of judgment thereon, see, post, §§ 1132 et seq. and notes.

As to docketing judgment of justices' court in superior court, see, post, § 899 and note.

As to final determination of action, see, post, § 1049 and note.

As to judgment affecting real estate in county other than that in which trial is had, see, ante, § 400 and note.

As to judgment by default in justices' court, see, post, §§ 871, 872 and notes.

As to judgment in general, see ante, §§ 577 et seq. and notes.

As to judgment in matter contempt of court, see, post, § 1218 and note.

As to judgments other than default in justices' court, see, post, §§ 889 et seq. and notes.

As to judgment of dismissal or nonsuit, see, ante, § 581 and note.

As to judgment on submission to arbitration, see, post, § 1286 and note.

As to judgment on appeal, certifying remittitur, and entry of judgment, see, post, § 958 and note.

As to remedial powers of appellate court, see, post, § 957 and note.

As to submitting controversy without action and entering of judgment thereon, see, post, §§ 1138 et seq. and notes.

As to verdict and judgment in actions of forcible and unlawful detainer, see, post, § 1174 and note.

94. Mandate to compel entry of judgment—When lies.—In an action tried by court judgment can not be entered until after decision of the cause has been rendered. Hence, writ of mandate will not be granted to compel entry of judgment until after court has tried cause and rendered its

decision.—*Broder v. Superior Court*, 103 Cal. 121, 122, 37 Pac. 143.

95. Mandamus to compel entry of default—When lies.—Mandamus will not lie to compel the clerk of the superior court to enter the default of the defendant for failure to answer the complaint within the time prescribed by law, where the only authority for entering the default is a filed stipulation signed only by the clerk of the attorney for the defendant and providing "that no default shall be taken against the defendant, he waiving his demurrer," and that he shall have to and inclusive of a certain date in which to file and serve his answer on the merits.—*Davidson v. Graham*, 25 Cal. App. 484, 144 Pac. 147.

96. Where application is also made to the court for an order for the same relief and refused, mandamus will likewise not lie to compel the clerk to enter such default.—*Davidson v. Graham*, 25 Cal. App. 484, 144 Pac. 147.

97. The rule that a court will not compel parties to perform acts which will subject them to punishment, or which will put them in conflict with the order or writ of another court, applies where a clerk is asked to perform an act which will put him in conflict with a valid order made by the same court in the same action and upon the same matter.—*Davidson v. Graham*, 25 Cal. App. 484, 144 Pac. 147.

98. Ministerial duty.—This section is equivalent to express direction by court to clerk to enter judgment in accordance with verdict. His duty is purely ministerial, and if through his neglect or misprision judgment actually rendered be not entered, court may, even after expiration of six months, order judgment entered *nunc pro tunc*.—*Marshall v. Taylor*, 97 Cal. 422, 426, 32 Pac. 515.

99. Motion—For new trial, does not stay proceedings but such stay may be regulated by a rule of court and in the absence of such rule party desiring a stay of proceedings pending motion for a new trial may obtain an order to that effect from the court.—*Pierce v. City of Los Angeles*, 159 Cal. 516, 114 Pac. 818.

100. Same—For order compelling clerk to enter judgment is proper remedy where he does not obey mandate of this section.—*First Nat. Bank v. Wolff*, 79 Cal. 69, 73, 21 Pac. 551, 748.

101. Clerk may be compelled on motion to enter proper judgment; court will not require party interested to resort to mandamus.—*Page v. Superior Court*, 76 Cal. 372, 374, 18 Pac. 380.

102. Same—Neglect of clerk to enter judgment.—When decree is ordered and signed it is ministerial duty of clerk to enter and docket judgment and prepare and file judgment-roll, and he can not by neglect to perform that duty destroy or impair effect of judgment.—*Baker v. Brickell*, 102 Cal. 620, 623, 36 Pac. 950.

103. Judgment is binding on parties and privies when signed by judge and filed, and clerk can not by failure to perform ministerial duty of entering it abridge rights of any party interested.—In matter of Newman, 75 Cal. 213, 221, 7 Am. St. Rep. 146, 16 Pac. 887.

104. Action of court does not depend upon entry of its orders by clerk, but upon fact that orders have been made, and whenever it is shown that an order has been made by court it is as effective as if it had been entered of record by clerk.—Niles v. Edwards, 95 Cal. 41, 47, 30 Pac. 134.

105. New trial—Effect of order setting aside verdict is to grant new trial, otherwise no judgment could be entered, there being no verdict, and no further trial could take place because no such order was made in terms.—Eades v. Trowbridge, 143 Cal. 25, 30, 76 Pac. 714.

As to setting aside judgment and entering different judgment where conclusions of law are inconsistent with facts found, see, ante, § 663 and note.

As to new trials, see §§ 656-663 and notes.

106. On pleadings.—A motion for judgment upon the pleadings is, in substance, both a motion and a demurrer. While it is in effect a demurrer, because it challenges the sufficiency of the complaint to state a legal wrong, or that of the answer to state a legal defense, as the case may be, it, at the same time, operates as a motion, for the reason that it is an application for an order for judgment, in which latter case the court becomes the exclusive judge of both the law and the facts.—Salo v. Smith, 25 Cal. App. 295, 143 Pac. 322.

107. Order in probate denying partition for homestead allowance is judgment by virtue of section 577, ante, defining judgment, and section 1716, post, declaring all issues of fact joined in probate proceedings must be tried in conformity with general laws and rules relating to trials.—In re Estate of Harrington, 147 Cal. 124, 109 Am. St. Rep. 118, 81 Pac. 546.

108. Party who may procure entry.—It is immaterial who sets clerk in motion to discharge his ministerial duties of entering judgment, etc., or who pays his fees therefor. He might perform his duty of his own motion, or court could direct him to do it, or any party interested in having it done could procure him to do it.—Baker v. Brickell, 102 Cal. 620, 623, 36 Pac. 950.

109. Presumption of duty performed.—When plaintiff pays clerk costs of action after verdict and presents him with form of judgment he has right to rely on assumption that clerk would perform duty required of him by this section, and failure of clerk so to do is not negligence of plaintiff.—Marshall v. Taylor, 97 Cal. 422, 425, 32 Pac. 515.

110. Quietting title.—In action to quiet title judgment becomes muniment of title to successor in interest of plaintiff, and he may

procure its entry at any time.—Baker v. Brickell, 102 Cal. 620, 623, 36 Pac. 950.

As to action to quiet title to water-rights, see, par. 2, this note.

111. Relief from judgment in equity on motion.—The aggrieved party to a judgment ordinarily must appeal to equity in the form of an independent suit for that purpose, where, the time within which he might have appealed therefrom having passed, he desires to set it aside for reasons extrinsic or collateral to the questions examined and determined in the action.—Altpeter v. Postal Telegraph-Cable Co., 25 Cal. App. 255, 143 Pac. 93.

112. Same — Under section 473, ante. — Courts give a very liberal interpretation to the provisions of section 473, ante.—Estate of Simmons, 168 Cal. 390, 143 Pac. 697.

113. If the trial court refuses to grant such relief solely because it believes that it has no power, on any showing, to relieve a contestant from failure to have a citation issued within the time limited by the statute, its refusal is not an exercise of its discretion to refuse relief under section 473, ante, but a dismissal of the motion for lack of jurisdiction.—Estate of Simmons, 168 Cal. 390, 143 Pac. 697.

114. An affidavit of merits, on motion for an order relieving a contestant in such case from neglect and default in failing to have citation issued within one year, on the ground of excusable neglect, is sufficient if it declares that the contestant "stated all the facts in connection with the said contest" to her attorney, and upon such statement was advised by him and believed that she had a good and meritorious case. The word "contest" means not merely the ground of attack, but the entire dispute involved in such attack and the defense thereto.—Estate of Simmons, 168 Cal. 390, 143 Pac. 697.

115. The six months within which application may be made to vacate an order of adoption, on the ground that the father had no notice of the proceedings, begins to run from the time of the filing of the order.—Bell v. Krauss, 169 Cal. 387, 146 Pac. 874.

116. But there are exceptions to this rule, and the legislature has seen fit to make provisions for the application of some of them in section 473, ante.—Altpeter v. Postal Telegraph-Cable Co., 25 Cal. App. 255, 143 Pac. 93.

117. The provision of such section permitting the defendant to answer where personal service of summons has not been had necessarily presupposes the right in the party to the action upon whom personal service of summons has not been had to have the judgment set aside preliminarily to the filing of the answer.—Altpeter v. Postal Telegraph-Cable Co., 25 Cal. App. 255, 143 Pac. 93.

118. Under the provision of section 473, ante, that "when from any cause the summons in an action has not been personally served on the defendant, the court may

allow, on such terms as may be just, such defendant or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action," a defendant corporation which was not served with summons, service having been made instead upon a foreign corporation by the same name, and hence which did not defend or appear, may, six months after it might have appealed from the judgment, move to set it aside.—*Altpeter v. Postal Telegraph-Cable Co.*, 25 Cal. App. 255, 143 Pac. 93.

119. Such provision of the Code of Civil Procedure does not contemplate a new or an independent suit in equity to set aside the judgment in order to enable the defendant to answer to the merits; it is intended as a distinct remedy from and cumulative to that which may be had in a court of equity to annul a judgment, the time for appealing which has passed.—*Altpeter v. Postal Telegraph-Cable Co.*, 25 Cal. App. 255, 143 Pac. 93.

120. The application of such code provision is not confined to cases where constructive service has been had and a default judgment thereupon entered.—*Altpeter v. Postal Telegraph-Cable Co.*, 25 Cal. App. 255, 143 Pac. 93.

121. **Rendition of judgment—What is a.**—Declaration of general conclusion of law from the facts found is rendition of judgment so far as the judgment when entered may relate to such rendition from certain purposes. But this does not make the conclusions of law first announced final and beyond reach of court so that it can not change or correct them before judgment is entered. There is no judgment which is final until a judgment is recorded.—*Condee v. Barton*, 62 Cal. 1, 5.

As to entry of judgment, see pars. 61-76, this note.

122. **Same—By what judge made.**—In case where testimony was heard by one judge, matter submitted to another judge who never heard any witnesses testify, and before whom no report of testimony was produced, but who orally decided issue, and where judgment was signed by still another judge, it can not stand, and must be reversed on appeal. Party litigant is entitled to decision from the judge who hears evidence where matter is tried without jury, and from jury that hears evidence, where it is tried by jury. He can not be compelled to accept decision upon facts from another judge or another jury.—*In matter of guardianship of Sullivan*, 143 Cal. 462, 467, 77 Pac. 153.

As to decision or finding of court, see, ante, §§ 632-635 and notes.

123. **Same—Clerk's entry in minutes of trial, does not constitute judgment.**—Rendition of judgment is filing of findings of fact and conclusions of law upon which clerk may at any time thereafter enter judgment at length in records of court.—*Crim v. Kes-*

sing, 89 Cal. 478, 486, 488, 23 Am. St. Rep. 491, 26 Pac. 1074.

124. **Same—Prior to code, findings were not essential to entry or validity of judgment,** and therefore it was held that entry in clerk's minutes of decision, as announced by court, constituted "rendition of judgment." But under code, whenever findings are required, there can be no "rendition of judgment" until they are made and filed with clerk. Findings of fact, however, are required only upon trial of question of fact, and they may in all instances be waived. Whenever they are waived, or are not required, entry of its decision in minutes of court constitutes "rendition of judgment" in same manner as it would under former system.—*Crim v. Kessing*, 89 Cal. 478, 488, 23 Am. St. Rep. 491, 26 Pac. 1074.

125. Rendition of judgment is judicial act, while entry upon record is merely ministerial.—*Crim v. Kessing*, 89 Cal. 478, 488, 23 Am. St. Rep. 491, 26 Pac. 1074.

126. **Res judicata—In general.**—A former judgment between the parties to an action is conclusive in all subsequent actions involving the same question, not only as to the matters actually decided in the former controversy, but as to all matters belonging to the subject of the controversy and properly within the scope of the issues which also might have been raised and determined; the presumption being that all such issues were presented and decided.—*Southern Pacific Co. v. Edmunds*, 168 Cal. 415, 143 Pac. 597.

127. But as to matters which might have been litigated and decided in a former suit as within the scope of the issues, but which were not actually or expressly in issue and adjudicated, only a presumption is indulged that they were decided; and this presumption is disputable and may be overcome by showing that although a particular matter was involved in the former action, it was by consent of the parties withdrawn from consideration at the trial and did not at all enter into or constitute any part of the verdict of the jury or the final determination of that action.—*Southern Pacific Co. v. Edmunds*, 168 Cal. 415, 143 Pac. 597.

128. A judgment in an action to recover for personal injuries is not conclusive on the right of the defendant in its subsequent action to determine its right to credit on the judgment the amount paid by it to the plaintiff before the commencement of the damage action for a full release of his claim for injuries, where the right to the credit is not questioned in the damage suit, but the validity of the release alone contested, and the jury are instructed, by consent of both parties, after the refusal of the court to give an instruction at the request of the plaintiff that they should disregard the release, except if they found for the plaintiff they should credit the amount paid for the release, that "In case you find for the plaintiff, you are instructed that you shall find and insert in your general verdict the full

amount of his damages without crediting defendant for the one thousand two hundred and fifty dollars which it has paid, and without making any allowance therefor."—*Southern Pacific Co. v. Edmunds*, 168 Cal. 415, 143 Pac. 597.

129. The purpose of such "consent" instruction immediately following the refusal of the court to give the "credit" instruction was to withdraw the matter of the right of the plaintiff to such credit from present consideration by the jury, leaving its application on any judgment which might be obtained against the defendant for consideration when it should be called on to satisfy it.—*Southern Pacific Co. v. Edmunds*, 168 Cal. 415, 143 Pac. 597.

130. In an action to quiet title to a tract of land, where the defendant by answer claims ownership of an easement over the land claimed by plaintiff, consisting of a roadway leading from defendant's land across the plaintiff's land to a public highway, a final judgment in a former action between the same parties declaring defendant herein to be entitled to the identical easement, is conclusive of the rights of the parties, and is admissible in evidence without the necessity of setting it up as a former adjudication.—*Higuera v. Corea*, 168 Cal. 788, 145 Pac. 529.

131. Practically the sole purpose of resorting to courts for a judgment establishing a right is to furnish the party with a record on which he can rely as conclusive proof of his right whenever it is again assailed.—*Higuera v. Corea*, 168 Cal. 788, 145 Pac. 529.

132. The successor in interest of the original defendant in an action to enjoin the latter from diverting the waters of a certain creek is bound, under section 1908 of the Code of Civil Procedure, by a judgment in favor of the plaintiff to the same extent as was the original defendant before it transferred the property.—*Gale v. Tuolumne County Water Co.*, 169 Cal. 46, 145 Pac. 532.

133. The general rule that a judgment is conclusive, not only as to that which is actually determined, but also as to every other matter which the parties might have litigated in the action, is not always applicable literally.—*Brown v. Brown*, 171 Cal. 1, 147 Pac. 1168.

134. The issues in a case ordinarily refer to the beginning of the suit, and matters occurring during its pendency are not in issue, and can not be received in evidence, unless under some supplemental pleading filed by permission of the court. The plaintiff is not estopped from asserting any title acquired after the commencement of the action, because he must generally recover upon the cause of action held by him at that time, and can not be aided by right of action arising afterward.—*Brown v. Brown*, 170 Cal. 1, 147 Pac. 1168.

135. All matters in litigation which become the bases of a judgment are res

judicata, and to permit causes of action or defenses once presented, considered and definitely determined to be again asserted in another or subsequent suit or action is in violation of the principles underlying and supporting the doctrine.—*Giuffre v. Lauricella*, 25 Cal. App. 422, 143 Pac. 1061.

136. The failure of the defendant, in an action for damages for the malicious prosecution of certain attachment suits, to plead the judgment in a former action to enjoin the prosecution of such suits, in which no damages were asked or allowed, as a bar, constitutes a waiver of such defense.—*Schudel v. Helbing*, 26 Cal. App. 410, 147 Pac. 89.

137. A judgment obtained in a suit in equity to compel the specific performance of a contract for a lease, and to restrain the lessor from instituting and prosecuting successive attachment suits for an increased rental based upon the attempted repudiation of the contract, is not a bar to a subsequent action for damages for the malicious prosecution of the attachment suits.—*Schudel v. Helbing*, 26 Cal. App. 410, 147 Pac. 89.

138. A judgment of the state supreme court that premature notice of an intention to move for a new trial did not deprive the court of jurisdiction to hear an appeal nor constitute ground for its dismissal because of want of jurisdiction, is binding on a subsequent grantee of land sold under the judgment appealed from, when the judgment is collaterally attacked in a federal court.—*United States Oil & Land Co. v. Bell*, 219 Fed. 785.

139. The expression in section 1910, post, "and a judgment or other determination could in that case have been made between them alone," relates to and qualifies section 1909, post, not section 1908, post.—*Atchison, T. & S. F. R. Co. v. Nelson*, 220 Fed. 53.

140. A judgment in favor of a husband and wife in their action against a carrier for personal injuries sustained by her is conclusive that the carrier was negligent and that its negligence was the approximate cause of the injury, in a subsequent action by the husband alone to recover for the loss of his wife's services and for expenditures made on account of her injuries as a result of the accident.—*Atchison, T. & S. F. R. Co. v. Nelson*, 220 Fed. 53.

141. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, by employing reasonable diligence, might have brought forward at the time.—*Atchison, T. & S. F. R. Co. v. Nelson*, 220 Fed. 53.

142. A judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies, whenever the existence of that fact is again an issue between them, not only when the subject-matter is the same, but when the point comes incidentally in question in relation to

a different matter, in the same or any other court, except on appeal or other proceeding provided for its revision.—*Atchison, T. & S. F. R. Co. v. Nelson*, 220 Fed. 53.

143. Rough minutes—No provision for.—There is no law providing for "rough minutes." The clerk doubtless finds it necessary as orders are announced by the court to make a memorandum thereof for his own guidance in entering the orders on the register of actions and in the minutes. These memoranda are often referred to as "rough minutes," but they do not constitute an official record of the court. They are sometimes useful as evidence if a proper foundation is laid, but they have no inherent validity or effect.—*Brownell v. Superior Court*, 157 Cal. 703, 705, 109 Pac. 91.

144. Several judgments against defendants may be entered in an action of ejectment against several defendants occupying different portions of property. This might be done upon trial on separate findings or verdicts, and there is no objection to same course on findings by court after default.—*Lick v. Stockdale*, 18 Cal. 219, 224.

As to whether judgment shall be several, see, par. 1, this note.

145. Statute of limitations—Runs from entry, not rendition, of judgment.—*Trenouth v. Farrington*, 54 Cal. 273, 274; *Edwards v. Hellings*, 103 Cal. 204, 207, 37 Pac. 218; *Herrlich v. McDonald*, 104 Cal. 551, 552, 38 Pac. 360.

146. Same—Judgment-debtor may at any time himself cause judgment to be entered and thus stop running of statute of limitations.—*Edwards v. Hellings*, 103 Cal. 204, 207, 37 Pac. 218.

147. Suit on foreign judgment.—An action upon a judgment recovered in the state of Illinois on a joint contract against two defendants which is void as to one of them because of nonservice of process may be maintained in this state against the other defendant over whom the court had acquired jurisdiction. — *Cellulose Package Mfg. Co. v. Calhoun*, 166 Cal. 513, 137 Pac. 238.

148. Time of entry.—Entry of judgment being but ministerial act, can be performed by clerk after term of office of judge who rendered it has expired with as much effect as before.—*Crim v. Kessing*, 89 Cal. 478, 489, 23 Am. St. Rep. 491, 26 Pac. 1074.

As to order of proceeding on trial, see, ante, §§ 607 et seq. and notes.

As to provision relating to trials in general, see, ante, §§ 646-653 and notes.

As to referees and trial by referee, see, ante, §§ 638 et seq. and notes.

As to trial by court, see, ante, §§ 631 et seq. and notes.

As to trial by jury, see, ante, §§ 600 et seq. and notes.

As to trial in general, see, ante, §§ 588 et seq. and notes.

149. Vacation of judgment—Generally.—A court has the right, independent of section 473, ante, to set aside a judgment rendered without jurisdiction of the person of the defendant, and an appeal lies from such order.—*Postal Telegraph-Cable Co. v. Superior Court*, 22 Cal. App. 770, 136 Pac. 538.

150. The judgment also may be vacated by an action in equity.—*Postal Telegraph-Cable Co. v. Superior Court*, 22 Cal. App. 770, 136 Pac. 538.

151. Same—As to one defendant.—If a judgment be given against several defendants who have been sued as joint tort-feasors, the judgment, if found to be erroneous as to any one of the defendants, may be vacated as to that one only, and be continued in full force and effect as to the remaining defendants who have not appealed.—*Fearon v. Fodera*, 169 Cal. 370, Ann. Cas. 1916B, 312, 148 Pac. 200.

152. Same—For mistake and excusable neglect.—An affidavit of merits is essential to a motion made under section 473, ante, for relief from a judgment on the ground of mistake, inadvertence, surprise or excusable neglect.—*Parkside Realty Co. v. MacDonald*, 167 Cal. 342, 139 Pac. 805.

153. It is not an abuse of discretion for a trial judge to refuse to vacate a judgment on the ground that the defendant, the moving party, misunderstood the date of the trial and hence permitted his principal witness to leave the state, if the defendant, in attempting to excuse his negligence, contents himself with the unqualified statement that he understood the case was set for August 12th, whereas it was set for July 12th, and there is no pretense that he was not positively and clearly informed by his attorney that the trial was to begin on the latter date.—*Watson v. Columbia Basin Dev. Co.*, 22 Cal. App. 556, 135 Pac. 511.

154. Before an appellate court is authorized to disturb an order made upon a motion to set aside a judgment under section 473 of the Code of Civil Procedure, it must clearly appear that the court making the order has abused the discretion committed to it; otherwise stated, that the order is without any evidence to sustain it.—*Watson v. Columbia Basin Dev. Co.*, 22 Cal. App. 556, 135 Pac. 511.

155. When an appellate court is called upon to review the action of the trial court in refusing to vacate its judgment on the ground of mistake, inadvertence or excusable neglect, the question is not whether the appellate tribunal would have set aside the judgment on the showing made if the motion had been addressed to it in the first instance, but whether the trial court abused its discretion in the action taken by it.—*Watson v. Columbia Basin Dev. Co.*, 22 Cal. App. 556, 135 Pac. 511.

156. Validity of judgment—Does not depend upon entry being made within twenty-four hours.—*Churchill v. Louie*, 135 Cal. 608, 612, 67 Pac. 1052.

157. Verdict rendered Saturday night is not invalidated by failure to enter judgment until following Monday.—*Bundy v. Maginess*, 76 Cal. 532, 534, 18 Pac. 668.

As to verdict, see §§ 618-628 and notes.

As to entry of judgment after death of debtor, see, post, § 669 and note.

As to recording judgment, see, post, § 668 and note.

As to judgment against sureties and appeal bond, see, post, § 942 and note.

158. **Void Judgment.**—A void judgment is in legal effect no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are legally worthless. It neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void.—*Buxton v. Pennsylvania Lumber Co.*, 221 Fed. 718.

§ 665. CASE MAY BE BROUGHT BEFORE THE COURT FOR ARGUMENT. When the case is reserved for argument or further consideration, as mentioned in the last section, it may be brought by either party before the court for argument.

History: Enacted March 11, 1872, re-enactment of § 198 Practice Act as amended in 1854 (Stats. 1854, p. 84).

§ 666. WHEN COUNTER-CLAIM ESTABLISHED EXCEEDS PLAINTIFF'S DEMAND. If a counter-claim, established at the trial, exceeds the plaintiff's demand, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly.

History: Enacted March 11, 1872, re-enactment of § 199 Practice Act.

COUNTER-CLAIM—EXCEEDING PLAINTIFF'S DEMAND.

1. Optional with defendant to set up counter-claim.
2. Parties—Counter-claim.

As to counter-claim generally, see, ante, §§ 438, 439, 440, 442 and notes.

1. **Optional with defendant to set up counter-claim.**—Defendant is not compelled by reason of this section to set up and litigate new matter constituting a counter-claim.—*Ayres v. Bensley*, 32 Cal. 620, 629.

2. **Parties—Counter-claim** must exist in favor of defendant and against plaintiff in order that judgment as provided in this section may be entered.—*Duff v. Hobbs*, 19 Cal. 646, 658.

§ 667. IN REPLEVIN, JUDGMENT TO BE IN THE ALTERNATIVE, AND WITH DAMAGES. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery can not be had, and damages for the detention.

If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return can not be had, and damages for taking and withholding the same.

[Gold coin or currency judgment.] In an action on a contract or obligation in writing, for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether it be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein; and in all actions for the recovery of money, if the plaintiff allege in his complaint that the same was understood and agreed by the respective parties to be payable in a specified kind of money or currency, and this fact is admitted by the default of the defendant or established by evidence, the judgment for the plaintiff must be

made payable in the kind of money or currency so alleged in the complaint; and in an action against any person for the recovery of money received by such person in a fiduciary capacity, or to the use of another, judgment for the plaintiff must be made payable in the kind of money or currency so received by such person.

History: Enacted March 11, 1872, re-enactment with additions of § 200 Practice Act.

JUDGMENT IN REPLEVIN.

I. CLAIM AND DELIVERY—IN GENERAL, 1-11.

II. SAME—ALTERNATIVE JUDGMENT WITH DAMAGES, 12-147.

III. JUDGMENT PAYABLE IN SPECIFIC KIND OF MONEY, 148-181.

I. CLAIM AND DELIVERY—IN GENERAL.

1-3. Appeal from judgment under this section—Bond to stay execution contains covenant.

4, 5. Destruction of property after taking—Judgment for value and damages.

6. Detention of shares of stock—Anticipatory damages—Special damages.

7. Dismissal after destruction of property—Does not deprive defendant of rights.

8. Same—Suit on bond—Measure of damages.

9. Interest not recoverable—Damages for withholding.

10. Primary purpose of action in replevin.

11. Taking property to enforce lien—Wrongful—But not larceny.

II. CLAIM AND DELIVERY—ALTERNATIVE JUDGMENT WITH DAMAGES.

12-14. Alternative form of judgment—As to generally.

15, 16. Same—Form of.

17-23. Same—Must be entered.

24. Same—Need not be entered, when—General rule.

25, 26. Same—Same—Application of section.

27-30. Same—Same—Delivery impossible.

31. Same—Same—Commixture of property.

32. Same—Same—Dismissal of action.

33, 34. Same—Same—Plaintiff in possession.

35. Same—Same—Non-prejudicial error.

36, 37. Same—Showing necessary.

38. Same—Statutory rule is laid down.

39. Appeal—Aggrieved party.

40. Same—Conflicting evidence.

41. Same—Final judgment.

42. Same—Modification of judgment.

43-45. Same—Presumptions.

46. Same—Stay of execution.

47-49. Same—What reviewed.

50. Change of rights pendente lite.

51. Computation of value.

52. Conversion—Judgment in.

53. Same—Construction of section.

54, 55. Costs—Defendant entitled to recover.

56. Same—Percentage act did not apply.

57, 58. Same—Value of property as controlling.

59, 60. Damages incidental.

61-65. Same—Description of property.

66, 67. Same—Enjoining execution of judgment.

68. Excessive judgment—Full value is, when.

69. Findings—Contradictory.

70. Same—Ownership.

71, 72. Same—Plaintiff's right of possession.

73. Same—"Separate defense."

74. Same—Separate value of several articles.

75. Same—Value.

76. Form of judgment for plaintiff.

77. Same—Conclusions of law.

78. Joint judgment for defendants.

79. Judgment for the defendant—May properly be for sum of money only.

80. Judgment on pleadings.

81. Money judgment for value of property—Is improper.

82. Same—Exception.

83. Part of the property can not be awarded.

84. Same—Where all in issue.

85. Parties defendant.

86. Qualified possession—One holding may recover.

87. Relief granted—How determined.

88-90. Return of property to defendant—Answer must claim.

91. Same—Same—As to what sufficient.

92. Same—Entire property.

93. Same—General verdict for defendants.

94-97. Same—Plaintiff having taken possession.

98. Same—Express finding not necessary.

- 99. Same—Verdict for plaintiff for part only.
- 100. Same—Same—Presumption.
- 101. Right of possession and damages for detention.
- 102. Satisfaction of judgment—Offer and tender by defendant.
- 103-105. Same—Return of part of property.
- 106. Same—Return of property in damaged condition.
- 107. Substituted defendant.
- 108, 109. Title—Effect of judgment on.
- 110. Value of property—Admitted—Harmless error.
- 111. Same—And damages for its detention.
- 112. Same—Cost is not measure of damages.
- 113. Same—Cost may be considered.
- 114. Same—Estoppel—Statement of value by plaintiff in affidavit and bond.
- 115. Same—Exceeding that alleged in complaint.
- 116. Same—Failure to prove.
- 117-119. Same—Fixed and fluctuating.
- 120. Full value—Bailee may recover.
- 121. Same—Lienholder may not recover.
- 122. Same—Mortgagee v. second mortgagee.
- 123. Same—Mortgagee v. mortgageor.
- 124. Same—Sheriff may recover.
- 125. Same—Same—Measure of recovery against.
- 126. Same—Increase of property.
- 127. Same—Offer to purchase.
- 128, 129. Same—Place where fixed.
- 130-132. Same—Separate value for each article.
- 133. Same—Special property.
- 134-137. Same—Time at which found.
- 138. Same—Written securities.
- 139. Verdict sufficient to support judgment.
- 140-146. Same—Code does not require verdict to be special.
- 147. Same—General verdict for plaintiff, effect of.

III. JUDGMENT PAYABLE IN SPECIFIC KIND OF MONEY.

- 148. Account stated—Signed by party charged.
- 149. Admission by pleadings.
- 150. Same—Verdict need not provide what.
- 151. Conflict—Section does not, with federal law.
- 152. Same—Same—Questioned.
- 153. Consideration—Moral obligation.
- 154-157. Contract essential and controlling.

- 158-160. Same—Option to pay in other money.
- 161, 162. Same—Penalty attached.
- 163. Default judgment.
- 164, 165. Difference in value of currency.
- 166. Effect on contracts executed prior to act.
- 167, 168. Fiduciary capacity—Executor holds money of estate in.
- 169. General finding of value.
- 170. "Gold and silver coin"—Obligation to pay in.
- 171. Money had and received.
- 172. Nature of act.
- 173. Open account.
- 174, 175. Pleading—Complaint must pray this relief—Verdict.
- 176. Plea of tender must show what.
- 177. Strict construction required.
- 178. Sureties—Judgment against.
- 179. Unauthorized entry by clerk.
- 180. Unauthorized verdict—Judgment on.
- 181. Written promise—Verbal promise to pay partnership debt—Gold coin.

I. CLAIM AND DELIVERY—IN GENERAL.

As to claim and delivery generally, see, ante, §§ 509-521 and notes.

1. Appeal from judgment under this section—Bond to stay execution contains covenant that surety would allow judgment to be taken against it on motion, etc., and therefore such judgment was entered and paid by the surety. Held the surety could not recover from the appellant as the covenant was without consideration or authority of law.—United States Fidelity & G. Co. v. More, 155 Cal. 415, 418, 101 Pac. 302.

As to right of aggrieved party to appeal, see pars. 39-49, this note.

2. Upon appeal from judgment under this section provision in bond for entry of judgment against surety upon motion is not required and if inserted is surplusage.—United States Fidelity & G. Co. v. More, 155 Cal. 415, 416, 101 Pac. 302.

3. Upon appeal from judgment under this section the only bond required to stay execution is that prescribed by section 943, post.—United States Fidelity & G. Co. v. More, 155 Cal. 415, 416, 101 Pac. 302.

4. Destruction of property after taking—Judgment for value and damages.—Where property taken in replevin was destroyed by fire the owners may recover on the bond the value of the property and damages for withholding it.—Nahhas v. Browning, 181 Cal. 55, 6 A. L. R. 476, 183 Pac. 442.

As to dismissal after destruction of property, see par. 7, this note.

5. In such case the owners' recovery is not limited to interest on the value of the property as in conversion.—Nahhas v. Browning, 181 Cal. 55, 6 A. L. R. 476, 183 Pac. 442.

6. Detention of shares of stock—Anticipatory damages—Special damages.—In an action in claim and delivery arising out of the wrongful detention of shares of corporate stock, under the provisions of the above section, the plaintiff is entitled to recover the depreciation in the value of the property unlawfully detained as an element of damage natural to be anticipated, and for that reason is not required to specifically plead, such damages but they are covered by, and may be recovered under, an averment of general damage.—*Berry v. Bank of Bakersfield*, 177 Cal. 206, 170 Pac. 415, approving doctrine in *Morris v. Allen*, 17 Cal. App. 684, 121 Pac. 690; *Clow v. Yount*, 93 Ill. App. 112, distinguishing *Stevenson v. Smith*, 28 Cal. 103, 87 Am. Dec. 107.

7. Dismissal after destruction of property—Does not deprive defendant of rights.—The plaintiff can not, by dismissing the action after destruction of the property taken in replevin, deprive the defendant of his right to recover damages on the bond, if he is successful.—*Nahhas v. Browning*, 181 Cal. 55, 6 A. L. R. 476, 183 Pac. 442, following doctrine in *Mills v. Gleason*, 21 Cal. 274, which was approved in *Clary v. Rolland*, 24 Cal. 147, 152.

See, also, par. 3, this note.

As to destruction of property by fire after taking and judgment for value and damages, see pars. 4, 5, this note.

8. Same—Suit on bond—Measure of damages.—Had the action been carried to judgment, the defendant would have been entitled to a judgment for the value of the property, not as damages for its conversion, but as a substitute for and in place of the property, and would have been entitled in addition to damages for withholding the property; and this would have been the measure of damages to the defendant had the original action proceeded to judgment, and such, also, will be the measure of damages in a suit on plaintiff's bond in replevin.—*Nahhas v. Browning*, 181 Cal. 55, 6 A. L. R. 476, 183 Pac. 442, approving doctrine in *Sopres v. Lilly*, 1 Colo. 266; *Talcott v. Rose*, — Tex. Civ. App. —, 64 S. W. 1009.

9. Interest not recoverable—Damages for withholding.—Owners of property taken in replevin can not recover interest as such on the value of the property, and also damages for the withholding thereof.—*Nahhas v. Browning*, 181 Cal. 55, 6 A. L. R. 476, 183 Pac. 442.

See discussion and authorities, 23 R. C. L. 911, § 74.

As to damages as distinguished from interest for loss of use of property taken in replevin, see note 6 A. L. R. 478.

10. Primary purpose of an action in replevin is to enforce a right to possession in personal property. It sometimes happens that it becomes impossible in the action to specifically enforce the right of possession, and in such cases a money compensation may be given in lieu thereof. Ordinarily

the judgment is in the alternative form, but where it appears that a delivery of the property can not be had the judgment may properly be for its value alone.—*Donovan v. Aetna Indemnity Co.*, 10 Cal. App. 723, 728, 103 Pac. 365.

11. Taking property to enforce lien—Wrongful—But not larceny.—The taking by one person of the personal property of another, without his consent, is not a larceny; the felonies intended for the essence of the crime of larceny; hence where the owner of an apartment house leased under the terms which required that the tenant should leave the apartment clean on vacating it or pay for its cleaning, the action of a landlord in seizing articles of the tenant because the apartment was not left clean as required by the contract of leasing, this could not be regarded as grand larceny under the provisions of section 484 of the Penal Code; the owner of the property could be amply compensated in damages for the wrongful detention of the property by the landlord under the provisions of the above section and section 3336 of the Civil Code, and the relief must be had in civil action, not a criminal proceedings.—*Ex parte Bayles*, — Cal. App. —, 190 Pac. 1034.

II. CLAIM AND DELIVERY—ALTERNATIVE JUDGMENT WITH DAMAGES.

12. Alternative form of judgment—As to generally.—Where it appears that the possession of the specific personal property may be obtained or the property itself can be delivered to the party claiming it, failure to make the judgment in the alternative form is not erroneous.—*Beggs v. Smith*, 26 Cal. App. 532, 147 Pac. 585.

13. While a judgment must ordinarily be in the alternative, yet a judgment that is not in the alternative is not void, and whether or not it is even erroneous must depend upon the facts of the particular case.—*Keiser v. Levering*, 29 Cal. App. 41, 154 Pac. 281.

14. A judgment which after ordering recovery by the plaintiff of the property described therein states "that the plaintiff is entitled to judgment for the sum of twelve thousand five hundred dollars in the event that said pictures are not returned to the plaintiff herein by said defendant," is substantially a judgment in the alternative.—*Orchardson v. Christie*, 30 Cal. App. 8, 157 Pac. 547.

15. Same—Form of.—Judgment that defendant have and recover from plaintiff sum of one thousand five hundred dollars, or return of property described in the complaint, and his costs, can not be sustained, as defendant was not entitled to judgment for value of the property, except upon condition that return of the property could not be had. The judgment should be "for return of the property, or the value thereof in case a return can not be had."—*Etchepare v. Aguirre*, 91 Cal. 288, 292, 25 Am. St. Rep.

180, 27 Pac. 668. See *Washburn v. Huntington*, 78 Cal. 573, 577, 21 Pac. 305.

16. Plaintiffs are not entitled to recover from defendants value of property unless they are unable to deliver it, and defendants are entitled to satisfy plaintiff's claim by delivery of property sued for, and can be compelled to pay its value only in case such delivery can not be had, and therefore judgment "for return to them of the property described in complaint or its value, to wit, the sum of one thousand dollars and costs," is not in conformity with statute and is erroneous.—*Meads v. Lasar*, 92 Cal. 221, 225, 28 Pac. 935.

17. Same—Must be entered.—That the successful party may have delivery of the property, or if that can not be had, may recover value of property as found by jury, and stated in judgment, with his damages and costs.—*Nickerson v. Chatterton*, 7 Cal. 568, 571.

18. Distinguished.—*Glulca v. Atwood*, 8 Cal. 446, 448.

19. Judgment for plaintiff must be in alternative for possession of the property, or value thereof in case delivery and damages for detention can not be had.—*McCue v. Tunstead*, 66 Cal. 486, 487, 6 Pac. 316. See *Holmberg v. Hendy*, 2 Cal. Unrep. 560, 10 Pac. 394; *Campbell v. Jones*, 38 Cal. 507; *Cummings v. Stewart*, 42 Cal. 230.

20. It is only where verdict is found for defendant in action to recover possession of personal property that judgment must be entered for return of property if defendant claims to be entitled to its return. But in action brought to recover possession when plaintiff obtains verdict, judgment should be for possession or value of property and damages, if any awarded, for its detention. Such is rule for entry of judgments prescribed by this section, and judgment which is not in alternative form, as required by code, is erroneous.—*Stewart v. Taylor*, 68 Cal. 5, 6, 8 Pac. 605.

21. Judgment must be in alternative or it is erroneous.—*Cooke v. Aguirre*, 86 Cal. 479, 483, 25 Pac. 5.

22. Judgment must be in alternative as provided by this section.—*Berson v. Nunan*, 63 Cal. 550, 552; *Brichman v. Ross*, 67 Cal. 601, 606, 8 Pac. 316.

23. Compare: *Claudius v. Aguirre*, 89 Cal. 501, 506, 26 Pac. 1077, where foregoing decisions are criticized and held not authority for reversal of such judgment.

24. Same—Need not be entered when—General rule.—Evident purpose of requiring judgment in alternative is that if plaintiff, after obtaining judgment for possession of property, is unable to obtain delivery, he may in the same action have judgment for its value. Primary object is to recover possession, but if plaintiff has already obtained this possession before judgment, there is no occasion for any judgment for C. C. P.—108

its value, as condition is wanting upon which such clause in judgment is authorized, namely, "if delivery can not be had." Plaintiff need not avail himself of provisional remedy for obtaining possession prior to judgment, or, if he did, defendant might have retaken property, or without retaking it may obtain judgment for its return. In either of these cases judgment must be in alternative in order that in case delivery can not be had prevailing party may recover value of property, or in order to determine amount to be recovered from sureties upon undertaking.—*Claudius v. Aguirre*, 89 Cal. 501, 504, 26 Pac. 1077.

25. Same—Same—Application of section.—Section 177 Practice Act applied only to judgment rendered after trial, and not to cases of nonsuit or voluntary dismissal by plaintiff.—*Clary v. Rolland*, 24 Cal. 147, 148, 150, 151.

26. Provision of section that "If the property has been delivered to the plaintiff and defendant claimed a return thereof, judgment for defendant may be for return of property or the value thereof in case a return can not be had, and damages for taking and withholding same has no application where property is not taken and delivered to plaintiff.—*Black v. Hilliker*, 130 Cal. 190, 193, 62 Pac. 481.

27. Same—Same—Delivery impossible.—In action based on contract of bailment, usual judgment is in alternative that the plaintiff recover possession of the property, or its value, in case delivery can not be had; but where it appears that property can not be delivered, defendant is in no way prejudiced by judgment for value only; and fact that judgment is not in alternative is no ground for reversal.—*Faulkner v. First Nat. Bank*, 130 Cal. 258, 266, 66 Pac. 463. See *Brown v. Johnson*, 45 Cal. 76; *De Thomas v. Witherby*, 61 Cal. 92, 44 Am. Rep. 542; *Burke v. Koch*, 75 Cal. 356, 17 Pac. 228.

As to destruction of property by fire after taking, see pars. 4, 5, 7, 8, this note.

28. Failure to render judgment for possession of property where it appears on trial that it had been hopelessly lost or destroyed, so that judgment for its delivery would be necessarily unavailing, is, at most, a technical error or omission, and one for which judgment would not be reversed.—*Brown v. Johnson*, 45 Cal. 76, 77.

29. Defendants having sold and disposed of large portion of property sued for, and appropriated proceeds thereof, court is not bound to find value of articles which could be returned or to enter judgment in alternative, but may render judgment for value of entire property.—*Burke v. Koch*, 75 Cal. 356, 358, 17 Pac. 228.

30. Where delivery of all but small portion of property is impossible, judgment for plaintiff for its value without alternative of delivery is proper.—*Erreca v. Meyer*, 142 Cal. 308, 309, 75 Pac. 826.

31. Same—Same—Commixture of property.—Where defendant has so intermingled and commixed the property sued for with other property that it can not be distinguished, judgment in alternative form is not necessary.—*Seligman v. Armando*, 94 Cal. 314, 316, 29 Pac. 716, following doctrine in *Caruthers v. Hensley*, 90 Cal. 559, 27 Pac. 411.

32. Same—Same—Dismissal of action entitles defendant to return of property, and it is matter of no concern to plaintiff whether judgment be in alternative form or not, as he has no option as to whether he should pay for or return property.—*Kneebone v. Kneebone*, 83 Cal. 645, 648, 23 Pac. 1031.

See, also, pars. 7, 8, this note.

33. Same—Same—Plaintiff in possession.—Mere failure to include in judgment clause which can not have any operative effect or confer any right or protection upon either plaintiff or defendant, such as for delivery of possession to plaintiff in case where he already has possession, does not affect substantial rights of either party and is not sufficient ground for reversal of judgment.—*Claudius v. Aguirre*, 89 Cal. 501, 506, 26 Pac. 1077.

34. Where property has been delivered to plaintiff prior to trial of cause, judgment for possession without alternative for value is not erroneous.—*Caruthers v. Hensley*, 90 Cal. 559, 560, 27 Pac. 411.

35. Same—Same—Non-prejudicial error.—Where plaintiff gives bond and takes possession of property at commencement of action, an alternative judgment in his favor for too large amount is immaterial.—*California C. F. Assoc. v. Stelling*, 141 Cal. 713, 718, 75 Pac. 320.

36. Same—Showing necessary.—Alternative judgment for value can not be unless it be found plaintiff is entitled to recover property, and, in order that it be so found, there must be showing that defendant had possession of property at time suit was commenced.—*Riclotto v. Clement*, 94 Cal. 105, 107, 108, 29 Pac. 414.

37. Compare: *Faulkner v. First Nat. Bank*, 130 Cal. 258, 266, 66 Pac. 463.

38. Same—Statutory rule is laid down as to judgment which shall be entered in this class of cases, and judgment can not be entered for alternative value unless it is found that plaintiff is entitled to recover property sued for. If he is not entitled to recover property, he is not entitled to judgment, and if he is entitled to judgment, it must be in form prescribed by this section.—*Washburn v. Huntington*, 78 Cal. 573, 577, 21 Pac. 305.

39. Appeal—Aggrieved party.—Appeal lies from judgment that "plaintiff do have and recover of and from defendant the possession of all personal property described in complaint." No costs were awarded plaintiff and judgment was not in alternative form. Defendant by his answer had denied

he was ever owner of or in possession of the property, still he is party "aggrieved," for had the case been tried and denial sustained, proper judgment would have been that plaintiff take nothing and defendant recover his costs.—*Martin v. Porter*, 84 Cal. 476, 479, 24 Pac. 109.

As to appeal and bond to stay execution to contain covenant, see pars. 1-3, this note.

Appeals generally.—See, post, §§ 939 et seq. and notes.

Stay of execution on appeal from judgment in claim an delivery.—See, post, § 943 and note.

40. Same—Conflicting evidence.—Finding as to value made upon conflicting evidence will not be disturbed on appeal.—*Roberts v. Burr*, 135 Cal. 156, 160, 67 Pac. 46.

41. Same—Final judgment will not be directed where no finding is made on issues of value and damages.—*Thompson v. Corpstein*, 52 Cal. 653.

42. Same—Modification of judgment.—On appeal judgment will be modified to make it conform to the requirement of this section, where to accomplish such no other guide than plain provisions of section and findings on file will be necessary.—*Kelly v. McKibben*, 54 Cal. 192, 193.

43. Same—Presumptions.—On appeal from judgment for plaintiff for possession of property without alternative of value in case possession could not be had, it will be presumed possession had been obtained by plaintiff.—*Caruthers v. Hensley*, 90 Cal. 559, 561, 27 Pac. 411.

44. Where defendant prays return of property, and it does not appear he has given bond, etc., it will be presumed on appeal that property was delivered to plaintiff, and where plaintiff has been found to be entitled to only part of property, judgment will be modified to provide that balance thereof be returned to defendant.—*Ryan v. Fitzgerald*, 87 Cal. 345, 348, 25 Pac. 546.

45. When jury find plaintiff entitled to possession they are not required to find value of the property if it has been delivered to plaintiff, and, unless value has been found, there is no basis upon which to render alternative judgment for its value. For the purpose of sustaining judgment entered in favor of plaintiff for possession of personal property without alternative for its value "in case delivery can not be had," it will be presumed in the absence of any bill of exceptions or other showing of error, that it appeared at the trial that plaintiff had already obtained possession of the property sued for.—*Caruthers v. Hensley*, 90 Cal. 559, 560, 27 Pac. 411.

46. Same—Stay of execution.—Proceedings pending appeal will not be stayed because defendant has given redelivery bond. Judgment for plaintiff is immediately enforceable unless defendant gives statutory bond to stay execution.—*Swasey v. Adair*, 83 Cal. 203, 26 Pac. 83.

47. **Same—What reviewed.**—Objection to form of verdict, or that excessive damages were thereby awarded, can only be made available on motion for new trial, and can not be raised for first time in appellate court.—*Campbell v. Jones*, 41 Cal. 515, 518.

48. Defendant setting up title in his own behalf for purpose of having judgment that property be returned to him, can not be heard to say there was no proper issue made as to title. The answer was deemed denied, and defendant, having gone to trial upon the theory that title was in issue, can not on appeal for the first time be heard to say there was no such issue.—*Flinn v. Ferry*, 127 Cal. 648, 654, 60 Pac. 434.

49. Where defendants allow general allegation of damage in complaint to go unchallenged and plaintiff to, on trial, make general statement as to how much he was damaged without requiring him to state in what manner, objection thereto will be disregarded when made for first time on appeal.—*Hickey v. Coschina*, 133 Cal. 81, 85, 65 Pac. 313.

50. **Change of rights pendente lite.**—Judgment should adjust equities between the parties as they stand at time of its rendition when rights and titles have changed pendente lite.—*Brook v. Bayless*, 6 Okla. 568, 52 Pac. 738.

51. **Computation of value.**—The value of the property, where the judgment is in the alternative, is to be computed as of the time when demand for delivery was made and not as of the date of the original deposit in an action to recover the possession of certificates of stock and a bond deposited with stockholders as collateral security in the buying and selling of stocks on margin.—*Hartnett v. Wilson*, 31 Cal. App. 678, 161 Pac. 281.

52. **Conversion—Judgment in.**—Damages amounting to the value of property sued for may be had in action for personal property or its value, although claim and delivery may not lie for property, e. g., corporate stock, where complaint is sufficiently broad to show such damage, and same is within issues framed by pleadings.—*Dennison v. Chapman*, 105 Cal. 447, 453, 39 Pac. 61.

53. **Same—Construction of section.**—This section applies to cases where judgment is entered after trial, and not to cases where the action is determined without trial.—*Kneebone v. Kneebone*, 83 Cal. 645, 648, 23 Pac. 1031.

54. **Costs—Defendant entitled to recover.**—Where defendant comes rightfully into possession of property, and has never manifested any disposition to claim title to it and shows willingness to surrender, he can not be made to answer for costs without proof of demand made upon him.—*California C. F. Assoc. v. Stelling*, 141 Cal. 713, 719, 75 Pac. 320.

As to costs generally, see, post, §§ 1021, 1040 and notes.

55. Costs should be allowed defendant rightfully in possession of property in absence of demand.—*Chipman v. McDonald*, 9 Kan. App. 882, 57 Pac. 252.

56. **Same—Percentage Act did not apply.**—Act allowing percentage on amount of judgment recovered in San Francisco did not apply to alternative judgment in claim and delivery, as the amount recovered is not primary and absolute result of judgment.—*Wheatland M. Co. v. Pirrie*, 89 Cal. 459, 463, 26 Pac. 964.

57. **Same—Value of property as controlling.**—Costs may be allowed plaintiff where it is found he is entitled to part of the property and defendant to part, where part awarded plaintiff is of value exceeding three hundred dollars.—*Rohr v. McCalg*, 33 Cal. 309, 310.

58. Recovery of costs by defendant is controlled by value alleged or ad damnum clause of complaint, and not by value of property returned to defendant by judgment.—*Edgar v. Gray*, 5 Cal. 267.

59. **Damages incidental.**—Right to recover the property taken or its value is entirely independent of right to recover damages for taking and detention. Former restores to one from whom his property has been taken the property itself or its value. Latter compensates him for loss resulting from wrongful act of taking, and wrongful detention, and right to payment of damages awarded is not affected or impaired either by return of property or payment of its value, nor, on other hand, will payment of damages awarded release or affect in any way portion of judgment requiring return of property or payment of its value as to time of taking.—*Nichols v. Paulson*, 10 N. D. 440, 87 N. W. 977.

As to damages, see, ante, § 509 and note pars. 84-119.

Default judgment upon failure to answer, see, ante, § 585 and note.

60. General verdict for plaintiff will not be set aside because jury fails to find damages, they being nominal issue and not principal object of action.—*Gaines v. White*, 1 S. D. 434, 47 N. W. 524.

61. **Same—Description of property in judgment by reference to findings and in findings by reference to complaint is inexcusably circuitous but not ambiguous or uncertain.** Certum est quod certum redd. potest.—*Kelly v. McKibben*, 54 Cal. 192, 193.

62. Description of property in judgment by reference to description in complaint is sufficient. Certum est quod certum reddi potest (that is certain which can be made certain).—*Hogue v. Fanning*, 73 Cal. 54, 57, 14 Pac. 560.

63. Judgment must of itself, or by reference to complaint or other pleadings, contain certain description of the property.—*Welch v. Smith*, 45 Cal. 230, 231.

64. Judgment must contain sufficient description of the property, either of itself or

by reference to some other pleading or paper, and without such description is bad for uncertainty.—*Cooke v. Aguirre*, 86 Cal. 479, 483, 25 Pac. 5.

65. Judgment and verdict which do not describe the property in some manner are informal and erroneous, and are not cured by stipulation of defendant that verdict was finding for plaintiff as to title and right of possession of the property described in complaint.—*Campbell v. Jones*, 38 Cal. 507, 509, 510.

As to effect of dismissal, see, ante, § 509 and note.

As to description of property, see, ante, § 509 and note.

As to disposition of property by defendant, see, ante, § 509 and note pars. 167-171.

66. Same—Enjoining execution of judgment.—Defendant in claim and delivery having obtained judgment for return of the property or its value, and plaintiff having tendered a return of the property and payment of judgment for costs, etc., which defendant refused to accept, and caused execution for value of the property to issue, which execution the court refused to recall on motion of plaintiff, and from which refusal an appeal is pending. Plaintiff may in such case maintain bill in equity to enjoin all proceedings on such execution pending the appeal.—*Eppinger v. Scott*, 230 Cal. 275, 277, 62 Pac. 460.

67. Execution of judgment for return of property to defendant or its value in case return can not be had will be enjoined upon showing that before verdict plaintiff voluntarily returned the property to defendant, and plaintiff's order to show such on trial, which offer was ruled out, and that defendant accepted the property and agreed to satisfy judgment upon payment of damages and costs.—*Thompson v. Laughlin*, 91 Cal. 313, 315, 27 Pac. 752 (dis. op. by Sharpstein, J.).

68. Excessive judgment—Full value is when.—Where the plaintiff's right to have possession of the described property is only claimed for the purpose of satisfying his claims for an unpaid indebtedness, and where no special damages are alleged or proved, the value of the property to him can not exceed the amount of the indebtedness, and therefore a judgment for the full value in case delivery can not exceed such amount.—*Kelser v. Levering*, 29 Cal. App. 41, 154 Pac. 281.

See par. 115, this note.

69. Findings—Contradictory, determining that both plaintiff and defendant are entitled to possession of property can not support judgment.—*Carman v. Ross*, 64 Cal. 249, 29 Pac. 510.

70. Same—Ownership, if directly in issue, must be found upon or judgment can not be entered on verdict finding plaintiff entitled to possession or value of property.—*Holt v. Van Eps*, 1 Dak. 206, 46 N. W. 689.

71. Same—Plaintiff's right of possession is material issue upon which court must find in order that findings shall sustain judgment for plaintiff.—*Cooke v. Aguirre*, 86 Cal. 479, 482, 25 Pac. 5.

72. Finding of right of possession at time of commencement of action is immaterial where judgment is for defendant for return of property or its value in stipulated sum.—*Banning v. Marleau*, 133 Cal. 485, 486, 65 Pac. 964.

73. Same—"Separate defense" need not be found upon when matters therein alleged are all included in the general issue as to ownership.—*Black v. Black*, 74 Cal. 520, 522, 16 Pac. 311.

74. Same—Separate value of several articles.—Where complaint alleges value of several articles of personal property at gross sum, and answer denies they are of that value, or of value exceeding lesser sum, and proceeds to enumerate various items stating value of each, the judgment is not erroneous in failing to find value of each article, as such finding is required only where jury are instructed to so find, and such instruction must be pertinent and proper and asked and refused before error can be predicated thereon.—*Kellogg v. Burr*, 126 Cal. 38, 40, 58 Pac. 306.

75. Same—Value.—No finding of value is necessary if goods have been delivered to plaintiff and judgment be in his favor.—*Samuels v. Burnham*, 10 Kan. App. 574, 61 Pac. 755.

76. Form of judgment for plaintiff should be for the possession of property, not for return, latter form being appropriate only where judgment is for defendant.—*Campbell v. Jones*, 38 Cal. 507, 513.

77. Same—Conclusions of law.—When jury finds right of possession to be in plaintiff, conclusion of law follows, as provided in this section, that he is entitled to delivery if it can be had, and, if not, to value of the property as found by the jury in alternative. This the judgment must contain, but verdict need not.—*Ryan v. Fitzgerald*, 87 Cal. 345, 346, 25 Pac. 546.

As two inconsistent positions can not be taken by plaintiff, see, ante, § 509 and note par. 214.

78. Joint judgment for defendants sued jointly may be rendered, though they answer separately.—*Myers v. Moulton*, 71 Cal. 498, 503, 12 Pac. 505.

79. Judgment for the defendant—May properly be for a sum of money only where the property is taken over on the replevin bond and is lost or destroyed while in the possession of the plaintiff.—*Donovan v. Aetna Indemnity Co.*, 10 Cal. App. 723, 728, 103 Pac. 365.

See par. 81, this note.

80. Judgment on pleadings.—Where plaintiff presents his case in two parallel sets of allegations, defendant may reply to either set, and it is not necessary for them

to reply to both in order to shield themselves against judgment on pleadings.—*Nudd v. Thompson*, 34 Cal. 39, 47.

As to judgment, in general, see, ante, §§ 577 et seq. and notes.

As to jury trial, see, ante, § 509 and note pars. 221, 222.

As to loss or destruction of the property, see, ante, § 509 and note pars. 235, 236.

81. Money judgment for value of property—Is improper under statute providing judgment shall be for delivery of the property or its value in case delivery can not be had.—*Hall v. Law G. & T. Soc.*, 22 Wash. 305, 60 Pac. 643.

See par. 79, this note.

82. Same—Exception—Money judgment for value of property or plaintiff's interest therein may be rendered where defendant has disposed of property prior to trial.—*Park v. Robinson*, 15 S. D. 551, 91 N. W. 344.

83. Part of the property can not be awarded plaintiff, "leaving defendant to his remedy on the bond" as to balance, ownership of which court was unable to determine for want of evidence.—*Jandt v. South*, 2 Dak. 46, 47 N. W. 779.

84. Same—Where all in issue—Judgment for one-half property described in complaint entered on verdict therefor, where all material allegations of complaint are in issue, is not responsive to issues made and will be reversed.—*Muller v. Jewell*, 66 Cal. 216, 217, 5 Pac. 84.

85. Parties defendant—Where in a suit against A individually he justifies as assignee of estate of insolvent debtor, he can not complain if judgment runs against him in that capacity and individually and not against estate of insolvent.—*O'Brien v. Ballou*, 116 Cal. 318, 324, 48 Pac. 130.

86. Qualified possession—One holding may recover—Fact that plaintiff at time of trial has a qualified possession of property as agistor, property having been placed in his possession by a vendee of defendant, does not prevent him obtaining judgment for the absolute and unqualified possession of the property, and judgment that he is entitled to possession of the property, and that he recover possession of the same, is proper.—*Benjamin v. Huston*, 16 S. D. 569, 94 N. W. 584.

87. Relief granted—How determined—Judgment for recovery of possession of note or its value may be rendered upon complaint sufficiently stating cause of action therefor, although different relief is prayed. Relief to which plaintiff may be entitled is to be determined by court and after trial any relief consistent with case made by complaint and embraced within issues may be given.—*More v. Finger*, 128 Cal. 313, 318, 60 Pac. 933.

Relief consistent with case made.—See, ante, § 580 and note.

88. Return of property to defendant—Answer must claim—Judgment for defendant for value of property upon showing that same can not be delivered, should not be rendered upon dismissal of action, unless the answer contains some averment or prayer showing change of possession from defendant to plaintiff. Judgment of return is in nature of cross-judgment, and there must be some appropriate averments in pleadings to put in issue facts upon which relief is given.—*Gould v. Scannell*, 13 Cal. 430, 431.

89. Return of the property to defendant must be claimed and prayed for in answer, or judgment that he recover property or its value will not be sustained.—*Banning v. Marleau*, 101 Cal. 238, 239, 35 Pac. 772.

90. In an action for the replevin of an automobile in which the defendant, by way of counter-claim, showed the fact that the automobile had been taken from his possession by the sheriff at the instance of the plaintiff and alleged certain damages he had sustained by reason of such act, but in his prayer for judgment he made no demand whatsoever for the redelivery of the automobile, such answer will be insufficient to support a judgment for the directing of the return of the property.—*Lee v. De La Motte*, — Cal. App. —, 189 Pac. 1034, following the doctrine in *Pico v. Pico*, 56 Cal. 453; and *Banning v. Marleau*, 101 Cal. 238, 35 Pac. 772.

91. Same—Same—As to what sufficient—Prayer in answer for return of property is sufficient to justify judgment for its return or value in case return can not be had.—*Myers v. Moulton*, 71 Cal. 498, 504, 12 Pac. 505.

92. Same—Entire property—Defendant who recovers judgment where property has been delivered to plaintiff is entitled to judgment for return of property, and if property—all of it—can not be returned, then to judgment for value of the whole.—*Whetmore v. Rupe*, 65 Cal. 237, 238, 3 Pac. 851.

93. Same—General verdict for defendants will support judgment for return of property to them and failure to give alternative judgment for value is no ground of complaint on part of plaintiff.—*Waldman v. Broder*, 10 Cal. 378, 380.

94. Same—Plaintiff having taken possession—Legal effect of finding for defendant on question of plaintiff's right to the property is to entitle defendants from whom it was taken to its restoration, nor is there anything in failure to give alternative judgment for value of the property. This omission might have been complained of by defendants if they had shown failure, but it is no ground of complaint on part of plaintiff.—*Waldman v. Broder*, 10 Cal. 378, 380.

95. Approved: *Kneebone v. Kneebone*, 83 Cal. 645, 648, 23 Pac. 1031.

96. Alternative judgment in favor of defendant for return of the property "or value thereof" is proper when answer "claims" return and court, jury or referee finds value of the property, and that defendant is entitled to return.—*Pico v. Pico*, 56 Cal. 453, 460.

As to alternative judgment, see pars. 12-38, this note.

97. In action of claim and delivery, both parties are actors. Plaintiff seeks recovery on ground he is entitled to possession, and defendant seeks ordinarily to defeat action and maintain his possession on ground that plaintiff has no right to such possession. When, therefore, defendant prevails in action and property has been taken from him under process, he is clearly entitled to its return, or its value in case return can not be had.—*Pitts A. Wks. v. Young*, 6 S. D. 557, 62 N. W. 432.

98. *Same*—Express finding not necessary.—Legal effect of finding for defendants on question of plaintiff's right to the property is to entitle defendants from whom it was taken to its restoration, and this right is not dependent upon any finding of jury to that effect, but is conclusion of law from verdict for defendants. And it is right of the court to state this legal conclusion as a portion of its judgment.—*Waldman v. Broder*, 10 Cal. 378, 380.

99. *Same*—Verdict for plaintiff for part only of property being silent as to balance, gives him no right to possession of that balance; there being nothing to show but that defendant is entitled thereto, it can not be withheld from him. Silence of verdict and judgment as to balance of property must be held to be finding that plaintiff was denied any further relief than he obtained, and he is precluded from any further litigation with defendant as to this balance.—*Ryan v. Fitzgerald*, 87 Cal. 345, 346, 25 Pac. 546.

100. *Same*—*Same*—Presumption.—In case where plaintiff is awarded part only of property, and there being no showing that defendant gave redelivery bond, it must be presumed sheriff delivered property to plaintiff, and defendant having prayed return in his answer, judgment should be that balance of property not awarded to plaintiff be returned to defendant.—*Ryan v. Fitzgerald*, 87 Cal. 345, 348, 25 Pac. 546.

101. Right of possession and damages for detention.—It is the general rule that, where the plaintiff prevails, even though the property has been delivered to him on the writ, he is entitled to a judgment, not only affirming his right of possession, but awarding him as well such pleaded and proven damages as will compensate him for the injury sustained by reason of the wrongful taking and detention.—*Morris v. Allen*, 17 Cal. App. 688, 121 Pac. 690.

102. Satisfaction of judgment—Offer and tender by defendant to deliver property be-

fore execution is satisfaction of judgment for return, and alternative judgment for its value can not be thereafter enforced.—*Johnson v. Gallegos*, 10 N. M. 1, 60 Pac. 71; *Marks v. Willis*, 36 Ore. 1, 58 Pac. 526.

103. *Same*—Return of part of property sued for by sheriff under execution does not satisfy the judgment, and execution may be enforced for value of balance of property.—*Black v. Black*, 74 Cal. 520, 522, 16 Pac. 311.

104. Plaintiff has no right to retain such of articles sued for as he might choose and pay defendant value thereof, notwithstanding court finds defendant is owner thereof. Such proposition can not be sustained upon any principles of law.—*Black v. Hilliker*, 130 Cal. 190, 192, 62 Pac. 481.

105. Wrong-doer may not through his wrong-doing acquire privilege of restoring to its owner particular article or paying its value as found by jury. Under our code judgment is primary for return of all property wrongfully taken or withheld, and judgment for its value comes into operation only "in case return can not be had."—*Whetmore v. Rupe*, 65 Cal. 237, 238, 3 Pac. 851.

106. *Same*—Return of property in damaged condition.—Owner is entitled to return of his property in substantially as good condition as when taken and offer to return property some time after judgment for its return or value in substantially damaged condition is not satisfaction of judgment.—*Nichols v. Paulson*, 10 N. D. 440, 87 N. W. 977.

107. Substituted defendant.—Purchaser from defendant with full notice and after suit is commenced who procures himself to be substituted as defendant in cause, takes place of defendant cum onere, and judgment for recovery of property or its value if delivery cannot be had may be entered against him.—*Wise v. Collins*, 121 Cal. 147, 152, 53 Pac. 640.

108. Title—Effect of judgment on.—When plaintiff or defendant in the original suit obtains judgment for delivery of the property, or, if it cannot be found, then for its value, title of property vests in party against whom judgment is given, subject to right of successful party to take it in discharge of so much of judgment as to make up assessed value of property. If, therefore, property should be accidentally lost or destroyed after judgment and before possession by sheriff, loss would fall upon unsuccessful party, and he would be bound to pay its value.—*Nickerson v. Chatterton*, 7 Cal. 568, 572.

109. When plaintiff or defendant obtains judgment for delivery of property, or if it can not be found, then for its value, title of property vests in party against whom judgment is given, subject to right of successful party to take it in discharge of so much of judgment as is made up by assessed value of property.—*Hunt v. Robinson*,

11 Cal. 262, 278. See *Nickerson v. Chatterton*, 7 Cal. 568.

110. Value of property — Admitted — Harmless error.—Where value alleged in complaint is not denied by answer, objection to evidence of value should be sustained, but error in admitting such value is without prejudice to defendant where jury finds lower value than that alleged.—*Tully v. Harloe*, 35 Cal. 302, 306, 95 Am. Dec. 102.

111. Same—And damages for its detention.—Under this section the value of the property and damages for its detention are separate and independent actions, and the damages that may be pleaded, proved, and recovered, are general or special or both.—*Morris v. Allen*, 17 Cal. App. 688, 121 Pac. 690. See *Nahhas v. Browning*, 181 Cal. 55, 6 A. L. R. 476, 183 Pac. 442.

As to necessity that verdict in claim and delivery give separate valuation of several articles involved, see note Ann. Cas. 1912D, 849-852.

112. Same—Cost is not measure of damages.—Full value of goods at time of taking, and not what they cost plaintiff, is measure of damage.—*Pelberg v. Gorham*, 23 Cal. 349, 352.

113. Same—Cost may be considered.—In fixing value, evidence of what it would cost to purchase in open market and replace property in controversy is admissible.—*Angell v. Hopkins*, 79 Cal. 181, 183, 21 Pac. 729; *Levy v. Scott*, 115 Cal. 39, 49, 46 Pac. 892 (citing *Cassin v. Marshall*, 18 Cal. 689).

114. Same—Estoppel—Statement of value by plaintiff in affidavit and bond by which he sought to obtain possession of the property estops him asserting the property to be of less value.—*Park v. Robinson*, 15 S. D. 551, 91 N. W. 344.

115. Same—Exceeding that alleged in complaint.—Judgment may be for more than value of goods as alleged in complaint, provided damages alleged are larger than judgment. Mistake as to value of goods which is only one predicate of the recovery does not estop plaintiff from recovering sum commensurate with loss or injury sustained by him if amount so recovered be within the ad damnum of the writ.—*Coghill v. Boring*, 15 Cal. 213, 218.

See par. 68, this note.

116. Same—Failure to prove value is not prejudicial to one wrongfully replevying property thereafter sold by him for greater sum than amount of judgment rendered against him for its value.—*Keystone I. Co. v. Welsheimer*, 8 Kan. App. 861, 55 Pac. 348.

117. Same—Fixed and fluctuating.—The measure of damage where property converted has fixed value is that value with legal interest from time of conversion; when value is fluctuating plaintiff may recover highest value at time of conversion or at any time afterwards.—*Douglass v. Kraft*, 9 Cal. 562, 563; *Hamer v. Hathaway*, 33 Cal. 117, 119.

118. Where property is of fluctuating market value, value to be fixed is highest price between time of taking and trial. Reason for exception being that in usual course of trade or business it is likely the owner would have realized enhanced value if he had not been deprived of his property.—*Page v. Fowler*, 39 Cal. 412, 419, 2 Am. Rep. 462.

119. Approved: *Benjamin v. Huston*, 16 S. D. 569, 94 N. W. 584.

120. Full value—Bailor may recover.—Bailor may recover the full value of property taken from him by one without title or right of possession where return of property is impossible, holding excess over his special property therein in trust for his bailor.—*Hall v. Southern Pac. Co.*, 6 Ariz. 378, 57 Pac. 617.

121. Same—Lienholder may not recover.—Lienholder in action of claim and delivery to recover property upon which he has lien, is not entitled to judgment for full value of property in case delivery can not be had, but only for amount of his lien or special property therein.—*Wilkerson v. Thorp*, 128 Cal. 221, 225, 60 Pac. 679.

122. Same—Mortgagee v. second mortgagee.—Full value of property and not merely plaintiff's interest therein is to be recovered by defendant, mortgagee of chattels, in action by another mortgagee of such chattels if latter fails to recover in action; defendant therein being responsible to mortgagee for chattels or their value.—*Madison Nat. Bank v. Farmer*, 5 Dak. 282, 40 N. W. 345.

123. Same—Mortgagee v. mortgagee.—In action by chattel mortgagee where defendant obtains redelivery to him, and property is found to be of greater value than amount of debt, alternative judgment should be only in amount due, and not for full value of property.—*National Bank of Commerce v. Feeney*, 9 S. D. 550, 70 N. W. 874.

124. Same—Sheriff may recover full value of property wrongfully replevined from him while held under process, and not merely value of his special interest in it.—*Coos Bay R. Co. v. Siglin*, 34 Ore. 80, 53 Pac. 504.

125. Same—Same—Measure of recovery against.—In action against officer for property wrongfully taken, where plaintiff bids in such property at judicial sale, he is not entitled to recover full value of property, but only amount it cost to obtain possession of the property with interest on such amount from the time of payment.—*Northrup v. Cross*, 2 N. D. 433, 51 N. W. 718.

126. Same—Increase of property.—Value of increase up to time of trial and judgment should be allowed plaintiff in recovery of judgment by him in action for cow.—*Wade v. Gould*, 8 Okla. 690, 59 Pac. 11.

127. Same—Offers to purchase property by third person is not competent proof of its value. "a mere offer would be no legal proof that plaintiff was deprived of sum

offered. It furnishes no reason that plaintiff would have received sum offered if he had possession of the property it referred to.—*N. Y. Young v. Atwood*, 5 Hill 234; *Masterson v. Brooklyn*, 7 Hill 61, 62. *Mich. Perkins v. People*, 27 Mich. 386. *Mass. Fowler v. County Comrs.*, 38 Mass. (6 Allen), 92, 96.

128. *Same*—Place where fixed.—Market value is to be ascertained at place of conversion.—*Hamer v. Hathaway*, 33 Cal. 117, 120.

129. Value which plaintiff is entitled to recover in case delivery can not be had is value to be ascertained at place where it is detained when action is commenced. Evidence of value in places of nearby markets, cost of marketing, etc., is admissible as tending to prove value at place of detention.—*Hisler v. Carr*, 34 Cal. 641, 645.

130. *Same*—Separate value of each article need not be found where plaintiff alleges only the aggregate value of all articles and all property is adjudged returned to defendant; the finding of its aggregate value is all that was required.—*Black v. Hilliker*, 130 Cal. 190, 192, 62 Pac. 481.

131. Where defendant takes issue only upon the aggregate value of property described, and no evidence of value of each specific article is offered at trial, court does not err in not instructing jury to find value of each specific article.—*Brenot v. Robinson*, 108 Cal. 143, 144, 41 Pac. 37.

132. Value of any specific portion of the property in controversy is to be found by jury only "if so instructed." Error can therefore only arise in case where such instruction would be pertinent and proper and instruction was asked and refused.—*Whetmore v. Rupe*, 65 Cal. 237, 238, 3 Pac. 851.

133. *Same*—Special property.—Value of special or limited property of defendant in goods replevied from him by general owner and not full value of goods should be found and awarded where judgment is rendered for defendant.—*Thornton, J.*, in conc. op. in *Pico v. Martinez*, 55 Cal. 148, 151.

134. *Same*—Time at which found.—Value to be recovered in case delivery can not be had is value as of day of trial, plaintiff being entitled primarily to very property sued for; amount of money value can be proximately fixed best by ascertaining it as of date nearest to time when property would be delivered.—*Phillips v. Sutherland*, 2 Cal. Unrep. 241, 2 Pac. 32.

135. Time of trial is time at which value must be fixed when delivery can not be had.—*Gardner v. Brown*, 22 Nev. 156, 37 Pac. 240.

136. Value to be fixed by jury is that of property at time of the taking by defendant, or of commencement of the action, where property is not of a fluctuating value.—*Benjamin v. Huston*, 16 S. D. 569, 94 N. W. 584.

137. Where there is proof of value at time of the commencement of action and place where the goods were detained, evidence of value at any other time or place is immaterial.—*Durst v. Burton*, 47 N. Y. 167, 170.

138. *Same*—Written securities are presumed to be worth the principal and interest indicated on their face in action of claim and delivery for their recovery.—*Holt v. Van Eps*, 1 Dak. 206, 46 N. W. 689.

As to case where affidavit does not truly state value of property, officers or sureties on any undertaking or bond may set up true value, see, ante, § 473 and note.

139. Verdict sufficient to support judgment.—In action against two defendants, verdict that "we, the jury, find for defendant," where question at issue, whether plaintiffs were owners and entitled to possession of property, no affirmative relief being sought by defendants, is sufficient to sustain judgment that plaintiff take nothing, and that defendants (naming them) recover from plaintiffs their costs.—*Butler v. Estrella R. V. Co.*, 124 Cal. 239, 241, 56 Pac. 1040. See *Willard v. Archer*, 63 Cal. 33.

140. *Same*—Code does not require verdict to be special except as to value of property, and sole object of this exception is to enable court to render alternative judgment as required by this section. A verdict, special as to value of property, but general on all other issues, is sufficient to justify judgment for return of property, or for value thereof in case delivery could not be had. Such finding would have consisted entirely of pure conclusions of law in verdict.—*Etchepare v. Aguirre*, 91 Cal. 288, 292, 25 Am. St. Rep. 180, 27 Pac. 668.

141. Under section 627, ante, the jury are authorized to find value of property, if their verdict be in favor of plaintiff, only "if property has not been delivered to plaintiff" and eo converso if property has been delivered to plaintiff they are not required to find value, and in absence of such findings there is no verdict upon which to base alternative judgment.—*Claudius v. Aguirre*, 89 Cal. 501, 504, 26 Pac. 1077.

142. Judgment must be founded upon a sufficient verdict and can not be sustained upon verdict that "we find a verdict for plaintiff in sum of five hundred dollars."—*Stewart v. Taylor*, 68 Cal. 5, 6, 7, 8 Pac. 505.

143. Verdict for plaintiff for value of property and damages, but not for plaintiff for property, where it remains in defendant's hands, is erroneous, as under such verdict and judgment thereon defendant could not elect to deliver property.—*Norcross v. Nunan*, 61 Cal. 640, 643.

144. Verdict that goods are property of defendant and that he is entitled to possession is equivalent to general verdict upon issue of payment and usury, is sufficient to support judgment for defendant.—*Nunn v. Bird*, 36 Ore. 515, 59 Pac. 808.

145. Verdict finding that plaintiff is entitled to possession of property and value thereof is sufficient to support judgment for plaintiff for possession of property or its value, in case where each party claims right of possession by virtue of absolute ownership.—*Branstetter v. Morgan*, 3 N. D. 290, 55 N. W. 758.

146. Where facts are admitted by the pleadings or are not controverted, it is province of court to direct verdict, and this is rule in cases of claim and delivery, and therefore when value of plaintiff's interest in property is not found in verdict, but is not controverted, court may order verdict amended and judgment entered accordingly.—*Fletcher v. Nelson*, 6 N. D. 94, 69 N. W. 53.

147. Same.—General verdict for plaintiff finds ownership and right of possession in him with unlawful detention by defendant.—*Gaines v. White*, 1 S. D. 434, 47 N. W. 524.

As to verdict, see, ante, § 627 and note.

III. JUDGMENT PAYABLE IN SPECIFIC KIND OF MONEY.

148. Account stated.—Signed by party charged, and containing clause "Payable in gold coin (United States) according to contract" is sufficient to support judgment payable in gold coin.—*Carey v. Philadelphia & C. P. Co.*, 33 Cal. 694, 697.

149. Admission by pleadings.—Verdict for sum of money generally will support judgment payable in gold coin when obligation to pay in such coin is admitted by pleadings.—*Pinkerton v. Woodward*, 33 Cal. 557, 607, 91 Am. Dec. 657.

150. Same.—Verdict need not provide for payment in gold coin in order that such judgment may be entered if it is admitted by pleadings that debt was payable in such coin.—*Winans v. Hassey*, 48 Cal. 634, 637.

151. Conflict.—Section does not, with federal law.—This act is remedial in nature, affording to party who may be justly entitled to performance of contract in terms, means of enforcing it. Right to its enforcement is not inconsistent with good faith and dictates of scrupulous and exact justice, and there can be no doubt of power of legislature to provide for creditor remedy to compel his debtor to do what he has solemnly and deliberately bound himself to do unless act is in derogation of laws of congress making United States notes legal tender in payment for debts and lawful money, and this the act is not. It creates no new right in abstract. It does no more than add to cases in which it is competent for courts to enforce execution of contracts specifically and provides means by which this can be done.—*Carpentier v. Atherton*, 25 Cal. 564, 567, 572, 576.

152. Same.—Same.—Questioned.—Whether provision relating to recovery of moneys received in fiduciary capacity and to suits for moneys had and received to use of another irrespective of any express agreement

to pay specific kind of money, is repugnant to act of congress making treasury notes legal tender in payment of debts, not decided (*Sawyer, J., dis. op.*).—*Magraw v. McGlynn*, 26 Cal. 421, 434.

153. Consideration.—Moral obligation.—Agreement to pay note and mortgage in gold coin made subsequent to execution thereof, to secure extension of time of payment, is sufficient, even if moral obligation was to pay only in money which was current at time debt was incurred.—*Belloc v. Davis*, 38 Cal. 242, 256.

154. Contract essential and controlling.—Judgment on contract made by supervisors for street improvements against owner of property can not be made payable in gold coin, it being on liability founded upon contract to which he was not party and bound thereby only by force of statute.—*Perine C. & Pav. Co. v. Quackenbush*, 104 Cal. 684, 689, 38 Pac. 533.

155. Where no contract to pay in specific kind of money exists, debtor may discharge his obligation by payment in lawful money, but court can not by its judgment say that payment shall be made in any one kind of money in preference to another. Verdict in action for services where no agreement to pay in any specific kind of money was shown may be based upon value of services in legal tender.—*Spencer v. Prindle*, 28 Cal. 276, 278.

156. Payment in gold coin may be required by judgment for wages, provided there was promise to pay in such.—*Bradbury v. Cronise*, 46 Cal. 287, 289.

157. Judgment on note providing payment to be made in "U. S. gold coin" is properly made payable in United States gold coin.—*Sheehy v. Chalmers*, 4 Cal. 617, 36 Pac. 514.

158. Same.—Option to pay in other money.—Contract can not be said to be payable in specific kind of money or currency when it provides for payment in alternative in specific kind of money or something else.—*Reese v. Stearns*, 29 Cal. 273, 275.

159. Agreement that all payments of principal and interest shall be made in gold coin of United States of America of present standard of weight and fineness, or equivalent of such coin if paid in legal currency, is contract to pay given sum of money in any lawful money of United States, and therefore will not support judgment payable in gold coin only. In contemplation of law, dollar in legal tender notes is equal to and equivalent of dollar in gold coin.—*Reese v. Stearns*, 29 Cal. 273, 275, 277.

160. Instrument containing promise to pay in gold coin, but also if not paid in coin to pay "such further sum as may be equal to difference in value in San Francisco market between such gold coin and paper currency of United States as is now or may hereafter be made legal tender by laws of United States or of this state" does not authorize judgment payable in gold

coin.—*Lamping v. Hyatt*, 27 Cal. 99, 103; *Reese v. Stearns*, 29 Cal. 273, 275.

161. **Same—Penalty attached.**—Direct and specific contract to pay in gold coin is not vitiated by independent promise to pay additional sum if not paid in gold coin.—*Lane v. Gluckauf*, 28 Cal. 288; *Reese v. Stearns*, 29 Cal. 273, 275.

162. **Note payable in gold coin, or, in case of failure to pay in such coin, promise to pay such further sum or percentage as damages as shall be equal to actual difference in value between such coin and United States treasury notes or other paper as shall be legal tender, should be construed to be notes payable in coin, and that intention of parties was to secure payment in gold coin if it could be lawfully enforced, but if not, to secure payment in legal tender notes at their market value when converted into gold, and that latter stipulation was not inserted in contract for benefit of maker, nor to give him an election of kind of money in which he might make payment. Such note will support judgment payable in gold coin.**—*Burnett v. Stearns*, 33 Cal. 468, 473.

163. **Default judgment on note payable in gold coin should be made payable in like coin.**—*Harding v. Cowing*, 28 Cal. 212, 214.

164. **Difference in value of currency.**—Value of property in gold coin and in greenbacks, or currency, in legal contemplation, must be same.—*Tarpy v. Shepherd*, 30 Cal. 180, 181.

165. **In ejectment, annual rental value of premises being found both in gold coin and currency, judgment in general for amount equal to currency valuation is correct.**—*Carpentier v. Small*, 35 Cal. 346, 357.

166. **Effect on contracts executed prior to act.**—Note and mortgage made prior to passage of "Specific Contract Act" may be paid in legal tender notes or any lawful money.—*Belloc v. Davis*, 38 Cal. 242, 254.

167. **Fiduciary capacity.**—Executor holds money of estate in fiduciary capacity, and therefore when he has received money in gold coin he may be compelled to pay claims against estate in same kind of coin.—*Magraw v. McGlynn*, 26 Cal. 421, 430, 432.

168. **Executors can only be required to pay claims against estate in gold coin where they have received moneys of estate in such coin, and where property has been sold for legal tender notes it is error to require payment in gold coin.**—*Estate of Den*, 39 Cal. 70.

As to form of judgment and procedure in case of liability to make payment in kind. see note 29 L. R. A. 593.

169. **General finding of value without specification that it is in gold coin will not support judgment payable in gold coin alone.**—*North Pac. R. Co. v. Reynolds*, 50 Cal. 90, 93.

170. **"Gold and silver coin"—Obligation payable in.**—Allegation of note made payable in "United States gold and silver coin" will not support judgment payable in gold coin alone.—*Burnett v. Stearns*, 33 Cal. 468, 473.

171. **Money had and received.**—In action of money had and received, judgment for payment in gold coin is proper where it appears money was received in such coin.—*Wendt v. Ross*, 33 Cal. 650, 656.

172. **Nature of act.**—At common law, provision for payment of judgment in any specific kind of money was unknown, and was also unknown to our law until enactment of the "Specific Contract Act" in April, 1863. This statute ingrafted a new remedy on the relief of a general nature that court of common-law jurisdiction could afford, one of remedies peculiar to courts of equity, which in its nature is analogous to a decree for a specific performance, and it restricted the relief to specific class of cases. It can not be extended beyond cases expressly provided for by its terms, and therefore does not apply to action upon judgment rendered prior to its passage.—*Reed v. Eldredge*, 27 Cal. 346, 349.

173. **Open account.**—Where original deposit in gold coin is turned into an open account with no written contract to pay in gold coin, verdict for amount "payable in gold coin" is verdict against law.—*Howard v. Roeben*, 33 Cal. 399, 400.

174. **Pleading.—Complaint must pray this relief.—Verdict.**—To sustain judgment payable in gold coin complaint must allege agreement to pay in such money. Verdict of jury for certain amount "in gold coin" where such is not in issue can not be sustained, but clause "in gold coin" will be stricken out as surplusage.—*Watson v. San Francisco & H. B. R. Co.*, 50 Cal. 523, 524.

175. **Complaint must allege agreement to pay in gold coin.**—*Goldsmith v. Sawyer*, 46 Cal. 209, 214.

176. **Plea of tender must show tender made in gold coin where debt is required to be paid in that kind of coin.**—*Magraw v. McGlynn*, 26 Cal. 421, 433.

177. **Strict construction required.**—This section confers special authority to enter peculiar judgment not known to common law, or even to equity, in certain specified "actions." It must be strictly construed and can not be extended beyond case prescribed.—*Hathaway v. Brady*, 26 Cal. 581, 591.

178. **Sureties.—Judgment against sureties on bond of guardian should not be made payable in gold coin, unless the bond, which is contract of sureties, so provides.** Fact that principal was liable to pay the sum for which sureties are liable in gold coin does not alter their right to discharge their obligation in any kind of lawful money.—*Fox v. Minor*, 32 Cal. 111, 120, 91 Am. Dec. 566; *Mendocino Co. v. Morris*, 32 Cal. 145, 149.

179. **Unauthorized entry by clerk of clause** that payment be made in gold coin does not affect or impair validity of judgment for recovery of money, and is as powerless as would be any other unauthorized entry in respect to obligation or lien of judgment.—*Wallace v. Eldredge*, 27 Cal. 495, 497.

180. **Unauthorized verdict—Judgment on.**—In action of slander, where jury returns

verdict for plaintiff payable "in gold coin" it is proper for court to disregard that portion of verdict and enter plain money judgment.—*Chamberlin v. Vance*, 51 Cal. 75, 85.

181. **Written promise—Verbal promise to pay partnership debt in gold coin** may be enforced if thereafter one of partners, on behalf of the firm, in writing, agrees to make payment in such coin.—*Meyer v. Kohn*, 29 Cal. 279, 280.

§ 668. JUDGMENT-BOOK TO BE KEPT BY THE CLERK. The clerk must keep, with the records of the court, a book to be called the "judgment-book," in which judgments must be entered.

History: Enacted March 11, 1872, re-enactment of § 201 Practice Act, omitting concluding part reading "and shall specify clearly the relief granted, or other determination of the action."

JUDGMENT-BOOK.

- 1, 2. Appeal—Time of entry.
3. Same—Notice of appeal.
4. Date of entry.
- 5-7. Dismissal of action.
- 8, 9. Entry of judgment—A ministerial act.
10. Same—Signature of judge.
11. Same—Sufficiency of.
12. Same—Upon demurrer to complaint sustained.
13. Evidence.
14. Foreclosure—Judgment in.
15. Judgment—Is final act of court.
16. Same—Upon demurrer to complaint sustained.
17. Mandatory—Section is.
18. Register of clerk.

As to judgment-docket as a public record, see, post, § 871 and note.

As to setting aside dismissal of an action before the order of dismissal is entered, see, ante, § 581, note par. 14.

1. **Appeal—Time of entry** in this record and not in minutes of court is period at which time to appeal commences to run.—*Thomas v. Anderson*, 55 Cal. 43, 46; *Tyrrell v. Baldwin*, 72 Cal. 192, 193, 13 Pac. 475.

2. **Time to appeal commences to run** from its entry and appeal taken prior thereto is premature.—*Home of Inebriates v. Kaplan*, 84 Cal. 486, 488, 24 Pac. 119.

3. **Same—Notice of appeal filed on same day** judgment is entered is not premature.—*Tyrrell v. Baldwin*, 72 Cal. 192, 193, 13 Pac. 475.

As to appeals to supreme court, see, post, §§ 939 et seq. 963 and notes.

4. **Date of entry.**—Keeping true history of time of entry of judgment is one of most important duties of clerk, as under our practice it is initial point of many rights, e. g., after this and not before judgment can be docketed and judgment-lien created; judgment-roll can not be made up

until after this entry.—*Menzies v. Watson*, 105 Cal. 109, 112, 38 Pac. 641.

5. **Dismissal of action** so that court loses control over cause is not made until judgment of dismissal be entered.—*Page v. Page*, 77 Cal. 83, 19 Pac. 183; *Wolters v. Rossi*, 126 Cal. 644, 648, 59 Pac. 143.

6. **Judgment of dismissal must be entered** in judgment-book before action is dismissed.—*Page v. Superior Court*, 76 Cal. 372, 374, 18 Pac. 385.

7. **Order dismissing action for failure to return summons** need not be entered to have effect of final judgment and be appealable.—*Marks v. Keenan*, 140 Cal. 33, 34, 73 Pac. 751.

8. **Entry of judgment—A ministerial act.**—Entry of judgment in the judgment-book, as herein provided, is purely a ministerial act.—*Hoover v. Lester*, 16 Cal. App. 153, 116 Pac. 382.

9. **Entry of judgment by clerk** is ministerial act and he must follow closely the forms provided by law for the exercise of the power conferred upon him, otherwise his acts will be invalid.—*Old Settlers' Inv. Co. v. White*, 158 Cal. 236, 110 Pac. 922.

10. **Same—Signature of judge.**—The fact that the signature of the judge appears on the entry of judgment in the judgment-book adds nothing to the record; nor does the want thereof detract from its sufficiency.—*Hoover v. Lester*, 16 Cal. App. 153, 116 Pac. 382.

11. **Same—Sufficiency of.**—Entry of judgment in the judgment-book, as required, is sufficient, when it sets out the substance of the findings and conclusions written and filed by the judge as required by section 632 Code Civil Procedure.—*Hoover v. Lester*, 16 Cal. App. 154, 116 Pac. 382.

12. **Same—Upon demurrer to complaint sustained.**—Without regard to the particular relief given the defendant, whether it be that the plaintiff shall take nothing, or that the action shall abate, or be dismissed, or the defendant recover his costs, the judgment in such case is a final determination of the relative rights of the

parties upon the pleadings, so far as the particular action is concerned, and is required to be entered in the judgment-book required to be kept by the clerk, and no appeal therefrom is authorized until such entry is made.—Wood v. Missouri Pac. R. Co., 152 Cal. 344, 347, 92 Pac. 868.

See par. 16, this note.

13. Evidence.—Judgment-book is part of records of court and final repository of determination of court upon every cause which passes to judgment. It is final record and competent evidence of what matters were considered and passed upon; it is indeed most permanent memorial ordained by law to be kept. In case of loss or absence of judgment-roll it is competent evidence of final adjudication in suit, and so its recitals showing acquisition of jurisdiction of defendant are evidence of facts recited; judgment thus carrying on its face evidence of its own validity. But to render judgment admissible it must be shown to be valid judgment, and in absence of appropriate method of doing this—by judgment-roll—it must appear that facts showing court had jurisdiction are recited in judgment itself.—Simmons v. Threshour, 118 Cal. 100, 101, 102, 50 Pac. 812.

14. Foreclosure — Judgment in.—Decree ascertaining and determining amount for which defendants were liable to plaintiff in action to foreclose lien providing for sale of property, deficiency judgment, etc., is judgment of court and properly entered by clerk in judgment-book.—Hines v. Miller, 126 Cal. 683, 685, 59 Pac. 142.

15. Judgment.—Is the final action of court upon issue made by pleadings and which

is judicial determination of that issue that is to be recorded by clerk in judgment-book.—Von Schmidt v. Widber, 99 Cal. 511, 515, 84 Pac. 109.

As to effect of death of party on judgment-lien, see, post, § 671 and note pars. 18-20.

As to entry of judgment, see, ante, § 664 and note.

As to what constitutes judgment, see, ante, § 664 and note.

16. Same.—Upon demurrer to complaint sustained, is not a judgment upon dismissal of the action under this section, which may be entered in the clerk's register or upon the minutes, but must be entered in the judgment-book required, under above section, to be kept for the purpose by the clerk.—Wood, Curtis & Co. v. Missouri Pac. R. Co., 152 Cal. 347, 92 Pac. 868.

See par. 12, this note.

17. Mandatory.—Section 1a.—Direction to enter judgment in judgment-book is mandatory because it imposes public duty on ministerial officer.—Page v. Superior Court, 76 Cal. 372, 373, 18 Pac. 385.

As to nunc pro tunc entry of judgment after death of party, see, post, § 669 and note.

As to nunc pro tunc entry of judgment, see note 4 Am. St. Rep. 828.

18. Register of clerk provided for by section 1052, post, is distinct from "judgment-book" here provided for.—Wolters v. Rossi, 126 Cal. 644, 649, 59 Pac. 143.

As to register of actions to be kept by clerk, see, post, § 1052 and note.

§ 669. IF A PARTY DIE AFTER VERDICT, JUDGMENT MAY BE ENTERED, BUT NOT TO BE A LIEN. If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment is not a lien on the real property of the deceased party, but is payable in the course of administration on his estate.

History: Enacted March 11, 1872, re-enactment of § 202 Practice Act.

DEATH AFTER VERDICT—JUDGMENT NUNC PRO TUNC.

1. Action for tort—Judgment nunc pro tunc—After death of defendant.
- 2, 3. Authority of court is inherent.
4. Divorce actions—Included within provisions of this section.
5. Same—Decree of divorce.
6. Effect of this section.
- 7, 8. Findings and conclusions of law.
9. Practice.
10. Service of process not made.
11. Substitution of executor not required.
12. Time of determination of rights.

1. Action for tort—Judgment nunc pro tunc.—After death of defendant.—In the case of an action for damages against a physician for malpractice, the defendant having died after the case had been tried before the court and submitted for decision, a judgment against the defendant entered by order of the court nunc pro tunc as of the day of the submission of the cause for determination if properly made on motion of the plaintiff against opposition of the defendant.—Estate of Pillsbury, 175 Cal. 454, 3 L. A. R. 1396, 166 Pac. 11.

As to power of trial court to enter judgment nunc pro tunc after death of party, see Exhaustive Annotations, 3 L. A. R. 1403.

See par. 5, this note.

2. **Authority of court is inherent** to order its judgment entered nunc pro tunc and is to be exercised for purpose of doing justice between parties. Court will always exercise this authority when it is apparent that delay in rendering judgment or failure to enter it after its rendition is result of some act or delay of court and not owing to any fault of party making application.—*Fox v. Hale & Norcross Silver Min. Co.*, 108 Cal. 478, 480, 41 Pac. 328.

3. **Apart from code**, and if it were silent regarding procedure in case of death of party pending litigation, court would be authorized to make its decision rendered prior to death as complete as if it had become final prior to that time.—*Fox v. Hale & Norcross Silver Min. Co.*, 108 Cal. 478, 482, 41 Pac. 328.

4. **Divorce actions—Included within the provisions of this section.**—Hence where interlocutory decree of divorce has been rendered by which property rights are adjudicated and one of the parties therein after the expiration of a year moved for a final decree and died pending the determination of the motion, final judgment may still be entered.—*John v. Superior Court*, 5 Cal. App. 262, 264, 90 Pac. 53.

5. **Same—Decree of divorce** can not be entered nunc pro tunc after death of one of parties.—*In re Estate of Cook*, 77 Cal. 220, 11 Am. St. Rep. 267, 1 L. R. A. 567, 17 Pac. 923.

As to entry of judgment nunc pro tunc after death of party, see par. 1, this note; and note 1 L. R. A. 567.

6. **Effect of this section** in providing for entry of judgment which is payable out of estate of decedent affords statutory procedure which was unknown to common law and to that extent removes necessity of directing judgment to be entered upon decision as of date anterior to his death. It does not, however, do away with rule that authorizes court to direct that its decision so far as same shall be necessary to protect rights of parties shall be entered nunc pro tunc as of a day anterior to death of party.—*Fox v. Hale & Norcross Silver Min. Co.*, 108 Cal. 478, 482, 41 Pac. 328.

7. **Findings and conclusions of law** stand in same relation with regard to this section as judgment.—*Fox v. Hale & Norcross Silver Min. Co.*, 108 Cal. 478, 481 41 Pac. 328.

8. **Where party dies** after court has filed written opinion announcing its conclusions and directing counsel to prepare findings and decree in accordance therewith, findings may be filed and judgment entered nunc pro tunc as of date anterior to death.—*Fox v. Hale & Norcross Silver Min. Co.*, 108 Cal. 478, 480, 41 Pac. 328.

As to effect of death of party on judgment-lien, see, post, § 671 and note pars. 18-20.

As to nunc pro tunc entry of judgment, see note 4 Am. St. Rep. 828.

Same—Suggestion of.—See, ante, § 385 and note.

9. **Practice.**—Proper practice on suggestion of death of party after verdict and before judgment is to direct entry of judgment as provided in this section and then to suspend all further proceedings in cause until executors or administrators be qualified and substituted as parties.—*Estate of Page*, 50 Cal. 40, 42.

10. **Service of process not made.**—Verdict and judgment against two defendants can not stand as against one who died a few days after the action was commenced and who, so far as the record shows, was never served.—*Alpers v. Schammel*, 75 Cal. 590, 593, 17 Pac. 708.

11. **Substitution of executor not required.**—Court is directed to render judgment on verdict and judgment is but formal entry of result of litigation—demand of successful party having been liquidated and established by verdict. Statute does not contemplate any substitution of executors or administrators prior to entry of judgment. It should be entered against decedent by name, and its effect is same as if it had been ordered as of date anterior to his decease, except that it can not be made to charge estate with lien which should have priority and is payable only in due course of administration.—*Estate of Page*, 50 Cal. 40, 42, 43.

12. **Time of determination of rights.**—If cause has been tried and finally submitted to court for its judgment, rights of parties should be determined as they existed at time of such submission and neither party should be prejudiced by delay of court in rendering its judgment.—*Fox v. Hale & Norcross Silver Min. Co.*, 108 Cal. 478, 481, 41 Pac. 328.

As to effect of death of one of the parties after judgment upon remedy by execution, see notes 61 L. R. A. 353; 7 L. R. A. (N. S.) 424; 19 L. R. A. (N. S.) 516; 20 L. R. A. (N. S.) 635; 43 L. R. A. (N. S.) 1116.

As to effect of judgment entered against a dead person, see note 49 L. R. A. 153.

As to death of party before final judgment, see note 20 L. R. A. 143.

As to validity of judgment entered against deceased person, see note 52 Am. Dec. 107.

As to lien of judgment after death of defendant, see note 89 Am. Dec. 243.

As to death of judgment-debtor, effect of upon subsequent enforcement of judgment, see note 65 Am. Dec. 123.

§ 670. JUDGMENT-ROLL, WHAT TO CONTAIN. Immediately after entering the judgment, the clerk must attach together and file the following papers, which constitute the judgment-roll:

1. In case the complaint is not answered by any defendant, the summons, with the affidavit or proof of service; the complaint with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment; and in case the service so made is by publication, the affidavit for publication of summons, and the order directing the publication of summons;

2. In all other cases, the pleadings, all orders striking out any pleading in whole or in part, a copy of the verdict of the jury, or finding of the court or referee, and a copy of any order made on demurrer, or relating to a change of parties, and a copy of the judgment; if there are two or more defendants in the action, and any one of them has allowed judgment to pass against him by default, the summons, with proof of its service, on such defendant; and if the service on such defaulting defendant be by publication, then the affidavit for publication, and the order directing the publication of the summons.

History: Enacted March 11, 1872, re-enactment with additions of § 203 Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 319; March 9, 1876, Code Amdts. 1875-6, p. 93; March 12, 1895, Stats. and Amdts. 1895, p. 45; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 151, held unconstitutional, see history, § 5 ante; March 20, 1907, Stats. and Amdts. 1907, p. 720, Kerr's Stats. and Amdts. 1906-7, p. 453.

JUDGMENT-ROLL—WHAT CONSTITUTES.

I. JUDGMENT-ROLL—IN GENERAL, 1-53.

II. PAPERS CONSTITUTING PART OF JUDGMENT-ROLL, 54-80.

III. PAPERS NOT CONSTITUTING PART OF JUDGMENT-ROLL, 81-125.

I. JUDGMENT-ROLL—IN GENERAL.

1. Absence of certain papers—Effect of.
2. Same—If summons be absent.
3. Same—Finding of court.
4. Appeal—On judgment-roll—Error not shown on—Not considered by appellate court.
5. Same—Record on.
6. Same—Same—Limitation.
7. Copy of original paper.
8. Correction of errors.
9. Date of judgment.
- 10-13. Decree of distribution—Appeal from.
14. Direct attack—How judgment sustained.
15. Entry in minutes.
16. Evidence—Admissibility of judgment-roll in.
17. Same—Upon judgment of court of general jurisdiction.
18. Same—In actions involving adverse possession.
19. Same—Of another county.

20. Same—On application for writ of assistance.
21. Same—Parties.
22. Existence of judgment-roll—Does not depend upon what.
23. Final judgment—Must be rendered and entered.
24. Findings contemplated by this section.
25. Findings and judgment—May be incorporated in same document.
26. Impeachment—Evidence aliunde.
27. Ministerial duty of clerk.
28. Neglect of clerk.
29. Presumption on appeal—Correctness of judgment-roll.
30. Same—On the judgment-roll alone.
31. Same—Of performance of duty by clerk.
32. Same—Of validity of judgment.
33. Same—Same—When arises.
34. Probate proceedings.
- 35, 36. Same—Settlement of accounts of executor.
37. Record of judgment—Is judgment-roll.
38. Same—All essentials of common-law record.
- 39-41. Recital of service in judgment.
42. Same—Direct attack.
43. Same—Collateral attack—Prima facie evidence.

- 44, 45. Setting aside void judgment.
- 46, 47. Same—What necessary.
- 48. Same—Unauthorized default.
- 49. Statute of limitations.
- 50. Time when roll made up.
- 51, 52. Void judgment—How determined.
- 53. Same—Presumption.

II. PAPERS CONSTITUTING PART OF JUDGMENT-ROLL.

- 54. Affidavit for publication of summons—Since amendment of 1895.
- 55. Answer, original—An essential part of judgment-roll.
- 56-58. Bill of exceptions.
- 59. Same—Need not be included.
- 60. Change of parties—In general.
- 61. Same—Order substituting plaintiff.
- 62. Construction of section—Effect of amendment of 1907.
- 63. Contents of roll.
- 64. Copy of judgment.
- 65. Cross-complaint—Part of judgment-roll.
- 66. Decision or findings.
- 67. Original complaint—Is not for all purposes superseded.
- 68-70. Proof of service of summons must appear from roll.
- 71. Same—What it is.
- 72, 73. Publication of summons—Affidavit and order—Prior to 1895.
- 74. Same—How considered.
- 75. Report of referee.
- 76. Requirement that "a copy of the verdict of the jury" be included.
- 77. Special verdict.
- 78. Stipulation—Entered in minutes of court.
- 79. Verdict—Part of judgment-roll.
- 80. Want of findings in judgment-roll—Presumption.

III. PAPERS NOT CONSTITUTING PART OF JUDGMENT-ROLL.

- 81. Affidavits for publication of summons.
- 82, 83. Same—An order of publication of summons—Prior to 1895.
- 84. Amendments—The order allowing amended complaint.
- 85, 86. Same—And proof of service.
- 87. An appearance—Under section 1014, post.
- 88. Same—Appearance by written notice.
- 89. Bill of particulars.
- 90. Change of venue—Proceedings for.
- 91, 92. Default—Order setting aside.
- 93. Demurrer—Notice of overruling of.
- 94. Same—Notice, affidavit, and motion to strike out.

- 95. Same—Order ruling on.
- 96. Direction to prepare findings and judgment.
- 97. Error in overruling demurrer—Record—Waiver.
- 98. Exhibits and orders—Printed in transcript.
- 99. Findings—Bearing date after judgment-roll.
- 100, 101. Same—In case of default.
- 102. Same—Minute-entry.
- 103. Same—Of referee.
- 104. Guardian ad litem—Order appointing.
- 105. Intermediate order.
- 106, 107. Minutes of clerk—Form no part.
- 108. Motion to strike out—Not part of judgment-roll—Order striking is.
- 109, 110. Notice of intention to move for new trial.
- 111. Order—Granting leave to amend.
- 112. Same—Order refusing to strike out a pleading.
- 113. Proof of service of notice of appeal.
- 114. Publication of summons—Affidavit and order of publication.
- 115. Report of referee—Is simply report of testimony.
- 116-118. Striking out pleading—Motion and order to strike.
- 119. Same—Notice of motion to strike out.
- 120, 121. Same—Order striking out.
- 122. Stipulation—Entered in minutes.
- 123. Same—Of parties.
- 124. Testimony—Unless embodied in bill of exceptions.
- 125. Vacation of judgment—Defective affidavit of service of notice of decision—Judgment-roll.

I. JUDGMENT-ROLL—IN GENERAL.

As to duty of clerk to certify transcript containing reporter's notes and papers not included in judgment-roll, see, post, § 950 and note.

1. Absence of certain papers—Effect of. —Judgment void upon its face is one that appears to be void by inspection of roll. Mere absence therefrom of a paper, e. g. return of officer showing service of summons, can not invalidate judgment when judgment itself recites fact that defendant was duly served with process, and such recitals or findings are as conclusive upon parties in all collateral proceedings as any adjudication of court can be. It must be presumed they were supported by sufficient testimony not set forth in record.—*People v. Harrison*, 84 Cal. 607, 609, 610, 24 Pac. 311; *Whitney v. Daggett*, 108 Cal. 232, 235, 41 Pac. 471.

As to decrees of distribution in probate court and appeals from, see pars. 10-13, this note.

2. Same.—If summons be absent from judgment-roll but it appears summons in fact issued, with evidence of its contents showing it to be regular and sufficient in form, and that it was duly served, such a prima facie showing is made as to jurisdiction of person of defendant, even in absence of original summons, as will support judgment upon direct attack. Such showing is made by roll containing affidavit for publication of summons, showing it had issued; order of publication showing same; affidavit of printer showing publication containing copy of summons, affidavit of mailing; and decree reciting due service on and default of defendant.—Kahn v. Matthal, 115 Cal. 689, 691, 692, 47 Pac. 698.

3. Same.—Finding of court that defendant was duly served with process is sufficient to show jurisdiction. Judgment does not depend upon performance of clerical duties of making up judgment-roll or preserving papers. It is enough if facts exist which are required to give court jurisdiction, and finding that they do exist, though summons and return—the usual evidence—may have been lost or mislaid, is sufficient.—Lick v. Stockdale, 18 Cal. 219, 223.

4. Appeal.—On judgment-roll—Error not shown on.—Not considered by appellate court.—In a case in which an appeal is taken on the judgment-roll alone, although there is printed in the transcript a copy of a minute order showing that defendant objected to filing of an amended complaint, such minute-entry is no part of the judgment-roll, under the provisions of the above section and the alleged erroneous ruling not being duly authenticated as required by law, an appellate court can not review the error predicated thereon and will not disturb the judgment.—United States Film Co. v. United States Fidelity & Guarantee Co., 44 Cal. App. 227, 186 Pac. 364, approving the doctrine in *De Pedrorena v. Hotchkiss*, 95 Cal. 636, 30 Pac. 787; *Nolte v. Nolte*, 29 Cal. App. 126, 154 Pac. 873.

5. Same.—Record on.—While this section prescribes what constitutes judgment-roll, it does not prescribe what should constitute record on appeal.—Foley v. Foley, 120 Cal. 33, 38, 52 Pac. 122.

As to record on appeal, see, ante, § 661 and note.

As to papers to be furnished and used on appeal from judgment, see, post, §§ 950 et seq. and notes.

As to appeals in general, see, post, §§ 934 et seq. and notes.

As to appeals to supreme court—in what cases may be taken, see, post, § 963 and note.

6. Same.—Same.—Limitation.—In absence of statement on appeal or bill of exceptions record reviewed by appellate court is limited to such papers as are declared by this section to constitute judgment-roll.—McAbee v. Randall, 41 Cal. 136, 137.

7. Copy of original paper appearing in judgment-roll, it will be presumed original was lost and copy properly substituted.—Sichler v. Look, 93 Cal. 600, 608, 29 Pac. 220.

As to lost papers, how supplied, see, post, § 1045 and note.

8. Correction of errors.—Clerical errors in judgment where shown by record may be corrected at any time so as to make entry correspond with judgment rendered. And this may be done even after appeal and affirmation of judgment.—Dreyfuss v. Tompkins, 67 Cal. 339, 340, 7 Pac. 732.

As to judgment-roll in criminal cases, see Kerr's Cyc. Pen. Code, 2d ed., § 1207 and note.

As to judgment-roll on voluntary dissolution of corporation, see, post, § 1233 and note.

9. Date of judgment.—This section provides for authentic record of date of entry of judgment. It requires clerk immediately after entering judgment to make up and file judgment-roll. This means that he must indorse roll as filed on particular date and authenticate indorsement by his official signature. This in absence of other evidence would raise presumption that official duty has been duly performed and be authentic evidence that judgment had been entered immediately before on same date.—Estate of Picholr, 139 Cal. 694, 697, 70 Pac. 214, 73 Pac. 604.

10. Decree of distribution.—Appeal from.—The only papers which an appellate court can consider on an appeal from a decree of distribution, where the bill of exceptions or transcript has not been authenticated by the trial judge, are the papers which would be the equivalent of the judgment-roll in an ordinary civil action, that is, the petition for distribution, the opposition thereto, if any, the counter-petitions filed, or any other papers in the nature of pleadings purporting to set forth claims of parties who appeared and claimed distribution, with the answers thereto, also the findings of the court, if any, or any orders or other papers of like character mentioned in this section.—Estate of Gamble, 166 Cal. 253, 135 Pac. 970.

As to probate proceedings, see pars. 34-36, this note.

11. There is no "judgment-roll," strictly speaking, in proceedings in probate, but whenever proceedings in probate are so akin to a civil action as to necessitate the "papers," which are declared by this section to constitute the judgment-roll, they may be held to constitute the judgment-roll referred to in section 661, ante, (repealed).—Going v. Guy, 166 Cal. 279, 135 Pac. 1128.

12. The judgment-roll on an appeal from a decree of distribution is the petition for distribution, the opposition thereto, if any written opposition is filed, the counter-petitions filed, if any, or any other papers in the nature of pleadings filed at or before the hearing purporting to set forth the claims

of the parties who appeared and claimed distribution, with the answers thereto, also the findings of the court, if any, upon the issue formed, any orders or other papers of like character to those mentioned in section 670 of the Code of Civil Procedure, and the decree of distribution itself.—*Estate of Broome*, 169 Cal. 604, 147 Pac. 270.

13. It is axiomatic that papers not properly authenticated as having been used on a hearing resulting in a judgment or order or decree, can not be considered on appeal, saving those papers and those alone which may be considered as a part of the judgment-roll.—*Estate of Broome*, 169 Cal. 604, 147 Pac. 270.

14. **Direct attack — How judgment sustained.**—To sustain judgment on direct attack record must show court had jurisdiction of person against whom judgment was rendered and that judgment was warranted by allegations of pleadings of the party in whose favor it was rendered. In determining that question recitals in judgment can not be referred to for question is whether record sustains judgment. Such recitals therefore will not be accepted as substitute for summons and proof of service.—*McKinlay v. Tuttle*, 42 Cal. 570, 577.

15. **Entry in minutes** is evidently intended for guidance of court in its further action in cause, and ceases to be of value upon entry of judgment; for it forms no part of judgment-roll or "record" of judicial action of court, and can not be used to impeach that record.—*Von Schmidt v. Widber*, 99 Cal. 511, 515, 34 Pac. 109.

16. **Evidence—Admissibility of judgment-roll** in evidence is to be determined upon its inspection.—*Crin v. Kessing*, 89 Cal. 478, 483, 23 Am. St. Rep. 491, 26 Pac. 1074.

17. **Same—Foreign judgment of court of general jurisdiction** is presumed to be correct: is admissible in evidence when duly authenticated, and if it contains finding or recital of service by publication, it will be presumed such service was made upon sufficient affidavit and order.—*McHatton v. Rhodes*, 143 Cal. 275, 277, 101 Am. St. Rep. 125, 76 Pac. 1036.

18. **Same—In actions involving adverse possession** judgment-rolls in other actions are admissible to show defendant at various times claimed title to land and as thus tending to prove adverse possession.—*Hines v. Good*, 128 Cal. 38, 41, 79 Am. St. Rep. 22, 60 Pac. 527.

19. **Same—Of another county.**—Admissibility of judgment-roll of another county does not depend upon manner in which it was taken from that county to court where it is sought to be used.—*People v. Alden*, 113 Cal. 264, 267, 45 Pac. 327.

20. **Same—On application for writ of assistance** judgment-roll is admissible in evidence although appeal be pending where execution has not been stayed.—*California M. & S. Bank v. Graves*, 129 Cal. 649, 651, 62 Pac. 259.

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21. **Same—Parties.**—Judgment-roll is not evidence to bind or estop defendant unless parties to action be same or in privity.—*Cloverdale v. Smith*, 128 Cal. 230, 235, 60 Pac. 851.

22. **Existence of judgment-roll—Does not depend upon** fact that clerk has fastened these papers together, nor do any other papers which clerk may have joined with those which statute declares should constitute judgment-roll become part of such roll by reason of having been so joined.—*Colton L. & W. Co. v. Swartz*, 99 Cal. 278, 281, 33 Pac. 878.

23. **Final judgment—Must be rendered and entered** before roll can be made up.—*Emeric v. Alvarado*, 64 Cal. 529, 542, 2 Pac. 418.

24. **Findings contemplated by this section** should consist of concise, distinct, pointed, and separate statement of each specific essential fact established by evidence in its proper order without any of testimony by which facts are proved, followed by similar statement of conclusions of law drawn from facts thus found. It is distinct from written opinion, if one be delivered, which forms no part of judgment-roll.—*Hidden v. Jordan*, 28 Cal. 301, 305.

25. **Findings and judgment—May be incorporated in same document** and judgment is not rendered ineffective for that reason.—*Hopkins v. Warner*, 109 Cal. 133, 139, 41 Pac. 868.

26. **Impeachment—Evidence aliunde.**—Judgment-roll can not be impeached for want of jurisdiction by evidence aliunde, and hence, minutes and files of court are inadmissible for that purpose.—*Ballerino v. Superior Court*, 2 Cal. App. 759, 84 Pac. 225.

27. **Ministerial duty of clerk.**—Upon filing of findings and decree, it is ministerial duty of clerk to enter and docket judgment and prepare and file judgment-roll.—*Baker v. Brickell*, 102 Cal. 620, 623, 36 Pac. 950.

28. **Neglect of clerk** to make up judgment-roll does not vitiate judgment or proceedings under it. Judgment-roll is in fact not to be made up until after entry.—*Sharp v. Lumley*, 34 Cal. 611, 614.

29. **Presumption on appeal—Correctness of judgment-roll.**—In absence of showing to contrary, it will be presumed that proceedings, order, findings, and judgment contained in transcript certified by clerk to be correct are those which constitute the judgment-roll.—*O'Shea v. Wilkinson*, 95 Cal. 454, 455, 30 Pac. 588.

30. **Same—On the judgment-roll alone** are all in support of the regularity of the proceedings as they affect the validity of the judgment, and on such an appeal where an amended answer appears in the record without further explanation, it is presumed to have been filed with leave of court, or to have been an amendment as of right and filed within the statutory time for such an amendment.—*Segerstrom v. Scott*, 16 Cal. App. 260, 116 Pac. 690.

31. Same—Of performance of duty by clerk.—Presumption is that clerk whose duty it is to make up and file judgment-roll did so, and the statute provides that roll should be filed in county where judgment is recovered. Statement in execution that judgment was recovered in certain county raises presumption that roll was filed in such county.—*Van Cleave v. Bucher*, 79 Cal. 600, 602, 21 Pac. 954.

32. Same—Of validity of judgment.—All intendments will be made in support of judgment and all proceedings necessary to its validity will be presumed to have been regularly taken, and any matter which might have been presented to court below which would have authorized judgment will be presumed to have been thus presented if record shows nothing to contrary upon appeal from judgment.—*Von Schmidt v. Von Schmidt*, 104 Cal. 547, 550, 38 Pac. 361.

33. Same—Same—When arises.—Presumption which law implies in support of judgments of courts of general jurisdiction only arises with respect to jurisdictional facts concerning which record is silent. Where judgment recites service of process on defendant but judgment-roll shows insufficient and void service by publication, recitals of judgment do not control and can not be held to show jurisdiction.—*Latta v. Tutton*, 122 Cal. 279, 282, 68 Am. St. Rep. 30, 54 Pac. 844.

34. Probate proceedings.—In proceedings in probate there is no judgment-roll strictly speaking, but whenever proceedings in probate are so akin to civil action as to necessitate "papers" which are declared by this section to constitute judgment-roll in civil action, they may be held to constitute judgment-roll referred to in section 661, ante (repealed).—*Estate of Ryer*, 110 Cal. 566, 560, 42 Pac. 1082.

As to decree of distribution and appeal therefrom, see pars. 10-13, this note.

35. Same—Settlement of accounts of executor or administrator, though sometimes spoken of as an order is in effect judgment, and in proceedings for settlement of such accounts, petition and account, and written objections filed to it are pleadings which the clerk is required to attach to copy of judgment, and these constitute judgment-roll.—*Miller v. Lux*, 100 Cal. 609, 613, 35 Pac. 345, 639, following doctrine in *Estate of Page*, 57 Cal. 238; *Estate of Isaacs*, 30 Cal. 106.

36. In proceeding for settlement of account of administrator petition and account and written objections filed to it are pleadings which clerk is required to attach to copy of judgment and these constitute judgment-roll.—*Estate of Isaacs*, 30 Cal. 106; *Estate of Page*, 57 Cal. 238, 240; *Miller v. Lux*, 100 Cal. 609, 613, 35 Pac. 345.

37. Record of judgment—Is judgment-roll, and statute has provided of what this should consist, and upon appeal from final judgment the only papers that can be considered where there is no bill of exceptions

are notice of appeal and judgment-roll.—*Sichler v. Look*, 93 Cal. 600, 606, 29 Pac. 220.

38. Same—All essentials of common-law record are contained in judgment-roll provided by this section. It omits formal parts—the placita memorandum, continuances, and connecting links, some of which have been rendered unnecessary by changes in our proceedings, but it contains substance of former rolls.—(*Sawyer, J.*)—*Hahn v. Kelly*, 34 Cal. 391, 425, 94 Am. Dec. 742.

39. Recital of service in judgment itself in case where roll has been lost is conclusive on collateral attack and parol testimony is not admissible to contradict same after lapse of many years.—*People v. Harrison*, 84 Cal. 607, 24 Pac. 311.

40. Nothing appearing in judgment-roll to contradict recitals of due service of process found in decree they are deemed true and show court had jurisdiction of subject-matter and parties. Judgment of court of general jurisdiction is conclusively presumed to be correct unless record itself shows that court did not have jurisdiction. When it has such jurisdiction its record speaks absolute verity because it is court's record of its own acts and such jurisdiction will be conclusively presumed unless contrary appears upon face of record.—*Butler v. Soule*, 124 Cal. 69, 71, 56 Pac. 601. See *Crim v. Kessing*, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074.

41. Affidavit and order for publication constituted no part of judgment-roll prior to amendment of 1895, and therefore affidavits of service and recitals in judgment found in judgment-roll are conclusive.—*Estate of Newman*, 75 Cal. 213, 220, 7 Am. St. Rep. 146, 16 Pac. 887.

42. Same—Direct attack.—Recital and findings that certain defendants had been duly served with summons, had not appeared, and that their defaults had been duly and regularly taken and entered, is not conclusive proof of facts as against defendant who has not answered; and is not conclusive against evidence of service required to be in, and when found in, judgment-roll, which does not show valid service, and where it appears by such record that service was insufficient, judgment is invalid and void.—*Reinhart v. Lugo*, 86 Cal. 395, 399, 400, 21 Am. St. Rep. 52, 24 Pac. 1089.

43. Same—Collateral attack—Prima facie evidence of service only is supplied by recital in judgment when judgment is directly attacked, and is never conclusive except where attack is collateral.—*Whitney v. Daggett*, 108 Cal. 232, 235, 41 Pac. 471.

44. Setting aside void judgment.—Judgment void on its face and which requires only inspection of judgment-roll to show invalidity may be set aside on motion by court rendering it at any time after its entry, and judgment which is in fact void for want of jurisdiction over person of defendant, but where invalidity does not appear from judgment-roll, may be set aside upon motion within reasonable time after entry.—*People*

ex rel. Schwartz v. Temple, 103 Cal. 447, 458, 37 Pac. 414.

45. "A judgment which is void upon its face and which requires only an inspection of judgment-roll to demonstrate its want of vitality, is a dead limb upon the judicial tree, and should be lopped off, if power so to do exists. It can bear no fruit to plaintiff, but is constant menace to defendant."—People v. Greene, 74 Cal. 400, 405, 5 Am. St. Rep. 448, 16 Pac. 197; People v. Davis, 143 Cal. 673, 676, 77 Pac. 651.

46. *Same*—What necessary. — Judgment can not be vacated or set aside except upon application pursuant to section 473, ante, unless its invalidity is apparent from inspection of judgment-roll. If its invalidity does not appear from such inspection, sole remedy of aggrieved party, who may not in fact have been served with process, must be found in new action on equity side of court.—People v. Davis, 143 Cal. 673, 676, 77 Pac. 651.

47. To obtain order vacating judgment on ground of defect in affidavit for publication of summons, it is necessary that judgment be void on face of record, or in other words, it should appear from record that affidavit was so defective as to confirm no jurisdiction on trial judge to make an order for publication.—People v. Wrin, 143 Cal. 11, 13, 76 Pac. 646.

48. *Same*—Unauthorized default.—Court at any time may set aside default judgment by clerk when it appears from roll that clerk had no authority to enter it.—Wharton v. Harlan, 68 Cal. 422, 425, 9 Pac. 727; People v. Greene, 74 Cal. 400, 404, 5 Am. St. Rep. 448, 16 Pac. 197; Hyde v. Redding, 74 Cal. 493, 501, 16 Pac. 380.

49. Statute of limitations is set running by entry of judgment and not by ministerial act of clerk in compiling judgment-roll, which by very contemplation of law is to be done after entry of judgment.—Dore v. Klumpke, 140 Cal. 356, 357, 73 Pac. 1064.

50. Time when roll made up.—Only after "entry" of judgment in judgment-book and not before can judgment-roll be made up and filed.—Menzies v. Watson, 105 Cal. 109, 111, 38 Pac. 641.

51. Void judgment—How determined.—Judgment is void upon its face only when that fact is made apparent by inspection of judgment-roll.—People v. Thomas, 101 Cal. 571, 573, 36 Pac. 9. See Hahn v. Kelly, 34 Cal. 391, 404, 94 Am. Dec. 742; Jacks v. Baldez, 97 Cal. 91, 31 Pac. 899; People ex rel. Schwartz v. Temple, 103 Cal. 447, 453, 37 Pac. 414; Latta v. Tutton, 122 Cal. 279, 282, 68 Am. St. Rep. 30, 54 Pac. 844.

52. It is settled law that judgment is not void upon its face, unless its invalidity is apparent from an inspection of judgment-roll.—People v. Davis, 143 Cal. 673, 676, 77 Pac. 651.

53. *Same*—Presumption.—Whether judgment is void or not must be determined by

inspection of judgment-roll. Prior to amendment of 1895 neither affidavit nor order for publication of summons constituted any part of judgment-roll, and under law then in force can not be considered. In case where service by publication was authorized and appears from roll, it must be conclusively presumed that proper affidavit and order were made.—People v. Davis, 143 Cal. 673, 677, 77 Pac. 651.

II. PAPERS CONSTITUTING PART OF JUDGMENT-ROLL.

54. Affidavit for publication of summons—Since amendment of 1895. — Since the amendment of 1895, the affidavit for publication of summons where service is by publication is a part of the judgment-roll and may be considered in determining from the record whether or not a judgment is void.—People v. Mulcahy, 159 Cal. 34, 112 Pac. 853.

55. Answer, original.—An essential part of judgment-roll.—The original answer is an essential part of the judgment-roll, and where the same is omitted from the judgment-roll presented on the appeal from the judgment and order denying new trial, and the answer which the court refused to allow substituted, the judgment-roll is fatally defective.—Lincoln County Bank v. Fetterman, 170 Cal. 357, 149 Pac. 811.

56. Bill of exceptions.—All bills of exceptions taken and filed are part of judgment-roll, and appellant is required to bring to appellate court, upon appeal from judgment, copy of judgment-roll, and, therefore, if upon second appeal there are found in record matters which were not determined upon former appeal, appellant has right to be heard thereon.—Klauber v. San Diego S. C. Co., 98 Cal. 105, 109, 32 Pac. 876.

57. Exceptions taken during trial should be written out and reduced to form of bill and filed in case, and when judgment-roll is made up, attached to it. Minutes of court is not proper place for these exceptions, as they form no part of judgment-roll.—More v. Del Valle, 28 Cal. 170, 174.

58. Exceptions taken at trial and duly settled in bill are annexed to and form part of judgment-roll, and, therefore, constitute part of record on appeal from judgment on judgment-roll alone.—Wetherbee v. Carroll, 33 Cal. 549, 553.

59. *Same*—Need not be included. — By mandate of this section that clerk make up judgment-roll immediately after entry of judgment party is not precluded from on appeal using bill of exceptions made up and settled pursuant to section 650, ante, and such bill may form part of record on appeal from judgment.—Caldwell v. Parks, 47 Cal. 640, 641; Berry v. San Francisco & N. P. R. Co., 47 Cal. 643, 644.

60. Change of parties.—In general.—Order directing names of two plaintiffs to be stricken from complaint forms part of judgment-roll, and therefore no amended

complaint to show such fact need be filed.—*Tormey v. Pierce*, 49 Cal. 306, 307.

61. Same—Order substituting plaintiff being order "relating to change of parties" becomes part of judgment-roll and imparts same verity as to other parts of record.—*Crim v. Kessing*, 89 Cal. 478, 486, 23 Am. St. Rep. 491, 26 Pac. 1074.

62. Construction of section—Effect of amendment of 1907.—The amendment of this section, making "all orders striking out any pleading in whole or in part" part of the judgment-roll does not enlarge the scope of the appeal from the order denying a motion for new trial.—*Stockton Iron Works v. Walters*, 18 Cal. App. 373, 377, 123 Pac. 240.

63. Contents of roll.—The papers designated as forming judgment-roll are those which are elsewhere mentioned as part of proceedings, culminating in judgment in suit. "Judgment," of which copy is to be included in "roll," is judgment defined in section 577, ante, as "the final determination of rights of party in action or proceeding," and as there can be but one "final determination" in action, it follows that there can be but one judgment in judgment-roll, and that if during proceedings in action a judgment should be set aside and another thereafter entered, only this last judgment can form part of judgment-roll, just as when complaint or answer is amended only amended pleadings, or those upon which cause was tried, form "pleadings" which are part of judgment-roll.—*Colton L. & W. Co. v. Swartz*, 99 Cal. 278, 282, 33 Pac. 878.

64. Copy of judgment whether by default or after trial must be contained in roll.—*Thomas v. Anderson*, 55 Cal. 43, 44.

65. Cross-complaint.—Part of judgment-roll and roll must show proof of service thereof, although no summons is required to be issued thereon, or judgment by default can not be rendered against cross-defendants.—*White v. Patton*, 87 Cal. 151, 154, 25 Pac. 270.

66. Decision or findings (which is a very different thing from opinion) constitutes part of judgment-roll and is always sent up on appeal.—*Kimball v. Stormer*, 65 Cal. 116, 118, 3 Pac. 408.

67. Original complaint—Is not for all purposes superseded by amended complaint. It is still part of record in case and may be referred to for many purposes. Whether it should be made part of judgment-roll, *quære*.—*Redington v. Cornwell*, 90 Cal. 49, 60, 27 Pac. 40.

68. Proof of service of summons must appear from roll made up upon default judgment, and must affirmatively show court acquired jurisdiction, e. g., if affidavit fails to show party making service was over age of eighteen years it is insufficient.—*Barney v. Vigoureux*, 75 Cal. 376, 378, 17 Pac. 433.

69. Proof of service of summons issued upon cross-complaint should be contained in judgment-roll with memorandum of default of defendants failing to answer cross-com-

plaint indorsed thereon.—*Winter v. McMillan*, 87 Cal. 256, 266, 22 Am. St. Rep. 243, 25 Pac. 407.

70. Where service is made by publication record must affirmatively show proper service, or, upon direct attack, it will be held court did not acquire jurisdiction.—*Weeks v. Garibaldi South Gold Min. Co.*, 73 Cal. 599, 601, 15 Pac. 302.

71. Same—What it is.—By proof of service is meant affidavit of party making service, or certificate of officer if service is made by officer, showing his competency to make service, and that he in fact made it, or if service be made by publication, affidavit of printer, or his foreman, or principal clerk, showing publication has been made, and affidavit showing deposit in post-office if such deposit was made.—*Hahn v. Kelly*, 34 Cal. 391, 404, 94 Am. Dec. 742.

72. Publication of summons—Affidavit and order.—Prior to 1895, affidavit and order for publication of summons formed no part of judgment-roll. But since that amendment they must be included, and facts necessary to be stated therein are equally evidence of steps by which jurisdiction of person of defendant is obtained as is summons itself.—*Kahn v. Matthai*, 115 Cal. 689, 691, 692, 47 Pac. 698.

73. Affidavit to procure publication of summons and proof of service must now be made part of judgment-roll.—*San Diego Sav. Bank v. Goodsell*, 137 Cal. 420, 428, 70 Pac. 299.

74. Same—How considered.—Statute providing that affidavit for publication of summons, and order directing its publication, should form part of judgment-roll, these documents are therefore to be considered in determining whether court obtained jurisdiction of defendant in action.—*Parsons v. Weis*, 144 Cal. 410, 415, 77 Pac. 1007.

75. Report of referee.—Where the referee reports decision upon whole case his report stands as decision of court, and is part of judgment-roll same as would be finding of court.—*Thompson v. Patterson*, 54 Cal. 542, 546. See *Faulkner v. Hendy*, 103 Cal. 15, 20, 36 Pac. 1021.

76. Requirement that "a copy of the verdict of the jury" be included in the judgment-roll embraces the special verdicts, which themselves absolutely control the general verdict, as well as the general verdict.—*California Wine Assoc. v. Commercial Union Fire Ins. Co. of New York*, 159 Cal. 149, 112 Pac. 858.

77. Special verdict is part of the judgment-roll.—*California Wine Assoc. v. Commercial Union Fire Ins. Co.*, 159 Cal. 49, 52, 112 Pac. 858.

78. Stipulation—Entered in minutes of court, as follows: "Attorneys for plaintiff and said attorney for 'W' now stipulate that answer of 'W,' now on trial, to plaintiff's amended complaint, but his answer to said amended complaint, when amended as hereinafter specified," became part of plead-

ing, and was properly attached to judgment-roll.—*Kent v. San Francisco Sav. Union*, 130 Cal. 401, 406, 62 Pac. 620.

79. Verdict—Part of judgment-roll, and when appearing therein will be presumed to have been properly recorded and entered by clerk as required by section 628, ante.—*Goldman v. Rogers*, 85 Cal. 574, 579, 24 Pac. 782.

80. Want of findings in judgment-roll—Presumption.—Where no findings appear in the judgment-roll in the record on appeal on the judgment-roll alone, it will be presumed that findings were waived in accordance with the provisions of section 634, ante.—*Kritzer v. Tracy Eng. Co.*, 16 Cal. App. 290, 116 Pac. 700.

III. PAPERS NOT CONSTITUTING PART OF JUDGMENT-ROLL.

81. Affidavits for publication of summons.—Upon a direct attack by appeal the judgment can not be held to be void merely because the affidavits upon which the order for publication of summons was granted do not appear in the judgment-roll.—*William Wilson Co. v. Trainor*, 27 Cal. App. 43, 148 Pac. 954.

82. Same—An order for publication of summons—Prior to 1895, these papers were not a part of the judgment-roll, and could not be examined for the purpose of ascertaining, upon collateral attack upon the judgment, whether they were sufficient or otherwise, but must, in such case, be conclusively presumed to have complied with all legal requirements.—*Estate of McNeill*, 155 Cal. 342, 100 Pac. 1086.

83. Prior to amendment of 1895, the affidavit and order did not constitute a part of the roll, and in the case of a judgment rendered previous to that amendment, where the service of summons appeared to have been authorized, it must be conclusively presumed that there was a sufficient affidavit and a sufficient order.—*Lake v. Bonyng*, 161 Cal. 126, 118 Pac. 535.

84. Amendments—The order allowing amended complaint is not part of judgment-roll.—*Carter v. Paige*, 3 Cal. Unrep. 64, 20 Pac. 729.

85. Same—And proof of service.—Order granting leave to file amended pleading or proof of service of amended pleading are not part of judgment-roll.—*Livermore v. Webb*, 56 Cal. 489, 492.

86. Proof of service of amended pleadings is not required to appear in judgment-roll.—*Riverside Co. v. Stockman*, 124 Cal. 222, 224, 56 Pac. 1027.

87. An appearance—Under section 1014, post, is not required to be made a part of the judgment-roll.—*Western Lumber & M. Co. v. Merchants Amusement Co.*, 13 Cal. App. 4, 9, 108 Pac. 891.

88. Same—Appearance by written notice as provided in section 1014, post, is not a part of the judgment-roll, and the absence of evidence of service of a defendant, or of

a pleading by him, is therefore not necessarily inconsistent with a recital of his appearance in the judgment-roll. In the absence of anything to the contrary, it will be presumed that he did appear in the mode which is not required by the statute to be shown in the judgment-roll.—*Brown v. Caldwell*, 13 Cal. App. 29, 31, 108 Pac. 874.

89. Bill of particulars constitutes no part of judgment-roll.—*Edelman v. McDonell*, 126 Cal. 210, 213, 58 Pac. 528.

90. Change of venue—Proceedings for.—Petition, bond, and order for change of venue do not constitute part of judgment-roll.—*Rough v. Booth*, 2 Cal. Unrep. 720, 3 Pac. 91.

91. Default—Order setting aside default and allowing defendant to answer on certain conditions forms no part of judgment-roll.—*De Pedrorrena v. Hotchkiss*, 95 Cal. 636, 638, 30 Pac. 787.

92. Order setting aside defendant's default and judgment against him, and restoring his answer to files, forms no part of judgment-roll.—*Von Schmidt v. Von Schmidt*, 104 Cal. 547, 550, 38 Pac. 361.

93. Demurrer—Notice of overruling of demurrer and proof of service thereof form no part of judgment-roll.—*Jacks v. Baldez*, 97 Cal. 91, 92, 31 Pac. 899.

94. Same—Notice, affidavit, and motion to strike out demurrer and order made thereon form no part of judgment-roll.—*Orange Growers' Bank v. Duncan*, 133 Cal. 254, 255, 65 Pac. 469.

95. Same—Order ruling on.—Where statute did not provide for order ruling on demurrer to be part of judgment-roll it was presumed, statute being silent, that demurrer had been disposed of.—*Abadie v. Carrillo*, 32 Cal. 172, 174.

96. Direction to prepare findings and judgment.—A direction of the court that plaintiff's attorney prepare findings and judgment is no part of the judgment-roll, and hence an inspection of it would not disclose that such direction was given.—*California Cent. Creamery Co. v. Crescent City L. W. & P. Co.*, 30 Cal. App. 619, 159 Pac. 209.

97. Error in overruling demurrer—Record—Waiver.—In a case in an appeal from a judgment the order made on demurrer to the complaint does not appear in the transcript, the demurrer must be held to have been waived under the provisions of the above section requiring a copy of an order made on demurrer to be made part of the judgment-roll.—*Watson v. Anderson*, 36 Cal. App. 778, 173 Pac. 394, following doctrine in *Silcox v. Land*, 78 Cal. 118, 20 Pac. 297.

98. Exhibits and orders—Printed in transcript.—Exhibits and orders printed in the transcript but having no place therein as not being part of the judgment-roll are improperly in the record when there is no bill of exceptions, and the appellate court will not notice points attempted to be made

as to them.—*Brown v. Canty*, 31 Cal. App. 183, 159 Pac. 1056.

99. Findings—Bearing date after judgment-roll is presumed to have been completed, and being in position in judgment-roll after judgment, need not be considered a portion thereof, for on appeal all intendments are in favor of regularity of proceedings, and in absence of statement of bill of exceptions, it will be presumed findings were waived.—*Gordon v. Donahue*, 79 Cal. 501, 503, 21 Pac. 970.

100. Same—In case of default, are not necessary, and form no part of judgment-roll.—*Mulcahy v. Glazier*, 51 Cal. 626, 630; *Murray v. Murray*, 115 Cal. 266, 270, 37 L.R. A. 626, 47 Pac. 37.

101. Findings of fact and conclusions of law, where there has been no answer in case, are unnecessary, do not properly form part of judgment-roll, and can not be considered on appeal upon judgment-roll alone.—*Thomson v. Thomson*, 121 Cal. 112, 153 Pac. 403.

102. Same—Minute-entry.—A minute-entry as to findings made by the clerk is not a part of the judgment-roll, and will not be considered to overturn the presumption that findings were waived, where, on an appeal on the judgment-roll alone, no findings appear in the record.—*Kritzer v. Tracy Eng. Co.*, 16 Cal. App. 290, 116 Pac. 700.

As to minute-entry by clerk, see par. 105, this note.

103. Same—Of referee to determine, not whole issue, but particular fact, is not part of judgment-roll.—*Faulkner v. Hendy*, 103 Cal. 15, 20, 36 Pac. 1021.

104. Guardian ad litem—Order appointing guardian ad litem is not required to be in judgment-roll.—*Emeric v. Alvarado*, 64 Cal. 529, 592, 2 Pac. 418; *Batchelder v. Baker*, 79 Cal. 266, 267, 21 Pac. 754.

105. Intermediate order of court, except "orders relating to change of parties," forms no part of judgment-roll.—*Harper v. Minor*, 27 Cal. 107, 110.

106. Minutes of clerk—Form no part of judgment-roll.—*Harper v. Minor*, 27 Cal. 107, 110; *Von Schmidt v. Widdber*, 99 Cal. 511, 515, 34 Pac. 109; *Knowles v. Baldwin*, 125 Cal. 224, 227, 57 Pac. 988.

See par. 101, this note.

107. Minute-order of court as basis for entering second judgment is not part of judgment-roll.—*Galvin v. Palmer*, 134 Cal. 426, 429, 66 Pac. 572.

108. Motion to strike out—Not part of judgment-roll—Order striking in.—Under the provisions of the above section as amended by the legislature in 1907 an order striking out part of a pleading, is a part of the judgment-roll but the motion to strike out is not a part of the judgment-roll, even though it be pleaded in the transcript.—*Overton v. Noyes*, 177 Cal. 450, 170 Pac. 1110.

109. Notice of intention to move for new trial was formerly made part of record on appeal by express statutory provision, but it is not so under present code.—*Pico v. Cohn*, 78 Cal. 384, 385, 20 Pac. 706.

110. Notice of intention not a part of the judgment-roll.—*Carver v. San Joaquin Cigar Co.*, 16 Cal. App. 761, 765, 118 Pac. 92.

111. Order—Granting leave to amend is not a part of the judgment-roll, and on appeal on the judgment-roll alone, without a bill of exceptions, an amended answer appearing as a part of the judgment-roll will be presumed to have been with leave or an amendment as of right and within the time allowed for such amendments.—*Segerstrom v. Scott*, 16 Cal. App. 260, 116 Pac. 690.

112. Same—Order refusing to strike out a pleading not included in 1907 amendment, and not part of judgment-roll.—*South Yuba Water Co. v. Auburn*, 16 Cal. App. 780, 118 Pac. 101.

113. Proof of service of notice of appeal is not, and from nature of act could not be, part of judgment-roll.—*Peck v. Agnew*, 126 Cal. 607, 610, 59 Pac. 125.

114. Publication of summons—Affidavit and order of publication of summons were not part of judgment-roll prior to amendment of 1895, and would not appear in record on appeal, and in absence of any showing to contrary it will be presumed in support of judgment that finding of due service appearing in judgment-roll was based upon service made in pursuance of statute.—*Hahn v. Kelly*, 34 Cal. 391, 404, 94 Am. Dec. 742; *Sichler v. Look*, 93 Cal. 600, 607, 29 Pac. 220; *La Petra v. Gleason*, 101 Cal. 246, 249, 35 Pac. 765; *People v. Thomas*, 101 Cal. 571, 573, 36 Pac. 9; *People ex rel. Schwartz v. Temple*, 103 Cal. 447, 453, 37 Pac. 414.

115. Report of referee—Is simply report of testimony upon which judge bases his findings, and forms no part of judgment-roll.—*Harper v. Minor*, 27 Cal. 107, 109.

116. Striking out pleading—Motion and order to strike out portions of complaint are no part of judgment-roll.—*Harper v. Minor*, 27 Cal. 107, 109; *Dimick v. Campbell*, 31 Cal. 238, 240; *Sharp v. Daugney*, 33 Cal. 505, 513; *Sutter v. San Francisco*, 36 Cal. 112, 114.

117. Motion to strike out portion of answer and order denying same constitute no part of judgment-roll.—*Sutton v. Stephan*, 101 Cal. 545, 547, 36 Pac. 106.

118. Neither motion to strike out parts of complaint nor to make complaint more definite or certain, or order denying such motions, is part of judgment-roll, and same can not be reviewed on appeal from judgment in absence of bill of exceptions.—*Mock v. Santa Rosa*, 126 Cal. 330, 347, 53 Pac. 826, following rule in *Spinetti v. Brignardello*, 53 Cal. 283; *Sichler v. Look*, 93 Cal. 603, 607, 29 Pac. 220.

119. *Same*—Notice of motion to strike out, and order refusing such motion, do not become part of judgment-roll, and can be reviewed only upon bill of exceptions.—*Ganceart v. Henry*, 98 Cal. 281, 283, 33 Pac. 92.

120. *Same*—Order striking out pleadings does not constitute part of judgment-roll.—*De Pedorena v. Hotchkiss*, 95 Cal. 636, 638, 30 Pac. 787; *Hawley v. Kocher*, 123 Cal. 77, 79, 55 Pac. 696.

121. Order striking out pleadings forms no part of judgment-roll, and therefore can not be reviewed without bill of exceptions.—*Spence v. Scott*, 97 Cal. 181, 31 Pac. 52, 939.

122. *Stipulation*—Entered in minutes of court forms no part of judgment-roll.—*Spreckels v. Ord*, 72 Cal. 86, 88, 13 Pac. 158.

123. *Same*—Of parties that cause be continued; that certain amount is due, and that it be paid in certain instalments or judg-

ment might be entered, forms no part of judgment-roll.—*Spinetti v. Brignardello*, 53 Cal. 281, 283.

124. *Testimony*—Unless embodied in bill of exceptions and filed, can not be made part of judgment-roll.—*Lee Sack Sam v. Gray*, 104 Cal. 243, 246, 38 Pac. 85.

125. *Vacation of judgment*—Defective affidavit of service of notice of decision—*Judgment-roll*.—The proof of service of a notice of decision on demurrer not constituting part of the judgment-roll within the provisions of the above section, the fact that the affidavit of service of such notice is defective does not make a judgment rendered thereon void on its face.—*Spaulding & Co. v. Chapin*, 37 Cal. App. 573, 174 Pac. 334, following doctrine in *Jacks v. Baldez*, 97 Cal. 91, 31 Pac. 899; *Calif. Central Creameries Co. v. Crescent City Light, Water & Power Co.*, 30 Cal. App. 619, 159 Pac. 209.

§ 671. JUDGMENT-LIEN, WHEN IT BEGINS AND WHEN IT EXPIRES.

Immediately after filing the judgment-roll, the clerk must make the proper entries of the judgment under appropriate heads, in the docket kept by him, noting thereon the hour and minute of the day of such entry; and from the time the judgment is docketed it becomes a lien upon all the real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterwards acquire, until the lien ceases. The lien continues for five years unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking as provided in this code, in which case the lien of the judgment and any lien by virtue of an attachment that has been issued and levied in the action ceases.

History: Enacted March 11, 1872, a re-enactment of § 204 of Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 320; March 9, 1895, Stats. and Amdts. 1895, p. 37; April 19, 1917, Stats. and Amdts. 1917, p. 141. In effect July 27, 1917.

JUDGMENT-LIEN—BEGINS WHEN, AND WHEN EXPIRES.

1. After-acquired property—Date of acquisition—Priority of liens.
- 2-4. Appeal—Effect of stay of execution.
5. Attachment-lien—Is merged in judgment-lien.
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8. Constitutional law—Limiting lien.
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10. Conveyance—Lien is not.
- 11, 12. Conveyance by debtor—In general.
- 13, 14. *Same*—Must have vested interest.
15. Creation of lien—What necessary.
- 16, 17. *Same*—Docketing of judgment is essential.
- 18, 19. Death of judgment-debtor—Does not destroy lien.
20. *Same*—Judgment-creditor may petition probate court.

21. Docketing judgment—Consists of entry in docket in clerk's office.
- 22, 23. *Same*—Ministerial act.
- 24, 25. Does not attach, when.
26. Equity suit to foreclose.
27. Estate in the land—Release of lien.
28. Execution—Effect of.
29. *Same*—May be issued and levied before docketing of judgment.
30. Exempt property.
31. Foreclosure of lien.
32. Foreclosure of mortgage—Lien in case of.
- 33-35. *Same*—Lien for deficiency judgment.
- 36, 37. *Same*—Personal judgment against mortgageor.
- 38, 39. Fraudulent conveyance—Effect of.
40. Homestead not affected—In general.
- 41, 42. *Same*—Docketing of judgment creates no lien against.
43. Judgment-docket—Is public record.

44. Judgment of the justice of the peace.
45. Judgment for maintenance—In divorce action—Creates lien.
46. Leasehold interest—Not such real property as will be affected.
- 47-50. Levy of execution.
51. Lien upon community property—By decree of divorce.
52. Mortgageor—Effect of judgment against after foreclosure.
53. Nature of.
54. Order enjoining sale under execution.
55. Partition—Judgment for costs.
56. Sale must be made during statutory period.
57. Same—Where superior lien.
58. Sale under execution.
59. Share in undistributed estate.
60. Statutory lien purely.
61. Statute creating a superior lien.
62. Statute of limitations.
63. Time of docketing must appear.
64. Time of holding title.
65. Transcript not equivalent of docket.
66. Unrecorded mortgage—Takes priority over.
67. Upon the real property, only.

1. After-acquired property—Date of acquisition—Priority of liens.—Under the provisions of the above section a docketed judgment can not "become a lien" upon after-acquired property of the judgment-debtor until the property is actually acquired by him; and where a judgment-debtor has several judgments docketed against him, and thereafter acquires property the liens of the various judgments thus docketed are immediately attached, and in so far as the order in point of time of such docketings is concerned, there will be no priority of liens, since the lien simultaneously attached upon the acquisition of the property.—*Hertweck v. Fearon*, 180 Cal. 71, 179 Pac. 190, approving doctrine in *Kister-son v. Tate*, 94 Iowa 665, 54 Am. St. Rep. 419, 63 N. W. 350; *Ware v. Delahawe*, 95 Iowa 667, 64 N. W. 640; *In re Estate of Hazard*, 73 Hun (N. Y.) 22, 25 N. Y. Sup. 928, affirmed 141 N. Y. 586, 36 N. E. 739; *Moore v. Jordan*, 117 N. C. 86, 53 Am. St. Rep. 576, 42 L. R. A. 209, 23 S. E. 259.

As to lien of judgments on after acquired lands, see note 53 Am. St. Rep. 579.

As to priority of judgment-liens of after-acquired property, see note 42 L. R. A. 209.

2. Appeal—Effect of stay of execution.—Obvious intention is to charge estate of judgment-debtor and give creditor certain time to get his money. Statute intended this time should run from date of judgment or period at which plaintiff was in situation to take out execution and pursue his remedy to final satisfaction. The lien is but an in-

cident of judgment, and where judgment is stayed by appeal the time lien exists does not commence to run until filing of the remittitur from the appellate court.—*Dewey v. Latson*, 6 Cal. 130, 134; *Englund v. Lewis*, 25 Cal. 337, 352.

3. Time during which judgment-lien runs commences at docketing of judgment, unless execution is stayed by appeal with stay-bond. Time during which execution is thus stayed is to be omitted from computation. Any period of time, however, which may transpire between docketing of judgment and stay of proceedings is to be included in computation. Stay, either by order of court pending motion for new trial or by appeal with stay-bond, merely suspends running of statutory time, but it does not postpone commencement of statutory limitation until after stay has ceased. *Dewey v. Latson*, 6 Cal. 130, and *Englund v. Lewis*, 25 Cal. 337, are not opposed to this conclusion.—*Barrollhet v. Hathaway*, 31 Cal. 395, 397, 89 Am. Dec. 193.

4. Judgment-lien is suspended by appeal only where execution of judgment is stayed. If execution be not stayed, life of lien commences at docket of judgment.—*Chapin v. Broder*, 16 Cal. 403, 422; *Englund v. Lewis*, 25 Cal. 337, 350, 353.

As to effect upon existing judgment-lien of proceedings to renew, review, or extend judgment, see note 53 L. R. A. 702.

As to effect on appeals, and giving security thereon, see, post, § 937 and note.

As to stay of execution on appeal, see, post, §§ 941 et seq. and notes.

5. Attachment-lien—Is merged in judgment-lien, and ceases except as maintaining priority of lien upon property attached, when judgment-lien attaches to property.—*Bagley v. Ward*, 37 Cal. 121, 133, 99 Am. Dec. 256.

6. Same—Revival.—Effect of stay-bond on appeal is to extinguish only liens resulting from judgment and from process thereunder. Attachment-lien is not extinguished by such undertaking, and, although merged in judgment-lien, it may be revived where by act of defendant judgment-lien instead of expiring by lapse of time is extinguished by acts of defendant (per *Beatty*, C. J., on petition for rehearing).—*Riley v. Nance*, 97 Cal. 203, 207, 31 Pac. 1126, 32 Pac. 315.

As to attachment and attachment-liens, see, ante, § 537 and note.

7. Commences, when.—Time of judgment-lien commences to run from docketing of judgment, unless execution is stayed by appeal with stay-bond.—*Barrollhet v. Hathaway*, 31 Cal. 395, 397, 89 Am. Dec. 193; approved in *Rogers v. Druffel*, 46 Cal. 654, 656.

8. Constitutional law—Limiting lien.—Act prohibiting renewal or revival of judgment-lien is void as impairing obligation of contract when applied to judgments recovered on obligation incurred prior to

passage of act.—Howard v. Ross, 38 Wash. 627, 80 Pac. 819.

9. **Construction—Statutory right.**—The lien of a judgment treated by the above section exists purely by reason of the statute, no such lien having existed at common law.—Hertwick v. Fearen, 180 Cal. 71, 179 Pac. 190, following Boggs v. Dunn, 160 Cal. 283, 116 Pac. 743.

10. **Conveyance—Lien is not.**—Conveyance within meaning of Registry Act is not made by lien of judgment.—Wilcoxson v. Miller, 49 Cal. 193, 195.

11. **Conveyance by debtor—In general.**—Debtor can not convey land subject to attachment so as to exempt it from judgment-lien. People ex rel. Ford v. Irwin, 14 Cal. 428, 434, does not affirm, either in terms of effect, that he can (per Beatty, C. J., on petition for rehearing).—Riley v. Nance, 97 Cal. 203, 206, 31 Pac. 1126, 32 Pac. 315.

12. Lien does not attach to property until docketing of judgment, and therefore does not attach to property which debtor conveyed prior to docketing, although same was subject to attachment-lien.—Riley v. Nance, 97 Cal. 203, 205, 31 Pac. 1126, 32 Pac. 315.

13. **Same—Must have vested interest.**—Statutory lien of judgment upon real estate of judgment-debtor can attach only upon property in which such debtor has vested legal interest. It follows that if title to property has passed to and vested in another nothing remains upon which lien of judgment subsequently recovered could attach.—People ex rel. Ford v. Irwin, 14 Cal. 428, 434.

14. Lien can attach only to property in which debtor has vested legal interest.—People ex rel. Ford v. Irwin, 14 Cal. 428, 436.

As to judgment entered after death of party not a lien, see, ante, § 669 and note; post, § 1506 and note.

As to estates and interests affected by judgment-lien, see note 93 Am. Dec. 345.

As to lien of judgment after death of defendant, see note 89 Am. Dec. 243.

As to lien of judgment on after-acquired land, see note 13 Am. Dec. 626.

As to priority of judgment over conveyance made after beginning of term, see note 38 L. R. A. 293.

As to priority of judgment-liens on after-acquired property, see note 42 L. R. A. 209.

As to priority of lien of judgment, or of prior unrecorded conveyance, see note 16 L. R. A. 668.

15. **Creation of lien—What necessary.**—Docketing of judgment creates lien, and in order for judgment-creditor to redeem from execution sale he must produce copy of docket; copy of judgment itself is not sufficient.—Haskell v. Manlove, 14 Cal. 54, 57.

16. **Same—Docketing of judgment is essential to lien,** and where judgment was not

docketed lien did not exist.—Eldridge v. Wright, 55 Cal. 531, 533; Eby v. Foster, 61 Cal. 282, 286.

17. Only after judgment has been entered and judgment-roll made up and filed can judgment be docketed and judgment-lien created.—Menzies v. Watson, 105 Cal. 109, 111, 38 Pac. 641.

18. **Death of judgment-debtor—Does not destroy lien** of judgment docketed against him in his lifetime, and presentation of such judgment as claim against estate with allowance thereof does not interrupt the lien of the judgment; the allowance of the claim is not a judgment, and there is no merger of the judgment in the allowance.—Morton v. Adams, 124 Cal. 229, 230, 231, 71 Am. St. Rep. 53, 56 Pac. 1038.

19. Death of judgment-debtor does not destroy lien, and presentation of judgment as claim against estate with suit and judgment thereon does not merge judgment or destroy lien.—Estate of Wiley, 138 Cal. 301, 307, 71 Pac. 441.

20. **Same—Judgment-creditor may petition probate court** for sale of property upon which he holds judgment-lien against deceased.—Estate of Wiley, 138 Cal. 301, 307, 71 Pac. 441.

21. **Docketing judgment—Consists of entry in docket in clerk's office** before abstract of judgment. Docket is "a book with each page divided into eight columns and headed as follows: judgment-debtors; judgment-creditors; judgment—time of entry; where entered in judgment-book; appeals—when taken; judgment of appellate court; satisfaction of judgment; when entered," etc. (§ 672, post), and law has made it duty of clerk to enter in this docket title of each cause, with date of its commencement, and memorandum of every subsequent proceeding therein with date thereof (Pol. Code § 4204 subd. 3). Entry thus required must be made immediately after attaching together and filing papers which constitute judgment-roll. These things must be done to create judgment-lien upon real property; if they are not done as required by law there is no lien.—Eby v. Foster, 61 Cal. 282, 286.

22. **Same—Ministerial act,** and is for purpose of creating lien upon real property of debtor.—Los Angeles Co. Bank v. Raynor, 61 Cal. 145, 147.

23. **Approved in Otto v. Long,** 144 Cal. 144, 146, 77 Pac. 885.

24. **Does not attach when** the judgment-debtor holds nothing but the naked legal title, the complete equitable title being held by another who had paid purchase-price of the property.—Zenda Mining & M. Co. v. Tiffin, 11 Cal. App. 62, 65, 104 Pac. 10.

25. The judgment-lien can operate as a lien only on the interest of the judgment-debtor, whatever it may be. He must have a real interest in the property before the judgment-lien can attach thereto, and

where he has acted in a transaction purely and simply as an agent or trustee and has never been invested with anything higher than the mere naked title, the lien does not attach.—*Riverdale Mining Co. v. Wicks*, 14 Cal. App. 532, 112 Pac. 896.

26. Equity suit to foreclose.—Suit in equity may be brought to foreclose judgment-lien where there is no other adequate remedy, e. g. where judgment-debtor has died, but in lifetime conveyed property, as here it could not be reached in probate proceedings, nor could execution issue.—*Hibernia Sav. & L. Soc. v. London & L. F. Ins. Co.*, 138 Cal. 257, 259, 71 Pac. 334.

27. Estate in the land—Release of lien.—Lien amounts only to security against subsequent purchasers and encumbrancers. Judgment-creditor gets no estate in lands, and though he should release all his right to land, he might afterwards renew it by execution.—*Bagley v. Ward*, 37 Cal. 121, 133, 99 Am. Dec. 256.

28. Execution—Effect of.—Lands are bound by judgment-lien, and execution comes as power to sell. General lien is created by judgment, and execution is merely to give that lien effect—not by vesting possessory right to land affected by it in plaintiff, but by designating it for conversion into money by operation of the *fi. fa.*, and act of sheriff by virtue of it. Although levy of execution is unnecessary to give effect to judgment-lien, yet that course is usually pursued.—*Bagley v. Ward*, 37 Cal. 121, 132, 99 Am. Dec. 256.

29. Same—May be issued and levied before docketing of judgment and sale and conveyance of real estate thereunder will pass all interest held by judgment-debtor at time of levy.—*Hastings v. Cunningham*, 39 Cal. 137, 144; *Los Angeles Co. Bank v. Raynor*, 61 Cal. 145, 147.

As to enforcement of judgment by execution, see, post, §§ 681 et seq. and notes.

30. Exempt property.—Docketed judgment is not necessarily lien as it does not affect property exempt from execution or homestead.—*Dam v. Zink*, 112 Cal. 91, 93, 44 Pac. 331.

As to homestead, see pars. 40-42, this note.

As to property exempt from execution, see, post, § 690 and note.

As to lien of judgment of federal court, see notes 24 Am. Dec. 310, 47 L. R. A. 469.

31. Foreclosure of lien.—Enforcement of judgment-lien may be sought as affirmative relief in action to foreclose another lien to which lienholder is made party defendant.—*Hibernia Sav. & L. Soc. v. London & L. F. Ins. Co.*, 138 Cal. 257, 260, 71 Pac. 334.

32. Foreclosure of mortgage—Lien in case of.—Judgment of foreclosure of mortgage and for deficiency in event that mortgaged property is insufficient to pay debt

does not create judgment-lien.—*Chapin v. Broder*, 16 Cal. 403, 422, cited in *Englund v. Lewis*, 25 Cal. 337, 350.

33. Same—Lien for deficiency judgment.—Judgment for foreclosure of mortgage does not become lien on real estate, but when deficiency, if any, is ascertained after sale of mortgaged premises and docketed, same becomes lien from that time.—*Culver v. Rogers*, 28 Cal. 520, 526.

34. In foreclosure suits lien of judgment attaches upon return of deficiency.—*Hibberd v. Smith*, 50 Cal. 511, 517.

35. In foreclosure cases entry of decree does not create lien. It is only docketing of deficiency judgment which creates lien.—*Carpenter v. Lewis*, 119 Cal. 18, 22, 50 Pac. 925.

36. Same—Personal judgment against mortgagee in action of foreclosure, when docketed, becomes lien in accordance with statute, but nothing except judgment establishing definite personal liability can have this effect. A mere contingent provision referring to no particular amount, and in abeyance until contingency is determined, is not within meaning of statute. It may become valid and perfect judgment, but until amount to be recovered is ascertained and fixed no effect can be given to it as a lien.—*Englund v. Lewis*, 25 Cal. 337, 350, 357.

37. Distinguished: *Solomon v. Maguire*, 29 Cal. 227, 237; *Hibberd v. Smith*, 50 Cal. 511, 518.

38. Fraudulent conveyance—Effect of.—Property fraudulently transferred is impressed with lien of judgment against fraudulent grantor.—*First Nat. Bank v. Maxwell*, 123 Cal. 360, 371, 69 Am. St. Rep. 64, 55 Pac. 980.

39. Judgment-lien on property fraudulently conveyed before such conveyance does not affect creditor's right to have conveyance declared void by judicial decree.—*Ackerman v. Merle*, 137 Cal. 157, 159, 69 Pac. 982.

As to lien on lands fraudulently conveyed, see note 17 L. R. A. 345.

40. Homestead not affected—In general—Judgment-lien is purely statutory, and as statute only provides judgment shall become lien from time it is docketed upon property of judgment-debtor "not exempt from execution," which means upon property which is subject to forced sale, it does not attach to property declared homestead.—*Ackley v. Chamberlain*, 16 Cal. 181, 183, 76 Am. Dec. 516; *Bowman v. Norton*, 16 Cal. 213, 220.

As to exempt property, see par. 30, this note.

41. Same—Docketing of judgment creates no lien against homestead premises.—*Hohn v. Pauly*, 11 Cal. App. 724, 731, 106 Pac. 266.

42. Property covered by a valid declaration of homestead is not within the classification of "real property . . . not exempt from execution," and hence is not subject to a judgment-lien.—*Boggs v. Dunn*, 160 Cal. 285, 116 Pac. 743.

As to effect of lien on homestead right—Subject to homestead right, see note 11 L. R. A. 705; 87 Am. Dec. 278; 34 Am. St. Rep. 496.

43. Judgment-docket—Is public record.—The judgment docket is a public record and as such imparts notice to all persons interested.—*Bates v. Ransome-Crummey Co.*, 42 Cal. App. 699, 184 Pac. 39.

44. Judgment of justice of the peace is made a lien only by filing abstract thereof in office of recorder, as provided by section 900, post.—*Beaton v. Reid*, 111 Cal. 484, 486, 44 Pac. 167.

As to constituting judgment of justices' court lien on real property, see, post, §§ 899, 900 and notes.

As to lien of judgment of justice of the peace—Effect of filing transcript, see note 2 L. R. A. 831.

45. Judgment for maintenance—In divorce action—Creates lien.—The judgment in an action for divorce, in so far as it awards maintenance to the wife, is the same as any money judgment, the wife's position being similar to that of a creditor of her husband and the effect of docketing such judgment is to create a lien upon the property, community or separate, of the husband.—*Lisenbee v. Lisenbee*, 42 Cal. App. 567, 183 Pac. 862.

46. Leasehold interest—Not such real property as will be affected by lien given by this section.—*Summerville v. Stockton M. Co.*, 142 Cal. 529, 538, 76 Pac. 243.

47. Levy of execution during period of lien neither creates new lien nor extends judgment-lien, and in order to preserve his priority judgment-creditor must sell real property within period of statutory lien of judgment.—*Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256; *Rogers v. Druffel*, 46 Cal. 654, 655.

48. Levy of execution neither extends existing judgment-lien nor creates new lien.—*Bagley v. Ward*, 37 Cal. 121, 133, 99 Am. Dec. 256.

49. Levy of execution does not have effect of constituting judgment upon which execution was issued lien upon property levied upon where it otherwise was not such lien. Lien of execution is not that of judgment; execution neither creates judgment-lien nor extends one once created.—*Beaton v. Reid*, 111 Cal. 484, 486, 44 Pac. 167.

50. Relation of judgment-lienior to property may be different in some respects after levy of executions, and new relations may arise thereby as to debtor and other creditors. But issuance and levy of execu-

tion are not necessary to lien.—*Estate of Wiley*, 138 Cal. 301, 305, 71 Pac. 441.

51. Lien upon community property—By decree of divorce does not derive its force or life from this section.—*Gaston v. Gaston*, 114 Cal. 542, 546, 55 Am. St. Rep. 86, 46 Pac. 609.

As to superiority of lien of local assessments over prior liens, see notes 35 L. R. A. 372, 30 L. R. A. (N. S.) 761.

52. Mortgageor—Effect of judgment against after foreclosure.—Judgment against mortgageor rendered after sale and foreclosure of mortgaged premises does not become lien upon such premises, as his title was divested by sale, purchaser taking entire beneficial interest in property except actual possession, and being considered in equity the owner subject only to have his title divested by redemption.—*Robinson v. Thornton*, 102 Cal. 675, 680, 34 Pac. 120.

53. Nature of.—A judgment operates as a lien only upon the interest of the judgment-debtor, and a mere naked trustee has no interest in the land upon which a lien can attach.—*Riverdale Mining Co. v. Wicks*, 14 Cal. App. 532, 112 Pac. 896.

54. Order enjoining sale under execution does not stop running of statute.—*Rogers v. Druffel*, 46 Cal. 654, 656.

As to continuing lien of judgment opened or set aside to permit defense, see note 41 L. R. A. 222.

55. Partition—Judgment for costs in action of partition may or may not be lien upon property of judgment-debtor according as they are or are not specified in judgment as provided by section 796, post. In case they are so specified they constitute lien on several shares, and judgment may be enforced by execution against such shares and against other property held by respective parties, and such lien takes effect by relation at time of filing notice of lis pendens and without docketing of judgment. But in case costs be not allowed by and included in judgment, but reserved and subsequently distinct judgment for costs be rendered, such becomes lien only upon being docketed and in same manner as other judgments.—*Lacoste v. Eastland*, 117 Cal. 673, 677, 49 Pac. 1046.

56. Sale must be made during statutory period of lien in order to preserve priority thereby acquired.—*Bagley v. Ward*, 37 Cal. 121, 133, 99 Am. Dec. 256.

57. Same—Where superior lien.—Sale must be made within life of lien, and where lien is subordinate in another, interest of debtor in land should be sold subject to superior lien.—*Petaluma Sav. Bank v. Superior Court*, 111 Cal. 488, 499, 44 Pac. 177.

58. Sale under execution relates to time of levy only, and where execution is levied during life of lien, but returned without sale, second execution levied after expiration of lien relates back only to time of

its levy.— *Bagley v. Ward*, 37 Cal. 121, 139, 99 Am. Dec. 256.

59. Share in undistributed estate.—Heir or devisee is, upon death of ancestor or testator, immediately vested with interest in real property inherited by or devised to him, subject to rights of administration, and therefore judgment-lien, as against him, will immediately attach to such property.—*Martinovich v. Marsicano*, 137 Cal. 354, 355, 70 Pac. 459. See *Hibernia Sav. & L. Soc. v. London & L. F. Ins. Co.*, 138 Cal. 257, 261, 71 Pac. 334; *Gutter v. Dellamore*, 144 Cal. 665, 669, 79 Pac. 383.

60. Statutory lien purely.—Judgment becomes lien only by force of statute, and depends for its existence upon conditions of statutory origin.—*Culver v. Rogers*, 28 Cal. 520, 524.

61. Statute creating a superior lien.—Effect of judgment-lien can not be destroyed by act providing that laborer doing work for corporation should, under certain circumstances, have lien upon all property of corporation.—*Johnson v. Goodyear M. Co.*, 127 Cal. 4, 11, 78 Am. St. Rep. 17, 47 L. R. A. 338, 59 Pac. 304.

62. Statute of limitations on judgment-lien is suspended by filing of petition within life of lien to probate court for sale of

property of deceased judgment-debtor.—*Estate of Wiley*, 138 Cal. 301, 308, 71 Pac. 441.

63. Time of docketing must appear in record itself, as its commencement is day when judgment was docketed, and being merely statutory lien, neither its existence nor commencement can be proved by parol.—*Eby v. Foster*, 61 Cal. 282, 287.

64. Time of holding title.—Any interval of time, however small, in which title vests in judgment-debtor, is sufficient for lien to attach.—*Marriner v. Smith*, 27 Cal. 650, 652; *Hibberd v. Smith*, 50 Cal. 511; *Eby v. Foster*, 61 Cal. 282, 285.

65. Transcript not equivalent of docket.—Production of transcript of judgment is not equivalent to production of copy of docket, by one seeking to redeem.—*Willcoxson v. Miller*, 49 Cal. 193, 194.

66. Unrecorded mortgage—Takes priority over subsequent judgment-lien.—*Bank of Ukiah v. Petaluma Sav. Bank*, 100 Cal. 590, 591, 35 Pac. 170.

67. Upon the real property, only, of the judgment-debtor owned by him at the time of docketing of the judgment, or afterwards and before the expiration of the lien, and does not attach to property he had previously conveyed, also the deed conveying the same was not then recorded.—*Wolfe v. Langford*, 14 Cal. App. 359, 112 Pac. 203.

§ 671a. FILING JUDGMENTS OF UNITED STATES COURTS. Transcripts of judgments and copies of judgments rendered in the district or other courts of the United States within the state of California, when certified by the clerk of said courts under the seal thereof, may be filed and recorded in the office of the county clerk of any county in this state, and when so filed the clerk shall immediately enter the same in the judgment docket in the same manner as judgments rendered in the superior court are entered and such transcripts of judgments and copies of judgments, when so certified, may be filed for record in the office of any county recorder of this state and when so filed for record the county recorder shall record and index the same in the same manner as transcripts of judgments and copies of judgments of the courts of this state are recorded and indexed; and from such recording the judgment becomes a lien upon all the real property of the judgment debtor not exempt from execution in such county, owned by him at the time, or which he may afterward, and before the lien expires, acquire.

History: Enactment approved April 19, 1917, Stats. and Amdts. 1917, p. 142. In effect July 27, 1917.

§ 672. DOCKET, HOW KEPT, AND WHAT TO CONTAIN. The docket mentioned in the last section is a book which the clerk keeps in his office, with each page divided into nine columns, and headed as follows: Date of entry in docket; judgment debtors; judgment creditors; judgment; time of entry; where entered in judgment-book; appeals, when taken; judgment of appellate court; satisfaction of judgment, when entered. In the judgment is for the recovery of money, the amount must be stated in the docket

under the head of judgment; if the judgment is for any other relief, a memorandum of the general character of the relief granted must be stated. The names of the judgment debtors must be entered in alphabetical order.

History: Enacted March 11, 1872, re-enactment of § 205 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 151, held unconstitutional, see history, § 5 ante; amendment approved March 20, 1907, Stats. and Amdts. 1907, p. 720, Kerr's Stats. and Amdts. 1906-7, p. 453; May 16, 1921, Stats. and Amdts. 1921, p. 113. In effect July 29, 1921.

**JUDGMENT-DOCKET—HOW KEPT—
CONTENTS.**

1. Amount—Sufficiency of entry.
2. Complaint on judgment.
3. Date of entry.
4. Docketing judgment consists of.
5. Ministerial act.
6. Neglect to docket judgment.
7. Surnames should precede christian names.

As to docketing judgment, see note 87 Am. St. Rep. 665.

As to entry of judgment, see, ante, § 664 and note.

As to judgment-docket as a public record, see, ante, § 671 and note.

As to recording of judgment, see, ante, § 668 and note.

1. Amount—Sufficiency of entry.

[Red]

AMOUNT OF JUDGMENT.		
Cost.....	394 34	82 40

Entry of amount of judgment in column headed "Amount of Judgment" in above form is sufficient. Word "amount" in its connection with numerical figures indicates that judgment is for money or damages, since amount of any other kind of relief is not required to be stated, nor could memorandum of "a general character" of other kind of relief be expressed by numerical figures, however written or marked. The word "costs," immediately preceding figures "34|40," indicates that those figures represent money, since judgments for costs are always for money. Finally, the position of figures in column headed "Amount of Judgment," inclosed by double lines, and divided by a single red line, plainly indicates that figures on the left of red line represent

dollars, and those on the right represent cents. This mode of writing dollars and cents is more generally practised and quite as well understood as that in which dollar-mark (\$) is used. It is almost universally practised where sums of money are to be written in columns, as in blotters, journals, ledgers, and statements of accounts. When so written, not only courts, but all persons of common education readily read and understand the figures as representing definite number of dollars and cents.—Dyke v. Bank of Orange, 90 Cal. 397, 399, 27 Pac. 304.

2. Complaint on judgment need not allege it was docketed.—High v. Bank of Commerce, 95 Cal. 386, 389, 29 Am. St. Rep. 121, 30 Pac. 556.

3. Date of entry of judgment is as important a part of record as entry itself.—Estate of Scott, 124 Cal. 671, 676, 57 Pac. 654. See Estate of Pichoir, 139 Cal. 694, 697, 70 Pac. 214, 73 Pac. 604.

4. Docketing judgment consists of entry in docket in clerk's office of brief abstract of judgment, and law has made it duty of clerk to enter in this docket title of cause with date of its commencement, and memorandum of every subsequent proceeding therein, with date thereof. And docket, to create prior statutory judgment-lien, must of itself show date of docketing of judgment.—Eby v. Foster, 61 Cal. 282, 286, 287.

5. Ministerial act.—Upon filing of findings and decree, it is ministerial duty of clerk to enter and docket judgment and prepare and file judgment-roll.—Baker v. Brickell, 102 Cal. 620, 623, 36 Pac. 950.

6. Neglect to docket judgment does not destroy or impair its effect.—Baker v. Brickell, 102 Cal. 620, 623, 36 Pac. 950.

7. Surnames should precede christian names, and omission of christian name of judgment-debtor does not deprive docket of its useful functions in directing attention of those interested in existence of judgment, and to all its incidents.—Hibberd v. Smith, 50 Cal. 511, 517.

§ 673. DOCKET TO BE OPENED FOR INSPECTION WITHOUT CHARGE. The docket kept by the clerk is open at all times, during office hours, for the inspection of the public, without charge. The clerk must

arrange the several dockets kept by him in such a manner as to facilitate their inspection.

History: Enacted March 11, 1872, re-enactment of § 206 Practice Act.

As to judgment-docket as a public record, see, ante, § 671 and note.

As to public writings being open to inspection, see, post, §§ 1892, 1893 and notes.

§ 674. TRANSCRIPT TO BE FILED IN ANY COUNTY, AND JUDGMENT TO BECOME A LIEN THERE. The transcript of the original docket of any judgment, the enforcement of which has not been stayed on appeal, certified by the clerk, may be filed with the recorder of any other county, and from such filing the judgment becomes a lien upon all the real property of the judgment debtor not exempt from execution in such county, owned by him at the time, or which he may afterward, and before the lien expires, acquire.

The lien continues for two years unless the judgment is previously satisfied or the lien otherwise discharged.

History: Enacted March 11, 1872, re-enactment of § 207 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 152, held unconstitutional, see history, § 5 ante; amendment approved March 20, 1907, Stats. and Amdts. 1907, p. 720, Kerr's Stats. and Amdts. 1906-7, p. 454.

FILING TRANSCRIPT—JUDGMENT-LIEN.

1. Filing notice of lis pendens—New action.
2. Homestead.
3. Same—Discharge in bankruptcy.
4. New recordation—Necessary.
5. Satisfaction of lien—Clerk's certificate.

1. **Filing notice of lis pendens—New action.**—The filing of notice of the pendency of a new action to set aside a satisfaction as fraudulent to creditors was not sufficient to put defendants on notice, where the title had been previously transferred by the defendant in the original action.—City Properties Co. v. Fitzmaurice, 42 Cal. App. 16, 183 Pac. 267.

2. **Homestead.**—Property covered by a valid declaration of homestead is not within the classification of "real property . . . not exempt from execution," and hence, is

not subject to a judgment-lien.—Boggs v. Dunn, 160 Cal. 285, 116 Pac. 743.

3. **Same—Discharge in bankruptcy.**—Not being a lien on homestead irrespective of valuation, a judgment for money is discharged as to such homestead by the discharge of the judgment-debtor in bankruptcy subsequent to docketing of judgment.—Boggs v. Dunn, 160 Cal. 285, 116 Pac. 743.

4. **New recordation—Necessary.**—A judgment so satisfied can not be restored except by a new recordation of the transcript of the judgment.—City Properties Co. v. Fitzmaurice, 42 Cal. App. 16, 183 Pac. 267.

5. **Satisfaction of lien—Clerk's certificate.**—The lien created in another county is not discharged by the filing of a clerk's certificate of satisfaction, but by the satisfaction itself.—City Properties Co. v. Fitzmaurice, 42 Cal. App. 16, 183 Pac. 267.

§ 675. SATISFACTION OF A JUDGMENT, HOW MADE. Satisfaction of a judgment may be entered in the clerk's docket upon an execution returned satisfied, or upon an acknowledgment of satisfaction filed with the clerk, made in the manner of an acknowledgment of a conveyance of real property, by the judgment creditor, or by his indorsement on the face, or on the margin of the record of the judgment, or by the attorney, unless a revocation of his authority is filed. Whenever a judgment is satisfied in fact, otherwise than upon an execution, the party or attorney must give such acknowledgment, or make such indorsement, and upon motion, the court may compel it, or may order the entry of satisfaction to be made without it.

History: Enacted March 11, 1872, re-enactment of § 208 Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 320.

SATISFACTION OF JUDGMENT—HOW MADE.

1. Affirmance of judgment on appeal—Will not alter fact.
2. Appeal—Does not lie from satisfied judgment.
- 3-5. Same—Enforced satisfaction.
6. Same—Payment of judgment.
7. Same—Payment by administratrix.
8. Beneficial owners.
9. Certiorari does not lie.
- 10, 11. Co-creditors—Satisfaction by one.
12. Same—Assignment of debtor.
13. Same—Set-off of judgment.
14. Compromise—Assignment of judgment to attorney.
15. Same—Conflicting evidence.
16. Conditional release—Of one of two joint judgment-debtors.
17. Equitable remedy—Of enjoining execution of judgment.
18. Execution—Satisfaction by.
19. Joint tort-feasors—Satisfaction as to one.
20. Merits—Not reviewed on motion.
21. Motion for satisfaction—Evidence conflicting affidavits—Effect on appeal.
22. Same—Controverted fact—Reference to jury.
23. Same—Same—Reference to jury—Failure to request.
24. Same—Record on appeal—Lack of bill of exceptions.
25. Nominal plaintiff—Use of name of.
26. One satisfaction only.
27. Payment—Effect of.
28. Same—Does not always amount to satisfaction.
29. Payment by joint debtor.
30. Practice—Where judgment has been satisfied of record.
31. Set-off of judgments.
32. Sureties on appeal-bond.
33. Voluntary satisfaction.

As to set-off of judgments, see, post, § 688 and note.

1. **Affirmance of judgment on appeal—Will not alter fact** that judgment has been in part satisfied.—*Ryland v. Heney*, 130 Cal. 426, 431, 62 Pac. 616.

2. **Appeal—Does not lie from satisfied judgment.**—A party can not accept benefit or advantage given him by judgment or order and then seek to have it reviewed. An exception to this rule is where reversal could not affect right of party to benefit he has secured, as, e. g., where there is no controversy as to his right to amount for which judgment was given, but he claims to be entitled to greater amount.—*County of San Bernardino v. County of Riverside*, 135 Cal. 618, 620, 67 Pac. 1047.

3. **Same—Enforced satisfaction by execution** can not deprive judgment-debtor of his right to appeal, and he may require restitution in case of reversal.—*Kenney v. Parks*, 120 Cal. 22, 24, 52 Pac. 40.

4. **Forced payment by execution sale** against a non-consenting judgment-debtor can not be held such satisfaction as to abridge any of his rights upon or under appeal.—*Kenney v. Parks*, 120 Cal. 22, 24, 52 Pac. 40; *Vermont M. Co. v. Black*, 123 Cal. 21, 23, 55 Pac. 599.

5. **Judgment against deceased person** is not satisfied so as to prevent or cause dismissal of appeal by sale of property of estate under execution and payment of proceeds into court to await result of appeal.—*Vermont M. Co. v. Black*, 123 Cal. 21, 23, 55 Pac. 599.

6. **Same—Payment of judgment, unless by way of compromise or with agreement not to take or pursue appeal**, can not prevent party against whom judgment was rendered from seeking reversal on appeal, as in case of reversal he will be entitled to restitution.—*Warner Bros. Co. v. Freud*, 131 Cal. 639, 644, 82 Am. St. Rep. 400, 63 Pac. 1017. See *Hayes v. Nourse*, 107 N. Y. 577, 579, 1 Am. St. Rep. 891, 14 N. E. 508.

7. **Same—Payment by administratrix** for purpose of protecting rights of estate in real property which would otherwise be forfeited, should not be deemed a compulsory payment, and does not affect right of appeal.—*Warner Bros. Co. v. Freud*, 131 Cal. 639, 644, 82 Am. St. Rep. 400, 63 Pac. 1017.

As to appeal from judgments after satisfaction—When such may be sustained, see note 45 Am. St. Rep. 271.

As to authority of attorney to satisfy judgment, see, ante, § 283 and note.

8. **Beneficial owners** of judgment on claims assigned for collection may enter satisfaction, and enforcement of the judgment by their assignee, after such satisfaction, will be enjoined.—*Meyer v. Tully*, 46 Cal. 70, 73.

9. **Certiorari does not lie** when judgment is fully satisfied. Judgment of contempt for violation of injunction will not be reviewed where injunction has been obeyed and fine imposed voluntarily paid by defendant.—*Morton v. Superior Court*, 65 Cal. 496, 498, 4 Pac. 489. See *Kenney v. Parks*, 120 Cal. 22, 24, 52 Pac. 40.

10. **Co-creditors—Satisfaction by one.**—Only upon payment of whole amount due is one co-judgment-creditor authorized to enter satisfaction without consent of other.—*Haggin v. Clark*, 61 Cal. 1, 2.

11. **Approved:** *Haggin v. Clark*, 71 Cal. 444, 448, 449, 9 Pac. 736, 12 Pac. 478.

12. **Same—Assignment to debtor.**—Where judgment has determined rights of parties plaintiff, as between themselves, defendant, who has acquired rights of one plaintiff, may, upon tender of amount due other plaintiff, and refusal of such tender, com-

pel entry of satisfaction by proceeding under this section.—*Haggin v. Clark*, 71 Cal. 444, 451, 9 Pac. 736, 12 Pac. 478.

13. Same—Set-off of judgment.—One co-plaintiff may receive money due on judgment in favor of himself and several other co-plaintiffs, but he can not, without their authority, satisfy judgment by setting off judgment against one held by judgment-debtor against himself alone. Receiving payment in money of amount due on judgment is very different thing from an executory agreement to set-off another judgment against it. One requires no special authority from a co-plaintiff; the other does.—*Corwin v. Ward*, 35 Cal. 195, 198, 95 Am. Dec. 93.

14. Compromise—Assignment of judgment to attorney with defeasance by him that he held one-half thereof in trust for his assignor, does not confer upon him authority to satisfy judgment for less than full amount.—*Cobb v. Doggett*, 142 Cal. 142, 144, 75 Pac. 785.

15. Same—Conflicting evidence.—Satisfaction by attorney for less than amount due will not be set aside where evidence as to his authority to make such satisfaction is conflicting.—*Fuller v. Baker*, 48 Cal. 632, 634.

16. Conditional release—Of one of two joint judgment-debtors, releasing him so far as same can be done without releasing or discharging other from payment of balance does not constitute such release as will entitle other debtor to move and procure satisfaction of judgment.—*Barnum v. Cochran*, 139 Cal. 494, 495, 73 Pac. 242.

17. Equitable remedy—Of enjoining execution of judgment is not barred by this section, and especially not where party seeking relief has applied to court rendering judgment to declare satisfaction and recall execution, but has been denied such relief.—*Eppinger v. Scott*, 130 Cal. 275, 277, 62 Pac. 460.

18. Execution—Satisfaction by.—Satisfaction is made where sale under execution realizes sufficient to pay judgment, principal and costs as entered, and accruing costs, and no part of money thus realized can be applied to other purposes, such as payment of keeper's fees incurred prior to judgment but not included in memorandum of costs filed thereon.—*Hotchkiss v. Smith*, 108 Cal. 285, 287, 41 Pac. 304.

As to execution of judgment, see, post, §§ 681 et seq. and notes.

As to party paying more than his share of judgment compelling contribution, see, post, § 709 and note.

As to redemption of real property sold under execution, see, post, §§ 700-708 and notes.

As to sales under execution, see, post, § 694 and note.

As to satisfaction of judgment by levy on real and personal property, see note 58 Am. Dec. 350.

19. Joint tort-fessors—Satisfaction as to one.—Satisfaction of judgment against several joint tort-fessors by and as to one of them is satisfaction as to all.—*Chetwood v. California Nat. Bank*, 113 Cal. 414, 426, 45 Pac. 704.

As to effect of judgment against one joint tort-fessor upon liability of the other, see notes 58 L. R. A. 410, L. R. A. 1918D, 308.

20. Merits—Not reviewed on motion.—Motion to have judgment satisfied can not be used as means of reopening the case, that is, where judgment has determined respective rights of parties plaintiff as between themselves it can not be shown by affidavits on this motion that their rights are in fact different.—*Haggin v. Clark*, 71 Cal. 444, 448, 9 Pac. 236, 12 Pac. 478.

21. Motion for satisfaction—Evidence conflicting affidavits—Effect on appeal.—In a case in which a judgment-defendant gives notice of motion for an order satisfying the judgment and recalling an execution issued thereon, under the provisions of the above section authorizing such proceedings "whenever a judgment is satisfied in fact, otherwise then upon an execution," an order of satisfaction is to be made by the court in those cases only where the judgment has in fact been satisfied; where the only evidence touching this vital question consists of affidavits which are in direct conflict, on appeal from an order denying the motion it can not be said that the court erred.—*State Bank of Lansing v. McLaury*, 175 Cal. 31, 165 Pac. 7.

22. Same—Controverted fact—Reference to jury.—In those cases in which satisfaction is denied and the affidavits submitted are conflicting, the court should either remit the defendant to an independent action, or should provide for determination of the disputed fact by means of a reference, or a submission to a jury (dictum).—*State Bank of Lansing v. McLaury*, 175 Cal. 31, 165 Pac. 7, approving the doctrine in *Woodford v. Reynolds*, 36 Minn. 155, 30 N. W. 757; *Dwight v. St. John*, 25 N. Y. 203; *Atkinson v. Harrison*, 153 Pa. St. 472, 26 Atl. 294.

23. Same—Same—Reference to jury—Failure to request.—Where the defendant moving for satisfaction of judgment under such conflicting affidavits and fails to request a reference, or a submission of the issue of fact to a jury, but presents his motion for decision on such conflicting affidavits, having so presented it he will not be heard to insist on appeal that the court below should, of its own motion, have directed a procedure different from that which he himself initiated and invited.—*State Bank of Lansing v. McLaury*, 175 Cal. 31, 165 Pac. 7.

24. Same—Record on appeal—Lack of bill of exceptions.—A motion for satisfaction of judgment, heard and determined upon conflicting affidavits on appeal is no denial of the motion where the transcript consists merely of copies of the complaint,

the judgment, defendant's notice of motion, a written motion, defendant's affidavit, a counter-affidavit, the order denying the motion, and the notice of appeal certified by the clerk as correct copies of the originals on file, but not incorporated in any bill of exceptions, on appeal the appellate court can not consider such affidavits or other evidence used in the court below because they are not authentic by incorporation into a bill of exceptions under Rule XXIX of the supreme court (177 Cal. lvi, 176 Pac. vii), providing the method of authentication where no other mode is authorized by law; for the appellate court not only being precluded from considering the affidavits in the transcript must assume, in support of the order, that any additional evidence which would support it was presented to the court below.—*State Bank of Lansing v. McLaury*, 175 Cal. 31, 165 Pac. 7, following doctrine in *Herrlich v. McDonald*, 80 Cal. 472, 22 Pac. 299; *Von Glahn v. Brennan*, 81 Cal. 261, 22 Pac. 596; *Shain v. Elkerenkotter*, 88 Cal. 13, 25 Pac. 966; *Melde v. Reynolds*, 120 Cal. 234, 52 Pac. 491; *Ramsbottom v. Fitzgerald*, 128 Cal. 75, 60 Pac. 522; *Skinner v. Horn*, 144 Cal. 278, 77 Pac. 904; *Estate of Dean*, 149 Cal. 487, 87 Pac. 13.

25. Nominal plaintiff—Use of name of nominal plaintiff by his assignee or agent of his assignee in satisfying judgment is not improper.—*Cobb v. Doggett*, 142 Cal. 142, 143, 75 Pac. 785.

26. One satisfaction only of judgment is allowed. While plaintiff may bring several actions against joint tort-feasors recovering judgment in each, but satisfaction of any one of these judgments is satisfaction of all.—*Butler v. Ashworth*, 110 Cal. 614, 618, 42 Pac. 4, 386.

27. Payment—Effect of.—When judgment has been satisfied, it has passed beyond review, for satisfaction thereof is last act and end of proceeding. Payment produces permanent and irrevocable discharge, after which judgment can not be restored by any subsequent agreement, nor kept on foot to cover new and distinct engagements.—*Estate of Baby*, 87 Cal. 200, 202, 22 Am. St. Rep. 239, 25 Pac. 405.

28. Same—Does not always amount to satisfaction.—Rule is that mere payment by one joint debtor does not operate as an ac-

cord and satisfaction of judgment as to other joint judgment-debtors unless it plainly appears payment was intended to have such effect.—*Williams v. Riehl*, 127 Cal. 365, 370, 78 Am. St. Rep. 60, 59 Pac. 762.

29. Payment by joint debtor who in fact was surety for principal debtor, and an assignment of judgment to him, does not constitute satisfaction, and he may therefore proceed against his co-debtors for contribution by execution of judgment.—*Coffee v. Tevis*, 17 Cal. 239, 245; *Williams v. Riehl*, 127 Cal. 365, 370, 78 Am. St. Rep. 60, 59 Pac. 762.

As to right of surety who has paid judgment to enforce it for his own benefit, see note 16 L. R. A. 115.

30. Practice—Where judgment has been satisfied of record but not in fact, it is proper practice to issue order to show cause why execution should not issue upon judgment to judgment-debtor, thus giving him an opportunity to be heard upon matter.—*McAuliffe v. Coughlin*, 105 Cal. 268, 270, 38 Pac. 730.

As to satisfaction of judgment in replevin, see, ante, § 667 and note pars. 102-106.

31. Set-off of judgments.—Satisfaction may be made by set-off of another judgment, and court may decree this by virtue of its general jurisdiction over its judgments and suitors.—*Coonan v. Loewenthal*, 147 Cal. 218, 81 Pac. 527.

As to set-off of judgments, see, ante, § 440 and note.

32. Sureties on appeal-bond are not entitled to notice beyond entry of judgment against them, but if the judgment be in fact satisfied, may apply under the provisions of this section to have it satisfied of record.—*Meredith v. Santa Clara M. Assoc.*, 60 Cal. 617, 621.

As to judgments against sureties on appeal-bond, see, post, § 942 and note.

33. Voluntary satisfaction of judgment renders the question on appeal a moot question and therefore the appeal will be dismissed.—*Moore v. Morrison*, 130 Cal. 80, 81, 62 Pac. 268.

As to vacating satisfaction of judgment when title of purchaser at execution sale fails, see 53 Am. Dec. 701.

§ 675a. SATISFACTION OF MORTGAGE RECORDED. Whenever a mortgage on real property is foreclosed in this state and the property covered by such mortgage is sold under and pursuant to the decree of foreclosure entered in the action in which such foreclosure is had, it shall be the duty of the sheriff, or commissioner making the sale, as the case may be, within five days after the purchaser at the sale becomes entitled to a deed from such sheriff, or commissioner thereunder, to enter upon the margin of the county records where such mortgage is recorded, if the same be recorded, a satisfaction of the same.

[Form of satisfaction.] Such satisfaction shall be substantially in the following form:

Full satisfaction and discharge of the within mortgage by foreclosure is hereby entered this day of 19... Decree of foreclosure entered the day of 19.. in cause No. entitled, ... v. Sale under such decree had the day of 19...

.....
Sheriff (commissioner).

History: Enactment approved March 18, 1905, Stats. and Amdts. 1905, pp. 243, 244. In effect immediately.

§ 676. UNDERTAKING IN ACTION TO SET ASIDE TRANSFER OF PROPERTY. Where an action is commenced to set aside a transfer or conveyance of property on the grounds that such transfer or conveyance was made to hinder, delay or defraud a creditor or creditors, the transferee or grantee to whom it is alleged the property was transferred or conveyed to hinder, delay or defraud creditors or the successors or assigns of such transferee or grantee, may give an undertaking as herein provided, and when such undertaking is given as herein provided, the transferee or grantee to whom it is alleged the property was transferred or conveyed to hinder, delay or defraud creditors, or the successors and assigns of such transferee or grantee, may sell, encumber, transfer, convey, mortgage, pledge or otherwise dispose of the property, or any part thereof, which is alleged to have been transferred or conveyed to hinder, delay or defraud creditors, so that the purchaser, encumbrancer, transferee, mortgagee, grantee or pledgee of such property, will take, own, hold and possess such property unaffected by such action and suit, or the judgment which may be rendered therein.

History: Enacted March 9, 1903, Stats. and Amdts. 1903, p. 98.

1. Suit on stockholders' liability—Compelling satisfaction—Effect of.—In an action to enforce the liability of stockholders in which some of the stockholders pay the sum adjudged against them and the prevailing party has accepted the money from the clerk of the court, a satisfaction of the judgment as to such parties, whether voluntary or under the compulsion authorized

by the above section may be had and thereafter no appeal can be taken therefrom as such payment and acceptance constitutes "the last act there and of the proceeding." —Union Lithograph Co. v. Bacon, 179 Cal. 53, 175 Pac. 464, following doctrine in Estate of Baby, 87 Cal. 200, 22 Am. St. Rep. 239, 25 Pac. 405; Storke v. Storke, 132 Cal. 349, 64 Pac. 578.

§ 677. CONDITIONS OF UNDERTAKING AND AMOUNT OF. Such undertaking with two sureties shall be executed by the transferee or grantee to whom it is alleged the property was transferred or conveyed to hinder, delay or defraud creditors, or the successor or assign of such transferee or grantee, in double the estimated value of the property so alleged to have been transferred or conveyed, provided, in no case need such undertaking be for a greater sum than double the amount of the debt or liability alleged to be due and owing to the plaintiff in such action, commenced to set aside said transfer and conveyance; and where such estimated value of the property alleged so to have been conveyed is less than the sum alleged to be due and owing to the plaintiff in the action, such estimated value shall be stated in the undertaking, and said undertaking shall be conditioned that, if it be adjudged in said action

that the transfer or conveyance was made to hinder, delay or defraud a creditor or creditors, then that the transferee or grantee or the said successor or assigns of such transferee or grantee giving such undertaking, will pay to the plaintiff in said action a sum equal to the value, as the same is estimated in said undertaking, of said property alleged to have been transferred or conveyed to hinder, delay or defraud creditors, not exceeding the sum alleged to be due and owing to the plaintiff in the action.

History: Enacted March 9, 1903, Stats. and Amdts. 1903, p. 99.

§ 677½. FILING AND SERVICE OF UNDERTAKING. Said undertaking shall be filed in the action in which said execution issued and a copy thereof served upon the plaintiff or his attorney in said action.

History: Enactment approved March 9, 1903, Stats. and Amdts. 1903, p. 99.

§ 678. EXCEPTIONS TO SURETIES. Within ten days after service of the copy of undertaking the plaintiff may object to such undertaking on the ground of inability of the sureties, or either of them, to pay the sum for which they become bound in said undertaking, and upon the ground that the estimated value of the property therein is less than the market value of such property. Such objection to the undertaking shall be made in writing, specifying the ground or grounds of objection, and if the objection is made to the undertaking that the estimated value therein is less than the market value of the property, such objection shall specify the plaintiff's estimate of the market value of the property. Such written objection shall be served upon the said transferee or grantee, or the successor or assigns of such transferee or grantee giving such undertaking.

History: Enactment approved March 9, 1903, Stats. and Amdts. 1903, p. 99.

§ 678½. JUSTIFICATION OF SURETIES. APPROVAL AND DISAPPROVAL OF BOND. When the sureties or either of them, are objected to, the surety or sureties so objected to shall justify before the court in which the action is commenced, upon ten days' notice of the time when they will so justify being given to the plaintiff, or plaintiff's attorney.

[Hearing witnesses as to sufficiency of surety.] Upon the hearing and examination into the sufficiency of a surety, witness may be required to attend and evidence may be procured and introduced in the same manner as in trial of civil cases.

Upon such hearing and examination the court shall make its order, in writing, approving or disapproving the sufficiency of the sureties or surety on such undertaking. In case the court disapproves of the surety or sureties or any undertaking, a new undertaking may be filed and served, and to any undertaking given under the provisions of this act the same objection to the sureties may be made and the same proceedings had as in case of the first undertaking filed and served.

History: Enactment approved March 9, 1903, Stats. and Amdts. 1903, p. 99.

§ 679. OBJECTION BECAUSE ESTIMATED VALUE IN BOND LESS THAN MARKET VALUE. NEW UNDERTAKING. When objection is made to the undertaking upon the ground that the estimated value of the property, as stated in the undertaking, is less than the market value of the property, the transferee or grantee, or the successor or assigns of such transferee or grantee giving the undertaking may accept the estimated value stated by the plaintiff in said objection, and a new undertaking may at once be filed, with the plaintiff's estimate stated therein as the estimated value, and no objection shall thereafter be made upon that ground;

If the plaintiff's estimate of the market value is not accepted, the transferee or grantee, or the successor or assigns of the grantee or transferee giving such undertaking, upon ten days' notice to the plaintiff, shall move the court in which the action is pending to estimate the market value of the property, and upon the hearing of such motion, witnesses may be required to attend and testify, and evidence may be produced in the same manner as in the trial of civil actions.

[Court to estimate market value, when.] Upon the hearing of the motion the court shall estimate the market value of the property, and if the estimated value of the property as made by the court exceeds the estimated value as stated in the undertaking, a new undertaking shall be filed and served with the market value determined by the state value therein as the estimated value of the property.

History: Enactment approved March 9, 1903, Stats. and Amdts. 1903, p. 100.

§ 679½. JUSTIFICATION OF SURETIES. The sureties shall justify upon the undertaking as required by section one thousand and fifty-seven of the Code of Civil Procedure.

History: Enactment approved March 9, 1903, Stats. and Amdts. 1903, p. 100.

§ 680. WHEN UNDERTAKING BECOMES EFFECTIVE. The undertaking shall become effective for the purpose stated in section one of this act, ten days after service of copy thereof on the plaintiff, unless objection to such undertaking is made as in this act provided, and in case objection is so made to the undertaking filed and served, the same shall become effective for such purpose when an order is made by such court approving the sureties, when the surety or sureties are objected to, or affirming the estimate of the value of property when objection is made thereto, or in case any objection to the undertaking is sustained by the court when a new undertaking is filed and served as required by this act, to which no objection is made, or if made is not sustained by the court.

History: Enactment approved March 9, 1903, Stats. and Amdts. 1903, p. 100.

§ 680½. JUDGMENT AGAINST SURETIES ON BOND, WHEN. If judgment be rendered in said action that the alleged transfer or conveyance was made to hinder, delay or defraud creditors, then judgment shall be rendered

in such action without further proceeding in favor of plaintiff and against the principal and sureties on said undertaking for the sum for which said undertaking was executed according to the conditions thereof.

History: Enactment approved March 9, 1903, Stats. and Amdts. 1903, p. 101.

TITLE IX.

OF THE EXECUTION OF THE JUDGMENT IN CIVIL ACTIONS.

Chapter. I. THE EXECUTION, §§ 681-713½.

II. PROCEEDINGS SUPPLEMENTAL TO THE EXECUTION, §§ 714-721.

CHAPTER I.

THE EXECUTION.

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§ 681. **WITHIN WHAT TIME EXECUTION MAY ISSUE.** The party in whose favor judgment is given may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement.

[Time during which stayed excluded in computing time.] If, after the entry of the judgment, the issuing of execution thereon is stayed or enjoined by any judgment or order of court, or by operation of law, the time during which it is so stayed or enjoined must be excluded from the computation of the five years within which execution may issue.

History: Enacted March 11, 1872, re-enactment of § 209 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 152, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 682, Kerr's Stats. and Amdts. 1906-7, p. 454.

EXECUTION ON JUDGMENT—WITHIN WHAT TIME.

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1. Action on judgment—Maintainable, when.—Action may be maintained in this state upon domestic judgment, although time within which execution might issue has expired.—*Ames v. Hoy*, 12 Cal. 11; *Stuart v. Lander*, 16 Cal. 372, 373, 76 Am. Dec. 538; *Rowe v. Blake*, 99 Cal. 167, 170, 33 Pac. 864.

2. Attack upon judgment or execution—In general.—A judgment against a corporation, which is alleged to have been obtained through the collusion of the president of the company with the plaintiff in the action, and which at most is only voidable, can not be attacked in proceedings to set aside the execution sale.—*Morton Gas Engine Co. v. California Seeded Raisin Co.*, 24 Cal. App. 362, 141 Pac. 392.

3. Upon a motion to set aside an execution, the voidable judgment upon which the execution has been issued can not be assailed; for the law has provided a number of specific and appropriate remedies against voidable judgments of which this is not one, and has also provided that the grounds upon which executions issued upon voidable judgments and sales thereunder may be attacked, are those infirmities which arise after the judgment and out of the issuance of the writ and its attempted enforcement.—*Morton Gas Engine Co. v. California Seeded Raisin Co.*, 24 Cal. App. 362, 141 Pac. 392.

4. A petition for an order to set aside certain execution sales, which makes no specific attack upon the regularity in form of the several writs, but avers generally and upon information and belief that the sales made thereunder "were not made or held pursuant to any of the provisions of section 694 of the Code of Civil Procedure," states a mere conclusion of the pleader, and is insufficient to put in issue any specific infirmity in the writ itself or in the procedure attending its execution and the sales thereunder.—*Morton Gas Engine Co. v. California Seeded Raisin Co.*, 24 Cal. App. 362, 141 Pac. 392.

5. An allegation in such petition that the president of the defendant corporation pur-

chased the properties at such execution sales does not warrant the setting aside of the sales.—*Morton Gas Engine Co. v. California Seeded Raisin Co.*, 24 Cal. App. 362, 141 Pac. 392.

6. **Construction of section—In general.**—Commissioner in partition who is allowed fee for his services, amount of which is fixed by court and made charge upon land, is "party in whose favor judgment is given" within the meaning of the word "party" as used in this section.—*Cortez v. Superior Court*, 86 Cal. 274, 278, 21 Am. St. Rep. 37, 24 Pac. 1011; *Thomas v. San Diego C. Co.*, 111 Cal. 358, 362, 43 Pac. 965.

7. This section must be held to apply to judgment the object, purpose, and effect of which is to enforce payment of money, whether same be personal judgment against party indebted or decree foreclosing lien for amount due, and this rule applies to case of note and mortgage where latter is given to secure the express personal promise to pay money.—*Dorland v. Hanson*, 81 Cal. 202, 15 Am. St. Rep. 44, 22 Pac. 552; *Jacks v. Johnston*, 86 Cal. 384, 386, 21 Am. St. Rep. 50, 24 Pac. 1057.

8. This section can not be said to apply solely to personal judgments for recovery of money.—*Dorland v. Hanson*, 81 Cal. 202, 203, 15 Am. St. Rep. 44, 22 Pac. 552.

9. Provisions of this section limiting issue of execution for enforcement of judgment to term of five years is but limitation upon certain mode for its enforcement, and does not purport to limit or qualify right to its enforcement in any other mode. Therefore, action upon judgment to have amount of deficiency remaining unpaid thereon may be maintained for purpose of declaring such deficiency and lien upon certain lands.—*Rowe v. Blake*, 99 Cal. 167, 170, 171, 37 Am. St. Rep. 45, 33 Pac. 864. See *Ames v. Hoy*, 12 Cal. 11; *Stewart v. Lander*, 16 Cal. 372, 373, 76 Am. Dec. 538.

10. **Court—Not authorized to stay execution of judgment when there was any infirmity in judgment by reason of defective complaint.** If court had erred in overruling demurrer, remedy of party is by appeal from judgment and upon such appeal he may cause stay of execution.—*Edwards v. Hellings*, 103 Cal. 204, 206, 37 Pac. 218.

As to stay of execution, see, post, § 681a.

As to stay of proceedings, see pars. 41-43, this note.

11. **Discharge of debt—Payment to the sheriff of the amount due the judgment-debtor after the same becomes due and before the return of the execution amounts to a discharge of the debt under section 716, post, notwithstanding the debt was not due at the time of the levy of the writ.**—*Butler v. San Francisco Gas & Elec. Co.*, 168 Cal. 32, 141 Pac. 818.

12. **Duty to issue execution—Purely ministerial, and writ of mandate will lie to enforce performance of such duty.**—*Town*

of *Hayward v. Pimental*, 107 Cal. 386, 390, 40 Pac. 545.

13. **Enforcement of judgment—By execution does not depend upon entry or docketing of judgment.** These are merely ministerial acts, first of which is required to be done for putting in motion right of appeal from judgment itself and of limiting time within which right may be exercised under this section, or in which judgment may be enforced under section 685, post.—*Los Angeles Co. Bank v. Raynor*, 61 Cal. 145, 147.

14. **Same—As to judgment offered in evidence as collateral fact in support of execution, and for purpose of showing that at time execution under which sale was made judgment had been rendered and was then in force, see** *Colton L. & W. Co. v. Swartz*, 99 Cal. 278, 283, 33 Pac. 878.

15. **Execution sale—Estate and interest acquired.**—The purchaser at an execution sale is a mere assignee of the rights of the debtor at the time of levy, and is subject to the rule that: "As between successive assignees of a chose in action, he will have the preference who first gives notice to the debtor, even if he is a subsequent assignee, provided at the time of taking it he had no notice of a prior assignment."—*Widenmann v. Weniger*, 164 Cal. 667, 130 Pac. 421, 424.

As to purchaser getting absolute title of judgment-debtor subject only to right to redeem, in case of a mortgage foreclosure, see, post, § 700, note pars. 18-27.

As to the title acquired by the purchaser, see pars. 21-24, this note.

16. The title acquired by the purchaser at an execution sale is no better nor worse than the title he would have obtained if he had bought the claim privately from the owner without notice of the prior assignment thereof. The execution gave him no additional rights, and of itself it transferred to him only the title of the original owner as it existed at the time of the levy, under provisions of section 699, post.—*Widenmann v. Weniger*, 164 Cal. 667, 130 Pac. 421, 423.

17. Where the assignee of certain funds in the hands of the referee gave notice to such referee of the assignment thereof to him, the transfer of such funds by the referee to an officer of the court and by him to a purchaser at an execution sale did not deprive the assignee of his prior right thereto.—*Widenmann v. Weniger*, 164 Cal. 667, 130 Pac. 421, 424.

18. **Same—Judgment-creditor as bidder.**—A judgment-creditor, who upon an execution sale bids in the property for the amount of his judgment, is not entitled to hand the sheriff a receipt for the amount of his judgment in lieu of the cash payment required by his bid, and mandamus will not lie to compel the sheriff to execute, deliver and record a certificate of

sale to such bidder upon the tender of such a record.—*Kelly v. Barnet*, 24 Cal. App. 119, 140 Pac. 605.

19. The plain intendment of above section and following sections to 700, post, which govern the issuance and enforcement of writs of execution and prescribe the powers and duties of the officers executing the same, is, that sales of property under execution shall be conducted for cash, and that successful bidders shall be prepared to pay the amount of their bids in cash at the time of the sale.—*Kelly v. Barnet*, 24 Cal. App. 119, 140 Pac. 605.

20. While it is true that the judgment-creditor who bids in the property for the amount of his judgment may, as a matter of convenience, arrange with the officer making the sale to have the latter accept his receipt for the amount of the judgment in lieu of the cash payment required by his bid, the officer is not bound to do this, and may in every or any instance require the successful bidder to pay in cash the amount of his bid at the close of the sale.—*Kelly v. Barnet*, 24 Cal. App. 119, 140 Pac. 605.

21. **Same—Title acquired by purchaser.**—If the judgment-debtor has a good title, the purchaser gets it; if a partial title, he gets that; or if no title, he gets nothing. He assumes the risk of defects in the debtor's title; and this is true whether he purchases with or without notice.—*Buxton v. Pennsylvania Lumber Co.*, 221 Fed. 718.

22. A purchaser is bound to examine, or cause to be examined, all the documents of record constituting a part of the chain of title of those from whom he buys. The rule applies with special force to purchasers at execution sales, and to judgments, and to the proceedings under which such sales are made. Of such equities and irregularities as these disclose, the purchaser must be deemed to have had notice.—*Buxton v. Pennsylvania Lumber Co.*, 221 Fed. 718.

23. A purchaser from a purchaser under a decree void for want of jurisdiction is not a bona fide purchaser without notice. He is bound to know the want of jurisdiction. He is bound to know defects in papers showing his claim of title.—*Buxton v. Pennsylvania Lumber Co.*, 221 Fed. 718.

24. Parties attempting to enforce a void judgment may be responsible as trespassers. The purchaser at a sale by virtue of its authority finds himself without title and without redress.—*Buxton v. Pennsylvania Lumber Co.*, 221 Fed. 718.

25. **Same — Sheriff's commissions.** — A sheriff at an execution sale has no right to charge and collect his commission until he actually collects the money on execution, and a bidder who does not pay or tender the cash amount of his bid does not become a purchaser within the contemplation of the statute.—*Kelly v. Barnet*, 24 Cal. App. 119, 140 Pac. 605.

26. **Mandamus—To compel judge to issue writ.**—Where a judge, when application is made under section 685 of the Code of Civil Procedure for an order directing the issuance of an execution, expresses the view that the application will be granted and that he will sign the order when submitted, mandamus will not lie, upon the subsequent refusal of the judge to sign the order, to compel him to do so. The views of the judge, thus expressed from the bench, can not be construed as an order granting the application; and until the order is in fact made, there is no action on the part of the court, and the expressed views of the judge are as much subject to change as though they were unuttered.—*Lapique v. Superior Court*, 24 Cal. App. 313, 141 Pac. 223.

27. **Money owing by municipality to judgment-debtor—Subjecting to execution.**—The purpose of the enactment of section 710, post, relating to the garnishment of moneys, owing by municipalities, is to afford a means whereby money due from a municipal corporation to the debtor of another can be reached by the creditor and subjected to the payment of his claim, and is to be liberally construed with a view to effect its objects.—*Ott Hardware Co. v. Davis*, 165 Cal. 795, 134 Pac. 973.

28. The fact that the mayor of a municipality is by its charter required to sign all warrants on the city treasurer, does not require the transcript of judgment, affidavit and demand provided by section 710, post, of the Code of Civil Procedure, in order to be effective, to be served upon or filed with the mayor, where the city has an auditor.—*Ott Hardware Co. v. Davis*, 165 Cal. 795, 134 Pac. 973.

29. The auditor is not justified in refusing to draw and deliver his warrant on the ground that the proper disbursing officer will refuse to pay it.—*Ott Hardware Co. v. Davis*, 165 Cal. 795, 134 Pac. 973.

30. An agreement between the creditor of the municipality and his attorneys, made prior to the filing of the transcript with the auditor, that any money recovered against the city in certain litigation shall be applied in payment of the fees and disbursements of the litigation, does not constitute an assignment of the judgment as against the person filing such transcript.—*Ott Hardware Co. v. Davis*, 165 Cal. 795, 134 Pac. 973.

31. **Order authorizing issuance of execution,** made in one department of trial court, and order vacating same, made in another department of same court, is not for such reason necessarily erroneous.—*Dorland v. Hanson*, 81 Cal. 202, 204, 15 Am. St. Rep. 44, 22 Pac. 552.

32. **Party in whose favor judgment is entered—Entitled to his execution immediately,** and he can not be deprived of his right or delayed in its exercise by any act of opposite party.—*People ex rel. Carpenter v. Loucks*, 28 Cal. 68, 70.

33. Period of five years.—Within which execution may issue for unsatisfied balance on foreclosure sale may be taken out commences to run from date of judgment of foreclosure and not from date when balance was docketed.—*Bowers v. Crary*, 30 Cal. 621, 622.

34. Practice.—Upon motion to show cause why execution should not issue.—Upon motion for order that execution issue, it is proper and regular practice for court, of its own motion, to order defendant to show cause why plaintiff's motion should not be granted, thus giving defendant an opportunity to be heard in answer.—*McAuliffe v. Coughlin*, 105 Cal. 268, 270, 38 Pac. 730.

35. Order to show cause upon motion for order that execution issue is simply notice of motion and citation of defendant to appear at stated time and place and show cause why plaintiff's motion should not be granted.—*McAuliffe v. Coughlin*, 105 Cal. 268, 270, 38 Pac. 730.

36. Recorder of municipal court.—Directing return of an execution unsatisfied, and thereby acting in excess of his lawful authority, where judgment is not void, is not thereby relieved from obligation to issue another execution where his order as to first was complied with.—*Town of Hayward v. Pimental*, 107 Cal. 386, 390, 40 Pac. 545.

37. Right to execution for suitable allowances for support of wife during her life, under section 139 of Civil Code, does not accrue until such allowances respectively fall due.—*Gaston v. Gaston*, 114 Cal. 542, 547, 55 Am. St. Rep. 86, 46 Pac. 609. See *De Uprey v. De Uprey*, 23 Cal. 352.

38. Rule that valid sale may be made.—Under execution issued before entry of judgment has become rule of property and is foundation of vested rights (dis. op.).—*Bell v. Staacke*, 137 Cal. 307, 312, 70 Pac. 171.

39. Rule that execution cannot be issued in vacation has no existence in this state.—*Marysville v. Buchanan*, 3 Cal. 212, 214; *McMillan v. Richards*, 12 Cal. 467, 468.

40. Sale of real property under execution.—Issued upon judgment before entry of such judgment is effective to pass title.—

Los Angeles County Bank v. Raynor, 61 Cal. 145, 147; *Janes v. Bullard*, 107 Cal. 180, 132, 40 Pac. 108 (dis. op.); *Bell v. Staacke*, 137 Cal. 307, 311, 70 Pac. 171.

41. Stay of proceedings.—Until further order of court must be construed as extending stay only for such time as the court retained jurisdiction to vacate or modify the judgment.—*Pierce v. City of Los Angeles*, 159 Cal. 516, 114 Pac. 818.

As to stay of execution, see par. 10, this note, and, post, § 681a.

42. Unless an appeal be taken and the execution of the judgment stayed, execution may issue at any time after the judgment is entered and thereafter suit may be commenced upon bond and release attachment at any time after entry of judgment if its execution be not stayed.—*Bailey v. Aetna Indemnity Co.*, 5 Cal. App. 740, 746, 91 Pac. 416.

43. Same.—Pending proceedings leading up to appeal the trial court should have the power in the exercise of a wise discretion to maintain the status to the end that a party moving for a new trial in the event of its determination in his favor be protected adequately and fully in his rights.—*Pierce v. City of Los Angeles*, 159 Cal. 516, 114 Pac. 818.

44. Void execution.—Court has no authority to make order for issuance of writ of execution after lapse of five years from entry of judgment; and time during which execution was stayed should not be excluded from computation of the five years.—*Buell v. Buell*, 92 Cal. 393, 397, 28 Pac. 443. See *Solomon v. Maguire*, 29 Cal. 227; *Dorland v. Hanson*, 81 Cal. 202, 204, 15 Am. St. Rep. 44, 22 Pac. 552; *Cortez v. Superior Court*, 86 Cal. 274, 278, 21 Am. St. Rep. 37, 24 Pac. 1011.

45. Word "within."—In phrase "within one year after the rendition" has reference solely to end of period prescribed, and not to its beginning (dis. op.).—*Bell v. Staacke*, 137 Cal. 307, 311, 70 Pac. 171.

46. Writ of mandate.—Proper remedy to compel issuance of second execution where first is improperly quashed on motion.—*Town of Hayward v. Pimental*, 107 Cal. 386, 390, 40 Pac. 545.

§ 681a. STAY OF EXECUTION. The court or the judge thereof shall not have the power, without the consent of the adverse party, to stay, for a longer period than thirty days, the execution of any judgment or order[,] the execution whereof would be stayed on appeal only by the execution of a stay bond.

History: Enactment approved March 20, 1911, Stats. and Amdts. 1911, p. 400.

§ 682. WHO MAY ISSUE THE EXECUTION, ITS FORM, TO WHOM DIRECTED, AND WHAT IT SHALL REQUIRE. The writ of execution must be issued in the name of the people, sealed with the seal of the court, and subscribed by the clerk, and be directed to the sheriff, and it must intelligibly

refer to the judgment, stating the court, the county where the judgment-roll is filed, and if it be for money, the amount thereof, and the amount actually due thereon, and if made payable in a specified kind of money or currency, as provided in section six hundred and sixty-seven, the execution must also state the kind of money or currency in which the judgment is payable, and must require the sheriff substantially as follows:

1. **If it be against the property of the judgment debtor**, it must require the sheriff to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient personal property can not be found, then out of his real property; or if the judgment be a lien upon real property, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter; or if the execution be issued to a county other than the one in which the judgment was recovered, on the day when the transcript of the docket was filed in the office of the recorder of such county, stating such day, or any time thereafter;

2. **If it be against real or personal property in the hands of the personal representatives**, heirs, devisees, legatees, tenants, or trustees, it must require the sheriff to satisfy the judgment, with interest, out of such property;

3. **If it be against the person of the judgment debtor**, it must require the sheriff to arrest such debtor and commit him to the jail of the county until he pay the judgment, with interest, or be discharged according to law;

4. **If it be issued on a judgment made payable in a specified kind of money or currency**, as provided in section six hundred and sixty-seven, it must also require the sheriff to satisfy the same in the kind of money or currency in which the judgment is made payable, and the sheriff must refuse payment in any other kind of money or currency; and in case of levy and sale of the property of the judgment debtor, he must refuse payment from any purchaser at such sale in any other kind of money or currency than that specified in the execution. The sheriff collecting money or currency in the manner required by this chapter, must pay to the plaintiff or party entitled to recover the same, the same kind of money or currency received by him, and in case of neglect or refusal so to do, he shall be liable on his official bond to the judgment creditor in three times the amount of the money so collected;

5. **If it be for the delivery of the possession of real or personal property**, it must require the sheriff to deliver the possession of the same, describing it, to the party entitled thereto, and may, at the same time require the sheriff to satisfy any costs, damages, rents, or profits recovered by the same judgment, out of the personal property of the person against whom it was rendered, and the value of the property for which the judgment was rendered to be specified therein if a delivery thereof can not be had; and if sufficient personal property can not be found, then out of the real property, as provided in the first subdivision of this section.

History: Enacted March 11, 1872, re-enactment with addition of § 210 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 152, held unconstitutional, see history, § 5 ante.

WHO MAY ISSUE EXECUTION—FORM, ETC.

1. Amendment of writ—Power of amendment.
2. Construction of section—As to purpose of execution.
3. Defect in process—Effect of.
4. Imperfections in writ which are amendable—Effect of.
- 5, 6. Motion to recall execution—Defective complaint.
7. Order in which property may be sold—May be directed by court.
8. Order of sale upon foreclosure—Amount due.
9. Subscription of clerk—Essential part of writ.
10. Variance—In name of judgment-debtor in writ—Rule of idem sonans.
11. Void writ of execution—May be attacked by motion to vacate.

As to clerical errors in an execution and variances between it and the judgment, see note 133 Am. St. Rep. 213.

1. **Amendment of writ—Power of amendment.**—however extensive it may be, is limited to amendment of writs of court which can be authenticated only under provisions of law similar to ours by subscription of clerk.—*O'Donnell v. Merguire*, 131 Cal. 527, 529, 82 Am. St. Rep. 389, 63 Pac. 847.

As to defects in writ which are amendable, see par. 4, this note.

2. **Construction of section—As to purpose of execution.**—This section manifests purpose of execution so far as respects lands that are covered by lien of judgment. Under execution, lands are subject to judgment-lien made by levy upon same.—*Bagley v. Ward*, 37 Cal. 121, 132, 99 Am. Dec. 256.

3. **Defect in process—Effect of.**—Process under which mortgaged property was sold which did not conform to this section and section 684, post, as it did not purport to have been issued in name of people, nor was it directed to sheriff, nor did it direct him to execute judgment; held defective but not void where judgment itself directed sheriff to do all that process issued in regular form and manner could have directed him to do.—*Newmark v. Chapman*, 53 Cal. 557, 559. See *Granger v. Sheriff*, 140 Cal. 190, 194, 73 Pac. 816; *Hager v. Astorg*, 145 Cal. 548, 553, 79 Pac. 68.

4. **Imperfections in writ which are amendable** do not render writ void, but only voidable.—*Van Cleave v. Bucher*, 79 Cal. 600, 602, 21 Pac. 954. See *Hibberd v. Smith*, 50 Cal. 511.

As to amendment of writ, see par. 1, this note.

5. **Motion to recall execution—Defective complaint.**—Where judgment was rendered

by default in the recorder's court, and execution issued for enforcement thereof, but before levy defendant moved to recall and quash execution "on ground that complaint did not state facts sufficient to constitute cause of action, and that judgment therein entered was null and void," held that although complaint was demurrable, and judgment, founded upon it, erroneous, it does not follow that such judgment can be reviewed or error corrected on motion to quash execution, unless judgment be utterly void.—*Town of Hayward v. Pimental*, 107 Cal. 386, 389, 40 Pac. 545. See *Schultze v. State*, 43 Md. 295, 305.

6. **Motion to recall writ of execution** "for reason that said execution was wrongfully and unlawfully and improperly issued," is new and original proceeding, and notice of such motion may be given and signed by attorneys other than those who appeared in original action, substitution being not necessary.—*Buell v. Buell*, 92 Cal. 393, 396, 28 Pac. 443. See *McDonald v. McConkey*, 54 Cal. 143.

7. **Order in which property may be sold—May be directed by court.** and court is not required to follow order in which parcels had been enumerated by pleader or set forth in complaint; and in absence of any showing upon subject court will be justified in following by analogy in foreclosure sales requirements of this section for terms of an ordinary writ of execution, and directing that personal property be sold before resorting to real estate.—*Bank of Ukiah v. Reed*, 131 Cal. 597, 600, 63 Pac. 921.

8. **Order of sale upon foreclosure—Amount due.**—Provision in this section that execution for money shall state "amount actually due thereon" does not apply to order of sale upon judgment for foreclosure of mortgage.—*Hibernia Sav. & L. Soc. v. Behnke*, 121 Cal. 339, 342, 53 Pac. 812.

9. **Subscription of clerk—Essential part of writ.** without which there is no execution to be amended; sale by itself is insufficient.—*O'Donnell v. Merguire*, 131 Cal. 527, 530, 82 Am. St. Rep. 389, 63 Pac. 847.

10. **Variance—In name of judgment-debtor in writ—Rule of idem sonans.**—Variance in name of judgment-debtor in writ, where writ runs to John O. Welch, instead of John O. Welsh, is not fatal to writ, where court finds identity of person named, and where rule of idem sonans would seem to apply.—*Donohoe-Kelly Banking Co. v. Southern Pac. Co.*, 138 Cal. 183, 193, 94 Am. St. Rep. 28, 71 Pac. 93. See *People v. Fick*, 89 Cal. 144, 26 Pac. 759; *Galliano v. Kilfoy*, 94 Cal. 86, 29 Pac. 416; *People v. James*, 110 Cal. 155, 42 Pac. 479.

11. **Void writ of execution—May be attacked by motion to vacate and set aside.** and same may be said of sale made under it.—*Dorland v. Hanson*, 81 Cal. 202, 205, 15 Am. St. Rep. 44, 22 Pac. 552; *Buell v. Buell*, 92 Cal. 393, 398, 28 Pac. 443.

§ 683. WHEN MADE RETURNABLE. The execution may be made returnable at any time not less than ten nor more than sixty days after its receipt by the sheriff, to the clerk with whom the judgment-roll is filed. When the execution is returned, the clerk must attach it to the judgment-roll. If any real estate be levied upon, the clerk must record the execution and the return thereto at large, and certify the same under his hand as true copies, in a book to be called the "execution book," which book must be indexed, with the names of the plaintiffs and defendants in execution alphabetically arranged, and kept open at all times during office hours for the inspection of the public, without charge. It is evidence of the contents of the originals whenever they, or any part thereof, may be destroyed or mutilated.

History: Enacted March 11, 1872, re-enactment of § 212 Practice Act, adding all after first sentence.

RETURN OF EXECUTION.

1. Levy is essential act.
2. Presumption as to return of execution.
3. Sale after return day—Effect of.
4. Sale on foreclosure of materialman's lien.
5. Sheriff—Liable for trespass, when.
6. Same—Where sheriff has taken property in lifetime of writ.

As to amended return of writ of execution, see note 13 Am. Dec. 173-181.

1. **Levy is essential act** by which property is set apart for satisfaction of judgment and taken into custody of law, and, after property has been taken from defendant, his interest is limited to its application to judgment irrespective of time when it was sold.—*Southern Cal. L. Co. v. Ocean Beach H. Co.*, 94 Cal. 217, 222, 28 Am. St. Rep. 115, 29 Pac. 627.

2. **Presumption as to return of execution.**—Where it can not be determined from affidavits in supplementary proceedings when an execution was returned, if any presumption is to be applied it will be presumed that the execution was returned by the officer within sixty days after receipt by him.—*People ex rel. Dorris v. McKamy*, 28 Cal. App. 196, 151 Pac. 743.

3. **Sale after return day—Effect of.**—Property which has been specifically impressed with burden of satisfying judgment may be sold after return day of writ under order of court and judgment-debtor

is not affected by time within which such sale shall be made.—*Southern Cal. L. Co. v. Ocean Beach H. Co.*, 94 Cal. 217, 224, 28 Am. St. Rep. 115, 29 Pac. 627.

4. **Sale on foreclosure of materialman's lien** after return day of writ should not be set aside where only ground is that such sale was made after return day, since time in which to sell property for satisfaction of judgment is but directory and under control of court, and, in absence of some showing that injury has resulted from delay in making sale, sale should not be set aside merely because not made before return day of writ.—*Southern Cal. L. Co. v. Ocean Beach H. Co.*, 94 Cal. 217, 224, 28 Am. St. Rep. 115, 29 Pac. 627.

5. **Sheriff—Liable for trespass, when.**—Sheriff must show that seizure of particular property is within scope of his writ, and if by terms of writ such seizure is authorized only within limited period of time, seizure after that time has expired is unauthorized and sheriff is liable for trespass.—*Southern Cal. L. Co. v. Ocean Beach H. Co.*, 94 Cal. 217, 221, 28 Am. St. Rep. 115, 29 Pac. 627.

6. **Same—Where sheriff has taken property in lifetime of writ,** it has thereby become lawfully subject to application in satisfaction of the judgment, and sale may be made at any time thereafter.—*Southern Cal. L. Co. v. Ocean Beach H. Co.*, 94 Cal. 217, 221, 28 Am. St. Rep. 115, 29 Pac. 627.

§ 684. MONEY JUDGMENTS AND OTHERS, HOW ENFORCED. When the judgment is for money, or the possession of real or personal property, the same may be enforced by a writ of execution; and if the judgment direct that the defendant be arrested, the execution may issue against the person of the judgment debtor, after the return of an execution against his property unsatisfied in whole or part;

When the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment, or the material parts thereof, and directing

the proper officer to execute the judgment, by making the sale and applying the proceeds in conformity therewith;

When the judgment requires the performance of any other act than as above designated, a certified copy of the judgment may be served upon the party against whom the same is rendered, or upon the person or officer required thereby or by law to obey the same, and obedience thereto may be enforced by the court.

History: Enacted March 11, 1872, re-enactment with additions of § 213 Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 321.

MONEY JUDGMENT, ETC.—HOW ENFORCED.

1. Action for divorce—Order of sale of community property.
2. After-acquired title—Does not pass by execution sale.
3. Certified copy—In second class of judgments.
4. Construction of section—Resort to proceedings in contempt.
5. Enforcement of money judgment—Annulment.
6. Foreclosure sale—Of properties as one tract.
7. Final money judgment in divorce—Appointment of receiver.
8. Judgment-lien or levy—Operation of upon interest of defendant.
9. Judgment which directs sale of specific property.
10. Judgment—Unaffected by setting aside sale.
11. Judgment in divorce for money—Money judgment within meaning of section.
12. Process for enforcement of judgment—Prescribed by section.
13. Presumption—As to execution in foreclosure.
14. Same—Same—Process.
15. Process to enforce judgment—How executed.
16. Sale to conform to judgment—Reciting material parts.
17. Wilful refusal of party to comply with decree—Contempt.
18. Writ of venditioni exponas—Not necessary.
19. Writ reciting judgment or material part—Order of sale.

1. Action for divorce—Order of sale of community property.—Court, in granting divorce and ordering sale of community property and division or other disposition of proceeds, is authorized by this section to exercise such power, and, in absence of provision of code requiring confirmation of sale, conveyance will not be held void where sale is not confirmed.—Kimple v. Conway, 75 Cal. 413, 414, 17 Pac. 546.

2. After-acquired title—Does not pass by execution sale, and such after-acquired title is not affected by it.—Rupert v. Jones, 119 Cal. 111, 112, 61 Pac. 26.

3. Certified copy—In second class of judgments mentioned in statute is as indispensable as execution in first class mentioned, and officer has no more authority to enforce judgment of foreclosure without certified copy of judgment than he would have to enforce simple money judgment without an execution.—Heyman v. Babcock, 30 Cal. 367, 371.

4. Construction of section—Resort to proceedings in contempt.—This section contemplates that court may, if necessary, resort to proceedings in contempt for purpose of enforcing obedience to judgment which requires execution of conveyance by party thereto.—Seventy-Six L. & W. Co. v. Superior Court, 93 Cal. 139, 143, 28 Pac. 813.

5. Enforcement of money judgment—Annulment.—A sale made upon execution issued upon a judgment is not subject to annulment upon the ground that notice of the making and filing of findings and of the rendition and entry of the judgment was not served upon the adverse party prior to the issuance of the execution and sale of the property.—Foster v. Young, 172 Cal. 317, 156 Pac. 476.

6. Foreclosure sale—Of properties as one tract.—Court has power to render judgment directing property mortgaged to be sold as one tract.—Hopkins v. Wiard, 72 Cal. 259, 263, 13 Pac. 687.

7. Final money judgment in divorce—Appointment of receiver.—Where in suit for divorce defendant upon her cross-complaint was awarded interlocutory judgment in her favor for divorce, and, afterwards, upon final judgment for one hundred thousand dollars, and receiver was appointed after judgment to carry money judgment into effect, held that such judgment can only be regarded as ordinary money judgment, and that court did not have jurisdiction to order sale of property of plaintiff, including lands, by receiver, as writ of execution furnishes an ample and sufficient remedy and is only means provided for satisfying such judgment.—White v. White, 130 Cal. 597, 599, 80 Am. St. Rep. 150, 62 Pac. 1062.

8. **Judgment-lien or levy—Operation of upon interest of defendant.**—Judgment-lien or levy or subsequent sale can not in any event operate on any interest in land not in fact owned by defendant.—*Lehnhardt v. Jennings*, 119 Cal. 192, 197, 48 Pac. 56, 51 Pac. 195.

9. **Judgment which directs sale of specific property to satisfy mortgage or other lien upon it, falls within mode of enforcing final judgment where judgment requires performance of any other act than payment of money or delivery of real or personal property.**—*Heyman v. Babcock*, 30 Cal. 367, 371.

10. **Judgment—Unaffected by setting aside sale.**—Judgment remains, unchanged though court set aside sale thereunder.—*Hopkins v. Wiard*, 72 Cal. 259, 263, 13 Pac. 687.

11. **Judgment in divorce for money—Money judgment within meaning of section.**—Judgment in divorce for money upon final decree can be regarded as only ordinary money judgment.—*White v. White*, 130 Cal. 597, 599, 80 Am. St. Rep. 150, 62 Pac. 1062.

12. **Process for enforcement of judgment—Prescribed by section.**—Only process provided in this state for enforcement of judgment foreclosing lien upon specific property is that prescribed by this section of the code.—*Southern Cal. L. Co. v. Ocean Beach H. Co.*, 94 Cal. 217, 220, 28 Am. St. Rep. 115, 29 Pac. 627.

13. **Presumption—As to execution in foreclosure** is that it conforms with that portion of section which provides that "when judgment requires sale of property, same may be enforced by writ reciting such judgment, or material parts thereof, and directing proper officer to execute judgment by making sale and applying proceeds in conformity therewith."—*Northern C. I. Trust v. Cadman*, 101 Cal. 200, 204, 35 Pac.

557. See *Newmark v. Chapman*, 53 Cal. 557, 558.

14. **Same—Same—Process** under which judgment in foreclosure cases is enforced is provided for in this section and in section 694, post.—*Ontario L. & I. Co. v. Bedford*, 90 Cal. 181, 185, 27 Pac. 39.

15. **Process to enforce judgment—How executed.**—Process issued to enforce judgment under this section is always executed without notice other than that given to general public by ordinary posting and advertisement.—*Lehnhardt v. Jennings*, 119 Cal. 192, 197, 48 Pac. 56, 51 Pac. 195.

16. **Sale to conform to judgment—Reciting material parts.**—Sale must be in conformity with judgment in foreclosure under writ reciting judgment or material parts thereof.—*Hopkins v. Wiard*, 72 Cal. 259, 263, 13 Pac. 687.

17. **Wilful refusal of party to comply with decree—Contempt.**—Wilful refusal of party to comply with decree of court of competent jurisdiction directing him to execute conveyance constitutes contempt of court and may be punished as such.—*Seventy-Six L. & W. Co. v. Superior Court*, 93 Cal. 139, 143, 28 Pac. 813.

18. **Writ of venditioni exponas—Not necessary to justify sale, as it is only direction to perform duty which already exists and sheriff acquires no additional authority from its issuance.**—*Southern Cal. L. Co. v. Ocean Beach H. Co.*, 94 Cal. 217, 222, 28 Am. St. Rep. 115, 29 Pac. 627.

19. **Writ reciting judgment or material part—Order of sale.**—Writ reciting judgment or material part thereof and directing officer to execute judgment by making sale, etc., is proper course in foreclosure proceedings. By analogy to former equity practice, this writ is usually termed an order of sale.—*Tregear v. Etiwanda W. Co.*, 76 Cal. 537, 542, 9 Am. St. Rep. 245, 18 Pac. 658.

§ 685. **EXECUTION AFTER FIVE YEARS.** In all cases, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings;

[Not to revive judgment for money.] But nothing in this section shall be construed to revive a judgment for the recovery of money which shall have been barred by limitation at the time of the passage of this act.

History: Enacted March 11, 1872, founded on § 214 Practice Act; amendment approved March 9, 1895, Stats. and Amdts. 1895, p. 38.

EXECUTION AFTER FIVE YEARS.

1. Alias execution.
2. Character of proceeding.
3. Constitutionality of section—In general.
4. Same—Amendment of March 9, 1895.
5. Construction of section—As to generally.

6. Same—As limitation upon statute of limitations.
7. Same—Amendment of 1895.
8. Death of judgment-debtor—Enforcement of judgment after five years.
- 9, 10. Discretion of court—Granting motion for execution.
11. Same—Granting on ex parte motion—Review.

12. Same—Same—Motion to vacate—Affidavits.
13. Same—Order recalling—Res judicata.
14. Enforcement of judgment after five years—Methods—Construction of section.
15. Ex parte application under section.
16. Execution—As to jurisdiction of court.
17. Same—For unpaid allowance—Jurisdiction to issue after ten years.
18. Same—On judgment foreclosing mortgage.
19. Issue of execution after fourteen years—Discretion of court.
20. Judgment—Barred by lapse of time—Not revived.
21. Same—"For recovery of money"—Can not be enforced by execution after lapse of five years.
22. Same—Of foreclosure—Is not barred by limitation until period of five years.
23. Same—Of justices' court—Limitation of action on.
24. Notice—Of application for leave to issue execution.
25. Order—For execution hereunder—Not a new judgment.
26. Same—Notice of application.
27. Same—Staying proceedings.
28. Power of legislature—Inconsistency of proceeding.
29. Proviso in section—To effect that it is not to be construed to revive judgment.
30. Service of notice—Of time and place of making motion for leave to issue.
31. Time—General statute of limitations applies, when.
32. Title by adverse possession—After judgment for ejectment.
- 33-35. Under Practice Act.
36. Unpaid order for alimony—May be manifested at any time.
37. Where an execution has issued—Upon which a void sale has been made.

1. **Alias execution.**—The court does not exhaust its power to order execution under the provisions of this section by a single exercise thereof, but may make a subsequent order for execution for the deficiency that may remain.—*Weldon v. Rogers*, 159 Cal. 701, 115 Pac. 464.

2. **Character of proceeding.**—Is neither an "action" nor a "special proceeding of a civil nature," within the meaning of these terms as used in the general statute of limitations; but is merely a subsequent step in an action or special proceeding already commenced.—*Doehla v. Phillips*, 151 Cal. 490, 91 Pac. 330; *Bredfield v. Hannon*, 151 Cal. 498, 91 Pac. 334.

3. **Constitutionality of section.**—In general.—This section, so far as it may be con-

strued to permit an order to be made for issuance of execution, upon motion without notice to defendants, is constitutional, as legislature has undoubted power to provide that execution may issue on judgment at any time after its entry or rendition.—*Harrier v. Bassford*, 145 Cal. 529, 531, 78 Pac. 1038.

4. **Same—Amendment of March 9, 1895.**—The power of the legislature to establish or alter the period of limitation as to contracts then in force is subject only to the restriction that a reasonable time must be allowed for the prosecution of a proceeding after the passage of the act establishing or shortening the period in force.—*Doehla v. Phillips*, 151 Cal. 492, 91 Pac. 330; *Bredfield v. Hannon*, 151 Cal. 498, 91 Pac. 334.

As to power of legislature, see par. 28, this note.

5. **Construction of section.**—As to general.—This section was intended to and does apply to judgment requiring party against whom it is rendered to do some specific act, as, for example, to deliver specific real or personal property. Therefore court property sets aside and vacates former order authorizing writ of execution to issue upon decree foreclosing street assessment after lapse of five years, and vacate sale made thereunder; as such writ of execution is improperly issued after lapse of five years, and is not authorized under provisions of this section.—*Dorland v. Hanson*, 81 Cal. 202, 204, 15 Am. St. Rep. 44, 22 Pac. 552. See *Cortez v. Superior Court*, 86 Cal. 278, 21 Am. St. Rep. 37, 24 Pac. 1011; *Jacks v. Johnston*, 86 Cal. 384, 385, 386, 21 Am. St. Rep. 50, 24 Pac. 1057; *Buell v. Buell*, 92 Cal. 393, 398, 28 Pac. 443.

6. **Same—As limitation upon statute of limitations.**—The above section is a limitation upon the operation of the statute of limitations under the provisions of section 336, ante, to the extent that it passes within the discretion of the courts the power to authorize the enforcement by the ordinary processes provided by law of a judgment otherwise barred by the statute.—*Saunders v. Simms*, 183 Cal. 167, 190 Pac. 806.

7. **Same—Amendment of 1895.**—Construed to apply to and authorize the enforcement, after the period stated, of all money judgments, rendered at the time of the amendment, and not then barred by the general statute of limitations.—*Doehla v. Phillips*, 151 Cal. 490, 91 Pac. 330; *Bredfield v. Hannon*, 151 Cal. 498, 91 Pac. 334; *Weldon v. Rogers*, 151 Cal. 433, 90 Pac. 1062.

8. **Death of judgment-debtor—Enforcement of judgment after five years.**—In those cases in which a judgment-debtor has died and the statute of limitations has run against the judgment, under the provisions of the above section the court may grant the judgment-creditor leave to enforce the judgment by the presentation of a claim against the estate of the deceased judg-

ment-debtor and by bringing an action thereon in case the claim is rejected.—*Saunders v. Simms*, 183 Cal. 167, 190 Pac. 836.

9. Discretion of court—Granting motion for execution upon judgment after lapse of five years from date of its entry, by leave of court, under this section, is matter within discretion of court, and where discretion is not abused, order of court will not be disturbed.—*Wheeler v. Eldred*, 121 Cal. 28, 29, 66 Am. St. Rep. 20, 53 Pac. 431; *Wheeler v. Eldred*, 137 Cal. 37, 38, 69 Pac. 619. See *Van Rensselaer v. Wright*, 121 N. Y. 626, 25 N. E. 3; *Bank of New York v. Eden*, 17 Johns. (N. Y.) 105.

10. Under the provisions of the above section the court in which a judgment was rendered asked a discretion upon a showing of proper grounds, to determine whether the judgment may be enforced at all after the lapse of five years, although on an application for a writ of execution or in proceedings to vacate it, the court can not properly consider defenses to the general action or circumstances leading up to the judgment.—*Creditors Adjustment Co. v. Newman*, 185 Cal. 509, 197 Pac. 334, following doctrine in *Wheeler v. Eldred*, 121 Cal. 28, 66 Am. St. Rep. 20, 53 Pac. 431; *Weldon v. Rogers*, 159 Cal. 700, 115 Pac. 464.

11. Same—Granting on ex parte motion—Review.—In a case where the original application for the issuance of execution upon a judgment more than five years old was made with the notice, and the order therefor was apparently granted without showing of meritorious grounds for enforcement of the judgment the court may properly grant such order because no showing is required under the terms of the statute, and the court has authority to grant the writ on ex parte motion; but such order is reviewable on motion to vacate the order and recall the execution.—*Creditors Adjustment Co. v. Newman*, 185 Cal. 509, 197 Pac. 334, following the doctrine in *Harrier v. Bassford*, 145 Cal. 529, 78 Pac. 1038; *Doehla v. Phillips*, 151 Cal. 488, 91 Pac. 330. See pars. 15, 24, 30, this note.

12. Same—Same—Motion to vacate—Affidavits.—A motion to vacate such an order and to quash the execution granted may be duly made by a defendant, on notice to plaintiff, and upon the service of affidavits supporting such a motion.—*Creditors Adjustment Co. v. Newman*, 185 Cal. 509, 512, 197 Pac. 334.

13. Same—Order recalling—Res judicata.—The granting of an order recalling a writ of execution is a judgment on the merits as to the plaintiff's rights to enforce a judgment under the provisions of the above section, as to of grounds presented, or defenses thereto open to the plaintiff, because the question of the plaintiff's right to execution was clearly before the court on its merits, and even though the court may have committed error in the admission of cer-

tain evidence and in considering certain grounds of objection to the original order, which would have been called for reversal on appeal, the court had jurisdiction to act in the premises, and the judgment having become final, without appeal and other direct attack, is conclusive, whether the matter was rightly or wrongly decided, as to all matters presented and all matters which should have been presented at the hearing.—*Creditors Adjustment Co. v. Newman*, 185 Cal. 509, 197 Pac. 334, following doctrine in *Keech v. Beatty*, 127 Cal. 177, 59 Pac. 837; *Lam v. Wahlenmair*, 144 Cal. 91, 103 Am. St. Rep. 66, 77 Pac. 765; *Curtis v. Upton*, 175 Cal. 332, 165 Pac. 935.

14. Enforcement of judgment after five years—Methods—Construction of section.—Under the provisions of the above section regulating the enforcement of judgments after the lapse of five years, the procedure is not limited to enforcement by execution, but include such means as are provided by law for the enforcements of various classes of judgment.—*Saunders v. Simms*, 183 Cal. 167, 190 Pac. 806.

15. Ex parte application under section, upon an, the court has no power to direct the payment of money but only to give leave that the former judgment be carried into execution. The amounts to be specified in the execution must be determined solely by the terms of the judgment upon which it was to be founded and such amount could not be enlarged or diminished by anything in an order made under this section.—*Weldon v. Rogers*, 154 Cal. 632, 635, 98 Pac. 1070.

As to notice of application, see pars. 11, 24, 30, this note.

16. Execution—As to jurisdiction of court.—The court has no power to direct the payment of money as required under the judgment, issue of execution whereof, under the authority of this section, is sought, but merely to give leave that the former judgment be carried into effect, and so far as an order hereunder directs that execution be issued for a named amount it is useless and void.—*Weldon v. Rogers*, 154 Cal. 635, 98 Pac. 1070.

17. Same—For unpaid allowance—Jurisdiction to issue after ten years.—The court may, under the authority of this section, direct issue of execution for unpaid balance of allowance in a divorce case, if valid when made, and the failure of the wife, for a period of ten years, to make an effort to compel payment, does not show an abuse of the court's discretion.—*Harlan v. Harlan*, 154 Cal. 343, 98 Pac. 32.

As to unpaid order for alimony, see par. 36, this note.

18. Same—On judgment foreclosing mortgage given to secure payment of money can not be issued after five years from date of rendition of judgment.—*Jacks v. Johnston*, 86 Cal. 384, 385, 21 Am. St. Rep. 50, 24 Pac. 1057. See *Dorland v. Hanson*, 81

Cal. 202, 204, 15 Am. St. Rep. 44, 22 Pac. 552.

19. Issue of execution after fourteen years—Discretion of court.—Where the judgment had never been satisfied, in whole or in part, and the failure to enforce it was without prejudice to the legal rights of the judgment-debtor, and nothing appears whereby in equity and good conscience he should not be compelled to pay it, it is not an abuse of discretion to order execution upon a money judgment after the lapse of fourteen years from entry thereof. —*Doehla v. Phillips*, 151 Cal. 495, 91 Pac. 330; and, as to issue after lapse of five years, *Bredfield v. Hannon*, 151 Cal. 498, 91 Pac. 334.

20. Judgment—Barred by lapse of time—Not revived.—Old judgments long since defunct can not be revived by amendment to section as to remedy on which barred by lapse of time. —*Mann v. McAtee*, 37 Cal. 11, 15.

21. Same—"For recovery of money"—Can not be enforced by execution after lapse of five years from entry thereof. —*Cortez v. Superior Court*, 86 Cal. 274, 278, 21 Am. St. Rep. 37, 24 Pac. 1011. See *Dorland v. Hanson*, 81 Cal. 202, 15 Am. St. Rep. 44, 22 Pac. 552.

22. Same—Of foreclosure—Is not barred by limitation until period of five years and six months after its entry, five years being time provided in statute of limitations, and six months in which appeal may be taken, and where this period has not expired at time execution is issued, such execution will not be illegal. —*Harrier v. Bassford*, 145 Cal. 529, 531, 78 Pac. 1038.

23. Same—Of justices' court—Limitation of action on.—This section provides a different period of limitation from section 336, ante, and with section 925, post, does not authorize independent action on judgment rendered in justices' court after the lapse of five years. —*John Heinlen Co. v. Cadwell*, 3 Cal. App. 80, 84 Pac. 443.

24. Notice—Of application for leave to issue execution need be given only where there is some statute expressly prescribing it. —*Harrier v. Bassford*, 145 Cal. 529, 532, 78 Pac. 1038.

As to *ex parte* order, see pars. 11, 15, this note.

As to service of notice of time and place of making motion, see par. 30.

25. Order — For execution hereunder—Not a new judgment.—The recital as to interest is to be construed simply as an adjudication of the amount then due, for which execution should issue. —*Doehla v. Phillips*, 151 Cal. 496, 91 Pac. 330.

26. Same—Notice of application.—The order is not invalid for want of a previous notice of application. The statute does not require notice, and this omission does not invalidate it. —*Doehla v. Phillips*, 151 Cal. 492, 91 Pac. 330; *Bredfield v. Hannon*, 151 Cal. 498, 91 Pac. 334.

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As to *ex parte* order, and granting of writ on, see pars. 11, 15, this note.

27. Same—Staying proceedings does not operate to suspend running of statute. —*Cortez v. Superior Court*, 86 Cal. 274, 278, 21 Am. St. Rep. 37, 24 Pac. 1011.

28. Power of legislature—Inconsistency of proceeding.—While it may appear inconsistent that a judgment may be barred by the general statute of limitations, so far as the maintenance of a new action thereon is concerned, and yet, by leave of the court, be enforced by execution, the language of the statute must be so construed, and the power of the legislature to so provide recognized. —*Doehla v. Phillips*, 151 Cal. 494, 91 Pac. 330; *Bredfield v. Hannon*, 151 Cal. 498, 91 Pac. 334; *Weldon v. Rogers*, 151 Cal. 433, 90 Pac. 1062.

As to constitutionality of provision, see pars. 3, 4, this section.

29. Proviso in section—To effect that it is not to be construed to revive judgment for recovery of money is not applicable to case wherein judgment was rendered after enactment of section as amended, and where it could not have been barred by limitation at time of passage of amendment. —*Harrier v. Bassford*, 145 Cal. 529, 531, 78 Pac. 1038.

30. Service of notice—Of time and place of making motion for leave to issue execution is not required under this section. —*Harrier v. Bassford*, 145 Cal. 529, 532, 78 Pac. 1038.

31. Time—General statute of limitations applies only to actions and special proceedings, and not to motions of this character for leave to issue an execution, as to which no limitation as to time is fixed. —*Doehla v. Phillips*, 151 Cal. 492, 91 Pac. 330; *Bredfield v. Hannon*, 151 Cal. 498, 91 Pac. 334.

32. Title by adverse possession—After judgment for ejectment.—The provisions of the above section do not prevent the judgment defendant from acquiring title to land in an ejectment suit by adverse possession after judgment and before issue of execution. —*Hodgkins v. Peoples Water Company*, 177 Cal. 730, 171 Pac. 945.

33. Under Practice Act before order allowing execution to issue could be regularly entered, it was necessary to make it appear to satisfaction of court that some portion of judgment remained unsatisfied, and this fact was to be judicially ascertained. —*Solomon v. Maguire*, 29 Cal. 227, 229.

34. Corresponding section of Practice Act held to refer only to execution issued by clerk of court of record having seal, and not to execution issued by justice of peace. —*White v. Clark*, 8 Cal. 512, 513.

As to right of execution to enforce judgment lost by lapse of time under Practice Act, see *Stout v. Macy*, 22 Cal. 647, 650.

35. Notice under Practice Act was not required to be given of issuance of execu-

tion in cases of judgment rendered more than five years before application.—*Bryan v. Stidger*, 17 Cal. 270, 271.

36. Unpaid order for alimony—May be manifested at any time by court ordering issue of execution and delay of ten years after making of order for alimony will not invalidate execution.—*Harlan v. Harlan*, 154 Cal. 341, 343, 98 Pac. 32.

As to execution for unpaid allowance, see par. 17, this note.

37. Where an execution has issued—Upon which a void sale has been made under which the purchaser is entitled to a return of his money there is no proper credit upon the original judgment and the court may properly order execution for the full amount thereof.—*Weldon v. Rogers*, 157 Cal. 410, 415, 108 Pac. 266.

§ 686. WHEN EXECUTION MAY ISSUE AGAINST THE PROPERTY OF A PARTY AFTER HIS DEATH. Notwithstanding the death of a party after the judgment, execution thereon may be issued, or it may be enforced, as follows:

1. In case of the death of the judgment creditor, upon the application of his executor or administrator, or successor in interest;

2. In case of the death of the judgment debtor, if the judgment be for the recovery of real or personal property, or the enforcement of a lien thereon.

History: Enacted March 11, 1872, founded on § 215 Practice Act.

EXECUTION AFTER DEATH.

1. Execution after death of debtor.

2. Issue of execution at instance of personal representative.

1. Execution after death of the debtor.—Execution against property of judgment-debtor after death might be issued under Practice Act upon permission of probate court, but in case where judgment was in force when amendment of 1864 went into effect, authority was given to issue such execution only in case of judgment for recovery of real or personal property.—*Myers v.*

Mott, 29 Cal. 359, 368, 87 Am. Dec. 49. See *Bank of Stockton v. Howland*, 42 Cal. 129, 133; *Holladay v. Hare*, 69 Cal. 517, 11 Pac. 28; *Briggs v. Breen*, 123 Cal. 657, 662, 56 Pac. 633, 886.

As to execution not to issue after death, see, post, § 1505 and note.

2. Issue of execution at instance of personal representative may be had hereunder without resort to a civil action, and after the expiration of five years from date of entry.—*Weldon v. Rogers*, 151 Cal. 433, 90 Pac. 1062.

§ 687. EXECUTION, HOW AND TO WHOM ISSUED. Where the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county in the state.

Where it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property, or some part thereof, is situated.

[Requiring sale or delivery of real property.] If the judgment directs or authorizes the issuing of any process requiring the sale, or the delivery of possession of, or otherwise affecting specific real property, which is then, or subsequently becomes, a part of a county other than that in which such judgment was entered, such process may be issued to, and executed by, the sheriff of such other county, as to the property situate therein.

[Executions to different counties.] Executions may be issued at the same time to different counties.

History: Enacted March 11, 1872, re-enactment of § 216 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 153, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 683, *Kerr's Stats. and Amdts.* 1906-7, p. 454.

EXECUTION AFTER DEATH—AGAINST WHAT PROPERTY.

1. Execution directed to sheriff or any constable in county.
2. Irregularity does not render service void.

As to execution as evidence of officer's right to make levy, see note 18 Ann. Cas. 1128.

As to execution upon property of judgment-debtor, in general, direction to sheriff, etc., see, ante, § 682 and note.

As to form of execution, see, ante, § 682 and note.

As to process of superior court extending to all parts of state, see, ante, § 78 and note.

1. Execution may be directed to sheriff or any constable in county.—Each officer is vested with full power to serve writ, and it is indifferent matter to whom it is issued.—*Ross v. Wellman*, 102 Cal. 1, 5, 36 Pac. 402.

2. Irregularity does not render service void.—Execution directed to constable of Tule River Township, and return showing that it was received and executed by sheriff of Tulare county, is mere irregularity and does not render service void.—*Ross v. Wellman*, 102 Cal. 1, 5, 36 Pac. 402.

§ 688. WHAT SHALL BE LIABLE TO BE SEIZED ON EXECUTION. NOT TO BE AFFECTED TILL A LEVY IS MADE. All goods, chattels, moneys, and other property, both real and personal, or any interest therein, of the judgment debtor, not exempt by law, and all property and rights of property seized and held under attachment in the action, are liable to execution.

Shares and interests in any corporation or company, and debts and credits, and all other property, both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery, may be levied upon or released from levy in like manner as like property may be attached or released from attachment.

Gold dust must be returned by the officer as so [much] money collected at its current value, without exposing the same to sale. Until a levy, property is not affected by the execution.

History: Enacted March 11, 1872, re-enactment of § 217 Practice Act as amended 1854 (Stats. 1854, p. 84); amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 153, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 683, Kerr's Stats. and Amdts. 1906-7, p. 454.

WHAT PROPERTY LIABLE TO EXECUTION.

1. All beneficial estates—Are liable to be taken in execution.
2. Same—Principle as well as policy of law.
3. Cars, etc., of electric railway.
4. Same—Sections of railway lines.
5. Check on bank deposit — Execution upon fund.
6. Chose in action—Whether subject of levy.
7. Conditional sale — Title retained by seller—Subject to levy.
- 8, 9. Construction of section—As to intention.
- 10, 11. Common-law rule as to execution—Modification of.
12. Same—Effect of code provision.
- 13-15. Debts due judgment-debtor — Levy upon.
16. Same—Garnishee may off-set against claim of judgment-creditor.
17. Execution — Affects property from what time.
18. Formal levy is not necessary, when.
19. Further levy — Where execution has been issued and a void sale been made.
20. Growing crops as rent—Levy upon interest of lessor.
21. Homestead—Levy of execution creates no lien.
22. Same—Set apart for widow in probate.
23. Interest of debtor in shares of corporation.
24. Same—Sale of interest of debtor in shares.
25. Same—Purchaser at execution sale of shares of stock.
26. Interest in lands—Under our codes.
27. Interest reserved by trustee in deed of trust.
- 28-31. Judgment—Not subject to levy and sale under execution as personal property.

- 32, 33. Same—When valid becomes lien on property when docketed.
34. Justification—Not made out by officer, when.
35. Land liable to execution—Embraces all titles legal or equitable.
36. Levy of execution—Is made in same manner as levy upon attachment.
37. Same—Pending judgment-lien.
38. Levy upon money—Absence of showing of manner of making levy—Presumption.
39. Levy upon property—In possession of stranger to writ.
40. Lien of attachment—Is merged in judgment.
- 41-43. Lien of execution—Does not begin where judgment is not lien.
44. Order of sale by court—Not necessary.
45. Order upon debtor by creditor.
46. Outstanding title—Showing of.
- 47, 48. Same—Evidence of right to recover in ejectment.
49. Pledgor's interest—May be reached under execution.
50. Possessory claim to land—By pre-emption settler.
51. Proceedings supplementary to execution—Effect of notice to debtor of judgment-debtor.
- 52-54. Promissory note—Subject to sale under execution—Not exempt—Not a "credit."
55. Purpose of lien—Filing of notice.
56. Purpose of attaching under writ of execution.
57. Real estate of a judgment-debtor—Liable to execution.
58. Right of set-off—As between judgments.
59. Same—Judgments in cross-actions.
60. Sale and conveyance under execution—Will pass all interest held by judgment-debtor.
61. Sale of city's interest in land, upon execution.
62. Seat in stock exchange—Not property subject to execution.
63. Service of copy of execution and notice of garnishment.
64. Shares of stock—Constitute property which belongs to shareholder.
65. Seizure of pledge—Sheriff liable as trespasser, when.

1. All beneficial estates—Are liable to be taken in execution, irrespective of question, whether they are legal or equitable.—*Kennedy v. Nunan*, 52 Cal. 326, 331; *Le Roy v. Dunkerly*, 54 Cal. 452, 460.

2. Same—Principle as well as policy of law is to subject every species of property of judgment-debtor to payment of his debts, and no species of property is exempt except

such as is especially exempted by law.—*Pacific Bank v. Robinson*, 57 Cal. 520, 522, 40 Am. Rep. 120.

3. Cars, etc., of electric railway.—Quality of exemption from execution which pertains to franchise of street railway corporation does not extend also to property such as cars, trucks, electric goods and supplies, fire-proof safe, etc., used in business of operating line of street railway; and such property is subject to attachment and execution in like manner as other property not exempt by statute.—*Risdon I. & L. Co. v. Citizens' T. Co.*, 122 Cal. 94, 97, 68 Am. St. Rep. 25, 54 Pac. 529. See *Lathrop v. Middleton*, 23 Cal. 257; *Humphreys v. Hopkins*, 81 Cal. 551, 15 Am. St. Rep. 76, 22 Pac. 892; *Gregory v. Blanchard*, 98 Cal. 311, 33 Pac. 199.

4. Same—Sections of railway lines.—Whether rule as to liability on attachment or execution should extend to sections of railway lines or to parts of other similar immovable property susceptible of use only as unit, quære.—*Risdon I. & L. Co. v. Citizens' T. Co.*, 122 Cal. 94, 97, 68 Am. St. Rep. 25, 54 Pac. 529.

5. Check on bank deposit—Execution upon fund.—Where checks were drawn by judgment-debtor on deposit in bank in favor of different persons before garnishment of such funds under execution issued out of United States circuit court, and checks were presented for payment after garnishment, and payment refused, held that trial court erred in directing bank to pay to holders of checks amounts for which drawn, upon principle that check is not an assignment of fund drawn against, as against execution levied prior to presentation thereof, and will not, before acceptance, implied or express, support action by holder against bank holding deposit.—*Donohoe-Kelly Banking Co. v. Southern Pac. Co.*, 138 Cal. 183, 193, 94 Am. St. Rep. 28, 71 Pac. 93 (exhaustive review of authorities in this case as to effect of drawing check or making assignment of funds in bank prior to execution or garnishment, notice of which comes to garnishee after fund is sought to be levied upon).

6. Chose in action—Whether subject of levy, or not, must, when paper evidencing debt is not present to be assigned to purchaser and exhibited to bystanders, at least be accompanied by full and accurate description of particular interest under chose in action, with all of its conditions and covenants, and full explanation of facts which determine value of such instrument or contract, sufficient to apprise bystanders with reasonable accuracy of what is sold or offered.—*Crandall v. Blen*, 13 Cal. 15, 23.

7. Conditional sale—Title retained by seller—Subject to levy.—In a case in which a judgment-debtor has sold personal property under a conditional contract of sale whereby he retains title until the purchase-price is fully paid and delivers the property to the purchaser the title and interest re-

tained is subject to the levy of an execution upon a judgment in favor of a judgment-creditor of such seller, within the provisions of the above section and of section 698, post.—Escobar v. Rogers, 182 Cal. 603, 189 Pac. 268, following the doctrine in Humphreys v. Hopkins, 81 Cal. 551, 553, 15 Am. St. Rep. 76, 6 L. R. A. 792, 22 Pac. 892.

8. Construction of section—As to intention.—This section and sections 714-720, post, relating to proceedings supplemental to execution, were intended as substitute for creditor's bill as formerly used in chancery.—Pacific Bank v. Robinson, 57 Cal. 520, 522, 40 Am. Rep. 120. See Adams v. Hackett, 7 Cal. 187, 201; Lynch v. Johnson, 48 N. Y. 27, 33.

9. This section expressly provides that shares of corporation may be attached on execution in like manner as upon writs of attachment; and it is not necessary to sale of interest of judgment-debtor in shares that they should be in hands of sheriff to be personally delivered to purchaser.—West Coast S. F. Co. v. Wulff, 133 Cal. 315, 317, 85 Am. St. Rep. 171, 65 Pac. 622.

10. Common-law rule as to execution—Modification of.—The common-law rule was that execution was lien on personal property from time of its issuance, although there was no levy, but at common law neither judgment nor execution was lien on land, and method of applying land of judgment-debtor to satisfy judgment was by means of writ of elegit, whereby officer, after exhausting personal property, could seize land and apply rents and profits of one-half thereof upon writ.—Lean v. Givens, 146 Cal. 739, 741, 81 Pac. 128.

11. Rule at common law is in force in this state except as modified by statute or constitution; and it has been so far modified by code that only means of enforcing judgment for money is by writ of execution, and that land may be taken on execution as well as personal property.—Lean v. Givens, 146 Cal. 739, 741, 81 Pac. 128.

12. Same—Effect of code provision in connection with common law in force is to enlarge execution by making it enforceable against land and to make it, when levied, lien or charge on land.—Lean v. Givens, 146 Cal. 739, 742, 81 Pac. 128.

13. Debts due judgment-debtor—Levy upon.—It is difficult to define the exact nature of the right which a creditor secures by a levy upon a debt due the judgment-debtor. It may be regarded as an involuntary assignment of the debt or as the creation of a lien thereon.—Nordstrom v. Corona City Water Co., 155 Cal. 206, 213, 100 Pac. 242.

14. The above section and sections 537, 681 and 683, ante, are as applicable to the levy of execution on debts as upon real estate, and the rule that a lien is created by the levy applies, and therefore a garnishment on execution fixes the right of

the judgment-creditor so as to make his right to recover the debt from the garnishee superior to any claim or demand accruing subsequently.—Nordstrom v. Corona City Water Co., 155 Cal. 206, 212, 100 Pac. 242.

15. The code does not specifically define the effect of levying execution upon debts due the judgment-debtor. It does, however, authorize such levy, and it is not to be supposed the legislature intended to confer upon the judgment-creditor the right to levy an execution which could have no effect beyond that of warning the adverse parties and those facilitating a possible effort to defeat the collection of the judgment.—Nordstrom v. Corona City Water Co., 155 Cal. 206, 212, 100 Pac. 242.

16. Same—Garnishee may off-set against claim of judgment-creditor whatever demand he might be able to set off against claim of judgment-debtor against him but the set-off must be one which existed at the time of the garnishment.—Nordstrom v. Corona City Water Co., 155 Cal. 206, 213, 100 Pac. 242.

17. Execution—Affects property from what time.—Execution affects property under our statute only from time of levy.—Johnson v. Gorham, 6 Cal. 195, 196, 65 Am. Dec. 501.

18. Formal levy is not necessary where judgment is lien on land, as it adds nothing to effect of sale on execution.—Lean v. Givens, 146 Cal. 739, 742, 81 Pac. 128. See Lehnhardt v. Jennings, 119 Cal. 192, 195, 48 Pac. 56, 51 Pac. 195.

19. Further levy—Where execution has issued and a void sale been made thereon the court may, under authority of section 187, order a withdrawal of the execution and it is returned to the sheriff for further levy.—Weldon v. Rogers, 157 Cal. 410, 415, 108 Pac. 266.

20. Growing crops as rent—Levy upon interest of lessor.—As to execution levied upon interest in growing crops under cropping contracts, and equitable assignment of share of growing crops as rent, see Curtner v. Lyndon, 128 Cal. 35, 36, 60 Pac. 462.

21. Homestead—Levy of execution creates no lien against homestead premises.—Hohn v. Pauly, 11 Cal. App. 724, 731, 106 Pac. 266.

22. Same—Set apart for widow in probate, even though estate be insolvent and property so set apart constitute entire estate of decedent, can not be taken in execution by one of her creditors upon debt contracted by her and her husband prior to husband's decease (Beatty, C. J., dissenting).—Keyes v. Cyrus, 100 Cal. 322, 326, 38 Am. St. Rep. 296, 34 Pac. 722.

23. Interest of debtor in shares of corporation is regarded under this section, as under subdivision 4, section 542, ante, as property not capable of manual delivery.—West Coast S. F. Co. v. Wulff, 133 Cal. 315, 317, 85 Am. St. Rep. 171, 65 Pac. 622.

24. Same—Sale of interest of debtor in shares of corporate stock passes title without manual possession of certificate by sheriff when execution is served. Certificate might at time be in hands of owner, but levy and sale would entitle purchaser to have certificate issued to him, and for that purpose court would, upon appropriate proceedings, compel surrender of original certificate in order that it might be re-issued to purchaser.—*West Coast S. F. Co. v. Wulff*, 133 Cal. 315, 318, 85 Am. St. Rep. 171, 65 Pac. 622.

25. Same—Purchaser at execution sale of shares of stock of corporation standing on books of corporation in name of judgment-debtor, is entitled to have certificate of such shares re-issued to him as such purchaser, if at time of purchase he acts in good faith, and had no notice that outstanding certificate has been assigned or pledged to some person other than judgment-debtor.—*West Coast S. F. Co. v. Wulff*, 133 Cal. 315, 316, 85 Am. St. Rep. 171, 65 Pac. 622.

26. Interest in lands—Under our codes any interest, legal or equitable, which defendant has in lands is subject to attachment or execution.—*Godfrey v. Monrpe*, 101 Cal. 224, 227, 35 Pac. 761.

27. Interest reserved by trustee in deed of trust for balance of rents, issues, and profits of land, after providing for other trusts, is subject to sale under execution.—*Kennedy v. Nunan*, 52 Cal. 326, 331.

28. Judgment—Not subject to levy and sale under execution as personal property capable of manual delivery.—*Dore v. Dougherty*, 72 Cal. 232, 235, 1 Am. St. Rep. 48, 13 Pac. 621. See *McBride v. Fallon*, 65 Cal. 301, 4 Pac. 17; *Hoxie v. Bryant*, 131 Cal. 85, 89, 63 Pac. 153 (distinguishing case from one in which levy was made upon promissory note).

29. Judgment does not operate so as to release or obliterate attachment-lien. Property attached is still in contemplation of law in hands of officer, subject to judgment. Attachment-lien still exists so as to confer priority on lien of judgment.—*Porter v. Plco*, 55 Cal. 165, 174. See *Anderson v. Goff*, 72 Cal. 65, 71, 1 Am. St. Rep. 34, 13 Pac. 73.

30. Judgment is but evidence of debt; and where judgment as such is sought to be reached by execution, it can only be reached by mode provided for reaching debts and credits and other property incapable of manual delivery.—*Latham v. Blake*, 77 Cal. 646, 655, 18 Pac. 150, 20 Pac. 417.

31. Judgment is mere evidence of debt, and can be levied on and sold under execution in manner prescribed in code for levying on debts.—*McBride v. Fallon*, 65 Cal. 301, 303, 4 Pac. 17.

32. Same—When valid becomes lien on property when docketed, and it is immaterial whether it be called vendor's lien or

judgment-lien.—*Tilley v. Bonney*, 123 Cal. 118, 124, 55 Pac. 798.

33. Where judgment does not specify property which is to be taken, none of property of defendant is affected thereby or charged with lien of judgment until taken by sheriff under writ.—*Southern Cal. L. Co. v. Ocean Beach H. Co.*, 94 Cal. 217, 221, 28 Am. St. Rep. 115, 29 Pac. 627.

34. Justification—Not made out by officer when bill of exceptions shows that it was admitted that property was seized "by virtue of execution issued out of justices' court," etc., where no indebtedness is shown, and where no judgment is shown.—*Darville v. Mayhall*, 128 Cal. 617, 618, 61 Pac. 276.

35. Land liable to execution—Embraces all titles, legal or equitable, perfect or imperfect, including such rights as right in contract, those which are executory as well as those which are executed. And any interest, therefore, in land, legal or equitable, is subject to attachment, execution, levy and sale.—*Fish v. Fowle*, 58 Cal. 373, 375. See *Leese v. Clark*, 20 Cal. 387; *Kennedy v. Nunan*, 52 Cal. 326, 330; *Le Roy v. Dunkerly*, 54 Cal. 452, 460; *Soulard v. United States*, 29 U. S. (4 Pet.) 511, 7 L. ed. 938.

36. Levy of execution—Is made in same manner as levy upon attachment,—that is, by filing with county recorder copy of writ with notice that land, describing it, is attached, and serving similar notice on occupant.—*Lean v. Givens*, 146 Cal. 739, 742, 81 Pac. 128.

As to levy of writ of attachment, see, ante, § 542 and note.

37. Same—Pending judgment-lien, neither extends existing lien nor creates new lien; and sales under executions take effect by relation at time they are respectively levied, and not at date of levying of previous executions.—*Bagley v. Ward*, 37 Cal. 121, 138, 99 Am. Dec. 256.

38. Levy upon money—Absence of showing manner of making levy—Presumption.—Under the provisions of the above section moneys of a judgment-debtor are liable to execution, and where they are held by another than the judgment-debtor may be levied upon in like manner as like property may be attached; and under the provisions of subdivision 5 of section 542, ante, such property shall be levied upon under a writ of attachment by leaving with the person having possession or control of the money a notice as therein prescribed. Under the well-settled rule that findings of fact made by a trial court and to receive such construction as will uphold rather than defeat the judgment based thereon, in the absence of any showing as to how the levy was made upon the money of the judgment-debtor, the finding of the court that the execution was served upon the person holding the money of the judgment-debtor, implies that it was duly served in full com-

pliance with the provisions of the statute.—*Israel v. Bryan*, — Cal. App. — 197 Pac. 121.

39. Levy upon property—In possession of stranger to writ.—In order for answer to justify taking of property under execution against another who is stranger to writ, or to show that transfer of property by execution-debtor was fraudulent and void as to execution-creditor, he must prove not only issuing of execution, levy, and that he was creditor, but also rendition of judgment upon his debt, and that execution was issued upon judgment.—*Darville v. Mayhall*, 128 Cal. 617, 618, 61 Pac. 276. See *Thornburgh v. Hand*, 7 Cal. 554, 562; *Paige v. O'Neal*, 12 Cal. 483, 495; *Bickerstaff v. Doub*, 19 Cal. 109, 112, 79 Am. Dec. 204; *Leszinsky v. White*, 45 Cal. 279; *Kane v. Desmond*, 63 Cal. 464, 465.

40. Lien of attachment—Is merged in judgment when judgment is rendered in attachment suit, and becomes lien on real property attached.—*Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256. See *Anderson v. Goff*, 72 Cal. 65, 71, 1 Am. St. Rep. 34, 13 Pac. 73.

41. Lien of execution—Does not begin where judgment is not lien until levy is made and property taken on execution.—*Lean v. Givens*, 146 Cal. 739, 742, 81 Pac. 128. See *Summerville v. Stockton M. Co.*, 142 Cal. 529, 540, 76 Pac. 243.

42. Lien of execution is not that of judgment; execution neither creates judgment-lien nor extends judgment-lien once created.—*Beaton v. Reid*, 111 Cal. 484, 486, 44 Pac. 167. See *Bagley v. Ward*, 37 Cal. 121, 122, 99 Am. Dec. 256; *Rogers v. Druffel*, 46 Cal. 654; *Eby v. Foster*, 61 Cal. 282.

43. Lien of execution and lien of attachment subserve like purpose; lien of attachment to hold property until judgment, and lien of execution until sale.—*Beaton v. Reid*, 111 Cal. 484, 486, 44 Pac. 167.

44. Order of sale by court—Not necessary under this section, and section 550, ante, to authorize sheriff to sell attached property, and lien of attachment is not lost by taking simple money judgment without embodying therein directions for sale of attached property.—*Anderson v. Goff*, 72 Cal. 65, 70, 1 Am. St. Rep. 34, 13 Pac. 73. See *Law v. Henry*, 9 Cal. 538.

45. Order upon debtor by creditor to pay money to third party operates as equitable assignment of debt.—*Curtner v. Lyndon*, 128 Cal. 35, 36, 60 Pac. 462.

46. Outstanding title—Showing of.—In action of ejectment to recover lands purchased at sale under execution, issued upon judgment against defendant, and of which lands defendant was in possession at time of sale, or at date of lien of judgment or attachment, defendant can not defeat plaintiff's right to recover by showing that he, defendant, had no title to land, or that true title is outstanding.—*Robinson v. Thornton*, 102 Cal. 675, 681, 34 Pac. 120. See *Mc-*

Donald v. Badger, 23 Cal. 393, 83 Am. Dec. 123; *Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441.

47. Same—Evidence of right to recover in ejectment.—As against judgment-debtor, production of judgment, execution, and sheriff's deed is prima facie evidence of plaintiff's right to recover in ejectment, but if action is against stranger to judgment, plaintiff must also show that judgment-debtor had title or possession of land at date of lien or of sale. Mere possession of defendant in such case will then be deemed to have been taken subsequent to sale.—*Robinson v. Thornton*, 102 Cal. 675, 681, 34 Pac. 120.

48. Same rule applies to vendee of judgment-debtor or any other person coming in under him subsequent to creation of lien, and who has no other title or claim to lands than that which he derived from judgment-debtor, or whose title is in effect same as that which was sold under execution.—*Robinson v. Thornton*, 102 Cal. 675, 681, 34 Pac. 120. See *Jackson v. Bush*, 10 John. (N. Y.) 223; *Green v. Watrous*, 17 Serg. & R. (Pa.) 393, 398.

49. Pledgeor's interest—May be reached under execution, but it can only be done by serving garnishment on pledgee, and not by seizure of pledge.—*Treadwell v. Davis*, 34 Cal. 601, 607, 94 Am. Dec. 707.

50. Possessory claim to land—By preemption settler is not such title as may be sold on execution, as such settler does not acquire title until he proves upon and pays for land. Title afterwards acquired does not pass by execution sale, and judgment quieting title against defendant, claiming after-acquired title upon execution sale, will be affirmed.—*Rupert v. Jones*, 119 Cal. 111, 112, 61 Pac. 26.

51. Proceedings supplementary to execution—Effect of notice to debtor of judgment-debtor.—While, under the provisions of section 544, ante, the effect of the notice of attachment is to make the debtor of defendant directly liable to plaintiff, no such direct liability results from the levy of execution so as to give the judgment-creditor a right of action thereon against the garnishee.—*Nordstrom v. Corona City Water Co.*, 155 Cal. 211, 100 Pac. 242.

52. Promissory note—Subject to sale under execution—Not exempt—Not a "credit."—A promissory note secured by mortgage is subject to seizure and sale under execution.—*Hoxie v. Bryant*, 131 Cal. 85, 89, 63 Pac. 153. See *Davis v. Mitchell*, 34 Cal. 81; *Donahoe v. Gamble*, 38 Cal. 352, 99 Am. Dec. 339.

53. Owner of promissory note can not refuse to pay just judgment against him and claim note as exempt from execution. If note in any way can be found and seized by sheriff on execution, it may be sold and delivered to purchaser.—*Hoxie v. Bryant*, 131 Cal. 85, 89, 63 Pac. 153.

54. Promissory note is "credit" within meaning of statute.—*Davis v. Mitchell*, 34 Cal. 81, 88.

55. Purpose of lien—Filing of notice.—The purpose of lien is to cut off rights of third persons which might otherwise accrue between time of levy and time of sale, and filing of notice in office of recorder is for no other purpose than to give notice to third persons of prior charge.—*Lean v. Givens*, 146 Cal. 739, 742, 81 Pac. 128.

56. Purpose of attaching under writ of execution as permitted by this section is to obtain security for satisfaction of judgment previously recovered; but when such judgment is already lien, main object of an attachment has been accomplished.—*Lehnhardt v. Jennings*, 119 Cal. 192, 195, 48 Pac. 56, 51 Pac. 195.

57. Real estate of a judgment-debtor—Liable to execution and may be attached on execution in same manner as upon writ of attachment, but it is not affected by execution until there is a levy.—*Lean v. Givens*, 146 Cal. 739, 742, 81 Pac. 128.

58. Right of set-off—As between judgments.—Holder of larger judgment can not prevent holder of smaller judgment from having such smaller judgment set off pro tanto against larger judgment, and holder of smaller judgment can not prevent holder of larger judgment from having smaller so set off and then having execution issue for balance due on larger. Rights of parties in this respect are reciprocal.—*McBride v. Fallon*, 65 Cal. 301, 302, 4 Pac. 17.

59. Same—Judgments in cross-actions might be set off, one against other, and smaller thereby satisfied in full, larger to extent of smaller, and execution issue for balance, and where party assigns judgment to third party, he can not defeat right of other to have his judgment so set off. Assignee in such case would take demand cum onere and with right of set-off still clinging to it.—*McBride v. Fallon*, 65 Cal. 301, 302, 4 Pac. 17. See *Pierce v. Bent*, 69 Me. 381.

60. Sale and conveyance under execution—Will pass all interest held by judgment-debtor at time of levy, and it is not necessary that judgment be docketed at time of issuance.—*Hastings v. Cunningham*, 39 Cal. 137, 144.

61. Sale of city's interest in land, upon execution.—Interest of city of San Francisco in beach and water lots for ninety-nine years, which, before date of judgment, was vested in commissioners of funded debt of city, was, prior to passage of act of May 1, 1851—if not prior to assent of city to property being placed in hands of commissioners of funded debt,—qualified by no conditions, and was subject to levy and sale under execution upon money judgment against city duly entered, docketed, and recorded, and sale under execution duly issued upon such judgment transferring to purchasers of premises such interest.—*Le Roy v. Dunkerly*, 54 Cal. 452, 459. See *Holladay v. Frisbie*, 15 Cal. 631, 635; *Wheeler v. Miller*, 16 Cal. 124.

62. Seat in stock exchange—Not property subject to execution in any form.—*Lowenberg v. Greenebaum*, 99 Cal. 162, 166, 37 Am. St. Rep. 42, 21 L. R. A. 399, 33 Pac. 794. See *Pancoast v. Gowen*, 93 Pa. St. 66 71.

63. Service of copy of execution and notice of garnishment upon third party constitutes no lien on property of debtor in his hands capable of manual delivery.—*Johnson v. Gorham*, 6 Cal. 195, 196, 65 Am. Dec. 501.

64. Shares of stock—Constitute property which belongs to shareholder in corporation. Otherwise property would be in certificate; but certificate is only evidence of property, and it is not only evidence, for transfer on books of corporation, without issuance of certificate, vests title in shareholder.—*Payne v. Elliot*, 54 Cal. 339, 342, 35 Am. Rep. 80.

65. Seizure of pledge—Sheriff liable as trespasser, when.—Sheriff is trespasser and liable for value of goods seized under execution where such goods are in hands of pledgee, and where he fails to levy thereon by garnishment instead of by seizure of pledge.—*Treadwell v. Davis*, 34 Cal. 601, 608, 94 Am. Dec. 707.

§ 689. WHEN PROPERTY IS CLAIMED BY A THIRD PERSON. INDEMNITY. If the property levied on is claimed by a third person as his property by a written claim verified by his oath or that of his agent, setting out his right to the possession thereof, and served upon the sheriff, the sheriff is not bound to keep the property unless the plaintiff, or the person in whose favor the writ of execution runs, on demand, indemnifies the sheriff against such claim by an undertaking by at least two good and sufficient sureties in a sum equal to double the value of the property levied on; and the sheriff is not liable for damages for the taking or keeping of such property to any such third person, unless such a claim is made.

History: Enacted March 11, 1872, founded on § 218 Practice Act; amendment approved March 2, 1891, Stats. and Amdts. 1891, p. 20; by

Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 153, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 683, Kerr's Stats. and Amdts. 1906-7, p. 455.

PROPERTY LEVIED UPON CLAIMED BY THIRD PERSON.

1. Construction of section—Intended to protect sheriff.
2. Claim indicating joint purchase of property.
3. Claim or demand for crop—Served upon officer is not sufficient, when.
4. Defect in claim not affecting substantial rights.
- 5-7. Demand upon officer—Pleading of.
8. Exceptions stated in claim—As to certain property.
9. Form of demand.
10. Former statute providing for trial—Purpose of, same as amendment.
11. "Grounds of such title"—Meaning of.
12. Making or omitting to make verified claim—Matter of defense.
13. Notice by pledgee—When sufficient.
14. Notice of claim of party—Circumstances deemed sufficient.
15. Notice of claim—Delay in serving—Sheriff not liable for detention.
16. Objection that copy, and not original affidavit, was served.
17. Proof of as to service of verified claim.
18. Right of action for conversion of property.
19. Variance between demand and proof.

1. Construction of section—Intended to protect sheriff.—This section is intended for protection of sheriff. If claim is made, sheriff is not bound to retain property unless he is indemnified, and, unless indemnified, may release property without incurring liability therefor to plaintiff in attachment or execution. Sufficiency of notice is therefore question between that officer and plaintiff in attachment.—*Kellogg v. Burr*, 126 Cal. 38, 42, 58 Pac. 306; *Paden v. Goldbaum*, 4 Cal. Unrep. 767, 37 Pac. 759, 760; *Brenot v. Robinson*, 108 Cal. 143, 145, 41 Pac. 37; *Dubois v. Spinks*, 114 Cal. 289, 295, 46 Pac. 95.

2. Claim indicating joint purchase of property, served upon officer, held to sufficiently apprise officer of source of title, whether property was acquired jointly or severally.—*Henderson v. Hart*, 122 Cal. 332, 334, 54 Pac. 1110. See *Vermont M. Co. v. Brow*, 109 Cal. 241, 50 Am. St. Rep. 37, 41 Pac. 1031; *Dubois v. Spinks*, 114 Cal. 289, 295, 46 Pac. 95.

3. Claim or demand for crop—Served upon officer is not sufficient which does not claim ownership or title, but merely states that claimant is entitled to possession of whole of crop for satisfaction of certain sum secured by such lien.—*Stockton Sav. & L. Soc. v. Purvis*, 5 Cal. Unrep. 164, 42 Pac. 441, 442.

4. Defect in claim not affecting substantial rights.—When plaintiff in attachment, as well as sheriff, treated and regarded notice as sufficient, and sheriff having acted upon claim served upon him, procured protection of indemnity bond—the only protection he could have if he retained attached property—notice, though defective, could not have misled or prejudiced defendant by alleged defect in claim served upon him, and judgment will not be reversed for such alleged defect.—*Kellogg v. Burr*, 126 Cal. 38, 43, 58 Pac. 306.

5. Demand upon officer—Pleading of.—Allegation that before commencing action plaintiff made demand upon officer for property is, as matter of pleading, statement of fact of demand. If form of demand does not comply with section of code, defendant may traverse allegation in his answer, and may also object to proof when offered at trial.—*Brenot v. Robinson*, 108 Cal. 143, 145, 41 Pac. 37.

As to form of demand, see par. 9, this note.

6. Complaint in action against sheriff and sureties on his official bond, for conversion of property levied upon, is not defective in failing to allege demand for property in former proceedings in manner and form prescribed by this section.—*Fuller D. Co. v. McDade*, 113 Cal. 360, 363, 45 Pac. 694. See *Bell v. Peck*, 104 Cal. 35, 37 Pac. 766; *Brenot v. Robinson*, 108 Cal. 143, 41 Pac. 37.

7. Section prescribes only form in which claimant is to make demand.—*Brenot v. Robinson*, 108 Cal. 143, 145, 41 Pac. 37.

8. Exception stated in claim—As to certain property from claim of ownership does not vitiate claim where there is no question as to ownership of portion claimed.—*Susskind v. Hal*, 5 Cal. Unrep. 304, 44 Pac. 328, 330.

9. Form of demand.—If form of demand does not comply with statute, defendant should traverse allegation in his answer, or object to proof when offered.—*Richey v. Haley*, 138 Cal. 441, 444, 71 Pac. 499. See *Brenot v. Robinson*, 108 Cal. 145, 41 Pac. 37.

10. Former statute providing for trial—Purpose of, same as amendment.—The former statute providing for trial by sheriff's jury of claim of third person to property levied upon, as well as amendment to statute, was intended for protection of officer, and is therefore matter of defense.—*Paden v. Goldbaum*, 4 Cal. Unrep. 767, 37 Pac. 759, 761.

11. "Grounds of such title"—Meaning of.—The phrase "grounds of such title" in code has reference to reasons why claimant avers his own title superior to that of execution debtor. Explanation of manner in which such debtor acquired possession of property from claimant, coupled with statement of claimant's ownership, seems to be all that

should be required in such case.—*Vermont M. Co. v. Brow*, 109 Cal. 236, 241, 50 Am. St. Rep. 37, 41 Pac. 1031.

12. Making or omitting to make verified claim—Matter of defense.—The making or omitting to make verified claim, does not affect ownership of plaintiff, but if not made, exempts officer from liability in certain actions, and is matter of defense.—*Paden v. Goldbaum*, 4 Cal. Unrep. 767, 37 Pac. 759, 761.

As to delay in making claim and demand, see. par. 15, this note.

13. Notice by pledgee—When sufficient.—A notice given by pledgee stating that pledgee was entitled to possession under bill of sale, held sufficiently explicit under this section, purpose of which is to protect officer in making levy.—*Dubois v. Spinks*, 114 Cal. 289, 295, 46 Pac. 95.

14. Notice of claim of party—Circumstances deemed sufficient.—As to proof of circumstances in connection with admitted notice of claim, execution, and delivery of bond of indemnity, and order given to sheriff to proceed and sell property, from which court might reasonably infer that claimants were actually notified by sheriff of claim of third party, see *Graves v. Moore*, 58 Cal. 435, 439.

15. Notice of claim—Delay in serving—Sheriff not liable for detention.—In a case in which a third person claims to be the owner of property levied upon under an execution issued against another it is his duty, under the provisions of the above section, to make written claim to the sheriff, and if he neglected to do so for eight months or more after the levy of an attachment this delay absolves the sheriff from liability for the detention of the property levied upon for the period prior to the notice of claim, the sheriff not being liable for taking or detention of property levied upon to any third person claiming title unless such claim is made under the express

provisions of the above section.—*Mutch v. Long Beach Improvement Co.*, — Cal. App. —, 190 Pac. 638, following the doctrine in *Killey v. Cannell*, 12 Cal. 73; *Fuller Desk Co. v. McDade*, 113 Cal. 360, 363, 45 Pac. 694.

16. Objection that copy, and not original affidavit, was served is not well taken where not made when affidavit was offered in evidence, and, furthermore, is immaterial where there is no issue as to demand and affidavit, —complaint alleging demand, service, etc., and answer not denying same.—*Hickey v. Coschina*, 133 Cal. 81, 84, 65 Pac. 313.

17. Proof as to service of verified claim setting out plaintiff's title, its grounds and right to possession, as required by this section, is not required where demand alleged in complaint is not denied in answer; and where it appears affirmatively by defendant's answer that any kind of demand would have been unavailing, objection having been raised to form of demand for first time in appellate court. *Richey v. Haley*, 138 Cal. 441, 444, 71 Pac. 499.

18. Right of action for conversion of property seized by officer is complete on day of seizure. Such right is not taken away or impaired by amendment to section that did not go into effect until after seizure.—*Black v. Clasby*, 97 Cal. 482, 483, 32 Pac. 564.

19. Variance between demand and proof.—Where demand is introduced in evidence and it is claimed that statement of plaintiff's title and of grounds of same vary from account of matter given by plaintiff and another witness for plaintiff in their testimony; held that variance, if any, was immaterial where, were it otherwise, court would not be prepared to hold that efficacy of notice would be affected, and where it appears affirmatively by defendant's answer that "any kind of demand would have been unavailing."—*Hunt v. Hammel*, 142 Cal. 456, 460, 76 Pac. 378. See *Richey v. Haley*, 138 Cal. 441, 444, 71 Pac. 499.

§ 689a. LEVYING UPON PERSONAL PROPERTY UNDER CONTRACT FOR PURCHASE. Personal property in possession of the buyer under an executory agreement for its sale entered into after this section goes into effect may be taken under attachment or execution issued at the suit of a creditor of the buyer, notwithstanding any provision in the agreement for forfeiture in case of levy or change of possession.

History: Enactment approved May 25, 1921, Stats. and Amats. 1921, p. 391. In effect July 29, 1921.

§ 689b. SAME. TENDER TO SELLER OF SUMS DUE. The officer levying on such property must, within five days after being served with a verified written claim containing a detailed statement thereof, pay or tender to the seller full payment of all sums due or to accrue to him under the agreement, above setoffs, with interest to date of tender. If not so tendered, the seller's claim shall have the effect of the claim provided for in section six hundred

eighty-nine of this code. If the tender is refused, the amount thereof must be deposited with the county treasurer, payable to the order of the seller. Until such payment or deposit is made, the property can not be sold under the levy; but when made and also in case the seller fails to render his claim for thirty days following the personal service upon him by the levying officer of a written demand therefor, which service must be attested by the officer's certificate thereof, filed before the sale with the papers of the action wherein the attachment or execution was issued, then the title shall pass to the buyer and the property may be sold as in this chapter provided, free of all lien or claim of the seller.

History: Enactment approved May 25, 1921, Stats. and Amdts. 1921, p. 392. In effect July 29, 1921.

§ 689c. SAME. APPLICATION OF PROCEEDS OF SALE. When the property thus taken is sold under process, the officer must apply the proceeds of the sale as follows:

1. To the repayment of the sum paid to the seller, or deposited to his order, with interest from the date of such payment or deposit.
2. The balance, if any, in like manner as the proceeds of sales under execution are applied in other cases.

History: Enactment approved May 25, 1921, Stats. and Amdts. 1921, p. 392. In effect July 29, 1921.

§ 690. WHAT EXEMPT FROM EXECUTION. The following property is exempt from execution or attachment, except as herein otherwise specially provided:

1. **Chairs, tables, desks and books, to the value of two hundred dollars** belonging to the judgment debtor;

2. **Necessary household, table, and kitchen furniture** belonging to the judgment debtor, including one sewing machine, stove, stove pipes and furniture, wearing apparel, beds, bedding and bedsteads, hanging pictures, oil paintings and drawings drawn or painted by any member of the family, and family portraits and their necessary frames, provisions and fuel actually provided for individual or family use, sufficient for three months, and three cows and their suckling calves, four hogs with their suckling pigs, and food for such cows and hogs for one month; also one piano, one shotgun and one rifle;

3. **The farming utensils or implements of husbandry** of the judgment debtor, not exceeding in value the sum of one thousand dollars; also two oxen or two horses or two mules, and their harness, one cart or buggy and two wagons, and food for such oxen, horses or mules, for one month; also all seed grain or vegetables actually provided, reserved or on hand for the purpose of planting or sowing at any time within the ensuing six months, not exceeding in value the sum of two hundred dollars; and seventy-five beehives; one horse and vehicle belonging to any person who is maimed or crippled, and the same is necessary in his business;

4. **The tools or implements of a mechanic or artisan**, necessary to carry on his trade; the notarial seal, records and office furniture of a notary public; the

instruments and chest of a surgeon, physician, surveyor or dentist, necessary to the exercise of their profession, with their professional libraries and necessary office furniture; the professional libraries of attorneys, judges, ministers of the gospel, editors, school teachers and music teachers, and their necessary office furniture; including one safe and one typewriter; also the musical instruments of music teachers actually used by them in giving instructions, and all the indexes, abstracts, books, papers, maps and office furniture of a searcher of records necessary to be used in his profession; also the typewriters or other mechanical contrivances employed for writing in type, actually used by the owner thereof for making his living; also one bicycle when the same is used by the owner for the purpose of carrying on his regular business, or when the same is used for the purpose of transporting the owner to and from his place of business;

5. **The cabin or dwelling of a miner**, not exceeding in value the sum of five hundred dollars; also his sluices, pipes, hose, windlass, derrick, cars, pumps, tools, implements, and appliances necessary for carrying on any mining operation, not exceeding in value the aggregate sum of five hundred dollars; and two horses, mules or oxen with their harness, and food for such horses, mules or oxen for one month, when necessary to be used on any whim, windlass, derrick, car, pump or hoisting gear; and also his mining claim, actually worked by him, not exceeding in value the sum of one thousand dollars;

6. **Two horses, two oxen or two mules, and their harness, and one cart or wagon**, one dray or truck, one coupe, one hack, or carriage, for one or two horses, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster or other laborer habitually earns his living; and one horse with vehicle and harness or other equipments, used by a physician, surgeon, constable, or minister of the gospel, in the legitimate practice of his profession or business; with food for such oxen, horses or mules for one month;

7. **One fishing boat and net**, not exceeding the total value of five hundred dollars, the property of any fisherman, by the lawful use of which he earns his livelihood;

8. **Poultry** not exceeding in value seventy-five dollars;

9. **The wages and earnings of all seamen, sea-going fishermen and sealers**, not exceeding three hundred dollars, regardless of where or when earned, and in addition to all other exemptions otherwise provided by any law;

10. **The earnings of the judgment debtor for his personal services** rendered at any time within thirty days next preceding the levy of execution or attachment, when it appears by the debtor's affidavit or otherwise, that such earnings are necessary for the use of his family, residing in this state, supported in whole or in part by his labor; but where debts are incurred by any such person, or his wife or family for the common necessities of life, or have been incurred at a time when the debtor had no family residing in this state, supported in whole or in part by his labor, the one half of such earnings above mentioned is nevertheless subject to execution, garnishment or attachment to satisfy debts so incurred;

11. **The shares held by a member of a homestead association** duly incorporated, not exceeding in value one thousand dollars if the person holding the shares is not the owner of a homestead under the laws of this state;

12. **All the nautical instruments and wearing apparel of any master, officer, or seaman of any steamer or other vessel;**

13. **All fire engines, hooks and ladders, with the carts, trucks and carriages, hose buckets, implements, and apparatus thereunto appertaining, and all furniture and uniforms of any fire company or department organized under the laws of this state;**

14. **All arms, uniforms, and accouterments** required by law to be kept by any person, and also one gun, to be selected by the debtor;

15. **All courthouses, jails, public offices and buildings, lots, grounds and personal property**, the fixtures, furniture, books, papers, and appurtenances belonging to the jail and public offices belonging and appertaining to any county of this state; and all cemeteries, public squares, parks, and places, public buildings, town halls, markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament or public use, or for the use of any fire or military company organized under the laws of this state;

16. **All material not exceeding one thousand dollars in value, purchased in good faith** for use in the construction, alteration or repair of any building, mining claim or other improvement as long as in good faith the same is about to be applied to the construction, alteration or repair of such building, mining claim or other improvement;

17. **All machinery, tools and implements, necessary in and for boring, sinking, putting down and constructing surface or artesian wells;** also the engines necessary for operating such machinery, implements, tools, etc., also all trucks necessary for the transportation of such machinery, tools, implements, engines, etc., provided that the value of all the articles exempted under this subdivision shall not exceed one thousand dollars;

18. **All moneys, benefits, privileges, or immunities accruing or in any manner growing out of any life insurance**, if the annual premiums paid do not exceed five hundred dollars, and if they exceed that sum a like exemption shall exist which shall bear the same proportion to the moneys, benefits, privileges, and immunities so accruing or growing out of such insurance that said five hundred dollars bears to the whole annual premiums paid;

19. **Shares of stock in any building and loan association** to the value of one thousand dollars;

20. **All money received by any person, a resident of the state as a pension** from the United States government, whether the same shall be in the actual possession of such pensioner, or deposited, loaned or invested by him;

[Articles not exempt, when.] No article, however, or species of property mentioned in this section is exempt from execution issued upon a judgment

recovered for its price, or upon a judgment of foreclosure of a mortgage or other lien thereon.

History: Enacted March 11, 1872, founded on § 219 Practice Act; as amended 1854 (Stats. 1854, p. 84); amendment approved April 1, 1876, Code Amdts. 1875-6, p. 94; April 1, 1878, Code Amdts. 1877-8, p. 101; March 11, 1887, Stats. and Amdts. 1886-7, p. 99; March 27, 1897, Stats. and Amdts. 1897, p. 180; February 21, 1899, Stats. and Amdts. 1899, p. 19; February 23, 1901, Stats. and Amdts. 1900-1, p. 21; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, pp. 153, 156, held unconstitutional, see history, § 5 ante; March 10, 1903, Stats. and Amdts. 1903, p. 114; amended March 22, 1907, Stats. and Amdts. 1907, p. 882, Kerr's Stats. and Amdts. 1906-7, p. 455. In effect from and after approval.

PROPERTY EXEMPT FROM EXECUTION.

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IV. FARMING UTENSILS, IMPLEMENTS OF HUSBANDRY, HORSES, ETC.—SUBDIVISION 3, 12-33.

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XII. PENSION-MONEYS FROM UNITED STATES GOVERNMENT—SUBDIVISION 20, 86.

I. IN GENERAL.

1. Exempt property—Not subject to provisions of section 3440 of Civil Code.
2. Exemption is personal privilege.
3. Exemptions under Insolvent Act of 1880.
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7. Same—Sole mode of transfer.
8. Statutes are enacted on ground of public policy.

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9. Construction of section—Subdivision 1.

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10. Construction of section—Subdivision 2.
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- 12, 13. Construction of section—Subdivision 3.
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- 16, 17. Combined harvester.
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- 20, 21. Exemption—Purpose of.
22. Husbandry—Is business of farmer.
23. Implement of husbandry—Owned by farmer is exempt.
24. Improved farming implements.
25. Judgment against plaintiff on claim of exemption.
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27. Language of this subdivision—Constructed to make exemption applicable.
28. Occupation of farming—As contemplated by statute.
29. Practice Act.
30. Stallion—Not used as work-horse.
31. Subject of exemptions—Is one of legislative policy.
32. Threshing outfit—In general.
33. Same—Ownership in common.

V. TOOLS, IMPLEMENTS, ETC., OF MECHANICS, ETC.—SUBDIVISION 4.

34. Exemption—When question of fact.
35. Furniture of law office.
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41. Exemption of miner's cabin.

42. Homestead—May be selected upon mineral lands.
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VII. HORSES, ETC., OF TEAMSTERS, ETC.—SUBDIVISION 6.

44. Auto-truck.
45. Claimant of horses — Right to elect, when.
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47. Hackman.
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- 52, 53. Peddler's horses—Exemption of.
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- 57, 58. Construction of section — Subdivision 10.
- 59, 60. Same—"Family"—As used in subdivision 10.
61. Same—Same—Mere fact man's wife and children reside in different place, effect of.
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- 65, 66. Federal homestead — Land taken as government homestead.
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- 68, 69. Same—Excess is subject to levy.
70. Homestead-right — Subsequently acquired to attachment-lien.
71. Levy on property subject to homestead-exemption—Is imposed on property conditionally.
72. Purchaser of homestead property after levy—Takes subject to lien created by levying.
73. Value of homestead—Is finally determined by exposing property for sale.

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78. Exemptions are creatures of statute.
79. Exemption from execution—Continues after moneys are paid to beneficiary.
80. Insurance policy—Payable by its terms to executors or administrators.
81. Same—Interest of heirs in policy.
82. Same—Upon which annual premiums were less than five hundred dollars.
83. Moneys due upon policy—Liberal construction of statutes.
84. Title to insurance-money—Coming to surviving wife.
85. Words "exemption from execution"—Meaning exempt from any execution.

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86. Pension-money — Public administrator will not be appointed for purpose of receiving.

I. IN GENERAL.

1. **Exempt property**—Not subject to provisions of section 3440 of Civil Code.—The provisions of section 3440 of Civil Code do not apply to property exempt from execution under section 690.—*Butkin v. Cline*, 180 Cal. 381, 181 Pac. 390.

2. **Exemption is personal privilege** of claimant which he may claim or waive at his pleasure.—*Keybers v. McComber*, 67 Cal. 395, 400, 7 Pac. 838.

3. **Exemptions under Insolvent Act of 1880**.—As to exemptions allowed under Insolvent Act of 1880, and duty of court to set same aside, see *Noble v. Superior Court*, 109 Cal. 523, 526, 42 Pac. 155.

4. **Levy on exempt property**—Authority of court to set aside.—Courts have power over their own processes and may set aside levy of writ of attachment or execution upon exempt property.—*Holmes v. Marshall*, 145 Cal. 777, 783, 79 Pac. 534. See *Sandburg v. Papineau*, 81 Ill. 446.

5. **Patent-right**—Not being exempt from seizure and sale by laws of state, upon proper authority, is liable to execution.—*Pacific Bank v. Robinson*, 57 Cal. 520, 525, 40 Am Rep. 120. See *Barnes v. Morgan*, 3 Hun (N. Y.) 703; *Stephens v. Cady*, 55 U. S. (14 How.) 528, 529, 14 L. ed. 528.

6. **Patent-right** can not be advertised and sold under common execution; there is no way in which it can be levied upon; and mere advertising and sale of it, upon notice, would convey nothing to purchaser.—*Peterson v. Sheriff of San Francisco*, 115 Cal. 211, 213, 46 Pac. 1060. See *Carver v. Peck*, 131 Mass. 291.

7. **Same—Sole mode of transfer**.—Patent-right is thing created entirely by federal legislation. It is personal favor or monopoly, granted to particular person by United States government. It can not be transferred to another person except in manner pro-

vided under United States laws, and that is by assignment. If creditor of patentee can have patent-right subjected to satisfaction of his judgment, it can be done only by courts of equity acting in personam and compelling patentee to make assignment.—*Peterson v. Sheriff of San Francisco*, 115 Cal. 211, 213, 46 Pac. 1060.

As to patent-right, judgment-debtor compelled to deliver in proceedings supplemental to execution, see, post, § 714 and note par. 22.

8. Statutes are enacted on ground of public policy for benevolent purpose of saving debtors and their families from want by reason of misfortune or improvidence. The general rule now is to construe such statutes liberally, so as to carry out intention of legislature and humane purposes designed by law-makers.—*Holmes v. Marshall*, 145 Cal. 777, 778, 79 Pac. 534. See *In Re McManus*, 87 Cal. 292, 294, 22 Am. St. Rep. 250, 10 L. R. A. 567, 25 Pac. 413; *Spence v. Smith*, 121 Cal. 536, 66 Am. St. Rep. 62, 53 Pac. 653.

II. CHAIRS, DESKS, TABLES, BOOKS, ETC.—SUBDIVISION 1.

9. Construction of section—Subdivision 1.—Subdivision 1, with subdivisions 2 and 10, apply to all vocations mentioned in the section.—*Van Lue v. Warlich-Cornett Co.*, 12 Cal. App. 749, 751, 108 Pac. 717.

III. HOUSEHOLD FURNITURE—PROVISIONS, ETC.—SUBDIVISION 2.

As to food and clothing, exemption of, see note 45 Am. Dec. 256.

As to household furniture, see note 45 Am. Dec. 255, 256.

10. Construction of section—Subdivision 2.—Subdivision 2, with subdivisions 1 and 10, apply to all vocations mentioned in the section.—*Van Lue v. Warlich-Cornett Co.*, 12 Cal. App. 749, 751, 108 Pac. 717.

11. Money with which to purchase provisions—Sufficient for family use for three months is not exempt under statute. But where money has been used in good faith for that purpose before parties are called upon to account for it, and amount is no more than would reasonably be required to support family for three months, claim to exemption will be sustained.—*Gray v. Brunsold*, 140 Cal. 615, 624, 74 Pac. 303.

IV. FARMING UTENSILS, IMPLEMENTS OF HUSBANDRY, HORSES, ETC.—SUBDIVISION 3.

12. Construction of section—Subdivision 3.—This subdivision relates exclusively to persons engaged in farming.—*Murphy v. Harris*, 77 Cal. 194, 195, 99 Pac. 377. See *Brusie v. Griffith*, 34 Cal. 302, 305, 91 Am. Dec. 695; *Robert v. Adams*, 38 Cal. 383, 384, 99 Am. Dec. 413; *Howell v. Boyd*, 2 Cal. App. 486, 84 Pac. 315.

13. Subdivision 3 of above section relates exclusively to exemptions in favor of judgment-debtors who are farmers, and subdivi-

vision 6 to judgment-debtors who are teamsters or other laborers habitually earning their living, etc., and a consideration of these subdivisions with the scope and spirit of the whole section forces the conclusion that a person can not claim both the farmer's and the teamster's exemption.—*Van Lue v. Warlich-Cornett Co.*, 12 Cal. App. 749, 751, 108 Pac. 717.

14. Character and amount of property to be exempted—Purely question of legislative policy, and where legislature has determined that farming utensils and implements of husbandry of judgment-debtor shall be exempt, court is not authorized to refuse exemption because, in its opinion, they are not necessary for judgment-debtor, or because farming operations are carried on on greater scale than court deems necessary.—*Spence v. Smith*, 121 Cal. 536, 538, 66 Am. St. Rep. 62, 53 Pac. 653.

15. Code is restrictive—As to number and use only of horses used in husbandry. Exemption of two horses is allowed by code if same be used in husbandry, value and sex of which are immaterial.—*McCue v. Tunstead*, 65 Cal. 506, 507, 4 Pac. 510.

16. Combined harvester.—Exemption under this subdivision, providing that farming utensils are implements of husbandry of judgment-debtor are exempt includes combined harvester worth sum of three hundred dollars.—*Estate of Klemp*, 119 Cal. 41, 63 Am. St. Rep. 69, 39 L. R. A. 340, 50 Pac. 1062. See *Spence v. Smith*, 121 Cal. 536, 538, 66 Am. St. Rep. 62, 53 Pac. 653.

17. Combined harvester used directly in business of farming and for no other purpose, is farming utensil and an instrument of husbandry.—*Estate of Klemp*, 119 Cal. 41, 42, 63 Am. St. Rep. 69, 39 L. R. A. 340, 50 Pac. 1062.

18. Court—Not authorized to refuse exemption, because in its opinion implements are not necessary for judgment-debtor's use.—*Spence v. Smith*, 121 Cal. 536, 538, 66 Am. St. Rep. 62, 53 Pac. 653.

19. Exclusive use in debtor's vocation—Not required.—Debtor is not required to use exempt farming implements or property exclusively in his vocation.—*Spence v. Smith*, 121 Cal. 536, 539, 66 Am. St. Rep. 62, 53 Pac. 653.

20. Exemption—Purpose of.—Exemption is to enable judgment-debtor to earn support by farming, and secures to him means appropriate to that end.—*Robert v. Adams*, 38 Cal. 383, 384, 99 Am. Dec. 413.

21. Exemption provided in this subdivision was intended to apply only to oxen, horses, or mules suitable and intended for ordinary work conducted on farm.—*Robert v. Adams*, 38 Cal. 383, 384, 99 Am. Dec. 413.

22. Husbandry—Is business of farmer, comprehending various branches of agriculture.—*McCue v. Tunstead*, 65 Cal. 506, 507, 4 Pac. 510.

23. Implement of husbandry—Owned by farmer, is exempt, and its exemption does

not depend upon its value (prior to amendment of subdivision).—Estate of Klemp, 119 Cal. 41, 42, 63 Am. St. Rep. 69, 39 L. R. A. 340, 50 Pac. 1062.

24. Improved farming implements.—There is no ground from excluding an instrument from operation of statute because it is an improvement, and supplants former instrument used with less effectiveness for same purpose.—Estate of Klemp, 119 Cal. 41, 42, 63 Am. St. Rep. 69, 39 L. R. A. 340, 50 Pac. 1062.

25. Judgment against plaintiff on claim of exemption from execution, will not be disturbed where evidence as to exemption is disjointed and vague; and appellate court can not say with any reasonable certainty that plaintiff proved himself to be engaged in farming within meaning of subdivision 3 of section.—Murphy v. Harris, 77 Cal. 194, 196, 19 Pac. 377.

26. Phrase "Farming utensils," etc.—Meaning of.—Legislature meant by words, "the farming utensils or implements of husbandry of judgment-debtor," such utensils or implements as are intended and used by farmer in conducting his own farming operations; and it was not intended that all farming machinery which farmer may own should be exempt, for while he may use it to small extent on his own land, he may use it chiefly by renting it out or in doing work on others' farms for hire.—In re Baldwin, 71 Cal. 74, 78, 12 Pac. 74.

27. Language of this subdivision—Construed to make exemption applicable only to such judgment-debtors as are engaged in business of farming, and only to such oxen, horses or mules as are suitable and intended for ordinary work conducted on farm.—Brusie v. Griffith, 34 Cal. 302, 305, 91 Am. Dec. 695. See Robert v. Adams, 38 Cal. 383, 384, 99 Am. Dec. 413.

28. Occupation of farming—As contemplated by statute does not deal with classes of husbandry, nor does law limit exemptions to one particular class of husbandry, such as horticulturists, or viticulturists, or gardeners, as all such occupations constitute farming as contemplated by statute, and where person engages in diversified farming law can not be said to exempt only such of his farming utensils or implements as he may use in some one of separate branches of his farming operations.—Estate of Slade, 122 Cal. 434, 436, 55 Pac. 158.

29. Practice Act did not, in express terms, make exemption under this subdivision applicable only to such judgment-debtors as were engaged in business of farming at date of levy; but it is obvious that such was its intention.—Robert v. Adams, 38 Cal. 383, 384, 99 Am. Dec. 413. See Brusie v. Griffiths, 34 Cal. 302, 305, 91 Am. Dec. 695.

30. Stallion—Not used as work-horse on farm is not exempt from execution.—Robert v. Adams, 38 Cal. 383, 384, 99 Am. Dec. 413.

31. Subject of exemptions—Is one of legislative policy; and unless legislature shall

see fit to limit instruments of husbandry which shall be exempt, either by enumeration or by restriction placed on value, court has no warrant to eliminate from the statute anything which is clearly within its terms.—Estate of Kemp, 119 Cal. 41, 43, 63 Am. St. Rep. 69, 39 L. R. A. 340, 50 Pac. 1062.

32. Threshing outfit—In general.—State has fixed no limit to amount of land which judgment-debtor may cultivate by farming, and if farming utensils which he has are necessary for proper cultivation of his land, they are exempt from execution, irrespective of whether he would need them for cultivating smaller tract or not; and property consisting of farming utensils comprising threshing outfit of value of four hundred and sixty dollars, and other farming implements of value of one hundred and ninety dollars, sufficient to cultivate farm of over two thousand acres of land, are exempt from execution where statute has placed no limitation upon amount of land which may be farmed by debtor, or upon utensils or implements needed or used by farmer in conducting his own farming operations.—Spence v. Smith, 121 Cal. 536, 538, 66 Am. St. Rep. 62, 53 Pac. 653.

33. Same—Ownership in common.—Action of trial court in refusing to set aside as exempt threshing rig, consisting of threshing engine, tanks, thresher, derrick, seed-cleaner, etc., claimed as exempt under this subdivision, will not be reversed where it appears that such outfit was owned by claimant and others in common, and used by them to a limited extent on their several lands, but used principally in doing such work for others for hire.—In re Baldwin, 71 Cal. 74, 77, 12 Pac. 74.

V. TOOLS, IMPLEMENTS, ETC., OF MECHANICS, ETC.—SUBDIVISION 4.

As to articles considered tools or implements within exemption laws, see note 21 Am. Dec. 553, 554.

As to articles and machines, held not tools, see note 21 Am. Dec. 552, 553.

As to construction of word "trades," see note 21 Am. Dec. 545-554.

As to tools, etc., exemption of, in general, see notes 21 Am. Dec. 545-554; 25 Am. Rep. 63-67; 47 Am. Rep. 190, 192.

34. Exemption—When question of fact.—Whether whole printing-plant is exempt or not, or is necessary to carry on trade of printer, conceding such printer to be mechanic or artisan within meaning of this section, is question of fact to be submitted to jury under proper instructions.—In re Mitchell, 102 Cal. 534, 536, 36 Pac. 840.

35. Furniture of law office.—Where the trial court found on conflicting affidavits that the personal property seized was the professional and necessary law office furniture and that the debtor was using it in the actual practice of his profession the appellate court is not authorized to review the

evidence and make a different finding.—*Development Building Co. v. Woodruff*, 31 Cal. App. 732, 161 Pac. 754.

36. Jeweler's safe.—Where jeweler in insolvency proceedings claimed exemption of safe and testimony showed that he was jeweler and watch repairer, and engaged in that trade or business as means of support for himself and family, and that without use of said safe said business could not be prosecuted by him to any profitable end, that it was necessary and useful article in conducting said business, and that without use of said safe his customers would not leave their jewelry and watches with him to be repaired, etc., held that order of court setting aside safe to such claimant as insolvent debtor was not improper.—*In re McManus*, 87 Cal. 292, 293, 22 Am. St. Rep. 250, 10 L. R. A. 567, 25 Pac. 413.

37. Journeyman.—Law does not require employment as.—Law does not require that mechanic shall be employed as journeyman in order to be entitled to exemption; nor is phrase "necessary to carry on his trade" used in such strict sense that because some journeyman machinist can get employment with a manufacturer who will supply the instrument, therefore it is not necessary to the trade within meaning of statute.—*In re Robb*, 99 Cal. 202, 203, 31 Am. St. Rep. 48, 33 Pac. 890.

38. Lathe which according to testimony, is necessary to carry on business of mechanic and machinist, and costing about two hundred and fifty dollars and run by man power, is tool ordinarily and necessarily used by mechanics and machinists in their trade, and, as such, is exempt.—*In re Robb*, 99 Cal. 202, 203, 31 Am. St. Rep. 48, 33 Pac. 890.

39. Partnership property.—Is not exempt, and where partner desires to form partnership and combine his means with those of one or more, he must take precaution to retain exclusive ownership of tools and implements, allowing use of them to his associates, or he will lose entirely benefit of statutory exemptions as to that kind of property.—*Cowan v. Creditors*, 77 Cal. 403, 407, 11 Am. St. Rep. 294, 19 Pac. 755 (see cases cited in decision holding this doctrine is supported by preponderance of authority).

40. Printing-presses operated by steam, paper-cutting machine, etc., where regarded as tools or implements of printer, are exempted only so far as such tools or implements are necessary to carry on his trade, and not all that he may have acquired and used in his business.—*In re Mitchell*, 102 Cal. 534, 536, 36 Pac. 840.

VI. MINER'S CABIN, ETC.—SUBDIVISION 5.

41. Exemption of miner's cabin.—There is no inconsistency in right to exemption of cabin or dwelling of miner under provisions of this subdivision with claim of homestead provided elsewhere in statute. Homestead

is for benefit and protection of family, and law provided for its selection is liberally construed so as to effect this end. Exemption of claim under this subdivision does not depend upon residence thereon as in case of homestead.—*Gaylord v. Place*, 98 Cal. 472, 479, 33 Pac. 484. See *Heathman v. Holmes*, 94 Cal. 291, 29 Pac. 404.

42. Homestead.—May be selected upon mineral lands of United States.—*Gaylord v. Place*, 98 Cal. 472, 478, 33 Pac. 484.

As to homestead exemptions, see Part IX, this note.

43. Homestead-right.—Does not depend upon character of title held by party claiming it. It is imposed on land to extent of interest of claimant in it—not on title merely.—*Gaylord v. Place*, 98 Cal. 472, 478, 33 Pac. 484.

VII. HORSES, ETC., OF TEAMSTERS, ETC.—SUBDIVISION 6.

As to "laborers," who are, see note, 91 Am. Dec. 419, 420.

As to "team," "horse," "wagon," "cart," "carriage," etc., see notes, 45 Am. Dec. 255, 256, 53 Am. Rep. 768-771.

44. Auto-truck.—An auto-truck which the owner does not habitually use in earning his living is not exempt under subdivision 6 of section 690 of the Code of Civil Procedure.—*In re Schum*, 232 Fed. 414.

As to hackman, see par. 47, this note.

As to taxicab automobile, see par. 56, this note.

45. Claimant of horses.—Right to elect, when.—Claimant having more horses than number exempt by law has right to elect which he claims as exempt and it devolves upon him to claim exemption within reasonable time after notice of levy.—*Keybers v. McComber*, 67 Cal. 395, 400, 7 Pac. 838.

46. Debtor's claim to exemption.—Is limited by words of statute, and held in action for conversion brought to recover value of two horses; wagon, harness, and bread-box, claimed by peddler of bread, that as statute makes no mention of bread-box as property allowed peddlers, such exemption is not allowed.—*Stanton v. French*, 91 Cal. 274, 276, 25 Am. St. Rep. 174, 27 Pac. 657.

47. Hackman.—It is not necessary that party claiming exemption of horses by reason of his being hackman and using same in his business as such, should be actually using property at time of seizure. It is sufficient if he is engaged in such business as means of livelihood, even though horses are at time of seizure at pasture temporarily and hack undergoing repairs.—*Forsyth v. Bower*, 54 Cal. 639, 640.

As to auto-truck, see par. 44, this note.

As to taxicab automobile, see par. 56, this note.

48. Habitual use.—What to be shown under claim of.—In order to entitle party to claim of horses as exempt from execution, under sixth subdivision of this section, he

must show that he is a cartman, drayman, truckman, huckster, peddler, teamster, or other laborer, and that he habitually earns his living by use of such horses, etc.—*Dove v. Nunan*, 62 Cal. 399, 400. See *Brusie v. Griffith*, 34 Cal. 302, 307, 91 Am. Dec. 695.

49. Horses in order to be exempt need not necessarily be devoted exclusively to purposes of husbandry. They are exempt because owned by judgment-debtor engaged in husbandry.—*McCue v. Tunstead*, 65 Cal. 506, 3 Pac. 863, 864, 4 Pac. 510.

50. Requirement of this subdivision that party must "habitually" earn his living by use of animals claimed to be exempt, is imperative.—*Murphy v. Harris*, 77 Cal. 194, 195, 19 Pac. 377.

51. Phrase "other laborer"—Meaning of. —By "other laborer" is meant one who labors by and with aid of his team, and not by aid of pick and shovel, or anvil, or lapstone, or jack-plane, or yardstick (dictum).—*Brusie v. Griffith*, 34 Cal. 302, 307, 91 Am. Dec. 695.

52. Peddler's horses—Exemption of.—In an action of claim and delivery against officer for two horses, or their value, alleged to be exempt under subdivision six of this section and wrongfully taken by sheriff under writs of attachment, where great preponderance of evidence was to effect that the horses were not used habitually by claimant as huckster or peddler in earning his living, appellate court will not reverse judgment or order refusing to allow exemption.—*Paulson v. Nunan*, 72 Cal. 243, 244, 13 Pac. 626.

53. Question as to whether claimant of exemption under this subdivision is or is not peddler, habitually earning his living by use of horses claimed as exempt, is material issue in case.—*Paulson v. Nunan*, 64 Cal. 290, 291, 30 Pac. 845.

54. Same—Peddler of bread.—Fact that person with his wife conducted bakery upon a limited scale and sold bread at the shop, while he daily peddled bread throughout town and at railroad depot upon arrival of trains, etc., held not to deprive him of his rights as peddler under statute.—*Stanton v. French*, 91 Cal. 274, 277, 25 Am. St. Rep. 174, 27 Pac. 657.

55. Reasonable notice—As to claim of exemption.—Six days after levy claimant gave notice to officer that he claimed two horses and their harness as exempt from execution; held that this notice, in absence of showing to contrary, was within reasonable time.—*Keybers v. McComber*, 67 Cal. 395, 400, 7 Pac. 838.

56. Taxicab automobile.—A taxicab automobile is not exempt under the provisions of above section, exempting "one dray or truck, one coupe, one hack or carriage, for one or two horses, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster, or other laborer habitually earns his living."—*In re Wilder*, 221 Fed. 476.

As to auto-truck, see par. 44, this note.

As to hackman, see par. 47, this note.

As to preferred claim for wages, etc., see, post, § 1206 and note.

As to salaries and wages of public officers and employees and garnishment thereof, and such officers and employees deemed "judgment-debtors," see, post, § 710 and note par. 11.

As to wages, exemption of, in general, see notes 18 L. R. A. 305, 310; 18 L. R. A. 586; 30 L. R. A. (N. S.) 85.

As to wages, exemption of, in general, and collected statutes of various states thereto, see note 91 Am. Dec. 411-425.

VIII. EARNINGS FOR USE OF FAMILY, ETC.—SUBDIVISION 10.

57. Construction of section—Subdivision 10.—Subdivision 10, with subdivisions 1 and 2, apply to all vocations mentioned in the section.—*Van Lue v. Warlich-Cornett*, 12 Cal. App. 749, 751, 108 Pac. 717.

58. Provisions contained in this subdivision are not applicable in setting aside property exempt from execution where there is no family.—*Winterhalter v. Workmen's G. F. Assoc.* 75 Cal. 245, 249, 17 Pac. 1.

59. Same—"Family"—As used in subdivision 10 of this section does not include the mother of the debtor especially when not living with him or in the same county. The words "his family" as used in this section imply a collection of persons of which he is the head.—*Lawson v. Lawson*, 15 Cal. 498, 111 Pac. 354.

60. It is the relation, and dependence of the relation, and not the aggregation of the individuals that constitutes a family.—*Lawson v. Lawson*, 15 Cal. App. 498, 115 Pac. 461.

61. Same—Same—Mere fact man's wife and children reside in a different place from him does not render them any the less members of "his family" within the meaning of this section.—*Lawson v. Lawson*, 15 Cal. App. 498, 111 Pac. 354.

62. Exemption of judgment-debtor's earnings.—Where the mother of the judgment-debtor, shown to be a resident of the state, is old, in poor health, unable to maintain herself, and looks to her son for her sole support, she should be held to be a member of the debtor's family within the meaning of this section, though not an actual inmate of his house.—*Lawson v. Lawson*, 15 Cal. App. 498, 115 Pac. 461.

63. Same—Alimony.—In an effort of a former wife to enforce a judgment for alimony out of the whole of the earnings of her former husband it was held that the court properly made a partial exemption for the benefit of his aged and indigent mother, as a member of his family, though not residing with him.—*Lawson v. Lawson*, 15 Cal. App. 502, 115 Pac. 463.

64. Salary.—Where the judgment-debtor claimed exemption under subdivision 10 it was error for the trial judge to deny a mo-

tion for the release of the money on the ground that the salary was not necessary for the purposes stated, as it appeared that the debtor had drawn fifteen hundred dollars from the bank, which had been wholly unaccounted for, where the uncontradicted testimony of the debtor showed that the money had all been paid out by him for election expenses and litigation.—*People ex rel. Dorris v. McKamy*, 2^o Cal. App. 196, 151 Pac. 743.

IX. SHARES IN HOMESTEAD ASSOCIATION—HOMESTEADS—SUBDIVISION 11.

As to homestead—Exemption of, in general, see *Kerr's Cyc. Civ. Code*, 2d ed., § 1240 and note.

As to money equal to homestead-exemption when protected, see *Kerr's Cyc. Civ. Code*, 2d ed., § 1257 and note.

As to probate homestead, see, post, § 1465 and note.

As to retroactive construction of homestead-exemption laws, see note 45 Am. Dec. 252.

As to value of homestead property, determining excess over exemption, see *Kerr's Same—Execution-sale of, when void*, see *Kerr's Cyc. Civ. Code*, 2d ed., § 1240 and note par. 10.

Same—Levy of execution upon, creates no lien, see *Kerr's Cyc. Civ. Code*, 2d ed., § 1240 and note par. 23; and also note 87 Am. Dec. 273-282. *Cyc. Civ. Code*, 2d ed., §§ 1245-1261 and notes.

65. Federal homestead—Land taken as government homestead is not liable for any debt of homestead-claimant contracted prior to issuance of patent.—*Delany v. Knapp*, 111 Cal. 165, 168, 52 Am. St. Rep. 160, 43 Pac. 598.

66. Federal homestead, like state homestead, does not revive character and exemption as such upon subsequent repurchase by original holder by whom it had been sold.—*Delany v. Knapp*, 111 Cal. 165, 169, 52 Am. St. Rep. 160, 43 Pac. 598. See *Herbert v. Mayer*, 42 La. Ann. 839, 8 So. 590.

67. Homestead-exemption—Is purely statutory right limited by statutory conditions, and court can not impose restrictions upon right of creditor to enforce sale in addition to those imposed by statute.—*Lean v. Givens*, 146 Cal. 739, 744, 81 Pac. 128.

68. Same—Excess is subject to levy.—Levy of execution upon land where judgment is not lien, creates lien on land from that date which will charge whatever interest in land is, or may be made, subject to execution, including excess in value of homestead property over homestead-exemption.—*Lean v. Givens*, 146 Cal. 739, 742, 81 Pac. 128. See *Blood v. Light*, 38 Cal. 657, 99 Am. Dec. 441; *Beaton v. Reid*, 111 Cal. 486, 44 Pac. 167; *Lehnhardt v. Jennings*, 119 Cal. 195, 48 Pac. 56, 51 Pac. 195; *Summerville v. Stockton M. Co.*, 142 Cal. 529, 540, 76 Pac. 243.

69. Compare: *Lubbock v. McMann*, 82 Cal. 226, 230, 16 Am. St. Rep. 108, 22 Pac. 1145, where it was held that judgment is not lien on any part, either in extent or value of homestead premises even in case, where there is an excess in value above homestead-exemption.

70. Homestead-right—Subsequently acquired to attachment-lien defeats such lien, and levy of execution in like manner does not have effect to prevent premises from being impressed with homestead character at any time before sale.—*Beaton v. Reid*, 111 Cal. 484, 487, 44 Pac. 167. See *McCracken v. Harris*, 54 Cal. 81; *Sullivan v. Hendrickson*, 54 Cal. 258; *Wilson v. Madison*, 58 Cal. 1.

71. Levy on property subject to homestead-exemption—Is imposed on property conditionally, to become absolute in the event that it is determined, in manner prescribed by Civil Code (§§ 1245-1261), that excess exists.—*Lean v. Givens*, 146 Cal. 739, 743, 81 Pac. 128.

See *Kerr's Cyc. Civ. Code*, 2d ed., §§ 1245-1261 and notes.

72. Purchaser of homestead property after levy—Takes subject to lien created by levying upon excess over homestead value.—*Lean v. Givens*, 146 Cal. 739, 743, 81 Pac. 128.

73. Value of homestead—Is finally determined by exposing property for sale.—If bid is not made in excess of amount of exemption proceedings are entered. If larger amount is offered it conclusively proves that value exceeds exemption, and in that event excess of right is applicable on debt and claimant has no just cause to complain.—*Lean v. Givens*, 146 Cal. 739, 744, 81 Pac. 128.

X. PUBLIC BUILDINGS, ETC.—SUBDIVISION 15.

74. Mechanics' lien—Public buildings not subject to.—As to public buildings not subject to claim of mechanics' lien.—*Mayrhofer v. Board of Education*, 89 Cal. 110, 23 Am. St. Rep. 451, 26 Pac. 646; *Goldtree v. City of San Diego*, 8 Cal. App. 505, 512, 97 Pac. 216, 218.

See, also, 6 *Kerr's Cal. Dig.* p. 6048, § 8; notes 27 Am. Rep. 83; 17 Am. Cas. 131; Ann. Cas. 1913A, 762; Ann. Cas. 1914C, 102; 35 L. R. A. 141; 20 L. R. A. (N. S.) 261; 41 L. R. A. (N. S.) 315.

XI. LIFE INSURANCE POLICIES, ETC.—SUBDIVISION 18.

As to life, health, accident, annuity, and endowment insurance policies, exemptions of from execution, see *Kerr's Cyc. Civ. Code*, 2d ed., § 453k and note.

75. Ambiguous statute—Relating to exemption will not be construed to defeat express legislative will in relation to such exemption.—*Estate of Brown*, 123 Cal. 399, 402, 69 Am. St. Rep. 74, 55 Pac. 1055.

76. **Construction** — Code provision exempts only moneys accruing upon policies where annual premiums do not exceed five hundred dollars. It can not be construed as exempting part only of any policy.—*Estate of Brown*, 123 Cal. 399, 402, 69 Am. St. Rep. 74, 55 Pac. 1055.

77. Statute provides that all property exempt from execution shall be set apart for use of surviving husband or wife.—*Holmes v. Marshall*, 145 Cal. 777, 781, 79 Pac. 534.

See, post, § 1465 and note.

78. **Exemptions are creatures of statute and exceptions to general rule.** No property is exempt unless expressly made so, and no assumed legislative policy can justify courts in adding to statutory lists of exemptions; and where statute says that moneys accruing upon an insurance policy issued upon life of judgment-debtor, if annual premiums paid do not exceed five hundred dollars, it as plainly states as though added in words, that, if annual premiums paid do exceed five hundred dollars, no part of same is exempt.—*Estate of Brown*, 123 Cal. 399, 401, 69 Am. St. Rep. 74, 55 Pac. 1055.

79. **Exemption from execution—Continues after moneys are paid to beneficiary,** and such moneys can not be seized for wife's prior debts and diverted from support of family.—*Holmes v. Marshall*, 145 Cal. 777, 781, 79 Pac. 534.

80. **Insurance policy — Payable by its terms to executors or administrators of insured,** annual premiums upon which do not exceed the sum of five hundred dollars, although set apart under statute, is administered upon, and until set apart is part of estate. Order setting it apart is species of distribution.—*Estate of Miller*, 121 Cal. 353, 355, 53 Pac. 906.

81. **Same—Interest of heirs in policy.**—Heirs are not vested with any interest or right with reference to policy made payable to executors or administrators generally, except under special circumstances and subject to administration.—*Estate of Miller*, 121 Cal. 353, 355, 53 Pac. 906.

82. **Same—Upon which annual premiums were less than five hundred dollars,** and which was property of decedent in his lifetime, is properly set apart to his widow.—*Estate of Miller*, 121 Cal. 353, 355, 53 Pac. 906.

83. **Moneys due upon policy—Liberal construction of statutes** relating to exemptions can not go to extent of exempting moneys due upon policy upon which annual premiums exceed five hundred dollars, where statute in terms exempts policies upon which annual premiums are less than five hundred dollars.—*Estate of Brown*, 123 Cal. 399, 401, 69 Am. St. Rep. 74, 55 Pac. 1055.

84. **Title to insurance-money—Coming to surviving wife** through estate and under order setting it apart, vests title in her as effectively as if she had been named beneficiary of policy; and there is no reason why insurance money coming to wife directly as beneficiary should be exempt from execution and not that coming to her indirectly through estate and by order setting it apart.—*Holmes v. Marshall*, 145 Cal. 777, 781, 79 Pac. 534.

85. **Words "exempt from execution"—**Mean exempt from any execution, and exemption of insurance moneys extends not only against those of persons whose lives are insured and who pay premium requisite to procure and keep it in force, but continues after death and in favor of beneficiary, as exemption was clearly intended to apply to moneys coming from life insurance to hands of beneficiary.—*Holmes v. Marshall*, 145 Cal. 777, 779, 79 Pac. 534.

XII. PENSION-MONEYS FROM UNITED STATES GOVERNMENT—SUBDIVISION 20.

86. **Pension-money — Public administrator will not be appointed for the purpose of receiving pension-money** where the only object can be to subject it to his commissions and fees.—*Treadway v. Board of Directors of Veterans' Home of Cal.*, 14 Cal. App. 75, 111 Pac. 111.

§ 691. WRIT, HOW EXECUTED. The sheriff must execute the writ against the property of the judgment debtor, by levying on a sufficient amount of property, if there be sufficient; collecting or selling the things in action, and selling the other property, and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment.

Any excess in the proceeds over the judgment and accruing costs must be returned to the judgment debtor, unless otherwise directed by the judgment or order of the court. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs within the view of the sheriff, he must levy only on such part of the property as the judgment debtor may indicate, if the property indicated be amply sufficient to satisfy the judgment and costs.

History: Enacted March 11, 1872; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 321.

EXECUTION OF WRIT.

- 1, 2. "Accruing costs" — Not chargeable under this section—Keeper's fees and expenses.
 3. Assignee of insolvent corporation—Entitled to be treated as equitable assignee of check.
 - 4, 5. Construction—Levy as distinguished from selling.
 6. Default of sheriff in executing writ—Liability upon bond.
 7. Levy of execution—When not necessary to constitute lien.
 8. Mandate—Execution of writ of execution.
 - 9-11. Money—Sale of.
 12. Promissory note—Liable as "credit" to seizure and sale.
 13. Return—Title not affected by.
1. "Accruing costs"—Not chargeable under this section—Keeper's fees and expenses are not part of sheriff's "accruing costs" under this section, and such are not chargeable against defendant in judgment.—*Hotchkiss v. Smith*, 108 Cal. 285, 287, 41 Pac. 304.
 2. Accruing costs, as that term is used in statute, are such fees and expenses only as are incurred in executing judgment.—*Hotchkiss v. Smith*, 108 Cal. 285, 287, 41 Pac. 304.
 3. Assignee of insolvent corporation — Entitled to be treated as equitable assignee of check given officer upon execution sale of property belonging to insolvent corporation, where such officer fails and neglects to sue, and such equitable assignee may maintain his right of action to recover amount represented by check.—*Meherin v. Saunders*, 181 Cal. 681, 691, 63 Pac. 1084, sub nom. *Meherin v. Ambrose*, 54 L. R. A. 272. (*McFarland, Garoutte, Harrison, J. J.*, dissenting, holding, generally, that there being no privity of contract between purchaser at execution sale, and assignee of insolvent as to property sold prior to insolvency proceedings, and moneys alleged to be due as balance of purchase-price not already represented by check, such assignee can not maintain action against purchaser to recover purchase-money.)
 4. Construction—Levy as distinguished from selling.—This section makes the levying of writ a part of process of executing it. The term "levy" when employed to connote acts by which an officer manifests intention to appropriate land to satisfaction of an execution, and when not defined by statute, has considerable elasticity of meaning; so probably for reason that as common law permitted no levy of writ on lands, it did not devise any procedure for that purpose.—*Lehnhardt v. Jennings*, 119 Cal. 192, 194, 48 Pac. 56, 51 Pac. 195.
 5. Statute contemplates that levying is something different from selling.—*Lehn-*

hardt v. Jennings, 119 Cal. 192, 195, 48 Pac. 56, 51 Pac. 195.

6. Default of sheriff in executing writ—Liability upon bond.—Default of sheriff in executing writ of execution renders him liable upon his bond.—*Sheehy v. Graves*, 58 Cal. 449, 455.

7. Levy of execution—When not necessary to constitute lien.—Levy of execution is not necessary where judgment itself constitutes lien upon real property which is subject of execution sale, and where judgment does not constitute lien upon property sold and there is no levy, it follows that sale, if otherwise valid, takes effect upon day of its date, and not before, or at all events not before notices of sale are posted.—*Summerville v. Stockton M. Co.*, 142 Cal. 529, 540, 76 Pac. 243. See *Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256; *Blood v. Light*, 38 Cal. 654, 99 Am. Dec. 441; *Lehnhardt v. Jennings*, 119 Cal. 192, 48 Pac. 56, 51 Pac. 195.

8. Mandate—Execution of writ of execution.—Where the sheriff's return to an alternative writ of mandate requiring him to show cause why he should not execute a writ of execution, is based upon a restraining order, which the appellate court has already decided was issued without jurisdiction, the writ of mandate must issue.—*Kelsey v. Byers*, 40 Cal. App. 228, 180 Pac. 665.

9. Money—Sale of.—While the sale of money to satisfy a writ of execution is an anomalous proceeding still it would seem to be the proceeding where the money levied upon was the identical money deposited with a third party for safekeeping, for such was neither a debt nor a credit is in the meaning of subdivision 5 of this section and it would seem, therefore, proper to treat it as any other species of personal property and for the sheriff to sell it in the same manner as other personal property is required to be sold under execution.—*Magee v. Superior Court*, 10 Cal. App. 154, 159, 101 Pac. 532.

10. Where the sheriff levied upon and sold certain moneys deposited with a county treasurer for safekeeping, delivering to the purchaser a certificate of sale thereof, receiving from the purchaser the purchase-price and returned the execution satisfied, the court from which it issued has no further jurisdiction of or over the action and therefore any order it might make to protect the purchaser or to secure to him the possession of the money would be *coram non judice*.—*Magee v. Superior Court*, 10 Cal. App. 154, 159, 101 Pac. 532.

11. Where the sheriff levies upon and sells certain specific moneys to satisfy an execution the purchaser must look to the sheriff for the delivery to him of the property the same as if it had been live stock, or wheat, or property of any other description capable of manual delivery.—*Magee v. Superior Court*, 10 Cal. App. 154, 159, 101 Pac. 532.

12. Promissory note—Liable as "credit" to seizure and sale under execution.—*Davis v. Mitchell*, 34 Cal. 81, 87.

See § 688, ante, and note para. 52-54.

13. Return—Title not affected by.—It has been frequently held that the title of the purchaser at sheriff sale does not depend on the return to the writ.—*Weldon v. Rogers*, 157 Cal. 410, 415, 108 Pac. 266.

§ 692. NOTICE OF SALE UNDER EXECUTION, HOW GIVEN. Before the sale of property on execution, notice thereof must be given as follows:

1. In case of perishable property: By posting written notice of the time and place of sale in three public places of the township or city where the sale is to take place, for such time as may be reasonable, considering the character and condition of the property.

2. In case of other personal property: By posting a similar notice in three public places in the township or city where the sale is to take place, for not less than five days nor more than ten days.

3. In case of real property: By posting a similar notice, particularly describing the property, for twenty days, in three public places of the township or city where the property is situated, and also where the property is to be sold, and publishing a copy thereof, once a week for the same period, in some newspaper of general circulation, printed and published in the city or township, in which the property is situated, if there be one, or, in case no newspaper of general circulation be printed and published in the city or township, in some newspaper of general circulation, printed and published in the county.

4. When the judgment under which the property is to be sold is made payable in a specified kind of money or currency, the several notices required by this section must state the kind of money or currency in which bids may be made at such sale, which must be the same as that specified in the judgment.

History: Enacted March 11, 1872, re-enactment with additions of § 221 Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 322; March 23, 1907, Stats. and Amdts. 1907, p. 980, Kerr's Stats. and Amdts. 1906-7, p. 457.

NOTICE OF SALE—HOW GIVEN.

1. Computation of time of notice.
2. Description in notice—When sufficient.
3. Effect of section with post section 693.
4. Notice of sale—As manifesting intention of officer.
5. Same—Specifying method of sale in contract of pledge—Waiver of provisions of statute.
6. Partnership property—Sale of under execution—Directions to sheriff regarding giving notice.
7. Penalty and responsibility of officer—Right to select place and newspaper for publishing notice.
8. Questions appertaining to notice—Who affected by.
9. Requirement of notice—Purpose of.

1. Computation of time of notice.—Rule as stated in section 12, ante, is applicable in computing notice required under this section. Where law fixes time within which act is to be done, all of last day of that period is within the time, and default for

not doing act can only be taken on next day.—*Bellmer v. Blessington*, 136 Cal. 3, 5, 68 Pac. 111. See *Misch v. Mayhew*, 51 Cal. 514; *Hagenmeyer v. Board of Equalization*, 82 Cal. 214, 23 Pac. 14; *Landregan v. Peppin*, 86 Cal. 122, 126, 24 Pac. 859; *Derby v. Modesto*, 104 Cal. 515, 522, 38 Pac. 900; *Bates v. Howard*, 105 Cal. 173, 822, 38 Pac. 715.

See, ante, § 12 and note.

2. Description in notice—When sufficient.—The description in notice is sufficient where it conforms with description in judgment and identifies land to be sold.—*Anglo-California Bank v. Cert*, 142 Cal. 303, 307, 75 Pac. 902.

3. Effect of this section and section 693, post.—This section and section 693, post, enjoins upon sheriff both duty and responsibility of posting and publishing notices of sale as prescribed, which injunction necessarily implies duty and responsibility of selecting place where notices are to be posted and newspapers in which they are to be published, since they are not specified. He is required to post notices in three public places in township, etc., and to publish

them in some newspaper in county once a week under heavy penalty, besides his responsibility for all damages.—*Northern C. I. Trust v. Cadman*, 101 Cal. 200, 204, 35 Pac. 557.

4. Notice of sale—As manifesting intention of officer.—Notice given by officer as required by this section is an act manifesting intention of officer to appropriate described property to sale for satisfaction of writ, and is sufficient levy in any case where judgment is lien on property to be sold.—*Lehnhardt v. Jennings*, 119 Cal. 192, 197, 48 Pac. 56, 51 Pac. 195.

5. Same—Specifying method of sale in contract of pledge—Waiver of provisions of statute.—In a case in which a trust deed does not in terms and by special or separate reference to shares of stock pledged provide for the manner of the sale thereof but does provide, among other things, that in case of default in payment when due of any of the indebtedness covered by the instrument the trustee, on application of the creditor, "shall sell the above granted premises, or any such part thereof as in his discretion he shall find it necessary to sell in order to accomplish the object of these trusts" and further declare that the sale should be made in the manner described in the trust deed; this instrument, taken as a whole and considered in the light of the purpose for which it was made, intended that the manner of sale and the notice of sale set forth in the trust deed should apply to the shares of stock as well as to the land described in the deed; and that in affecting the same the pledgeor and grantor waived a compliance with the statutory method for the sale of pledged personal property, so that the sale carried to the purchaser full right and title to the shares of stock.—*Hinrichsen v. Imperial Water Co.*, — Cal. App. —, 193 Pac. 608.

6. Partnership property—Sale under execution—Directions to sheriff regarding giving of notice.—Where property is levied upon under execution issued under a judg-

ment the notice to be given of the sale is prescribed and regulated by the above section and the following section specifies the penalty which attaches to an officer selling without giving the notice as prescribed; but there is nothing in either of these sections that requires the court, or any judge thereof, to direct the giving of the notice. For this reason an interlocutory judgment which directs the sheriff how and when to give notice of sale of property to be levied upon under writ of execution to be issued is unnecessary, and for that reason may be treated as surplusage, the judgment being full, complete and enforceable without such directory provisions.—*Williams v. Reed*, 43 Cal. App. 425, 434, 185 Pac. 515, applying the doctrine in *Northern Counties Investment Trust v. Cadman*, 101 Cal. 200, 35 Pac. 557, abstracted in next note.

7. Penalty and responsibility of officer—Right to select place and newspaper for publishing notice.—Penalty and responsibility of sheriff are inconsistent with alleged authority of plaintiff in foreclosure, to dictate places or papers in which notices are to be published, and consistent only with his duty and power to select place and newspaper in which to publish required notices.—*Northern C. I. Trust v. Cadman*, 101 Cal. 200, 205, 35 Pac. 557. See *Richardson v. Tobin*, 45 Cal. 30, 31; *County of San Mateo v. Maloney*, 71 Cal. 205, 206, 12 Pac. 53; *Journal P. Co. v. Whitney*, 97 Cal. 283, 32 Pac. 237; *In re O'Sullivan*, 84 Cal. 444, 24 Pac. 281.

8. Questions appertaining to notice—Who affected by.—The questions appertaining to notice, as well as all others which merely relate to irregularity, are between officer selling and parties to execution.—*Kelley v. Desmond*, 63 Cal. 517, 519.

9. Requirement of notice—Purpose of.—The requirement of notice of sale on execution is as much for benefit and protection of defendant as for plaintiff.—*Northern C. I. Trust v. Cadman*, 101 Cal. 200, 205, 35 Pac. 557.

§ 693. SELLING WITHOUT NOTICE, WHAT PENALTY ATTACHED. An officer selling without the notice prescribed by the last section forfeits five hundred dollars to the aggrieved party, in addition to his actual damages; and a person wilfully taking down or defacing the notice posted, if done before the sale or the satisfaction of the judgment (if the judgment be satisfied before sale), forfeits five hundred dollars.

History: Enacted March 11, 1872, re-enactment of § 222 Practice Act.

SELLING WITHOUT NOTICE—PENALTY.

- 1, 2. Action to recover penalty and damages—Implies what—Construction of section.
3. Action for damages for sale without notice is not.
4. Action for false return of officer.
5. Aggrieved party—Purchaser without notice is not.
6. Same—Party is not aggrieved, when.
7. Neglect of officer making sale to give notice—Right of aggrieved party.
8. Recovery of penalty.

9. Return—Prima facie evidence—In favor of sheriff.
10. Same—Finding that recitals in return are true.
11. Same—Rule that return of sheriff is conclusive.
12. Title of purchaser—Not dependent upon sheriff's return.

1. Action to recover penalty and damages—Implies what—Construction of section.—Action to recover penalty and damages for selling personal property under writ of execution, without giving notice required by law, implies, and for its maintenance requires, valid execution, and, therefore, party can not contend in action for damages for penalty and damages thereon, that execution was void.—Bellmer v. Blessington, 136 Cal. 3, 4, 68 Pac. 111.

2. Action under this section, being to enforce penalty or forfeiture claimed, is to be strictly construed, and plaintiff must show clearly that his case comes within statute imposing forfeiture.—Askew v. Ebberts, 22 Cal. 263, 264.

3. Action for damages for sale without notice under statute, is complete as soon as officer delivers certificate of sale to purchaser, at execution sale, if in fact sale was without notice.—Raker v. Bucher, 100 Cal. 214, 220, 34 Pac. 654, 849.

4. Action for false return of officer was simply specific name (probably derived from forms of original writ) for one of numerous class of actions on case. It was not an action in rem for purpose of canceling or setting aside return in order to pave way for another action for damages, but was itself an action for damages founded upon official misconduct of sheriff.—Raker v. Bucher, 100 Cal. 214, 219, 34 Pac. 654, 849.

5. Aggrieved party—Purchaser without notice is not.—Purchaser at execution sale, without notice, is not aggrieved party within meaning of this section. Sale is either valid or invalid; it passes title, or it does not; if it be a nullity and passes no title, purchaser sustains no injury, and no right of action for forfeiture accrues. If authorized, purchaser is entitled, after time for redemption expires, to his deed, and may compel its execution and delivery.—Kelley v. Desmond, 63 Cal. 517, 518.

6. Same—Party is not injured or aggrieved unless it appears that by means of sale, without notice, he has been deprived of his property.—Askew v. Ebberts, 22 Cal. 263, 264.

7. Neglect of officer making sale to give notice—Right of aggrieved party.—The neglect of officer making sale to give notice required by law does not affect validity of sale, but party aggrieved has his remedy against officer for any injury sustained by reason of such neglect.—Smith v. Randall, 6 Cal. 47, 65 Am. Dec. 475; Harvey v. Fisk, 9 Cal. 93.

8. Recovery of penalty.—Under this statute, aggrieved party can only recover forfeiture when sale has been perfected and completed by at least payment of purchase-money by purchaser. He can not recover where there was attempted sale under defective notice, by which nothing passed and no right to property vested in purchaser, and where purchaser did not pay purchase-money, and where officer afterwards rightfully sold property after giving proper notice.—Askew v. Ebberts, 22 Cal. 263, 264.

9. Return—Prima facie evidence—In favor of sheriff in action against sheriff for false return; and as truth of return is real question in issue in such action, only slight evidence aliunde is required to overcome prima facie effect, which law attaches to return of officer.—Raker v. Bucher, 100 Cal. 214, 216, 217, 34 Pac. 654, 849.

10. Same—Finding that recitals in return are true, can not be sustained where it is not disputed that defendant, sheriff, had himself admitted falsity of return.—Raker v. Bucher, 100 Cal. 214, 217, 34 Pac. 654, 849.

11. Same—Rule that return of sheriff is conclusive as between parties to action and their privies, has no application in suit against sheriff for neglect of official duty.—Raker v. Bucher, 100 Cal. 214, 221, 34 Pac. 654, 849.

12. Title of purchaser—Not dependent upon sheriff's return.—The title of purchaser does not depend on sheriff's return, and in absence of such return debtor is obliged either to redeem his land or run risk of losing it by proof aliunde that sale was valid.—Raker v. Bucher, 100 Cal. 214, 220, 34 Pac. 654, 849.

§ 694. SALES, HOW CONDUCTED. NEITHER THE OFFICER CONDUCTING IT NOR HIS DEPUTY TO BE A PURCHASER. REAL AND PERSONAL PROPERTY, HOW SOLD. JUDGMENT DEBTOR, IF PRESENT, MAY DIRECT ORDER OF SALE, AND THE OFFICER SHALL FOLLOW HIS DIRECTIONS. All sales of property under execution must be made at auction, to the highest bidder, between the hours of nine in the morning and five in the afternoon.

After sufficient property has been sold to satisfy the execution, no more can be sold. Neither the officer holding the execution nor his deputy can become a purchaser, or be interested in any purchase, at such sale.

When the sale is of personal property, capable of manual delivery, it must be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, consisting of several known lots or parcels, they must be sold separately; or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion must be thus sold.

[Judgment debtor may direct order of sale.] The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, and the sheriff must follow such directions.

History: Enacted March 11, 1872, re-enactment of § 223 Practice Act.

CONDUCT OF SALE—WHO MAY BID AT SALE.

1. Action for unlawful sale—Burden of proof.
2. Construction of section—Applies to sales under foreclosure.
3. Same—Contract between parties as to manner of sale.
4. Same—Execution upon judgment is sufficient authority to sheriff.
5. Cloud on title—Injunction to restrain threatened sale.
6. Discretion of officer—To postpone sale.
7. Doctrine of caveat emptor applies.
8. Impeaching sale for fraud—Maxim of caveat emptor.
9. Misleading officer—Attempt to invalidate sale.
- 10, 11. Motion to set aside irregular sale—Burden upon party.
12. Inadequacy of price—As circumstance of fraud.
- 13, 14. Same—Measure of damages for wrongful sale.
15. Same—Presumption is in favor of order of lower court.
16. Presumption—That officer discharges duty.
17. Private sale—Sheriff has no right to sell at.
18. Procedure for setting aside voidable sale.
- 19, 20. Property in view of bidder—Construction of section.
21. Redemption from sale—Must be of land sold, and according to parcels.
- 22, 23. Rule as to sale en masse—Authority of court in mortgage foreclosure.
24. Same—Directions of judgment-debtor—Sheriff bound to follow.
25. Same—Irregularity resulting from sale en masse.

26. Same—Judgment-debtor in foreclosure.
27. Same—Object of statute.
- 28, 29. Same—Parties desiring property sold in separate parcels should proceed, how.
- 30, 31. Same—Sale of ditches and water-rights.
32. Rule is to consider every sale as final.
33. Sale of personal property upon execution—Not subject to confirmation of court.
34. Sale under execution—When void.
35. Sale under judgment of foreclosure.
36. Several executions—Application of moneys.
37. Sheriff's deed—When takes effect.
38. Undertaking on appeal—Where sale is directed for purpose of satisfying any liens.
39. Void sale—Title not passed by.

As to right of former sheriff to maintain action in respect to a sale made by him when in office, see note 29 L. R. A. (N. S.) 792.

1. Action for unlawful sale—Burden of proof.—Where purchaser acquires actual and lawful possession of personal property, sold upon execution, and plaintiff, in action upon sheriff's bond, seeks to recover damages for unlawful acts of sheriff, sale having been set aside, burden is upon plaintiff to show that in proper discharge of official duty sheriff could have retaken property after sale was set aside.—Orton v. Brown, 113 Cal. 561, 569, 45 Pac. 835.

2. Construction of section—Applies to sales under foreclosure.—This section is applicable to sales under decree of foreclosure when decree is silent as to manner or order in which separate parcels shall be sold.—Marston v. White, 91 Cal. 37, 40, 27 Pac. 588. See Ontario L. & I. Co. v. Bedford, 90 Cal. 181, 27 Pac. 39.

3. Same—Contract between parties as to manner of sale.—This section relates to sale under execution in cases where there have been no contracts between parties as to manner of sale. Where there is express provision in mortgage that in case foreclosure should be necessary, land should be sold in certain manner, and court in its decree followed that provision, there is no error.—*Bank of Sonoma Co. v. Charles*, 86 Cal. 322, 328, 24 Pac. 1019.

4. Same—Execution upon judgment is sufficient authority to sheriff to sell real property in his possession, and deed which he makes relates back to date of lien perpetuated by judgment.—*Porter v. Pico*, 55 Cal. 165, 174.

5. Cloud on title—Injunction to restrain threatened sale.—Owner in possession of land is entitled to enjoin threatened sale under defendant's execution, where such sale would be sufficient to cast doubt on validity of plaintiff's title and to cast cloud upon it, although sale would be ineffectual to pass title to purchaser.—*Porter v. Pico*, 55 Cal. 165, 175. See *Pixley v. Higgins*, 15 Cal. 127; *Fulton v. Hanlow*, 20 Cal. 450, 481; *Marriner v. Swift*, 27 Cal. 649, 653; *Ramsdell v. Fuller*, 28 Cal. 37, 42, 87 Am. Dec. 103; *Thompson v. Lynch*, 29 Cal. 189.

6. Discretion of officer—To postpone sale.—Where commissioner, appointed to sell property in foreclosure proceedings, was requested to postpone sale of certain parcels to two o'clock of day of sale, and refused to do so, held that such refusal did not constitute abuse of officer's discretion where no reason was given why sale should have been postponed.—*Connick v. Hill*, 127 Cal. 162, 166, 59 Pac. 832.

7. Doctrine of caveat emptor applies to execution sales.—*Meherin v. Saunders*, 131 Cal. 681, 689, 63 Pac. 1084, sub nom. *Meherin v. Ambrose*, 54 L. R. A. 272.

See notes 3 L. R. A. 441; 13 L. R. A. 304.

8. Impeding sale for fraud—Maxim of caveat emptor, granting that it applies to sheriff's sales, has never been carried to extent that such sale should not be impeached on ground of fraud or misrepresentation.—*Webster v. Haworth*, 8 Cal. 21, 26.

9. Misleading officer—Attempt to invalidate sale.—Rule, that sales en masse of land consisting of separate tracts will not be countenanced in courts of justice, does not go to such extent as to allow debtor, by misleading officer with false description, or by withholding information, to invalidate sale under execution made in good faith and in entire absence of fraud.—*Smith v. Randall*, 6 Cal. 47, 51, 52, 65 Am. Dec. 475.

10. Motion to set aside irregular sale.—*Hurden* is upon party seeking to set aside sale, to show such an irregularity or material departure from statute as will justify such course.—*Connick v. Hill*, 127 Cal. 162, 165, 58 Pac. 832; *Anglo-California Bank v. Cerf*, 142 Cal. 303, 307, 75 Pac. 902.

11. Inadequacy of price is not one of grounds for setting aside sale, particularly under our practice when judgment-debtor is allowed to redeem.—*Connick v. Hill*, 127 Cal. 162, 165, 58 Pac. 832; *Anglo-California Bank v. Cerf*, 142 Cal. 303, 307, 75 Pac. 902. See *Smith v. Randall*, 6 Cal. 51, 53, 65 Am. Dec. 475.

12. Inadequacy of price—As circumstance of fraud.—Inadequacy of price is a fact which, in connection with other circumstances, may establish fraud in officer in making sale, but is never of itself sufficient to annul such sale.—*Smith v. Randall*, 6 Cal. 51, 53, 65 Am. Dec. 475.

13. Same—Measure of damages for wrongful sale.—When plaintiff's property is seized and sold by defendant sheriff, and is afterwards repurchased by plaintiff from one who bought it at sheriff's sale, it is held that measure of damages is amount paid to repurchase property.—*Blewett v. Miller*, 131 Cal. 149, 151, 63 Pac. 157. See *Ala. Fields v. Williams*, 91 Ala. 502, 8 So. 808. *Pa. Kline v. McCandless*, 139 Pa. St. 223, 20 Atl. 1045. *Tex. Muenster v. Fields*, 89 Tex. 102, 33 S. W. 852.

14. Liability of sheriff, where sale was set aside by court, can only be for his failure to retake property after sale is set aside, and whether liability attaches for such failure, is question of fact, verdict upon which will not be disturbed where there is conflict in the evidence.—*Orton v. Browne*, 113 Cal. 561, 568, 45 Pac. 835.

15. Same—Presumption is in favor of order of lower court that value given was full value of property as stated by plaintiff in his affidavit, where evidence as to value is conflicting.—*Connick v. Hill*, 127 Cal. 162, 166, 59 Pac. 832.

16. Presumption—That officer discharges duty required of him according to law and that levy has been made in compliance with directions of writ.—*Porter v. Pico*, 55 Cal. 165, 172.

17. Private sale—Sheriff has no right to sell at, nor to authorize any one else to do so.—*Sheehy v. Graves*, 58 Cal. 449, 455.

18. Procedure for setting aside voidable sale.—When plaintiff in execution is purchaser, and before he conveys to another, court will set aside sale upon motion. But after he conveys to third person, and when third person becomes purchaser, court will not determine in this summary way questions which may affect rights of others not before court, and without opportunity of explaining away those circumstances which might destroy his title.—*Bryan v. Berry*, 8 Cal. 130, 135. See *San Francisco v. Pixley*, 21 Cal. 56, 57, 60; *Day v. Graham*, 6 Ill. (1 Gilm.) 435.

19. Property in view of bidder—Construction of section.—The provisions of the above section requiring personal property at execution sale to be within view, if capable of manual delivery, were intended for

the protection of the judgment-debtor, and he may waive his right if he chooses.—*Marsh v. Lapp*, 180 Cal. 231, 180 Pac. 533.

20. The removal of the property by the debtor after notice of sale amounts to such waiver.—*Marsh v. Lapp*, 180 Cal. 231, 180 Pac. 533.

21. Redemption from sale—Must be of land sold, and according to parcels in which it was sold.—*Hibernia Sav. & L. Soc. v. Behnke*, 121 Cal. 339, 341, 53 Pac. 812.

22. Rule as to sale en masse—Authority of court in mortgage foreclosure.—Sale as to separate parcels en masse in disregard of requirements of statute, is not void, but only voidable and subject to be set aside on timely application, and such sale en masse is not forbidden where parcels can not be separately sold. But while this rule is controlling, and should be strictly followed, it can not be held to apply where each distinct parcel is first offered for sale separately and no bids are received. In such case property may then be offered and sold as a whole, and sale will be upheld, unless other reasons appear for setting it aside.—*Anglo-California Bank v. Cerf*, 142 Cal. 303, 305, 75 Pac. 902. See *San Francisco v. Pixley*, 21 Cal. 56, 60; *Blood v. Light*, 38 Cal. 649, 654, 99 Am. Dec. 441; *Browne v. Ferrea*, 51 Cal. 552, 553; *Vigoureux v. Murphy*, 54 Cal. 346, 351; *Marston v. White*, 91 Cal. 37, 27 Pac. 588; *Hibernia Sav. & L. Soc. v. Behnke*, 121 Cal. 339, 53 Pac. 812; *Connick v. Hill*, 127 Cal. 162, 59 Pac. 832.

As to sales en masse, generally, see note 21 L. R. A. 40, 41.

23. Court, in foreclosure suit, has jurisdiction to provide in decree in what parcel or parcels mortgaged premises shall be sold.—*Hopkins v. Wiard*, 72 Cal. 259, 13 Pac. 687; *Bank of Sonoma Co. v. Charles*, 86 Cal. 322, 323, 24 Pac. 1019.

24. Same—Directions of judgment-debtor—Sheriff bound to follow.—Sheriff is bound to follow direction of judgment-debtor, who, at sale, directs order in which property is to be sold.—*Vigoureux v. Murphy*, 54 Cal. 346, 351.

25. Same—Irregularity resulting from sale en masse, as when entire tract levied upon and sold by sheriff under execution and advertised as separate tracts, may be corrected by motion to set aside sale on notice to judgment-creditor, sheriff, and purchaser at sale.—*Browne v. Ferrea*, 51 Cal. 552, 553 (Wallace, C. J., dissenting, holding that third person purchasing at sale, and paying purchase-money in good faith, and in ignorance of irregularity complained of, should not be disturbed in his title, where such irregularity was productive of no appreciable damage, and where it was affirmatively shown and found by court below that premises sold for more than they would bring on resale).

26. Same—Judgment-debtor in foreclosure under this section may require that

separate lots or parcels shall be sold separately, and may also direct order in which they shall be sold.—*Ontario L. & I. Co. v. Bedford*, 90 Cal. 181, 185, 27 Pac. 39. See *Leviston v. Swan*, 33 Cal. 480 (construing provision in Practice Act substantially same as provision in code upon same subject).

27. Same—Object of statute in requiring sale to be by parcel is to afford judgment-debtor an opportunity to redeem either of parcels.—*Hibernia Sav. & L. Soc. v. Behnke*, 121 Cal. 339, 341, 53 Pac. 812.

28. Same—Parties desiring property sold in separate parcels should proceed to that end in accordance with this section; and where one had interest in lands described in complaint in foreclosure, that was not covered by mortgage, or if he had any equity that he desired to have protected, and failed to present matter to trial court in proper manner, he could not be heard afterwards.—*County Bank v. Goldtree*, 129 Cal. 160, 164, 61 Pac. 785.

29. Property may be offered and sold in one parcel in foreclosure proceedings, after separate known parcels of land are offered for sale separately and no offer or bid is made for either parcel.—*Connick v. Hill*, 127 Cal. 162, 164, 59 Pac. 832. See *Marston v. White*, 91 Cal. 37, 40, 27 Pac. 588; *White v. Crow*, 110 U. S. 183, 190, 28 L. ed. 112, 4 Sup. Ct. Rep. 71.

30. Same—Sale of ditches and water-rights.—Where property sold on execution consisted of four ditches and water-rights connected therewith, and were sold by officer in one parcel, evidence being conflicting as to whether such ditches and water-rights constituted separate lot or parcel of real property, or were so connected that it would be difficult to bid on same in parcels or fix price upon separate parcels, action of trial court in refusing to set aside sale will not be disturbed.—*Gleason v. Hill*, 65 Cal. 17, 18, 2 Pac. 413.

31. Question whether water ditches constitute one or several parcels of real property is one of fact.—*Gleason v. Hill*, 65 Cal. 17, 19, 2 Pac. 413.

32. Rule is to consider every sale as final when made by officer of court under mandate thereof.—*Connick v. Hill*, 127 Cal. 162, 165, 59 Pac. 832. See *Hopkins v. Wiard*, 72 Cal. 259, 262, 13 Pac. 687.

33. Sale of personal property upon execution—Not subject to confirmation by court, nor has execution defendant any right to redemption. Such sale is completed by payment of sum bid, and purchaser is then entitled to immediate possession of property.—*Orton v. Browne*, 113 Cal. 561, 568, 45 Pac. 835.

34. Sale under execution—When void.—Only when conducted in a manner prohibited by statute, or in a manner which would not have been within the power of the court, in the first instance, to have author-

ized; and in this regard it is immaterial whether the departure was from the statutory mode, or from that prescribed by the decree.—*Bechtel v. Wier*, 152 Cal. 445, 93 Pac. 75.

35. Sale under judgment of foreclosure.—Held to apply to such sale only when the judgment is silent as to method, and when the judgment prescribed how the sale should be made this section would not apply.—*Estudillo v. Security Loan etc. Co.*, 149 Cal. 568, 87 Pac. 19.

36. Several executions—Application of moneys.—Where there are several executions in the hands of officer, at same time, under which lands are sold, money must be applied first to satisfaction of oldest existing judgment-lien.—*Bagley v. Ward*, 37 Cal. 121, 136, 99 Am. Dec. 256.

37. Sheriff's deed—When taken effect.—Sheriff's deed executed in pursuance of an execution-sale under judgment rendered in attachment suit, takes effect from date of levy of attachment, if levy is such as to create lien.—*Porter v. Pico*, 55 Cal. 165, 175.

38. Undertaking on appeal—Where sale is directed for purpose of satisfying any liens, other than mortgage lien need not provide for payment of any deficiency which judgment may direct. To this extent statute discriminates in favor of mortgage and against all other liens.—*Englund v. Lewis*, 25 Cal. 337, 354.

39. Void sale—Title not passed by.—Purchaser at sale on execution under void judgment finds himself without title.—*Sullivan v. Mier*, 67 Cal. 264, 266, 7 Pac. 691. See *Emeric v. Alvarado*, 64 Cal. 529, 590, 2 Pac. 418.

§ 695. IF PURCHASER REFUSES TO PAY PURCHASE-MONEY, WHAT PROCEEDINGS. If a purchaser refuse to pay the amount bid by him for property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss be occasioned thereby, the officer may recover the amount of such loss, with costs, from the bidder so refusing, in any court of competent jurisdiction.

History: Enacted March 11, 1872, re-enactment of §224 Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 323.

PROCEEDINGS WHERE PURCHASER REFUSES TO PAY.

1. Action to recover purchase-money—Tender of certificate of sale is not required.
- 2, 3. Check given for purchase-price—Action by equitable assignee.
4. Same—Plea of statute of limitations is immaterial, when.
5. Complaint—In action against defaulting bidder.
6. Misrepresentations—By judgment-creditor.
7. Payment of amount bid—Question of section.
8. Right to set-off by purchaser at execution-sale—Of indebtedness of judgment-debtor.

1. Action to recover purchase-money—Tender of certificate of sale is not required as basis of action to recover purchase-money.—*Harvey v. Fisk*, 9 Cal. 93, 94. See *People ex rel. Kohler v. Hayes*, 5 Cal. 66; *Williams v. Smith*, 6 Cal. 91.

2. Check given for purchase-price—Action by equitable assignee.—Purchaser at execution-sale who pays part in cash and remainder by check, and who thereupon receives certificate of sale from officer, will not be permitted to contend that statute furnishes exclusive rule for execution-sales, in that every sale must be for cash, whereas such sale was made at least in part, upon credit, as by act of purchaser officer was induced to accept check, and issued and re-

corded regular certificate of sale and thereby made himself accountable for full amount of purchaser's bid. Under such circumstances, purchaser can not say that there is no liability upon his part to pay sum covered by his check. Besides, his liability in such case is not merely statutory, but is common-law liability arising out of express promise to pay, based upon good and valuable consideration.—*Meherin v. Saunders*, 131 Cal. 681, 688, 63 Pac. 1084, sub nom. *Meherin v. Ambrose*, 54 L. R. A. 272.

3. Assignee of insolvent debtor after having brought action against officer for full amount of purchase-price bid on execution-sale of property belonging to insolvent prior to insolvency, and amount of which bid comprises portion of assets in insolvency, can not be regarded in law as equitable assignee of check given officer, as such assignee may either ratify constable's act and take check given for balance of purchase-money, or he may repudiate check and hold officer liable for money received at sale, but can not pursue two such remedies which are absolutely inconsistent with each other (dis. op.).—*Meherin v. Saunders*, 131 Cal. 681, 697, 699, 700, 63 Pac. 1084, sub nom. *Meherin v. Ambrose*, 54 L. R. A. 272. See *Galpin v. Lamb*, 29 Ohio St. 529; *Adams v. Adams*, 4 Watts (Pa.) 160.

4. Same—Plea of statute of limitations is immaterial when plaintiff maintains action as equitable assignee of check given officer on execution-sale, or as real prop-

erty in interest, because of default of his trustee in suing thereon, and where action was commenced within four years from date of check (McFarland, Garoutte, and Harrison, J. J., dissenting).—*Meherin v. Saunders*, 131 Cal. 681, 691, 63 Pac. 1084, sub nom. *Meherin v. Ambrose*, 54 L. R. A. 272.

5. **Complaint**—In action against defaulting bidder is not required to aver in specific terms that any "loss was occasioned thereby" in language of statute where facts averred, showing amounts bid at sale, show loss in difference between such amounts.—*Johns v. Trick*, 22 Cal. 511, 512.

6. **Misrepresentations** — By judgment-creditor.—Where in action to recover loss arising from refusal of defendant to pay for certain property purchased by him at sheriff's sale, answer alleges that defendant was induced to purchase through misrepresentations of judgment-creditor, real party in interest, sheriff being only nominal party, such purchaser should be relieved from contract of purchase where he applied to judgment-creditor for information, and act-

ing upon that information was misled to his prejudice, and in such case actual party in interest is estopped from claiming any advantage resulting from his misrepresentations of facts, whether wilfully or ignorantly made.—*Webster v. Haworth*, 8 Cal. 21, 26.

7. **Payment of amount bid—Question of fact**.—Whether purchaser at execution-sale paid amount of his bid or not, is question to be decided upon evidence apart from return of sale of constable, where purchaser is not party to action in which execution issued and is neither bound by return nor protected by it.—*Meherin v. Saunders*, 131 Cal. 681, 688, 63 Pac. 1084, sub nom. *Meherin v. Ambrose*, 54 L. R. A. 272.

8. **Right of set-off by purchaser at execution-sale**—Of indebtedness of judgment-debtor to purchaser, as to, see *Meherin v. Saunders*, 131 Cal. 681, 694, 63 Pac. 1084, sub nom. *Meherin v. Ambrose*, 54 L. R. A. 272; and see also distinction of right of set-off under circumstances of the case in dissenting opinions.

§ 696. OFFICER MAY REFUSE SUCH PURCHASER'S BID AFTER.

When a purchaser refuses to pay, the officer may, in his discretion, thereafter reject any subsequent bid of such person.

History: Enacted March 11, 1872, re-enactment of § 225 Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 323.

As to proceedings where purchaser refuses to pay amount bid, see, ante, § 695 and note.

§ 697. **THESE TWO SECTIONS NOT TO MAKE OFFICER LIABLE BEYOND A CERTAIN AMOUNT.** The two preceding sections must not be construed to make the officer liable for any more than the amount bid by the second or subsequent purchaser, and the amount collected from the purchaser refusing to pay.

History: Enacted March 11, 1872, re-enactment of § 226 Practice Act.

As to liability of officer in general, see, ante, §§ 695, 696 and notes.

§ 698. **PERSONAL PROPERTY, NOT CAPABLE OF MANUAL DELIVERY, HOW DELIVERED TO PURCHASER.** When the purchaser of any personal property capable of manual delivery pays the purchase-money, the officer making the sale must deliver to the purchaser the property, and, if desired, execute and deliver to him a certificate of the sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied.

History: Enacted March 11, 1872, re-enactment of § 227 Practice Act.

PERSONAL PROPERTY NOT CAPABLE OF MANUAL DELIVERY.

1. Commissioner in foreclosure—Substitute for sheriff.
2. Fifty tons of chrome ore—Delivery not required.

3. **Fraudulent transfers**—As to whom rule applicable.

As to interest of seller under conditional contract whereby he retains the title until purchase-price paid being a leviable interest, see, ante, § 688, note par. 7.

1. Commissioner in foreclosure—Substitute for sheriff.—Commissioner appointed to sell personal property in foreclosure of chattel mortgage thereon, is simply substitute for sheriff, and must make sale in like manner as sheriff would be required to do. Property being capable of manual delivery must be taken into possession and delivered to purchaser upon sale.—*Pacific I. Co. v. Ross*, 131 Cal. 8, 11, 63 Pac. 67.

2. Fifty tons of chrome ore—Delivery not required.—The above section does not require the manual delivery of fifty tons of chrome ore, the same being incapable of manual delivery.—*Dreisbach v. Braden*, 40 Cal. App. 407, 181 Pac. 262.

3. Fraudulent transfers—As to whom rule applicable.—Rule stated in section 3440 Civil Code relating to fraudulent transfers and necessity for actual and continued change of possession upon sales alleged to be valid as against creditors, etc., although it applies to execution-creditor where he purchases at execution-sale, does not apply to purchaser who is stranger to suit; and presumption, where stranger to writ purchases and pays for property at execution-sale and does not remove it from control of defendant, is not unfavorable to such purchaser.—*Matteucci v. Whelan*, 123 Cal. 312, 315, 69 Am. St. Rep. 60, 55 Pac. 990.

§ 699. PERSONAL PROPERTY NOT CAPABLE OF MANUAL DELIVERY, HOW SOLD AND DELIVERED. When the purchaser of any personal property not capable of manual delivery pays the purchase-money, the officer making the sale must execute and deliver to the purchaser a certificate of sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied.

History: Enacted March 11, 1872, re-enactment of § 228 Practice Act.

As to execution upon property not capable of manual delivery, see, ante, § 688 and note.

As to fifty tons chrome ore not being capable of manual delivery, see, ante, § 698, note par. 2.

As to personality not capable of manual delivery, attachment of, see, ante, § 542, subd. 3 and note; also § 688 and note.

As to possession of chattels sold on execution, see note 15 Am. Dec. 671, 672.

§ 700. REAL PROPERTY, SALE OF. TITLE OF PURCHASER. Upon a sale of real property, the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto on the date of the levy of the execution thereon, where such judgment is not a lien upon such property; if the judgment is a lien upon the real property the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor on or at any time after the day such judgment became a lien on such property;

[In case of attachment, substitution of purchaser to rights, etc., of judgment creditor.] And in case property, real or personal, has been attached in the action, the purchaser is substituted to and acquires all the right, title, interest and claim of the judgment debtor on or at any time after the day the attachment was levied upon such property.

History: Enacted March 11, 1872, re-enactment with addition of § 229 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 156, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 684, Kerr's Stats. and Amdts. 1906-7, p. 458.

REAL PROPERTY SOLD ON EXECUTION —TITLE OF PURCHASER.

1. Construction of section—As to purpose
—To what sales applicable.
2. Same—Corresponding section of Practice Act.
3. Same—Substitution of purchaser.

4. Certificate of sale—Equitable title vested by.
5. Continued possession of land by judgment-debtor.
6. Creditor purchasing at execution-sale—Acquired legal title.
7. Deed—As evidence of title.

8. Effect of clause concerning leasehold interests.
- 9, 12. Fire insurance policy—Sale as extinguishing interest.
13. Foreclosure—sale of interest of option-holder—Grantors of option not made parties—Deed does not pass title.
14. Function of order of sale.
15. Interest of purchaser etc.—Fraudulent judgment of redemption.
16. Motion to set aside certificates of sales—And deeds executed to defendants.
17. Purchaser at foreclosure sale—Interest acquired by.
- 18-25. Purchaser's title—As to nature of.
26. Same—Action to quiet title—Previous suit and judgment no bar, when.
27. Same—Deed not necessary to title.
28. Relation—Deed takes effect by.
29. Right to redeem—Exists only by virtue of statute.
30. Sale of real property upon execution—Is conditional, when.
- 31, 32. Statute of limitations—Not applicable to stranger to title.
33. Stranger to judgment—Rights of.
34. Title acquired by plaintiff—At sale upon his own judgment.
35. Sheriff's deed—Does not transfer any after-acquired interest.
36. Same—Under foreclosure of mortgage.
37. Sheriff's certificate to purchaser—Evidence of equitable interest.
38. Same—Not required to be recorded.
39. "Real property" — Construction of phrase.
40. Title and interest acquired by purchaser—General rule.

1. Construction of section—As to purpose—To what sales applicable.—This section was intended to state effect of sale of any and all interests in real property and to declare in what cases it should be subject to redemption. It applies alike to sales made to enforce lien of judgment and to sales of chattels real enforcing liens created by levy of execution. It has no relation to or effect on question when lien begins, manner of its creation, or acts from which it arises.—*Summerville v. Stockton M. Co.*, 142 Cal. 529, 540, 76 Pac. 243.

2. Same—Corresponding section of Practice Act held sufficiently comprehensive to include within its design sales of real estate under decrees of foreclosure of mortgages.—*Kent v. Laffan*, 2 Cal. 595, 596.

3. Same—Substitution of purchaser.—Language of this section that upon sale of property "the purchaser is substituted to, and acquires all the right, title, interest and claim of judgment-debtor thereto," which is to say unequivocally that he acquires legal as well as equitable title, is subject only to qualifications: first, that (when not

leasehold of less than two years' unexpired term) "property shall be subject to redemption," that deed shall be subsequently given (see, post, § 703); and, second, that pending time for redemption possession shall remain with defendant (see, post, § 706); and such qualifications are not inconsistent with vesting title in owner.—*Pollard v. Harlow*, 138 Cal. 390, 391, 71 Pac. 454, 648. See *Robinson v. Thornton*, 102 Cal. 680, 34 Pac. 120.

4. Certificate of sale—Equitable title vested by.—Certificate of sale signed by sheriff is evidence of sale whereby entire equitable title is conditionally vested in purchaser, subject to be defeated by redemption; but if not so redeemed, certificate is evidence of purchaser's right to deed which shall vest in him legal title which remained in judgment-debtor.—*Footman v. Wallace*, 75 Cal. 552, 556, 17 Pac. 680.

5. Continued possession of land by judgment-debtor is not any more incompatible with existence of legal title in another than any ordinary case of tenant and landlord.—*Pollard v. Harlow*, 138 Cal. 390, 393, 71 Pac. 454, 648.

6. Creditor purchasing at execution-sale—Acquires legal title.—A creditor at execution-sale who bids in the property and receives a sheriff's certificate therefor acquires not merely an equitable interest in the land, but the legal title, and could thereby maintain an action by cross-complaint in a partition suit against the debtor's vendee.—*Wangenham v. Garner*, 42 Cal. App. 332, 183 Pac. 670.

7. Deed—As evidence of title.—Execution of deed at sale gives to purchaser no new title to land purchased by him, but is simply evidence that his title has become absolute. Upon sale he acquires all right, title, interest, and claim of judgment-debtors thereto, subject to be defeated by redemption within six months, and to right of judgment-debtors to remain in possession of land until execution of sheriff's deed; and all that remains in judgment-debtors is right of redemption to retain possession of land until expiration of time therefor.—*Robinson v. Thornton*, 102 Cal. 675, 680, 34 Pac. 120; *Duff v. Randall*, 116 Cal. 226, 230, 58 Am. St. Rep. 158, 48 Pac. 66; *Pollard v. Harlow*, 138 Cal. 390, 392, 71 Pac. 454, 648.

As to deed taking effect by relation, see par. 28, this note.

8. Effect of clause concerning leasehold interests with respect to its bearing on meaning of phrase "real property" is merely to show that for purposes of this section words are used in sense broader than their common-law meaning and include chattels real as well as freehold estates. Without that clause, section would be held to apply only to estates of inheritance and estates for life, or, by common-law classification, freehold estates.—*Summerville v. Stockton M. Co.*, 142 Cal. 529, 540, 76 Pac. 243. See *Ex parte Wilson*, 7 Hill (N. Y.) 150; *People*

v. Westervelt, 17 Wend. (N. Y.) 674, 675; Westervelt v. People, 20 Wend. (N. Y.) 416, 417.

9. **Fire insurance policy—Sale as extinguishing interest.**—Sale to the plaintiff in foreclosure extinguishes mortgage indebtedness and all interest had in fire insurance policy given upon buildings "as further security for said indebtedness."—*Reynolds v. London & L. F. I. Co.*, 128 Cal. 16, 21, 79 Am. St. Rep. 17, 60 Pac. 467.

10. After mortgagee has changed his position from creditor to purchaser, he may, in latter capacity, procure policy on buildings and thus insure his interest in property itself. But whatever interest he has in old policy ceases with extinguishment of indebtedness upon foreclosure sale and purchase.—*Reynolds v. London & L. F. I. Co.*, 128 Cal. 16, 22, 79 Am. St. Rep. 17, 60 Pac. 467.

11. Mortgagee receiving fire insurance policy from mortgageor as further security for indebtedness is not party insured, and his interest in buildings mortgaged is not insured; interest in property which is insured is that of mortgageor, and it is only indebtedness of mortgageor to mortgagee which gives latter any interest in policy.—*Reynolds v. London & L. F. I. Co.*, 128 Cal. 16, 21, 79 Am. St. Rep. 17, 60 Pac. 467.

12. Insurance company is not legally liable to mortgagee in action upon fire insurance policy where policy is given as security for indebtedness from mortgageor to mortgagee, and where property insured was destroyed by fire after decree of sale on foreclosure where mortgagee became purchaser, although property was destroyed by fire before expiration of period of redemption.—*Reynolds v. London & L. F. I. Co.*, 128 Cal. 16, 18, 79 Am. St. Rep. 17, 60 Pac. 467.

13. **Foreclosure-sale of interest of option-holder—Grantors of option not made parties—Deed does not pass title.**—In a case in which an option to purchase a mine was given by A to B and B in working the mine incurred certain debts in connection with such work of mining the claim for which the mining claim was legally subject to the liens against the owners as well as against the optionee but in a foreclosure of the liens the action was brought against B alone on the theory that A's interest was simply incidental or a subordinate claim in the premises and accordingly prayed, and the prayer was granted, for a decree ordering the foreclosure of the liens against the interest of B only in the property. The sheriff's deed purporting to be made pursuant to the terms of the decree, while broad in its terms, is evidence against B only and not against A. The sheriff's deed could not convey more than directed by the decree, and therefor conveyed to the purchaser only the right, title, and interest of the judgment-debtor B, under the provisions of the above section.—*Anthony v. C. C. P.*—113

Janssen, 183 Cal. 329, 191 Pac. 538, applying the doctrine in *Donahue v. McNulty*, 24 Cal. 411, 85 Am. Dec. 78; *Foorman v. Wallace*, 75 Cal. 552, 17 Pac. 680.

14. **Function of order of sale to enforce judgment** is clearly efficacious to accomplish that object, whether judgment gives vendor's lien or general lien prior to another.—*Tilley v. Bonney*, 123 Cal. 118, 125, 55 Pac. 798.

15. **Interest of purchaser, etc.—Fraudulent judgment of redemption.**—Interest of purchaser or redemptioner, although subject to rights under valid judgment to junior redemptioner, who holds valid judgment as result of contested litigation, or confessed for purpose of creating right to redeem, can not be destroyed by void judgment obtained by fraud by junior redemptioner without knowledge or consent of debtor.—*Bennett v. Wilson*, 122 Cal. 509, 515, 68 Am. St. Rep. 61, 55 Pac. 390.

As to title acquired by purchaser at execution-sale of real property, see pars. 17-27, this note.

16. **Motion to set aside certificates of sales—And deeds executed to defendants in certain other actions**, on grounds that judgment therein had been modified by appellate court, is properly denied where plaintiffs issued execution on their judgment, purchased property, and caused their judgments to be satisfied. Where judgments remained so satisfied plaintiffs can not, by motion supplemental to satisfaction and extinguishment of judgments, determine relative rights of claimants to property in summary manner by motion.—*Bonney v. Tilley*, 123 Cal. 126, 129, 55 Pac. 801.

17. **Purchaser at foreclosure sale—Interest acquired by.**—Purchaser at sale under judgment rendered in foreclosure suit acquires same interest in property sold as does purchaser in property sold under ordinary money judgment. Upon sale, purchaser acquires all right, title, interest and claim of debtor thereto, and only right to redeem from sale is left in mortgageor.—*Duff v. Randall*, 116 Cal. 226, 230, 58 Am. St. Rep. 158, 48 Pac. 66. See *Reynolds v. London & L. F. I. Co.*, 128 Cal. 16, 20, 79 Am. St. Rep. 17, 60 Pac. 467.

18. **Purchaser's title—As to nature of.**—The purchaser at an execution sale takes his title subject to such liens, easements and equities as it was subject to in the hands of the defendant in execution, unless he can show that he is a purchaser in good faith, and without any notice, actual or constructive, of the existence of such lien, easement or equity.—*Koch v. Wilcoxon*, 30 Cal. App. 517, 158 Pac. 1048.

As to interest of purchaser, and effect of fraudulent judgment of redemption, see par. 15, this note.

19. A purchaser at an execution-sale, in order to maintain his title as against the claim of a third person, must have pur-

chased without any notice that the title was other than the record showed it to be.—*Koch v. Wilcoxon*, 30 Cal. App. 517, 158 Pac. 1048.

20. Notice which will charge the purchaser necessarily is any legal notice which he may have received of the defect in the title prior to the occurrence of the sale and the payment of his money.—*Koch v. Wilcoxon*, 30 Cal. App. 517, 158 Pac. 1048.

21. One purchasing real property at an execution-sale to enforce a judgment the nature of the title acquired by such purchaser is endowed with that of absolute title from the date on which he received his certificate of purchase, except that within the ensuing period of twelve months thereafter the execution-debtor, or other parties specified in the code, may redeem the property on compliance with the provisions of section 702, post.—*Leaver v. Smith*, — Cal. App. —, 190 Pac. 1050.

22. If the judgment-debtor has a good title, the purchaser gets it; if a partial title, he gets that; or if no title, he gets nothing. He assumes the risk of defects in the debtor's title; and this is true whether he purchased with or without notice.—*Buxton v. Pennsylvania Lumber Co.*, 221 Fed. 718.

23. A purchaser is bound to examine, or cause to be examined, all the documents of record constituting a part of the chain of title of those from whom he buys. The rule applies with special force to purchasers at execution-sales, and to judgments, and to the proceedings under which such sales are made. Of such equities and irregularities as these disclose, the purchaser must be deemed to have had notice.—*Buxton v. Pennsylvania Lumber Co.*, 221 Fed. 718.

24. A purchaser from a purchaser under a decree void for want of jurisdiction is not a bona fide purchaser without notice. He is bound to know the want of jurisdiction. He is bound to know defects in papers showing his claim of title.—*Buxton v. Pennsylvania Lumber Co.*, 221 Fed. 718.

25. Parties attempting to enforce a void judgment may be responsible as trespassers. The purchaser at a sale by virtue of its authority finds himself without title and without redress.—*Buxton v. Pennsylvania Lumber Co.*, 221 Fed. 718.

26. Same—Action to quiet title—Previous suit and judgment no bar, when.—Previous suit and judgment against the purchaser will not be a bar to a subsequent action to quiet title in a case in which the first action was brought before the expiration of the one-year period provided by section 702, post, in which the right of redemption exists, and the second action to quiet title was not brought until after such period of exemption had expired and the plaintiff's rights became absolute without any limitation whatever.—*Leaver v. Smith*, — Cal. App. —, 190 Pac. 1050.

27. Same—Deed not necessary to title.—The issuance of a deed to a purchaser of real property at sale to enforce an execution on a judgment is not essential to the vesting of the title in the plaintiff, and such deed is not necessary and indispensable evidence to the title of the purchaser.—*Leaver v. Smith*, — Cal. App. —, 190 Pac. 1050, following doctrine in *Pollard v. Harlow*, 138 Cal. 390, 70 Pac. 454, 648, distinguishing *Knigh v. Fair*, 9 Cal. 117.

28. Relation—Deed takes effect by.—Transfer is not perfect until execution and delivery of sheriff's deed, but by doctrine of relation, deed, when executed, is to be deemed and taken as though executed at date when lien, of which it is sequence, originated.—*Foorman v. Wallace*, 75 Cal. 552, 556, 17 Pac. 680.

29. Right to redeem—Exists only by virtue of statute.—*Eldridge v. Wright*, 55 Cal. 531, 533. See *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 515.

As to fraudulent judgment of redemption, see par. 15, this note.

30. Sale of real property upon execution—Is conditional when it may be defeated by payment of certain sum by certain distinct parties within certain limited time. If not paid within time, right to conveyance becomes absolute without any further sale or other act to be performed by anybody.—*Page v. Rogers*, 31 Cal. 292, 301; *Robinson v. Thornton*, 102 Cal. 675, 680, 34 Pac. 120; *Duff v. Randall*, 116 Cal. 226, 230, 58 Am. St. Rep. 158, 48 Pac. 66; *Breedlove v. Norwich U. F. I. Soc.*, 124 Cal. 164, 166, 56 Pac. 770; *Reynolds v. London & L. F. I. Co.*, 128 Cal. 16, 21, 79 Am. St. Rep. 17, 60 Pac. 467.

31. Statute of limitations—Not applicable to stranger to title.—Rule that statute of limitations does not begin to run against judgment-debtor, or one claiming under him, until execution of sheriff's deed, has no application to stranger to judgment, or to title which is not derived from judgment-debtor.—*Robinson v. Thornton*, 102 Cal. 675, 684, 34 Pac. 120.

32. Same—Garoutte and McFarland, J. J., dissenting, holding that grantee of attachment-debtor may not enter under his grant and then successfully plead statute of limitations as against holder of sheriff's deed, which is, in due course, procured by virtue of attachment suit.—See *Jefferson v. Wendt*, 51 Cal. 573; *Leonard v. Flynn*, 89 Cal. 535, 536, 23 Am. St. Rep. 500, 26 Pac. 1097; *Pratt v. Pratt*, 96 U. S. 704, 710, 24 L. ed. 805.

33. Stranger to judgment—Rights of.—As against judgment-debtor, production of judgment, execution, and sheriff's deed is prima facie evidence of plaintiff's right to recover; but if action is against stranger to judgment, plaintiff must also show that judgment-debtor had title or possession of land at time of lien or of sale. This prior possession will then be prima facie evidence

of right to recover in ejectment as against mere possession of defendant, which will be deemed to have been taken subsequent to sale.—*Robinson v. Thornton*, 102 Cal. 675, 681, 34 Pac. 120.

34. Title acquired by plaintiff—At sale upon his own judgment is affected by any defect in proceedings by virtue of which judgment is reversed.—*Purser v. Cady*, 120 Cal. 214, 217, 52 Pac. 489.

As to title of purchaser generally, see pars. 17-26, this note.

35. Sheriff's deed—Does not transfer any after-acquired interest in land, and judgment-debtor is not estopped from showing in ejectment suit against him that subsequent to execution of sale he had acquired different title from that which was sold under judgment.—*Emerson v. Sansome*, 41 Cal. 552; *Robinson v. Thornton*, 102 Cal. 675, 682, 34 Pac. 120.

36. Same—Under foreclosure of mortgage.—Under such deed the purchaser acquires all the right, title, and interest, of the judgment-debtor in the property sold, as of the date of the mortgage, inasmuch as, by the doctrine of relation, it is deemed and taken as though executed upon the date when the lien of which it is the sequence originated.—*Freelon v. Adrian*, 161 Cal. 18, 118 Pac. 220.

37. Sheriff's certificate to purchaser—Evidence of equitable interest which pur-

chaser has in land, and is "instrument" whereby an interest or title is created within meaning of section 1107 of Civil Code.—*Foorman v. Wallace*, 75 Cal. 552, 556, 17 Pac. 680.

See *Kerr's Cyc. Civil Code*, § 1107 and note.

38. Same—Not required to be recorded nor to be filed and there is nothing to prevent the sheriff correcting a clerical error in the certificate filed by the filing of a new certificate.—*Bristol v. Hershey*, 7 Cal. App. 738, 741, 95 Pac. 1040.

39. "Real property" — Construction of phrase.—This section can not be considered as legislative construction of phrase "real property," applicable to and fixing meaning of same phrase where used in section 671, ante, providing for judgment-liens.—*Summerville v. Stockton M. Co.*, 142 Cal. 529, 539, 76 Pac. 243.

40. Title and interest acquired by purchaser—General rule.—The purchaser of realty at foreclosure sale acquires all right, title and interest of mortgageor.—*Leet v. Armbruster*, 143 Cal. 663, 666, 77 Pac. 653. See *Robinson v. Thornton*, 102 Cal. 675, 34 Pac. 120; *Duff v. Randall*, 116 Cal. 226, 58 Am. St. Rep. 158, 48 Pac. 66; *Breedlove v. Norwich I. Co.*, 124 Cal. 164, 56 Pac. 770; *Reynolds v. London & L. F. I. Co.*, 128 Cal. 16, 79 Am. St. Rep. 17, 60 Pac. 467; *Pollard v. Harlow*, 138 Cal. 390, 71 Pac. 454, 648.

§ 700a. SALE ABSOLUTE, WHEN; WHEN SUBJECT TO REDEMPTION.

Sales of personal property, and of real property, when the estate therein is less than a leasehold of two years' unexpired term, are absolute. In all other cases the property is subject to redemption, as provided in this chapter.

The officer must give to the purchaser a certificate of sale, and file a duplicate thereof for record in the office of the county recorder of the county, which certificate must state the date of the judgment under which the sale was made and the names of the parties thereto,

[What certificate must show.] And contain:

1. A particular description of the real property sold;
2. The price bid for each distinct lot or parcel;
3. The whole price paid;
4. If the property is subject to redemption, the certificate must so declare, and if the redemption can be affected only in a particular kind of money or currency, that fact must be stated.

History: Enactment approved March 19, 1907, Stats. and Amdts. 1907, p. 684, *Kerr's Stats. and Amdts.* 1906-7, p. 458.

1. Foreclosure of mechanics' lien—Power of sheriff under decree.—In a case in which the worker of a mine, who also is the holder of an option to purchase, incurs expenses in operating the mine which become a lien upon the mine, covering both the interest and the interest of the owner, and the mine is thereafter sold on the foreclosure of such lien the sheriff is without

legal power at such time to execute a conveyance of the property, or to do anything in connection with the sale, except to execute to the purchaser a certificate of sale as provided by the above section; the mine being real estate, and the sale being made subject to redemption under the provisions of the above section and sections 701 and 702, post.—*Anthony v. Janssen*, 183 Cal. 329, 191 Pac. 538.

§ 701. REAL PROPERTY SO SOLD, BY WHOM IT MAY BE REDEEMED.

Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided, by the following persons, or their successors in interest:

1. **The judgment debtor, or his successor in interest**, in the whole or any part of the property;

2. **A creditor having a lien by judgment or mortgage** on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are, in this chapter, termed redemptioners.

History: Enacted March 11, 1872, re-enactment of § 230 Practice Act.

REDEMPTION—WHO MAY REDEEM.

1. Amount of property redeemed—Inference as to.
2. Distinction between right of mortgagee before decree of foreclosure and statutory right to redeem.
3. Deed of trust—Foreclosure—No right of redemption.
4. Effect attending redemption—Upon what depends.
5. Filing duplicate certificate of sale.
6. Interest or estate vested in purchaser or redemptioner—Can not be superseded by lien of void judgment.
7. Interest of purchaser at execution-sale—May be seized and sold before expiration of time of redemption.
8. Judgment not a lien—Effect of.
9. Judgment-lien—Does not attach to property conveyed before filed.
10. Mortgage—Foreclosure suit—Rights of persons interested.
11. Posthumous judgment-lien.
12. Reason for distinction—Between judgment-debtor and redemptioner.
13. Redemption by attorney—Right of redemptioner.
14. Redemptioners—Definition of.
- 15, 16. Same—Judgment-debtor is not redemptioner.
17. Same—Judgment-creditor is not redemptioner; when.
- 18, 19. Same—Second subdivision of section defines class.
20. Redemption of city lands—Commissioners to fund debt—Not authorized to effect.
21. Sale under prior mortgage—Bondholder under trust deed may redeem.
22. Slander of title—Action is maintainable.
23. Successors in interest—Stand in place of judgment-debtors.
24. Same—Defendant in execution may redeem.
25. Same—Homestead-right—Wife as successor in interest.

26. Same—Purchaser of real estate at execution-sale.

27. Same—Successor in interest redeems in that capacity.

28. Same—Tenant in common acquires interest, of whom.

29. Title—To portion of tract—As affecting right to redeem.

30. Same—Rights of successive lienholders.

As to whether purchaser or mortgagee from the original owner may after a sale under a prior mortgage and during the redemption period, be a redemptioner, see note 29 L. R. A. (N. S.) 508.

1. Amount of property redeemed—Inference as to.—Inference is, when redemption is effected under provisions of this section and section 700, ante, that redemption is made of whole property sold, and this inference is sustained by provisions of sections 702, 703, post.—*Eldridge v. Wright*, 55 Cal. 531, 534.

2. Distinction between right of mortgagee before decree of foreclosure and statutory right to redeem from judgment. see *Eldridge v. Wright*, 55 Cal. 535, 536 and cases cited.

3. Deed of trust—Foreclosure—No right of redemption.—In those cases in which security upon land is given in the form of a trust deed instead of a mortgage no suit is required for the sale of property, and there is no right of redemption; if the property is sold for no more than sufficient to satisfy the claim of beneficiary, then all subsequent liens fall; subsequent lienholders have a right to purchase the land under the trust deed for their own protection, but beyond that they can not go.—*City Lumber Co. v. Brown*, — Cal. App. —, 189 Pac. 330.

4. Effect attending redemption—Upon what depends.—The effect attending redemption of property sold subject to redemption depends upon character of person making redemption. If made by "redemptioner" as defined in second subdivision of this section, and there be no further re-

demption within statutory period, redemptioner is entitled to deed from sheriff conveying to him interest of judgment-debtor therein; but if made by judgment-debtor or his successor in interest, effect of sale is terminated, which fact is made to appear on record by certificate of redemption and note thereof on margin of certificate of sale.—*Calkins v. Steinbach*, 66 Cal. 117, 121, 4 Pac. 1103.

5. **Filing duplicate certificate of sale** in mode prescribed by statute imparts constructive notice to subsequent purchasers of estate acquired under it.—*Page v. Rogers*, 31 Cal. 293, 309.

6. **Interest or estate vested in purchaser or redemptioner—Can not be superseded by lien of void judgment**, which would prejudice his pre-existing right.—*Bennett v. Wilson*, 122 Cal. 509, 514, 68 Am. St. Rep. 61, 55 Pac. 390.

7. **Interest of purchaser at execution-sale—May be seized and sold before expiration of time of redemption**.—He has same quality of estate before as after time for redemption expires, only in former case title has not become consummated and is subject to be defeated by redemption. His interest is of an equitable estate in land in both cases, and not merely lien before period for redemption expires.—*Page v. Rogers*, 31 Cal. 293, 305.

8. **Judgment not a lien — Effect of.**—A judgment which does not constitute lien upon land does not entitle to redemption.—*White v. Costigan*, 6 Cal. Unrep. 641, 63 Pac. 1075, 1077.

9. **Judgment-lien—Does not attach to property conveyed before filed.**—In a case in which A recovers a judgment against B, who at the time is the owner of real property, but before final rendition of the judgment so as to give A a lien upon such real property B conveys the property to C, on the sale of such property under the foreclosure of a prior mortgage, under the provisions of subdivision 2 of the above section A will not be entitled to redeem from such foreclosure sale where the record owner at the time of the final rendition of A's judgment was not a party to the action, but was an innocent purchaser in good faith, notwithstanding the fact that the judgment-debtor may have conveyed the land to such purchaser for the purpose of defrauding his creditors.—*Fly v. Cline*, — Cal. App. —, 193 Pac. 615.

10. **Mortgage—Foreclosure suit—Rights of persons interested.**—Where the security for the repayment of money is in the form of a mortgage on land, and the obligation is not met, enforcement of the mortgage must be by foreclosure and sale in order to subject the property to the satisfaction of the debt, and subsequent lien-holders have an opportunity to join in the action and to promote, if possible, a sale for a sufficient amount to satisfy their own as well as the prior claim, and they are also entitled to the right of redemption under

the provisions of the above section.—*City Lumber Co. v. Brown*, — Cal. App. —, 189 Pac. 830, following the doctrine in *Whitney v. Higgins*, 10 Cal. 547, 70 Am. Dec. 748.

11. **Posthumous judgment-lien.**—Provision in section 1505, post, relating to judgment-creditor having judgment rendered against testator or intestate in his lifetime, and providing for redemption of real estate of decedent in like manner and with like effect as if judgment-debtor were still living, read in connection with definition of redemption as contained in subdivision 2 of this section, is recognition of existence of posthumous judgment-lien. Concurrent provisions of general practice and of probate procedure leave no doubt of intention of code not to extinguish lien upon death of debtor.—*Morton v. Adams*, 124 Cal. 229, 231, 71 Am. St. Rep. 53, 56 Pac. 1038.

12. **Reason for distinction — Between judgment-debtor and redemptioner** is that if latter were permitted to redeem, without paying prior lien held by purchaser, title would pass to redemptioner, and lien of purchaser would be defeated. But if judgment-debtor redeem, he is restored to his estate, and lien held by purchaser will be available.—*Sharp v. Miller*, 47 Cal. 82, 85.

13. **Redemption by attorney—Right of redemptioner.**—Where real property of judgment-debtor is sold under execution, and before time for redemption has elapsed, his attorney takes assignment of certificate of sale from purchaser, consideration being the amount required for redemption—a small fraction of the value of the property—held, that where attorney paid his own money for such assignment, though without consent of his client, he holds title as involuntary trustee for his client, with at most a lien for sum expended in procuring transfer, and that another judgment-creditor of client can not subject such equitable estate in land to payment of his judgment—right of client to enforce his equity against his trustee being purely personal right which he may waive if he chooses so to do.—*Fisher v. McInerney*, 137 Cal. 28, 36, 92 Am. St. Rep. 68, 69 Pac. 622 907. (Beatty, C. J., dissenting, holding that interest in land held by attorney for client as such voluntary trustee should not, at option of client, be placed beyond reach of another judgment-creditor.)

14. **Redemptioners—Definition of.**—Persons mentioned in second subdivision of statute are termed redemptioners, and if property sold be redeemed by such redemptioner another redemptioner may within sixty days after redemption again redeem it from last redemptioner on making payments prescribed by section 703, post.—*Calkins v. Steinbach*, 66 Cal. 117, 120, 4 Pac. 1103.

15. **Same—Judgment-debtor is not redemptioner** within meaning of second subdivision of this section.—*Yoakum v. Bower*, 51 Cal. 539, 541.

16. Judgment-debtors and their successors in interest do not come within class termed "redemptioners."—*Phillips v. Hagart*, 113 Cal. 552, 555, 54 Am. St. Rep. 369, 45 Pac. 843.

17. Same—Judgment-creditor is not redemptioner when judgment acquired is not lien upon land.—*Bagley v. Ward*, 27 Cal. 370, 372; *Perkins v. Center*, 35 Cal. 713, 722.

18. Same—Second subdivision of section defines class of persons who have right to exercise privilege of redemption. It does not limit or define extent of right. Limitations upon right are found in other provisions of statute.—*Eldridge v. Wright*, 55 Cal. 531, 535.

19. As to redemption, debtors, judgment-creditors, etc., under act of April 29, 1851, see *People ex rel. Thorne v. Hays*, 4 Cal. 127, 141, 150.

20. Redemption of city lands—Commissioners to fund debt—Not authorized to effect.—Redemption of lands of city of San Francisco sold under execution, commissioners of funded debt not authorized to effect, etc.—See *People ex rel. Thorne v. Hays*, 4 Cal. 127, 141, 148.

21. Sale under prior mortgage—Bondholder under trust deed may redeem.—Under the provisions of the above section a holder of bonds secured by a trust deed upon the property of a judgment-debtor which is sold on foreclosure of a prior mortgage is a creditor of the owner of the property thus sold at foreclosure sale, and accordingly is entitled to a lien upon the property by virtue of the deed of trust as security for the payment of the bonds held by him, and consequently in a position as a lien-creditor to redeem the property.—*Mitchell v. Price*, — Cal. App., 196 Pac. 82, following the doctrine in *Frink v. Murphy*, 21 Cal. 108, 81 Am. Dec. 149.

22. Slander of title—Action for is maintainable by one who possesses an estate or interest only, in real or personal property, and to entitle plaintiff to status of redemptioner in such action it should be alleged in complaint that he was mortgagee or judgment-debtor or successor in interest of judgment-debtor, or creditor having lien by judgment or mortgage on property sold.—*Edwards v. Burris*, 60 Cal. 157, 160.

23. Successors in interest—Stand in place of judgment-debtors, and when statute uses term "judgment-debtors," as contradistinguished from "redemptioners," words should be construed broadly enough to include successors in interest of judgment-debtor.—*Phillips v. Hagart*, 113 Cal. 552, 555, 54 Am. St. Rep. 369, 45 Pac. 843.

24. Same—Defendant in execution may redeem from execution sale notwithstanding he has conveyed to another property sold under execution.—*Yoakum v. Bower*, 51 Cal. 539, 540.

25. Same—Homestead-right—Wife as successor in interest.—Filing of declaration of homestead gives to wife interest in premises of which she can not be divested by any act of her husband alone or by any act taken against him alone. By declaration of homestead some portion of his title passes to wife, and she has right of redemption as his successor in interest.—*Watts v. Gallagher*, 97 Cal. 51, 52, 37 Pac. 626. See *Hefner v. Urton*, 71 Cal. 479, 480, 12 Pac. 486.

26. Same—Purchaser of real estate at execution-sale, whatever be nature of purchaser's title, whether legal or equitable, is "successor in interest" of judgment-debtor within meaning of term as used in this section of code.—*Pollard v. Harlow*, 138 Cal. 390, 393, 71 Pac. 454, 648.

27. Same—Successor in interest redeems in that capacity where he presents his evidence of title to commissioner, pays money required, and receives certificate.—*Pollard v. Harlow*, 138 Cal. 390, 393, 71 Pac. 454, 648.

28. Same—Tenant in common acquires interest of co-tenant and is entitled to redeem as successor in interest of such co-tenant. Upon his redemption, effect of sale is terminated and he thereupon acquires an equitable lien upon the interest of his co-tenant in lands for his proportion of money paid in effecting redemption; and he has his action to recover his proportion, and may obtain decree to effect that in default of such payment interests of co-tenant in lands be foreclosed.—*Calkins v. Steinbach*, 66 Cal. 117, 120, 4 Pac. 1103.

29. Title—To portion of tract—As affecting right to redeem.—Where the plaintiff obtains decree foreclosing lien upon block of land ordering whole block to be sold by sheriff, and in satisfaction of his lien therein purchases whole block at sheriff's sale under that order as property of judgment-debtor, and by virtue of such purchase demanded of sheriff a deed of whole block—under this state of facts, held that plaintiff will not be heard to object to redemption on ground that judgment-debtor never owned entire block; and held, further, that it was not valid objection to redemption of whole block by judgment-debtor that before such redemption he had sold part of said block.—*Southern Cal. L. Co. v. McDowell*, 105 Cal. 99, 101, 38 Pac. 627. See *Lorenzana v. Camarillo*, 45 Cal. 125; *Yoakum v. Bower*, 51 Cal. 539; *Eldridge v. Wright*, 55 Cal. 531, 543.

30. Same—Rights of successive lienholders.—Title of plaintiff which originates in levy of attachment older than that claimed by defendant must prevail against junior lien claimed by defendant, and, as successor in interest of judgment-debtor, party is entitled to redeem land conveyed to him upon execution-sale under this section, and defendant as judgment-creditor has also same right.—*Porter v. Pico*, 55 Cal. 165, 175.

§ 702. WHEN IT MAY BE REDEEMED, AND REDEMPTION MONEY.

The judgment debtor, or redemptioner, may redeem the property from the purchaser any time within twelve months after the sale on paying the purchaser the amount of his purchase, with one per cent per month thereon in addition. up to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase, and interest on such amount. And if the purchaser be also a creditor, having a prior lien to that of the redemptioner, other than the judgment under which said purchase was made, the amount of such lien with interest.

History: Enacted March 11, 1872, re-enactment of § 231 Practice Act as amended 1860; amendment approved February 15, 1876, Code Amdts. 1875-6, p. 96; March 27, 1895, Stats. and Amdts. 1895, p. 226; February 26, 1897, Stats. and Amdts. 1897, p. 41.

REDEMPTION—WHEN MAY BE MADE—REDEMPTION-MONEY.

1. Change in law—As to period of redemption—Operation of.
2. Same—Extension of time of redemption—Amendment of code.
3. Same—Judgment-debtor's right to redeem.
4. Same — Legislature, by subsequent amendment—Is powerless to diminish amount.
5. Same — Payment upon redemption — Effect of amendment of statute.
- 6, 7. Same—Purchaser at public sale is protected.
8. Computation of time of redemption.
9. Construction of section.
- 10-12. Judgment-debtor—Not redemptioner.
13. Legal title—During redemption period.
14. Lien for deficiency—As to generally.
15. Same—Injunction will issue to restrain sale.
- 16, 17. Mistake as to statute governing time of redemption — Fraudulent misrepresentation as to.
18. Obligation of contract—When not impaired.
19. Purchaser—As both creditor and purchaser—Prior lien.
20. Same—As member of partnership—Not redemptioner within meaning of section.
21. Sale by sheriff—Is regarded as sale by judgment-debtor.
22. Sale under execution—Judgment-creditor's right of redemption.
23. Same—Redemption limited as to time.
- 24, 25. Sheriff—Is agent of purchaser — For purpose of receiving payment.
26. Statutory right to redeem homestead —Vests in administrator or surviving wife.
1. Change in law—As to period of redemption—Operation of.—Amendment of this section passed in 1895 (Stats. 1895, p. 226), extending time for redemption from sales under execution to one year, has no

application to sales under foreclosure of mortgage executed prior to enactment of such amendment.—*Savings Bank v. Barrett*, 126 Cal. 413, 417, 58 Pac. 914. See *Barnitz v. Beverly*, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042.

2. Same—Extension of time of redemption—Amendment of code.—Where mortgage was made prior to amendment of this section extending period of redemption from six months to one year, mortgagee as purchaser is entitled to deed in time provided in statute before amendment, i. e., in six months from date of sale.—*Tuohy v. Moore*, 133 Cal. 516, 518, 65 Pac. 1107; *Malone v. Roy*, 134 Cal. 344, 345, 66 Pac. 313. See *Savings Bank v. Barrett*, 126 Cal. 413, 58 Pac. 914; *Benson v. Bunting*, 127 Cal. 532, 59 Pac. 991; *Haynes v. Tredway*, 133 Cal. 400, 403, 65 Pac. 892; *Barnitz v. Beverly*, 163 U. S. 118, 119, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042.

3. Same—Judgment-debtor's right to redemption is governed by law in effect when contract was made and judgment obtained, and not by law in force under subsequent amendment.—*Welsh v. Cross*, 146 Cal. 621, 623, 81 Pac. 229.

4. Same — Legislature, by subsequent amendment, is powerless to diminish amount which purchaser should receive as redemption from execution-sale. — *Thresher v. Atchison*, 117 Cal. 73, 76, 59 Am. St. Rep. 159, 48 Pac. 1020.

5. Same—Payment upon redemption—Effect of amendment of statute.—Where, at date of sale, section provided that redemption from sale might be made within six months by paying to purchaser "the amount of his purchase, with two per cent thereon in addition, up to time of redemption," with any taxes or assessment that he might have paid for his purchase, and before redemption amendment of section was passed (Stats. 1895, p. 226) whereby it was provided that redemption might be effected by paying amount of purchase, "with one per cent per month thereon in addition, up to time of redemption," with whatever taxes and assessments that might have been paid by purchaser; held, that

purchaser became vested with an interest in land, and with right of payment to him of amount of his purchase, with two per cent per month until time of such payment upon redemption.—*Thresher v. Atchison*, 117 Cal. 73, 74, 76, 59 Am. St. Rep. 159, 48 Pac. 1020.

6. **Same.—Purchaser at public sale is protected from any impairment of his title by subsequent legislation, for his title, whatever it may be, is fully governed by laws in force at time of his purchase.** So also redemption, its incidents and rights are governed by laws in force at time of sale.—*Leet v. Armbruster*, 143 Cal. 663, 667, 77 Pac. 653.

7. But such purchaser is subject to and his rights are governed by the laws in force at the time of his purchase at the foreclosure-sale, including the right of redemption therefrom and of its incidents and rights then existing, and the nature of the title acquired by such purchaser and his rights under his purchase depend wholly upon the provisions of such existing laws; the operation of the law then existing can in no sense be violative of the constitutional rights of the purchaser or deprive him of his rights without due process of law.—*Leet v. Armbruster*, 143 Cal. 663, 77 Pac. 653.

8. **Computation of time of redemption.**—Where execution-sale took place October 5, 1874, and sheriff's deed was executed on April 5, 1875, held that judgment-debtor had whole of fifth day of April to redeem, and that sheriff had power to execute deed only after period for redemption had passed, and that sheriff's deed executed before was void.—*Perham v. Kuper*, 61 Cal. 331, 332. See *Gross v. Fowler*, 21 Cal. 392; *Bernal v. Gleim*, 33 Cal. 668, 676; *Moore v. Martin*, 38 Cal. 428, 439; *Hall v. Yoell*, 45 Cal. 584, 588.

9. **Construction of section.**—Where incumbered realty is conveyed to a trustee to sell and apply the proceeds to the payment of the debt and expenses and then to apportion the residue among three different creditors, and the mortgage is foreclosed and the certificate of title is obtained by assignee of two of the three beneficiaries, the third can not have the trust restored after expiration of the time for redemption by offering to pay the full redemption price and the amount due the others. The right of redemption open to such beneficiaries was not an equitable right to be exercised at their pleasure, but the statutory right declared in this section.—*McNutt v. Nuevo Land Co.*, 167 Cal. 459, 140 Pac. 6.

10. **Judgment-debtor — Not redemptioner** in sense in which that term is employed in this section.—*Sharp v. Miller*, 47 Cal. 82, 85.

11. Where judgment-debtor redeems he is required to pay only purchase-money, with per cent prescribed in statute, together with taxes, etc. But if "redemption-er," or, in other words, creditor, holding subsequent lien on property, redeems,

he must also pay to purchaser any lien he may have prior to that of redemptioner other than that for which property was sold.—*Sharp v. Miller*, 47 Cal. 82, 85.

12. Judgment-debtor in redeeming property is not required to pay prior lien held by certain partnership of which purchaser at execution-sale was member.—*Campbell v. Oaks*, 68 Cal. 222, 225, 9 Pac. 77.

13. **Legal title — During redemption period.**—Legal title remains in judgment-debtor or mortgagee while time for redemption is running.—*Simpson v. Castle*, 52 Cal. 644, 649.

14. **Lien for deficiency.—As to generally.**—Prior to amendment of 1859, where real estate subject to judgment-lien was sold under execution on judgment, to judgment-creditor, for sum less than whole amount of judgment, he still continued to be a "creditor having a lien for the unsatisfied portion," and another judgment-debtor or redemptioner, with subsequent lien, could redeem without paying judgment; but as a result of decision in *McMillan v. Richards*, 9 Cal. 413, legislature modified rule established in that case by enacting that "after sale of any real estate, judgment under which sale was had shall cease to be a lien on such real estate." By amendment, clause excusing payment of judgment for deficiency, on redeeming, is equivalent to explicit declaration that during time for redemption unsatisfied portion of judgment is not lien on land sold under judgment.—*Simpson v. Castle*, 52 Cal. 644, 646, 649.

15. **Same.—Injunction will issue to restrain sale of property levied on execution on ground that sale and sheriff's deed in pursuance of it will cast cloud on plaintiff's title, where sale was threatened on judgment for deficiency.**—*Simpson v. Castle*, 52 Cal. 644, 649.

16. **Mistake as to statute governing time of redemption.—Fraudulent misrepresentation as to.**—In actions where defendant relies mainly upon fact that statutory period of redemption was allowed to expire before bill filed, but court found in this connection that before time had expired to redeem plaintiff was assured by defendant that he would not be urged, that statutory time to redeem would not be insisted upon, and that plaintiff believed and relied upon such assurances; held, under such circumstances, that purchaser is estopped to insist upon statutory period notwithstanding assurances were not in writing and were made without consideration, upon ground that debtor was lulled into false security.—*Benson v. Bunting*, 127 Cal. 532, 536, 78 Am. St. Rep. 81, 59 Pac. 991. See *Lucas v. Nichols*, 66 Ill. 41. See *Ind. Butt v. Butt*, 91 Ind. 305; *McMakin v. Schenck*, 98 Ind. 264. *Ky. Southard v. Pope*, 9 B. Mon. 261, 264; *Griffin v. Coffey*, 9 B. Mon. 452, 50 Am. Dec. 519; *Martin v. Martin*, 16 B. Mon. 8. *N. J. Combs v. Little*, 4 N. J. Eq. 310, 314, 40 Am. Dec. 207. *Tenn. Guinn v. Locke*, 1 Head 110.

17. Where in foreclosure of mortgage and sale thereon defendant represented to plaintiffs that they had a full year in which to redeem, whereas redemption should have been made within six months under statute as existing at time of sale, and where defendant's attorneys, as well as defendant, knowing that plaintiffs reposed full confidence in them, repeatedly informed plaintiffs that they had a full year in which to redeem; held, that no injustice would be done defendant in permitting plaintiffs afterwards to redeem upon supposed basis of twelve months' period for redemption, and that refusal of plaintiff's offer to redeem, made within that time, under circumstances operated as fraud upon plaintiffs and entitled them to relief in equity.—*Benson v. Bunting*, 127 Cal. 532, 536, 78 Am. St. Rep. 81, 59 Pac. 991.

18. **Obligation of contract.**—When not impaired.—Essential distinction seems to be that if party who complains of operation of law in reference to amount to be paid upon redemption is himself not injured by it, and if obligations of his contract are not impaired, he can not be heard to complain, nor will law be held as to him to violate any of his rights.—*Hooker v. Burr*, 137 Cal. 663, 671, 99 Am. St. Rep. 17, 70 Pac. 778, affirmed, 194 U. S. 415, 48 L. ed. 1046. See *Tuolumne R. Co. v. Sedgwick*, 15 Cal. 515; *Connecticut M. L. I. Co. v. Cushman*, 108 U. S. 51, 27 L. ed. 648; *Barnitz v. Beverly*, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042.

19. **Purchaser.**—As both creditor and purchaser.—Prior lien.—The purchaser may be both creditor and purchaser and still have prior lien to that of redemptioner. This can only be upon principle that legal estate is still in judgment-debtor until delivery of sheriff's deed.—*Knight v. Fair*, 9 Cal. 117, 118.

20. **Same.**—As member of partnership.—Not redemptioner within meaning of section.—A purchaser who, as member of partnership, held prior lien on lands purchased at execution-sale, is not creditor having prior lien to that of redemptioner, within meaning of second subdivision of this section.—*Campbell v. Oaks*, 68 Cal. 222, 225, 9 Pac. 77.

21. **Sale by sheriff.**—Is regarded as sale by judgment-debtor, and purchaser is entitled to rely upon statutory provisions for redemption existing at time of sale, to some extent, and in same manner as if they were incorporated into contract of sale executed by debtor.—*Thresher v. Atchison*, 117 Cal. 73, 75, 59 Am. St. Rep. 159, 48 Pac. 1020. See *Blood v. Light*, 38 Cal. 649, 658.

22. **Sale under execution.**—Judgment-creditor's right of redemption.—A judgment-creditor who was not the holder of a judgment-lien during the holidays proclaimed by the governor can not complain in equity that her right of redemption expired by reason of the intervention of such holidays.—*Summers v. Hammell*, 17 Cal. App. 494, 120 Pac. 66.

23. **Same.**—Redemption limited as to time.—Redemption under execution-sale is expressly limited to twelve months from the date of sale, and where the judgment-debtor does not redeem within twelve months, and there is no subsisting judgment-lien existing within that period, there can be no redemption in law or equity.—*Summers v. Hammell*, 17 Cal. App. 494, 120 Pac. 66.

24. **Sheriff.**—Is agent of purchaser.—For purpose of receiving payment, and that payment, to bind his principal, must be made in amount and kind of money to which principal is entitled. He may refuse tender of check, but if in bona fide transaction he accepts check as conditional payment, and that check is regularly paid, his principal has suffered no detriment, and transaction is quite within scope of agent's authority.—*Hooker v. Burr*, 137 Cal. 663, 668, 99 Am. St. Rep. 17, 70 Pac. 778, affirmed, 194 U. S. 415, 48 L. ed. 1046.

25. As to *People ex rel. Thorne v. Hays*, 4 Cal. 127, not followed as authority upon matters relating to redemption, and disapproved, see *Hooker v. Burr*, 137 Cal. 663, 667, 99 Am. St. Rep. 17, 70 Pac. 778, affirmed, 194 U. S. 415, 48 L. ed. 1046.

26. **Statutory right to redeem homestead.**—Vests in administrator or surviving wife upon death of husband, or in both administrator and wife, and is restricted to six months under statute so providing.—*Collins v. Scott*, 100 Cal. 446, 453, 34 Pac. 1086.

§ 703. WHEN JUDGMENT-DEBTOR OR OTHER REDEMPTIONER MAY REDEEM. If property be so redeemed by a redemptioner, another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner on paying the sum paid on such last redemption, with two per cent thereon in addition, and the amount of any assessment or taxes which the last redemptioner may have paid thereon after the redemption by him, with interest on such amount, and, in addition, the amount of any liens held by said last redemptioner prior to his own, with interest; but the judgment under which the property was sold need not be so paid as a lien. The property may be again, and as often as a redemptioner is so disposed, redeemed from any

previous redemptioner within sixty days after the last redemption, on paying the sum paid on the last previous redemption, with two per cent thereon in addition, and the amounts of any assessments or taxes which the last previous redemptioner paid after the redemption by him, with interest thereon, and the amount of any liens, other than the judgment under which the property was sold, held by the last redemptioner previous to his own, with interest.

Written notice of redemption must be given to the sheriff and a duplicate filed with the recorder of the county, and if any taxes or assessments are paid by the redemptioner, or if he has or acquires any lien other than that upon which the redemption was made, notice thereof must in like manner be given to the sheriff and filed with the recorder; and if such notice be not filed, the property may be redeemed without paying such tax, assessment, or lien. If no redemption be made within twelve months after the sale, the purchaser, or his assignee, is entitled to a conveyance; or if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given, and the time for redemption has expired, the last redemptioner, or his assignee, is entitled to a sheriff's deed; but, in all cases, the

Judgment debtor shall have the entire period of twelve months from the date of the sale to redeem the property. If the judgment debtor redeem, he must make the same payments as are required to effect a redemption by a redemptioner. If the debtor redeem, the effect of the sale is terminated, and he is restored to his estate.

[Certificate of redemption.] Upon a redemption by the debtor, the person to whom the payment is made must execute and deliver to him a certificate of redemption, acknowledged or proved before an officer authorized to take acknowledgments or conveyances of real property. Such certificate must be filed and recorded in the office of the recorder of the county in which the property is situated, and the recorder must note the record thereof in the margin of the record of the certificate of sale.

History: Enacted March 11, 1872, re-enactment of § 232 Practice Act as amended 1860; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 323; March 27, 1895, Stats. and Amdts. 1895, p. 226; February 26, 1897, Stats. and Amdts. 1897, p. 41.

WHEN JUDGMENT-DEBTOR, ETC., MAY REDEEM.

1. Construction of section.
2. Deed—By sheriff after redemption—Annulity.
3. Same—Conclusive evidence of facts of sale.
4. Same—Vests in purchaser title.
5. Effect of redemption—By a successor in interest.
6. Grantee of interest in lands subject to life estate.
7. Judgment in foreclosure suit.
8. Practice Act—Distinction between judgments.
- 9, 10. Redemption—By successor in interest—Effect of sale.
11. Same—From sale under execution—In equity.
12. Same—Is equivalent to transfer or assignment of certificate of sale.
13. Right of redemption—Parties affected.
14. Sale on foreclosure of lien—Time of redemption—Expiration necessary before deed.
15. Sale under judicial decree on foreclosure—Title acquired by.

As to confirmation of sale upon execution, see 10 h. C. L. p. 1318, § 116.

As to presumption that redemption includes whole property sold, see, ante, § 701, note par. 1.

As to provisions of this section as qualification of provisions relating to substitution of purchaser at execution-sale to all right, title, interest, etc., of judgment-debtor, see, ante, § 700, note par. 3.

As to recording certificate of sale, see Kerr's Cyc. Pol. Code, 2d ed., §§ 4234, 4237 and notes.

As to right of tenant in common to redeem and make payments prescribed by section, see, ante, § 701, note par. 28.

As to writ of assistance, see, post, § 1210 and note.

1. Construction of section.—It is only where the judgment-debtor redeems that the effect of the sale is terminated and he is restored to his estate.—*McNutt v. Nuevo Land Co.*, 167 Cal. 459, 140 Pac. 6.

2. Deed—By sheriff after redemption—A nullity.—Where the sheriff makes and delivers to the purchaser a deed after redemption, such deed is a nullity.—*Phillips v. Hagart*, 113 Cal. 552, 556, 54 Am. St. Rep. 369, 45 Pac. 848.

3. Same—Conclusive evidence of facts of sale as recited therein.—*Kelley v. Desmond*, 63 Cal. 517, 519. See *Hihn v. Peck*, 30 Cal. 280, 287; *Blood v. Light*, 38 Cal. 649, 653; *Mayo v. Foley*, 40 Cal. 281, 284.

4. Same—Vests in purchaser title of execution-debtor.—*Kelley v. Desmond*, 63 Cal. 517, 519.

5. Effect of a redemption—By a successor in interest holding the legal and equitable title is a restoration to the original estate but this does not apply to one holding the equitable title only under a certificate issued upon a second sale. In such cases the holder of the junior certificate redeems from the previous sale not his own interest and adverse to the debtor and holder of the legal title, and it is not a redemption in the interest of the judgment-debtor or for the judgment-debtor and the effect of which is not to restore the estate to the judgment-debtor nor to extinguish the original sale from which the redemption is had.—*Bristol v. Hershey*, 7 Cal. App. 738, 742, 95 Pac. 1040.

6. Grantee of interest in lands subject to life estate, who redeems property from foreclosure sale, is not redemptioner as that term is used in this section, and is not substituted to full rights of purchaser and entitled to deed without resale. By such redemption sale is set at large, leaving land subject to lien in his favor, and he is entitled to contribution from life tenant and several remaindermen for their several portions of money paid to redeem land.—*Warner Bros. Co. v. Freud*, 138 Cal. 651, 655, 72 Pac. 345.

7. Judgment in foreclosure suit, and of proceedings therein had, are conclusive against grantee of mortgagee who fails to record his conveyance. In such case grantee who stands idly by and permits foreclosure proceedings to be prosecuted without intervention upon his part is consenting to be represented by his mortgagee and legal effect of foreclosure and sale is to dispose of his title as completely as though he himself were party

to action.—*Breedlove v. Norwich*, U. F. I. Soc., 124 Cal. 164, 166, 56 Pac. 770.

8. Practice Act—Distinction between judgments.—Practice Act made no distinction between judgments for foreclosure of mortgages and judgments of different character. Sales under execution issued on judgments for foreclosure are subject to redemption as in other cases.—*Stout v. Macy*, 22 Cal. 647, 650.

9. Redemption—By successor in interest—Effect of sale.—It is not necessary that certificate of redemption, where redemption is made by successor in interest, should state capacity in which such redemption is made.—*Pollard v. Harlow*, 138 Cal. 390, 398, 71 Pac. 454, 648.

10. When redemption occurs all interest to realty possessed by purchaser at sale ceases, and title of judgment-debtor stands as if no sale had ever taken place.—*Phillips v. Hagart*, 113 Cal. 552, 556, 54 Am. St. Rep. 369, 45 Pac. 843; *Warner Bros. Co. v. Freud*, 138 Cal. 651, 655, 72 Pac. 345.

11. Same—From sale under execution—In equity.—Equity will, upon a proper showing of fraud, mistake, or other circumstances appealing to the discretion (or conscience) of the chancellor, decree redemption after the expiration of the statutory time has expired, but such redemption will find its support in the decree of the court and not in the statute, and a tender of the amount decreed to be paid, equivalent under section 704, post, to payment, which would, under this section, terminate the sale and restore the redemptioner to his estate, would not be construed as a tender under the statute, but as one under the decree; i. e., such tender, if made within the time prescribed, would protect the redemptioner from the effect of a default until the purchaser should tender a deed and demand payment of the amount due. The purchaser has the right of appeal from the decree, and the redemptioner could not, by such tender, deprive him of that right under penalty of loss of both property and the amount due in the event of the affirmation thereof. After affirmation of the decree, the redemptioner's right to redeem would still exist, but only upon condition of payment as prescribed, and his refusal to comply with such condition, upon tender of deed and demand of amount due, forfeits his right of redemption under the decree.—*Bunting v. Haskell*, 152 Cal. 429, 93 Pac. 110.

12. Same—Is equivalent to transfer or assignment of certificate of sale, and, although redemptioner might not be entitled to demand amount of his lien from subsequent redemptioner because of his failure to strictly comply with law, yet, if he is entitled to redeem and effects redemption to satisfaction of purchaser, sheriff's deed passes same title that it would have done had it been executed to purchaser without redemption.—*Bagley v. Ward*, 37 Cal. 121,

129, 99 Am. Dec. 256; *White v. Costigan*, 134 Cal. 33, 38, 66 Pac. 78. See *Eldridge v. Wright*, 55 Cal. 531, 536.

13. Right of redemption—Parties affected.—Whether person seeking to redeem from sheriff's sale is authorized to make such redemption, is question which concerns him and purchaser alone. If purchaser is willing to consider him as redemptioner, and accepts and retains redemption money paid by him, he can not thereafter question effect of such redemption.—*White v. Costigan*, 134 Cal. 33, 37, 66 Pac. 78. See *Abadie v. Lobero*, 36 Cal. 390; *Hervey v. Krost*, 116 Ind. 268, 19 N. E. 125; *Pearson v. Pearson*, 131 Ill. 464, 23 N. E. 418.

14. Sale on foreclosure of lien—Time of redemption—Expiration necessary before deed.—Where a mining claim has been sold under lien for expenses incurred in work-

ing the mine and the decree passed directs that the deed should be immediately made after the sale was completed was contrary to the provisions of the code and beyond the power of the court and for that reason was void and a deed executed in pursuance thereof may be given the effect of a certificate of sale, but can not pass any title to the property until after the period for redemption has expired.—*Anthony v. Janssen*, 183 Cal. 329, 191 Pac. 538.

15. Sale under judicial decree on foreclosure—Title acquired by.—Mortgagee can, in no case in this state, become owner of mortgaged premises, except by purchase upon sale under judicial decree.—*Warner Bros. Co. v. Freud*, 138 Cal. 651, 655, 72 Pac. 345. See *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655; *Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540; *Lord v. Morris*, 18 Cal. 482, 592.

§ 704. IN CASES OF REDEMPTION, TO WHOM THE PAYMENTS ARE TO BE MADE. The payments mentioned in the two last sections may be made to the purchaser or redemptioner, or for him, to the officer who made the sale. When the judgment under which the sale has been made is payable in a specified kind of money or currency, payments must be made in the same kind of money or currency, and a tender of the money is equivalent to payment.

History: Enacted March 11, 1872, re-enactment with addition of § 233 Practice Act.

PAYMENT ON REDEMPTION—TO WHOM MADE.

1. Sheriff—As agent to receive redemption moneys.
- 2-4. Tender equivalent of redemption—Not required to be kept good.

1. Sheriff—As agent to receive redemption moneys.—Sheriff is authorized to receive money of redemptioner or purchaser for previous redemptioner, but statute does not make sheriff such an agent as that by receiving money it would necessarily bind purchaser or previous redemptioner to accept it.—*Bennett v. Wilson*, 122 Cal. 509, 516, 68 Am. St. Rep. 61, 55 Pac. 390.

2. Tender equivalent of redemption—Not required to be kept good.—Where law declares an offer to redeem shall be so far as restoration of estate is concerned equivalent of redemption, purchaser buys with knowledge of this, and takes his title subject to condition that he may be divested of it either by redemption or by valid offer

to perform.—*Leet v. Armbruster*, 143 Cal. 663, 669, 77 Pac. 653.

3. Tender and refusal are equivalent to performance in discharging all collateral and accessorial liens and rights, and, in case of redemption of land in this state, ipso facto, work restoration of title to judgment-debtor or his successor in interest.—*Leet v. Armbruster*, 143 Cal. 663, 669, 77 Pac. 653.

4. Tender is not required to be kept good for purposes of action. It is tender itself and its refusal which instantaneously works discharge of purchaser's lien and divestiture of his title, although effect of tender did not operate as payment of debt for all purposes, as debt still remains due with sole right left in the purchaser of action at law for recovery of money.—*Leet v. Armbruster*, 143 Cal. 663, 669, 77 Pac. 653. See *Hershey v. Dennis*, 53 Cal. 77, 80; *Phillips v. Hagart*, 113 Cal. 552, 557, 54 Am. St. Rep. 369, 45 Pac. 843; *Haile v. Smith*, 113 Cal. 656, 664, 45 Pac. 872.

§ 705. WHAT A REDEMPTIONER MUST DO IN ORDER TO REDEEM. A redemptioner must produce to the officer or person from whom he seeks to redeem and serve with his notice to the sheriff making the sale, or his successor in office;

1. A copy of the docket of the judgment under which he claims the right to redeem, certified by the clerk of the court, or of the county where the judgment is docketed; or, if he redeem upon a mortgage or other lien, a note of the record thereof, certified by the recorder;

2. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself, or of a subscribing witness thereto;

3. An affidavit by himself or his agent, showing the amount then actually due on the lien.

History: Enacted March 11, 1872, re-enactment of § 234 Practice Act; amendment approved April 16, 1909, Stats. and Amdts. 1909, p. 967.

WHAT REDEMPTIONER MUST DO TO REDEEM.

1. Construction of section—As to application.
2. Judgment-debtors and successors in interest—Not redemptioners.
3. Power of sheriff—Is altogether statutory.
4. Redemption is statutory right—Tender entitles to.
5. Sheriff—When not authorized to convey.
6. Sheriff's deed—When does not transfer title.
7. Valid redemption—How made.
8. Waiver of requirements of section.

1. **Construction of section**—As to application.—This section applies only to redemptioners as defined in second subdivision of section 701, ante.—*Yoakum v. Bower*, 51 Cal. 539, 540; *Phillips v. Hagart*, 113 Cal. 552, 555, 54 Am. St. Rep. 369, 45 Pac. 843.

2. **Judgment-debtors and successors in interest—Not redemptioners.**—Judgment-debtors and their successors in interest do not come within class termed "redemptioners," and therefore are not required to follow demands of this section in making redemption.—*Phillips v. Hagart*, 113 Cal. 552, 555, 54 Am. St. Rep. 369, 45 Pac. 843.

3. **Power of sheriff—Is altogether statutory,** and where redemption is attempted to be effected through him, he has no authority either to receive redemption money from one claiming right to redeem under judgment or to execute deed to him unless

redemptioner produces copy of docket of his judgment.—*Wilcoxson v. Miller*, 49 Cal. 193, 194.

4. **Redemption is statutory right—Tender entitles to.**—Redemption is statutory right given only in event of tender and production of certain statutory proofs.—*Haskell v. Manlove*, 14 Cal. 54, 58.

5. **Sheriff—When not authorized to convey.**—Sheriff has no authority to convey in absence of written assignment, but where intent is apparent, transaction interpreted in light of circumstances of law and usage of state may be regarded in equity as assignment of purchaser's interest.—*White v. Costigan*, 6 Cal. Unrep. 641, 63 Pac. 1075, 1077. See *Abadie v. Lobero*, 36 Cal. 390, 396; *Eldridge v. Wright*, 55 Cal. 531, 536, 537.

6. **Sheriff's deed—Does not transfer title** when it does not recite that copy of docket of judgment was produced, nor where it was not shown alunde that such copy was produced.—*Wilcoxson v. Miller*, 49 Cal. 193, 194.

7. **Valid redemption—How made.**—Valid redemption can not be made unless creditor presents copy of docket of judgment under which he claims, duly certified, etc.—*Haskell v. Manlove*, 14 Cal. 54, 59.

8. **Waiver of requirements of section.**—Production of papers mentioned in statute upon redemption as between the immediate parties to redemption may be waived.—*Bagley v. Ward*, 37 Cal. 121, 129, 99 Am. Dec. 256.

§ 706. UNTIL THE EXPIRATION OF REDEMPTION TIME COURT MAY RESTRAIN WASTE ON THE PROPERTY. WHAT CONSIDERED WASTE.

Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, by order granted with or without notice, on the application of the purchaser or the judgment creditor.

But it is not waste for the person in possession of the property at the time of sale, or entitled to possession afterward, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used; or to use in the ordinary course of husbandry; or to make the necessary repairs of buildings thereon; or to use wood or timber on the property therefor; or for the repair of fences; or for fuel in his family, while he occupies the property.

History: Enacted March 11, 1872, re-enactment of § 235 Practice Act.

RESTRAINING WASTE.

1. Construction of section—As qualifying what.
2. Right of possession—Restraining waste.
3. Same—Action in claim and delivery, when not remedy.
4. Receiver—Appointment of to work mine.
5. Same—Same—Waste.

1. **Construction of section—As qualifying what.**—Provisions of this section as qualification of provisions relating to substitution of purchaser of execution sale to all right, title, etc., of judgment-debtor.—See, ante, § 700 and note par. 3.

2. **Right of possession — Restraining waste.**—Judgment-debtor is entitled to remain in possession of property where mortgage is foreclosed thereon, until expiration of time allowed for redemption, and during that period purchaser has and can assert no right to possession thereof, though on his application court may restrain commission of waste of property.—*People's Sav. Bank v. Jones*, 114 Cal. 422, 427, 46 Pac. 278. See *West v. Conant*, 100 Cal. 231, 234, 34 Pac. 705.

3. **Same—Action in claim and delivery** to recover house moved from mortgaged

premises after foreclosure sale and before commissioner's deed was executed, is prematurely brought when time allowed by statute for redemption had not expired and plaintiff was therefore not entitled to immediate possession of property.—*People's Sav. Bank v. Jones*, 114 Cal. 422, 427, 46 Pac. 278.

4. **Receiver—Appointment of to work mine.**—Receiver should be appointed for mine where during period of redemption mine is worked and gold is extracted therefrom to such extent as to constitute waste or destruction of property itself, or all that is of any essential value. Rather than restrain, it is to interest of all parties that receiver be appointed than stop working claims entirely.—*Hill v. Taylor*, 22 Cal. 191, 194.

5. **Same — Same — Waste.**—Working of mines and extraction of gold therefrom is something more than ordinary use of real estate by one in possession, and constitutes waste or destruction of property itself or all that is of any essential value and as such might be restrained under provisions of section 235 Practice Act (dictum).—*Hill v. Taylor*, 22 Cal. 191, 194.

As to restraining waste of property, see, post, §§ 745, 746 and notes.

§ 707. RENTS AND PROFITS. The purchaser, from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, is entitled to receive, from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof.

But when any rents or profits have been received by the judgment creditor or purchaser, or his or their assigns, from the property thus sold preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption money to be paid; and if the redemptioner or judgment debtor, before the expiration of the time allowed for such redemption, demands in writing of such purchaser or creditor, or his assigns, a written and verified statement of the amounts of such rents and profits thus received, the period for redemption is extended five days after such sworn statement is given by such purchaser or his assigns, to such redemptioner or debtor.

[**Statement—Effect of failure to give when demanded.**] If such purchaser or his assigns shall, for a period of one month from and after such demand, fail or refuse to give such statement, such redemptioner or debtor may bring an action in any court of competent jurisdiction, to compel an accounting and disclosure of such rents and profits, and until fifteen days from and after the final determination of such action, the right of redemption is extended to such redemptioner or debtor.

History: Enacted March 11, 1872, re-enactment of § 236 Practice Act with addition of all after first sentence.

RENTS AND PROFITS.

- 1, 2. Administrator—Not liable for value of use and occupation, when.
3. Allegation that rent was "payable monthly."

4. Annual rent—Apportionment of.
5. Bill in equity — When proper remedy to recover rents and profits.
6. Construction of section — Not applicable to tax-sales.

7. Crops or products of land to be paid as rent — Falling due at certain period.
8. Judgment-creditor—Does not become entitled to value of use and occupation.
9. Judgment-debtor — When entitled to possession.
10. Lessor—When not entitled to rents.
11. Liability to pay rent to purchaser—Payment to third person.
12. Liability of tenant in possession.
13. Occupation of premises — Prima facie liability.
14. Owner in fee in possession—Regarded as tenant.
15. Purchaser as equitable owner entitled to rents, etc.
16. Purchaser of realty at foreclosure sale —Entitled to value of use.
- 17-19. Purchaser at sheriff's sale—Right to rents and profits.
- 20, 21. Purchaser—When may sue for rent.
22. Rent to be paid in products of soil.
- 23, 24. Rents prior to sheriff's sale.
25. Rent payable by year—Is not indivisible.
26. Right to rents and profits—Purchaser is entitled to all.
27. Same—Right not limited to case where redemption is made.
- 28-30. "Tenant in possession" defined—Applies to all cases of tenancy.
- 31, 32. Title—Right to rents independent of.
33. Same—When purchaser's title prevails over title of heirs at law.
34. Undertaking on appeal — Rents, etc., provided for.

1. **Administrator—Not liable for value of use and occupation** of premises belonging to estate after sale thereof by sheriff. From that time purchaser at sale becomes entitled to value of use and occupation and estate or parties interested therein had no claim thereto.—*Walls v. Walker*, 37 Cal. 424, 431, 99 Am. Dec. 290. See *McDevitt v. Sullivan*, 8 Cal. 592, 596; *Harris v. Reynolds*, 13 Cal. 514; *Kline v. Chase*, 17 Cal. 596, 602; *Knight v. Truett*, 18 Cal. 113, 116.

2. **Administrator who uses and occupies premises after sheriff's sale** is bound to account to purchaser for value of such use and occupation.—*Walls v. Walker*, 37 Cal. 424, 432, 99 Am. Dec. 290.

3. **Allegation that rent was "payable monthly"** is not averment that it was payable in advance.—*Webster v. Cook*, 38 Cal. 423, 425.

4. **Annual rent—Apportionment of.**—Where rent is an annual rent, purchasers at foreclosure sales are entitled to an amount in proportion as time intervening between their purchase and expiration of year-term bears to one year (providing, of course, six months' term of redemption had

not expired in mean time).—*Clarke v. Cobb*, 121 Cal. 595, 599, 54 Pac. 74.

5. **Bill in equity—Proper remedy to recover rents and profits** from tenants in possession of property during redemption period, for defendants in such case being in possession are deemed trustees for plaintiff.—*Harris v. Reynolds*, 13 Cal. 514, 518, 73 Am. Rep. 600.

6. **Construction of section—Not applicable to tax-sales.**—This section (§ 236 Practice Act, corresponding with this section of code) has no application to tax-sales.—*Mayo v. Woods*, 31 Cal. 269, 270.

7. **Crops or products of land to be paid as rent—Falling due at certain period** of year, and that period occurring after purchase from sheriff and prior to time when right of redemption is barred, stand exactly as though land had been rented for cash rental, but payable at harvest time, and upon such state of facts it can not be claimed that purchaser at sheriff's sale would be entitled to entire amount of rent due and payable for use of land for entire year.—*Clarke v. Cobb*, 121 Cal. 595, 598, 54 Pac. 74.

8. **Judgment-creditor — Does not become entitled to value of use and occupation** until after sale has been made.—*Englund v. Lewis*, 25 Cal. 337, 354.

9. **Judgment-debtor — When entitled to possession.**—Judgment-debtor or his successor in interest in property is entitled to its possession until time for redemption from sale has expired.—*Purser v. Cady*, 120 Cal. 214, 218, 52 Pac. 485.

10. **Lessor—When not entitled to rents.**—Lessor to whose title plaintiff has succeeded is not entitled to rent accruing or to value of use and occupation of property subsequent to sale under judgment of foreclosure, unless such lessor effected redemption from sale; and payment of rent for period extending beyond date of such sale is made by lessee to lessor in such case at his peril.—*Harris v. Foster*, 97 Cal. 292, 295, 33 Am. St. Rep. 187, 32 Pac. 246.

11. **Liability to pay rent to purchaser—Payment to third person.**—In a case in which there is a liability to pay rent to the purchaser, not relieved by payment of rent to third person, one of execution defendants.—*Webster v. Cook*, 38 Cal. 423, 426.

12. **Liability of tenant in possession** to purchaser for rents or use and occupation from day of sale to expiration of time for redemption is statutory liability merely and exists without assent of person in possession. It is not liability founded on contract express or implied, within meaning of section 537, ante, authorizing issuance of attachment.—*Walker v. McCusker*, 65 Cal. 360, 361, 4 Pac. 206.

13. **Occupation of premises—Prima facie liability.**—In the case of occupation of premises by defendant from time of sheriff's sale up to execution of sheriff's deed

renders him *prima facie* liable to plaintiff for rent during that period where plaintiff purchased property at foreclosure sale.—*Webster v. Cook*, 38 Cal. 423, 425.

14. Owner in fee in possession—Regarded as tenant.—An owner in fee in possession is no less in legal contemplation tenant than man who occupies under him.—*Harris v. Reynolds*, 13 Cal. 514, 517, 73 Am. Dec. 600.

15. Purchaser as equitable owner entitled to rents, etc.—Purchaser acquires equitable estate in lands sold, and although conditional, such estate may become absolute by mere lapse of time; legal title remains in judgment-debtor, with right to defeat sale within statutory time, falling in which, estate of purchaser becomes indefeasible, and dry, naked title remains in judgment-debtor, which may be divested by sheriff's deed, and during this redemption period, statute regards purchaser as owner in equity and gives him rents and profits.—*Page v. Rogers*, 31 Cal. 294. See *Bennett v. Willson*, 122 Cal. 509, 513, 68 Am. St. Rep. 61, 55 Pac. 390.

16. Purchaser of realty at foreclosure sale—Entitled to value of use and occupation of premises during period of redemption, i. e., from date of sale until he receives deed from sheriff.—*Walker v. McCusker*, 71 Cal. 594, 596, 12 Pac. 723; *Benson v. Ewing*, 84 Cal. 89, 93, 23 Pac. 1112.

17. Purchaser at sheriff's sale—Right to rents and profits.—A purchaser of real property at sheriff's sale, from time of sale until redemption, and redemptioner from time of redemption until another redemption, is entitled to receive from tenant in possession rents of property sold or value of use and occupation thereof.—*Walker v. McCusker*, 71 Cal. 594, 596, 12 Pac. 723.

18. Purchaser of real property at execution-sale stands 'in same position as any other purchaser from judgment-debtor, and certificate of sale which he receives from sheriff is conveyance within meaning of recording act by which he is protected from unrecorded claims.—*Duff v. Randall*, 116 Cal. 226, 231, 58 Am. St. Rep. 158, 48 Pac. 66.

19. Purchaser on mortgage foreclosure sale is entitled to rents and profits of property during period of redemption.—*Yndart v. Den*, 125 Cal. 85, 89, 57 Pac. 761. See *Walker v. McCusker*, 71 Cal. 594, 12 Pac. 723.

20. Purchaser—When may sue for rent.—Purchaser may sue for rent as often as it falls due under terms of lease existing when he became purchaser. Effect of sale held equivalent to assignment of lease for time.—*Reynolds v. Lathrop*, 7 Cal. 43, 46.

21. Purchaser can not sue and recover from receiver rents and profits until they are collected and received by receiver.—*Pendola v. Alexanderson*, 67 Cal. 337, 339, 7 Pac. 756.

22. Rent to be paid in products of soil after harvests is rent within meaning of

this section; and contracts providing for such are in no sense cropping contracts.—*Clarke v. Cobb*, 121 Cal. 595, 597, 54 Pac. 74.

23. Rents prior to sheriff's sale.—Purchaser is not entitled to receive rents or profits which accrue prior to time of purchase of property at sheriff's sale.—*Pendola v. Alexanderson*, 67 Cal. 337, 339, 7 Pac. 756.

24. Rents should be considered in dealing with question of judgment-debtor's right to restitution in making redemption.—*Yndart v. Den*, 125 Cal. 85, 89, 57 Pac. 761.

25. Rent payable by the year—Is not indivisible.—*Clarke v. Cobb*, 121 Cal. 595, 599, 54 Pac. 74.

26. Right to rents and profits—Purchaser is entitled to all rents and profits of property sold, or of its use and occupation from time of sale until redemption, and if no redemption is made, he is entitled to retain rents and profits without any obligation to account therefor to mortgagee.—*Duff v. Randall*, 116 Cal. 226, 230, 58 Am. St. Rep. 158, 48 Pac. 66.

27. Same—Right not limited to cases where redemption is made.—Right on part of purchaser to receive rents and profits or value of use and occupation of property sold is not limited to cases where there has been redemption. It begins at time of purchase and continues until redemption is made, or, if there be no redemption, then until time allowed for redemption has expired.—*Walker v. McCusker*, 71 Cal. 594, 596, 12 Pac. 723. See *Reynolds v. Lathrop*, 7 Cal. 43; *McDevitt v. Sullivan*, 8 Cal. 592; *Harris v. Reynolds*, 13 Cal. 514, 517, 73 Am. Dec. 600; *Hill v. Taylor*, 22 Cal. 191; *Webster v. Cook*, 38 Cal. 423, 425.

28. "Tenant in possession"—Defined—Applies to all cases of tenancy.—Where in action it does not appear when or from whom certain defendant obtained title to mortgaged property, but as he was party to action of foreclosure, and it was therefore conclusively presumed by judgment that he held title subject to payment of mortgage debt, held, after purchase by plaintiff, that plaintiff was owner in equity, and thereafter, subject to right of redemption, defendant held legal title for plaintiff, and, having exclusive possession, defendant was, within meaning of words as used in statute, "tenant in possession" of property and liable to account to plaintiff for value of its use and occupation.—*Walker v. McCusker*, 71 Cal. 594, 596, 12 Pac. 723.

29. "Tenant in possession" is generic term intended to designate person from whom purchaser is to receive rents. Term fixes general right and applies to all cases of tenancy.—*Harris v. Reynolds*, 13 Cal. 514, 517, 73 Am. Dec. 600; *Knight v. Truett*, 18 Cal. 113, 115.

30. Definition of tenant in possession embraces within natural and usual meaning of

words judgment-debtor as well as his lessee.—*Harris v. Reynolds*, 13 Cal. 514, 517, 73 Am. Rep. 600; *Knight v. Truett*, 18 Cal. 113, 115.

31. **Title—Right to rents independent of.**—Purchaser by mere fact of purchase does not get title to property sold at sheriff's sale. His right is rather right to get title in given contingency, and transaction is executory, not executed.—*Harris v. Reynolds*, 13 Cal. 514, 516, 73 Am. Dec. 600.

32. Purchaser has statutory right to profits without having right to subject out of which profits proceed.—*Harris v. Reynolds*, 13 Cal. 514, 516, 73 Am. Dec. 600.

33. **Same—When purchaser's title prevails over title of heirs at law.**—The title acquired by purchaser at sheriff's sale must

prevail over that held by successors in interest as heirs at law of original owner, of which interest purchaser had no notice until after he had paid purchase-money and received certificate of sale. Such purchaser is fully protected in his purchase, and his right to protection is same whether he receives notice of such claim before or after execution of sheriff's deed.—*Duff v. Randall*, 116 Cal. 226, 232, 58 Am. St. Rep. 158, 48 Pac. 66.

34. **Undertaking on appeal—Rents, etc., provided for.**—Undertaking on appeal from judgment which directs delivery of possession of real property must provide against waste and for payment of value of use and occupation, and for these only, where there is no question as to deficiency pending such appeal.—*Englund v. Lewis*, 25 Cal. 337, 354.

§ 708. IF PURCHASER OF REAL PROPERTY BE EVICTED FOR IRREGULARITIES IN SALE, WHAT HE MAY RECOVER AND FROM WHOM. WHEN JUDGMENT TO BE REVIVED. PETITION FOR THE PURPOSE, HOW AND BY WHOM MADE. If the purchaser of real property sold on execution, or his successor in interest, be evicted therefrom in consequence of irregularities in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor.

[Failure to get possession because of irregularities—Procedure.] If the purchaser of property at sheriff's sale, or his successor in interest, fail to recover possession in consequence of irregularity in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, the court having jurisdiction thereof must, after notice and on motion of such party in interest, or his attorney, revive the original judgment in the name of the petitioner, for the amount paid by such purchaser at the sale, with interest thereon from the time of payment at the same rate that the original judgment bore; and the judgment so revived has the same force and effect as would an original judgment of the date of the revival, and no more.

History: Enacted March 11, 1872, founded on § 237 Practice Act as amended 1860 (Stats. 1860, p. 303).

PURCHASER EVICTED—RECOVERY, AND FROM WHOM.

1. Construction of section—As remedial in character—Liberal construction.
- 2-5. **Same—Intent of legislature—Modification of rule of common law.**
6. Erroneous judgment—Action properly brought against assignee.
7. Execution for excess over face of judgment—Voidable only.
8. Homestead—Sale on execution—Vacation of satisfaction.
9. Money collected on judgment subsequently reversed—Action to recover.
10. New judgment—When should not be ordered.

11. Notice—When should be given.
12. Original satisfaction entered inadvertently.
13. Original judgment—Revival of.
14. Sale under void or voidable execution—In general.
15. **Same—As to jurisdiction.**
16. **Same—Collateral attack.**
17. **Same—Sale on void execution is void.**
18. **Same—Whether execution is amendable is test.**
19. Statute of limitations—Does not begin to run against remedy, when.

As to remedies of a plaintiff who is dispossessed after being put in possession un-

der a judgment in ejectment, see note 135 Am. St. Rep. 646-650.

As to vacating satisfaction of execution because title of purchaser fails, see discussion and authorities, 134 Am. St. Rep. 35-40.

1. **Construction of section—As remedial in character—Liberal construction.**—The above section being remedial in character, is to be liberally construed, and as property sold was not the property of the defendant in the execution, it amounts to a sale of property not subject to execution, and a sale within the extent of the statute, and the purchaser will be entitled to the remedies afforded by the statute.—*Heine Piano Co. v. Boomer*, 183 Cal. 398, 406, 191 Pac. 900, following the doctrine in *Cross v. Zane*, 47 Cal. 602; *Hitchcock v. Carruthers*, 100 Cal. 100, 34 Pac. 627; *Merguire v. O'Donnell*, 139 Cal. 6, 196 Am. St. Rep. 91, 72 Pac. 337. See *Sturdivant v. Ward*, 90 Ark. 321, 134 Am. St. Rep. 32, 119 S. W. 427.

2. **Same—Intent of legislature—Modification of rule of common law.**—There is nothing to indicate that legislature intended to control effect or operation of this section, or remedy under it by section 336, ante. The only statute of limitations applicable to remedy under this section is section 343, ante, providing that "an action for relief, not hereinbefore provided for, must be commenced within four years after cause of action shall have accrued."—*Merguire v. O'Donnell*, 139 Cal. 6, 9, 96 Am. St. Rep. 91, 72 Pac. 337.

3. This section was intended to give remedy by petition in action which has culminated in judgment sought to be revived. Remedy intended to be given under it is as broad as that to be obtained in corresponding action in equity.—*Merguire v. O'Donnell*, 139 Cal. 6, 8, 96 Am. St. Rep. 91, 72 Pac. 337.

4. This section being remedial in its character, should be liberally construed.—*Cross v. Zane*, 47 Cal. 602, 603; *Hitchcock v. Caruthers*, 100 Cal. 100, 102, 34 Pac. 627; *Merguire v. O'Donnell*, 139 Cal. 6, 8, 96 Am. St. Rep. 91, 72 Pac. 337.

5. It was not object of this provision to disturb rule of common law in relation to validity of executions or judicial sales; but to guard against its mischievous consequences in certain cases by affording remedy which common law does not. Code provision does not deal with question as to when execution of sale shall be deemed valid, and when not, but leaves it as before, and merely provides that when, for any of reasons given by common law, sale shall be declared void, purchaser shall not be left, as at common law, without remedy.—*Hunt v. Loucks*, 38 Cal. 372, 377, 99 Am. Dec. 404.

6. **Erroneous judgment—Action is properly brought against assignee of erroneous judgment who gives plaintiff's property to be sold thereunder, and thereby produced injury of which plaintiff complained.**—*Reynolds v. Hosmer*, 45 Cal. 616, 630.

7. **Execution for excess over face of judgment—Voidable only.**—An execution for excess over face of judgment is not void, but is only voidable, and sale thereunder is not invalid.—*Hunt v. Loucks*, 38 Cal. 372, 375, 99 Am. Dec. 404.

8. **Homestead—Sale on execution—Vacation of satisfaction.**—The principles enunciated in paragraph 1 of this note apply in a case in which an execution has been levied upon land which had previously been declared upon as a homestead, and the land sold under the execution and the judgment marked upon the docket "satisfied," for the reason that the levy and sale were both void because the property was already homesteaded and free from execution; for this reason the satisfaction of the judgment should be set aside by a court of equity, regardless of the constructive notice furnished to the purchaser by the recorded declaration of homestead.—*Heine Piano Co. v. Boomer*, 183 Cal. 398, 407, 191 Pac. 900, applying the doctrine in *Waggie v. Worthy*, 74 Cal. 266, 5 Am. St. Rep. 440, 15 Pac. 381; *Gleason v. Spray*, 81 Cal. 217, 15 Am. St. Rep. 47, 22 Pac. 551; *Powell v. Patison*, 100 Cal. 236, 34 Pac. 677; *City Store v. Cofer*, 111 Cal. 482, 44 Pac. 168.

9. **Money collected on judgment subsequently reversed—Action to recover.**—Money collected on judgment subsequently reversed may be collected back in action against real parties plaintiff when suit had been prosecuted by assignees of choses in action in name of assignor.—*Reynolds v. Hosmer*, 45 Cal. 616, 629. See *Maghee v. Kellogg*, 24 Wend. (N. Y.) 32; *Bank of United States v. Bank of Washington*, 31 U. S. (6 Pet.) 8, 15, 8 L. ed. 299.

10. **New judgment—When should not be ordered.**—A new judgment should not be ordered against sureties upon undertaking in proceedings commenced under this section for reviving judgment to extent of property lost in former action, unless such opportunity to be heard is given sureties as by this section judgment-debtor is himself entitled to receive.—*Hitchcock v. Caruthers*, 100 Cal. 100, 105, 34 Pac. 627.

11. **Notice—When should be given.**—Notice, although not required by statute, should be given before court revives an old judgment.—*Hyde v. Boyle*, 93 Cal. 1, 6, 29 Pac. 247.

12. **Original satisfaction entered inadvertently or under such circumstances as required it to be set aside may be set aside by court, and order made designating amount for which judgment should be permitted to stand.**—*Hitchcock v. Caruthers*, 100 Cal. 100, 105, 34 Pac. 627.

13. **Original judgment—Revival of.**—Provision that original judgment may be revived "when property sold was not subject to execution and sale," covers case in which plaintiff obtained judgment against defendant, where property sold was not property of defendant in execution, but wholly that of stranger, in which case it

amounts to sale of property not subject to execution and sale within intent of act.—*Cross v. Zane*, 47 Cal. 602. See *Hitchcock v. Caruthers*, 100 Cal. 100, 102, 34 Pac. 627.

14. Sale under void or voidable execution—In general.—If execution be merely erroneous—that is to say, voidable—sale under it to bona fide purchaser will be valid, although execution be afterwards set aside; but if execution be irregular—that is to say, void—sale under it, even to bona fide purchaser, will also be void.—*Hunt v. Loucks*, 38 Cal. 372, 376, 99 Am. Dec. 404. See *Reynolds v. Harris*, 14 Cal. 667; *Johnson v. Lamping*, 34 Cal. 293; *Woodcock v. Bennett*, 1 Cow. (N. Y.) 711.

15. Same—As to jurisdiction.—Court has jurisdiction of subject-matter of motion for an order to issue execution on judgment, and incidentally to determine whether or not apparent satisfaction of judgment was void.—*McAuliffe v. Coughlin*, 105 Cal. 268, 270, 38 Pac. 730.

16. Same—Collateral attack can no more be made upon erroneous execution than upon erroneous judgment. Like an erroneous judgment, an erroneous execution is valid until set aside upon direct proceeding proper for that purpose; and until set aside all acts which have been done under

such execution are also valid.—*Hunt v. Loucks*, 38 Cal. 372, 382, 99 Am. Dec. 404.

17. Same—Sale on void execution is void for "irregularity in proceedings concerning sale."—*Merguire v. O'Donnell*, 139 Cal. 6, 8, 96 Am. St. Rep. 91, 72 Pac. 337.

18. Whether execution is amendable is test whether it be void or only voidable.—*Hunt v. Loucks*, 38 Cal. 372, 379, 99 Am. Dec. 404. See *Parmelee v. Hitchcock*, 12 Wend. (N. Y.) 96, 97.

19. Statute of limitations—Does not begin to run against remedy given by this section until purchaser shall "fail to recover possession," and where facts show that during pendency of suit to quiet title, purchaser was endeavoring to obtain judgment in his behalf which would result in his obtaining possession of property bought at execution-sale, held, that it can not be said that he had failed to obtain possession within meaning of statute until that suit was finally determined against him. As his remedy under statute did not arise until such failure, statute of limitations could not begin to run prior to that time on well-settled principle that statute does not begin to run until cause of action is matured.—*Merguire v. O'Donnell*, 139 Cal. 6, 9, 96 Am. St. Rep. 91, 72 Pac. 337.

§ 709. PARTY WHO PAYS MORE THAN HIS SHARE MAY COMPEL CONTRIBUTION. When property, liable to an execution against several persons, is sold thereon, and more than a due proportion of the judgment is satisfied out of the proceeds of the sale of the property of one of them, or one of them pays, without a sale, more than his proportion, he may compel contribution from the others; and when a judgment is against several, and is upon an obligation of one of them, as security for another, and the surety pays the amount, or any part thereof, either by sale of his property or before sale, he may compel repayment from the principal. In such case, the person so paying or contributing is entitled to the benefit of the judgment, to enforce contribution or repayment, if, within ten days after his payment, he file with the clerk of the court where the judgment was rendered, notice of his payment and claim to contribution or repayment. Upon a filing of such notice, the clerk must make an entry thereof in the margin of the docket.

History: Enacted March 11, 1872.

CONTRIBUTION.

1. Construction—As laying down fundamentals as to rights of sureties.
2. Same—As not changing general rule against contribution.
3. Same—As only purpose of filing notice with clerk, is what.
4. Co-surety—Right of to contribution—When accrues.
5. Co-tenant—Paying mortgage—Rights of.
6. Indemnitor of one debtor—Payment of joint judgment—Not entitled to substitution.

7. Joint tort-feasors—Judgment against—Payment by one defendant—Assignment of judgment—No right to contribution.
8. Same—Provisions of above section not applicable to joint tort-feasors.
9. Same—Rule of no contribution not changed.
10. Notice—Of motion for execution upon judgment.
11. Same—Of payment and claim of contribution—Necessary to right to enforce contribution.
- 12, 13. Same—To parties interested, is necessary.

14. Payment—Necessary prerequisite to right.
- 15-17. Same—Of judgment by one joint-debtor.
18. Purpose of enactment of section.
19. Statute must be strictly pursued.

As to right of person paying tax to be subrogated to the tax-lien, see note Ann. Cas. 1912C, 1302.

As to right of surety who has paid debt to be subrogated to right of creditor, as affected by the fact that the security becomes such for a consideration, see note Ann. Cas. 1913A, 565.

1. **Construction**—As laying down fundamentals as to rights of sureties, etc.—First part of section down to word "principal" only lays down fundamental rules as to rights of sureties and joint judgment-debtors to compel contribution. Latter portion of section—"in such case person so paying or contributing is entitled to benefit of judgment to enforce contribution or repayment, if within ten days," etc., is portion that contemplates giving to sureties or joint judgment-debtor's right to an execution in original proceedings. Section was no doubt enacted for benefit of sureties and joint judgment-debtors, in order to enable them, without bringing an action, to use judgment and writs of court for purpose of compelling, in case of sureties, repayment from their principal, or contribution from established co-sureties, and in case joint judgment-debtors, contribution from their co-debtors.—Williams v. Riehl, 127 Cal. 365, 369, 78 Am. St. Rep. 60, 59 Pac. 762.

2. **Same**—As not changing general rule against contribution.—This section does not enlarge the general rule against contribution by joint tort-feasors. It simply announces a rule of procedure, and provides a convenient method of enforcing contribution by a judgment-debtor who has paid a judgment as against a co-defendant liable for a proportion of the debt.—Dow v. Sunset Tel. & Tel. Co., 162 Cal. 136, 121 Pac. 379.

3. **Same**—Only purpose of filing notice with clerk of payment and claim to contribution or repayment is to enable clerk to make proper entry in margin of docket. Without such notice clerk would have no authority to make proper docket entry.—Clark v. Austin, 96 Cal. 283, 288, 31 Pac. 293.

4. **Co-surety—Right of to contribution**—When accrues.—Co-surety or joint judgment-debtor has right at moment he pays debt of his principal to recover proportionate share from his co-surety or joint debtor, and obligation of co-surety to pay is as binding as if created by promissory note or contract.—Williams v. Riehl, 127 Cal. 365, 370, 78 Am. St. Rep. 60, 59 Pac. 762.

5. **Co-tenant—Paying mortgage—Rights of**—In the case of partition of a tract encumbered by mortgages on separate parcels, one of the tenants in common who

subsequently is compelled to pay a mortgage in excess of his share will be subrogated to that extent to the interest of the mortgagee.—Rich v. Smith, 26 Cal. App. 775, 148 Pac. 545.

6. **Indemnitor of one debtor—Payment of joint judgment**—Not entitled to substitution.—In the case of a joint judgment against two or more persons, where an indemnitor of one of the judgment-debtors pays the entire judgment obtained against the indemnitee and another for the commission of an act for which such indemnitee and other person were jointly and severally liable, such indemnitor is not entitled to be subrogated to the rights of the indemnitee, as against the co-defendant, under the provisions of the above section.—Adams v. White Bus Line, 184 Cal. 710, 195 Pac. 389.

7. **Joint tort-feasors—Judgment against—Payment by one defendant—Assignment of judgment**—No right of contribution.—In a case in which one of several wrongdoers against whom a joint judgment has been obtained, pays such judgment and takes an assignment thereof, he acquires no right of contribution by reason of the fact that he takes an assignment of the judgment in the name of a man of straw, and this rule is not changed by the provisions of the above section.—Adams v. White Bus Line, 184 Cal. 710, 195 Pac. 389, approving and applying Boyer v. Bolender, 129 Pa. St. 324, 15 Am. St. Rep. 723, 18 Atl. 127.

8. **Same—Provisions of above section not applicable to joint tort-feasors**.—It is a well-established rule that there is no right of contribution between joint tort-feasors outside of a statutory provision to that effect; and the provisions of the above section do not pretend to deal with the matter of right of contribution between joint tort-feasors, its plain intent being simply to provide that when there is a judgment against two or more defendants who are entitled under the rules of the law to contribution from each other, and one of them pays the whole or more than his proportion of the judgment he should be entitled to contribution; and from this the inference can not be drawn that the legislature in enacting the above section as a part of the law of procedure of this state necessarily intended to change, or would change, the fundamental principle that there is no right of contribution between joint tort-feasors.—Adams v. White Bus Line, 184 Cal. 710, 195 Pac. 389, adopting and applying the rule in Forsythe v. Los Angeles R. Co., 149 Cal. 569, 87 Pac. 24; Dow v. Sunset Tel. & Tel. Co., 162 Cal. 136, 121 Pac. 379.

9. **Same—Rule of no contribution not changed** by this section, and one defendant tort-feasor is not a party aggrieved who may complain upon appeal that no judgment was rendered against the other.—Forsythe v. Los Angeles Ry. Co., 149 Cal. 573, 87 Pac. 24.

10. Notice—Of motion for execution upon judgment for purpose of compelling contribution or repayment under this section should be served upon party against whom such motion is directed, but it is not necessary that notice filed with clerk, to claim of right to contribution and repayment, should be filed on such party within ten days after moving party pays more than his proportion of judgment.—*Clark v. Austin*, 96 Cal. 283, 284, 31 Pac. 293.

11. Same—Of payment and claim of contribution—Necessary to right to enforce contribution.—The right to contribution in a case where one of the parties against whom judgment is entered has satisfied the same is purely statutory, and is designed to furnish a means whereby a defendant, against whom judgment has been entered and paid, may enforce claim to contribution in a proper case without resort to suit, and simply provides a convenient method for enforcing such contribution as against a co-defendant or co-defendants liable for a proportion of the debt; but before a right exists upon the part of the judgment-debtor satisfying the judgment he must comply with the requirements of the above section and file his notice and claim to contribution within ten days from the date on which he satisfies the judgment.—*Blake v. Arp*, — Cal. App. —, 192 Pac. 452, approving and applying the doctrine in *Dow v. Sunset Tel. & Tel. Co.*, 162 Cal. 136, 121 Pac. 379; *San Joaquin Valley Bank v. Gate City Oil Co.*, 36 Cal. App. 791, 173 Pac. 781.

12. Same — To parties interested, is necessary, and although statute does not specify person to whom notice is to be given, or its period, or manner in which it is to be given, natural meaning of word "notice" in phrase "file with clerk of court where judgment is rendered notice of his payment and claim to contribution or repayment" is notice to some one, and if person be not indicated, plain inference is that party intended is person to be proceeded against.—*Davis v. Heimbach*, 75 Cal. 261, 263, 17 Pac. 199.

13. Period and manner of giving notice are provided for in other parts of this code.—*Davis v. Heimbach*, 75 Cal. 261, 264, 17 Pac. 199.

See, post, §§ 1005-1011 and notes.

14. Payment—Necessary prerequisite to rights.—Sureties who are compelled to pay debt of their principal have legal remedy for reimbursement, which they may enforce against him by personal action, if he be alive, or against his estate, if he be dead; but in either case reimbursement can only be claimed for what has been expended.—*Estate of Hill*, 67 Cal. 238, 243, 7 Pac. 664.

15. Same—Of judgment by one joint-debtor does not operate as an accord and satisfaction of judgment as to other joint judgment-debtors unless it plainly appears that payment was to have such effect.—*Williams v. Riehl*, 127 Cal. 365, 370, 78 Am. St. Rep. 60, 59 Pac. 762. See *Coffee v. Tevis*, 17 Cal. 239.

16. Payment by one joint judgment-debtor more than five years previous, without any of proceedings specified in this section being taken to keep judgment alive for his benefit, judgment was extinguished by such payment.—*National Bank of Cal. v. Los Angeles Iron & Steel Co.*, 2 Cal. App. 659, 84 Pac. 466.

17. Payment by A, in order to prevent sale of property on execution upon deficiency judgment, made and entered against himself and B jointly, but upon which deficiency judgment B was primarily liable, is not voluntary payment, and where such payment is made by A in order to prevent sale of his property under execution he is entitled to maintain action against B for amount.—*Treat v. Craig*, 135 Cal. 91, 93, 67 Pac. 7. See *Williams v. Riehl*, 127 Cal. 369, 78 Am. St. Rep. 60, 59 Pac. 762.

18. Purpose of enactment of section.—Legislature did not have in mind case where parties paying judgment procured written assignment of it. Section was not enacted for purpose of giving assignees of judgments remedies as assignees. They have remedy independent of such section, and could enforce their judgment if such section had never been enacted.—*Williams v. Riehl*, 127 Cal. 365, 369, 78 Am. St. Rep. 60, 59 Pac. 762, quoting from construction placed upon similar section in Civil Code of Kansas in case of *Harris v. Frank*, 29 Kan. 203.

19. Statute must be strictly pursued.—Proceeding under this section, being statutory, must be strictly pursued.—*Davis v. Heimbach*, 75 Cal. 261, 262, 17 Pac. 199. See *Hansen v. Martin*, 63 Cal. 282.

§ 710. COLLECTION OF MONEYS FROM JUDGMENT-DEBTOR; PROCEDURE. The duly authenticated transcript of a judgment, for money, against a defendant, rendered by any court of this state may be filed with the controller of the state of California or the auditor of any county, city and county, city, or other municipal or public corporation, from which money is owing to the judgment debtor in such action (and in case there be no auditor then with the official whose duty corresponds to that of auditor), whereupon it shall be the duty of any such official, or of such public officer with whom such transcript

shall have been filed, to draw his warrant in favor of or to pay into the court from the docket of which the transcript was taken, so much of the money, if sufficient there be, over which such state of California, county, city and county, city, or other municipal or public corporation of which he is an official, or over which said public officer has control and custody and which belongs to or is owing to the judgment debtor in the cause designated in said transcript as will cancel said judgment; the money so paid into court shall be a discharge pro tanto of any amount so due or owing to such judgment debtor.

[Fee for filing transcript—Disposition of money by court.] For filing such a transcript any such official or public officer may charge a fee of fifty cents. Upon the receipt by any court of money under the provisions of this act so much therefor as is not exempt from execution shall be paid to the judgment creditor, the balance to the judgment debtor. Such transcript when so filed, shall be accompanied by an affidavit on behalf of the person in whose interest the same is filed, stating the exact amount at the time due on such judgment, and that such person desires to avail himself of the provisions of this section.

History: Enactment approved March 21, 1903, Stats. and Amdts. 1903, p. 362.

Editorial note: This section was enacted subsequently to the succeeding sections and was numbered 710; it would properly be numbered and placed 710a except that following sections were passed at one time and relate to a different subject.

COLLECTING MONEY FROM JUDGMENT-DEBTOR—PROCEDURE—GARNISHMENT.

1. Abstract of judgment—Prepared in accordance with provisions of section 897, post.
- 2-4. Applicability of section.
5. Construction of section—As to purpose.
6. Same—As to rights of judgment-creditor.
7. Same—Court is without power to make any order for disposition of money, until when.
- 8, 9. Same—With respect to application to municipalities.
- 10-13. Constitutionality of section.
14. Filing transcript—Effect of.
15. Garnishment of public funds—Accrual of demand.
16. Same—Action for damages against auditor—Sufficiency of complaint.
17. Same—Approval of demand of judgment-creditor.
18. Same—Duty of auditor.
- 19, 20. Same—Liability of auditor—Mandamus.
- 21, 22. General character of statute.
23. Mandate—Can not be issued requiring auditor to audit and allow demand.
24. Priority of claims.
25. Public officers—As “judgment-debtors.”
26. Special regulations—As to officers, etc.—Public policy.

1. Abstract of judgment—Prepared in accordance with provisions of section 897, post, and filed with auditor will not be sufficient to secure benefits of this section, which requires a transcript or copy of the judgment to be filed.—*Erkson v. Parker*, 3 Cal. App. 98, 84 Pac. 437.

2. Applicability of section.—Question whether this section applies to judgments recovered prior to its enactment, raised but not decided.—*Payne v. Baehr*, 153 Cal. 441, 447, 95 Pac. 895.

3. This section is applicable to the salaries of such public officers and employees as do not come within the term “constitutional officers.”—*Lawson v. Lawson*, 158 Cal. 446, 111 Pac. 354.

4. This section applies to the salaries of justices of the peace.—*Lawson v. Lawson*, 158 Cal. 446, 111 Pac. 354.

5. Construction of section—As to purpose.—The purpose of enacting the statute was to afford a means whereby money due from a municipality to the debtor of another could be reached by the creditor and subjected to the payment of his claim. This section must be liberally construed with a view to effect its object. Where the provisions of the section have been complied with a writ of mandate commanding the auditor to draw a warrant upon the city treasurer will lie. It makes no difference that the municipal charter requires all warrants to be signed by the mayor, nor that the fund out of which the plaintiff should have been paid is exhausted, and hence the writ unavailing if issued.—*Ott Hardware Company v. Davis*, 165 Cal. 795, 134 Pac. 973.

6. Same—As to rights of judgment-creditor.—The judgment-creditor can obtain under this section only such money as "is owing to the judgment-debtor" at the time of the filing of the authenticated transcript of judgment and affidavit, but money may be so "owing" although the demand therefor has not been audited. It is sufficient for all the purposes of this section that the claim of the judgment-debtor against the city or county has fully accrued at the time of the filing of the transcript, etc., and that nothing remains to be done to entitle him to the money except the presentation of a proper demand and the approval of the same by the auditor.—Payne v. Baehr, 153 Cal. 441, 445, 95 Pac. 895.

7. Same—Court is without power to make any order for disposition of money until it has been paid into court or the auditor's warrant therefore drawn in favor of the court has been delivered to the court.—Lawson v. Lawson, 158 Cal. 446, 111 Pac. 356.

8. Same—With respect to application to municipalities.—The filing with the city auditor of the transcript of judgment imposed upon that officer the ministerial duty of drawing a warrant. Inasmuch as prior to the adoption of this section municipal corporations were not subject to any of the statutory provisions relating to attachment or garnishment this added enactment must be given the effect only of prescribing a ministerial duty for the non-performance of which no liability can accrue against the municipality. (Dissenting opinion of Angellotti, J., with whom Henshaw concurred).—Ott Hardware Co. v. Davis, 165 Cal. 795, 134 Pac. 973.

9. This section prescribes an official duty ministerial in nature to be performed by the auditor for the benefit of the judgment-creditor when properly requested somewhat analogous to the duty of a sheriff to whom a writ of attachment or execution is delivered with directions to levy the same, and it can not reasonably be claimed that he would not be liable to the creditor properly demanding the performance of such duty for any actual damage caused such creditor by his refusal to perform the same, and this remedy to the injured party necessarily exists independently of the right of a party beneficially interested in the performance or an official to compel the performance of the same by the proceeding of mandamus.—Payne v. Baehr, 153 Cal. 441, 444, 95 Pac. 895.

10. Constitutionality of section.—This section is constitutional.—Ruperich v. Baehr, 142 Cal. 190, 196, 75 Pac. 782 (Van Dyke, J., and Beatty, C. J., dissenting, holding that section is unconstitutional so far as it applies to salary or compensation of officers whose salary or compensation is provided for under constitution).

11. This section is constitutional, and applicable to the salaries of public em-

ployees, at least to all except officers whose salaries are fixed by a provision of the constitution, and it is the duty of the auditor to deliver the demand of such employee when audited, allowed and indorsed, to the court rendering the judgment or its authorized officer when proper proceedings under this section are taken.—Payne v. Baehr, 153 Cal. 441, 443, 95 Pac. 895.

12. This section is not violative of the provisions of the constitution inhibiting special legislation and requiring that a general law shall have a uniform operation.—Lawson v. Lawson, 158 Cal. 446, 111 Pac. 354.

13. Prior to the enactment of this section the salary of a public officer was not subject to attachment or garnishment. The enactment of this section was a valid exercise of legislative power.—Trow v. Moody, 27 Cal. App. 403, 150 Pac. 77.

14. Filing transcript—Effect of.—The filing of a transcript of a judgment against a city official with the auditor as provided by section 710, post, has the effect of impounding whatever money is owing to the official at the time the transcript is filed, and the same has priority over an instrument filed on the same day but before the filing of the transcript wherein such official made a purported assignment of the portion of the monthly salary which he had then earned to the person filing the instrument.—Trow v. Moody, 27 Cal. App. 403, 150 Pac. 77.

15. Garnishment of public funds—Accrual of demand.—While a judgment-creditor can obtain only such money as "is owing the judgment-debtor" at the time of the filing of the authenticated transcript and affidavit, yet money may be owing although no demand therefor has been audited, and the judgment-creditor is entitled to have a warrant for whatever amount has accrued in favor of the debtor at the time of the filing of the transcript, without regard to whether a demand therefor has been audited or not, and it is not necessary that the transcript should be filed after audit of demand, and before delivery of warrant.—Payne v. Baehr, 153 Cal. 446, 95 Pac. 895.

16. Same—Action for damages against auditor—Sufficiency of complaint.—In an action against the auditor for damages for failure to draw his warrant as herein prescribed, a complaint which alleged that the judgment-debtor (an official stenographer) had performed all conditions necessary "to entitle him to have his demand against the treasury audited by said auditor," sufficiently alleges, against an objection by general demurrer, the presentation of a demand in proper form to be audited.—Payne v. Baehr, 153 Cal. 445, 95 Pac. 895.

17. Same—Approval of demand of judgment-creditor.—It is not essential to the right of action of a judgment-creditor against the auditor for damages for refusing to comply with the provisions of this

section, that he should have made a demand upon the auditor, other than the filing of the transcript herein prescribed, or that his demand against his debtor should have been approved by the police judge (in the case of a public stenographer).—Payne v. Baehr, 153 Cal. 447, 95 Pac. 895.

18. Same—Duty of auditor.—This section imposes upon the auditor an official duty, ministerial in its nature, to be performed for the benefit of a judgment-creditor who complies with its conditions, for failure or refusal to perform which he is liable to respond in damages to one specially injured by such refusal or neglect.—Payne v. Baehr, 153 Cal. 443, 95 Pac. 895.

19. Same—Liability of auditor—Mandamus.—The remedy of an injured party against the auditor for refusal to comply with the provisions of this section, to have damages for such refusal, exists independently of the right of the person beneficially interested to compel such compliance by a resort to the proceeding in mandamus.—Payne v. Baehr, 153 Cal. 444, 95 Pac. 895.

As to mandate not to issue requiring auditor to allow claim, see par. 23, this note.

20. Mandamus may issue to compel auditor to draw warrant in favor of justice of the peace for claim made under this section and an assignment of the salary of the debtor which is void because prematurely made is no defense.—Wilkes v. Sievers, 8 Cal. App. 659, 663, 97 Pac. 677.

21. General character of statute.—Law applies generally to all public corporations.—Ruperich v. Baehr, 142 Cal. 190, 196, 75 Pac. 782.

22. Fact that provisions of this section differ somewhat from ordinary processes of attachment and execution does not destroy its character as general law.—Ruperich v. Baehr, 142 Cal. 190, 196, 75 Pac. 782.

23. Mandate—Can not be issued requiring auditor to audit and allow demand in favor of employee of city against whom garnishment provided for in this section has been served, where no demand was made except for entire sum, as auditor is entitled to proper demand before he becomes subject to suit in mandamus.—Ruperich v. Baehr, 142 Cal. 190, 197, 75 Pac. 782. See pars. 19, 20, this note.

24. Priority of claims.—The claim of one who garnishes a debt due to his judgment-debtor is superior to the claims of laborers and materialmen under section 1184, post, who give notice after the garnishment has been made.—Miles v. Ryan, 172 Cal. 205, 157 Pac. 5.

25. Public officers—As "judgment-debtors."—Salaries and wages of public officers and employees are included in meaning of phrases "money owing," "money which belongs to," and "amounts so due or owing," and necessarily implies that such officers and employees are among persons classed as "judgment-debtors" to whom money is due or owing, and that such debtors are subject to garnishment as authorized by this section.—Ruperich v. Baehr, 142 Cal. 190, 195, 75 Pac. 782.

26. Special regulations—As to officers, etc.—Public policy.—The fact that there has been heretofore no means by which moneys due from state or from its public corporations could be reached and applied upon debts of persons to whom they are due, and that considerations of public policy require that public corporations and public officers and employees should not be held subject to the ordinary provisions and processes of law for garnishment of debts and claims due or owing, sufficiently distinguishes classes of persons and assets to which this section relates to justify legislature in making special regulations concerning such persons, and mode of reaching such assets.—Ruperich v. Baehr, 142 Cal. 190, 196, 75 Pac. 782.

§ 710[a]. CLAIM AND RELEASE OF PROPERTY HELD UNDER EXECUTION; UNDERTAKING. Where property levied upon under execution to satisfy a judgment for the payment of money is claimed, in whole or in part, by a person, corporation, partnership or association, other than the judgment debtor, such claimant may give an undertaking as herein provided, which undertaking shall release the property in the undertaking described from the lien and levy of such execution.

History: Enacted March 9, 1903, Stats. and Amdts. 1903, p. 102.

Editorial note: This section properly numbered 710, except for the reason given in history to preceding section.

1. Claim and delivery. Where property levied on under execution is owned or claimed by a third party.—See, ante, § 689

and note; also 21 Cent. Dig. col. 1058, §§ 543-599.

§ 710½. UNDERTAKING BY PARTY CLAIMING PROPERTY; AMOUNT OF AND CONDITIONS OF. Such undertaking, with two sureties, shall be

executed by the person, corporation, partnership or association, claiming in whole or in part, the property upon which execution is levied in double the estimated value of the property claimed by the person, corporation, partnership or association; provided, in no case need such undertaking be for a greater sum than double the amount for which the execution is levied; and where the estimated value of the property so claimed by the person, corporation, partnership or association is less than the sum for which such attachment is levied, such estimated value shall be stated in the undertaking, and said undertaking shall be conditioned that if the property claimed by the person, corporation, partnership or association is finally adjudged to be the property of the judgment debtor, said person, corporation, partnership or association will pay of said judgment upon which execution has issued a sum equal to the value, as estimated in said undertaking, of said property claimed by said person, corporation, partnership or association, and said property claimed shall be described in said undertaking.

History: Enactment approved March 9, 1903, Stats. and Amdts. 1903, p. 102.

As to objections to undertakings to be in writing, see, post, § 711½.

As to undertakings, execution of, etc., in general, see, post, § 1057 and note.

§ 710a. PAYMENT OF CLAIM OF CONTRACTOR ON PUBLIC WORK.

In the event the judgment debtor named in any transcript of judgment filed under the provisions of section seven hundred ten of this code, approved March 21, 1903, be a contractor upon any public work, the cost of which is to be paid out of any public moneys voted, appropriated or otherwise set apart for the purpose of paying therefor, only so much of the contract price shall be deemed owing to the contractor, within the meaning of said section, as may remain payable to him under the terms of his contract, upon the completion thereof, after the sums severally due and to become due to all persons who perform labor upon such work or who bestow skill or other necessary services, or furnish materials, appliances, teams or power used or consumed in the performance of such work, have been ascertained and paid. The controller, auditor, or other public disbursing officer whose duty it is to make payments under the provisions of such contract shall not draw his warrant in favor of the court from the docket of which the transcript was taken until said contract is completed and the payments above specified are made, and then only for the excess, if any, of the contract price over the aggregate of the sums so paid.

History: Enactment approved May 10, 1919, Stats. and Amdts. 1919, p. 451. In effect July 27, 1919.

§ 711. FILING AND SERVICE OF UNDERTAKING. Said undertaking shall be filed in the action in which said execution issued, and a copy thereof served upon the judgment creditor or his attorney in said action.

History: Enacted March 9, 1903, Stats. and Amdts. 1903, p. 102.

1. Conditions in restraint of alienation—Application of rule.—The alienation of property hereunder signifies its transfer, and implies the right by title to do so, and it has no application to a conditional sale which expressly provides that title shall

not pass until the conditions, as to payment of purchase-price, are fully performed.—*Morris v. Allen*, 17 Cal. App. 691, 121 Pac. 690.

As to service of papers, in general, see, post, §§ 1010-1017 and notes.

§ 711½. EXCEPTION TO SURETIES; HOW MADE. Within ten days after the service of the copy of undertaking, the judgment creditor may object to such undertaking on the ground of inability of the sureties, or either of them, to pay the sum for which they become bound in said undertaking, and upon the ground that the estimated value of property therein is less than the market value of the property claimed. Such objection to the undertaking shall be made in writing, specifying the ground or grounds of objection, and if the objection is made to the undertaking that the estimated value therein is less than the market value of the property claimed. Such objection shall specify the judgment creditor's estimate of the market value of the property claimed. Such written objection shall be served upon the person, partnership, corporation or association giving such undertaking and claiming the property therein described.

History: Enactment approved March 9, 1903, Stats. and Amdts. 1903, p. 102.

As to amount required upon undertaking, see, ante, § 710½.

§ 712. JUSTIFICATION OF SURETIES; APPROVAL AND DISAPPROVAL. When the sureties, or either of them, are objected to, the surety or sureties so objected to shall justify before the court out of which such execution issued, upon ten days' notice of the time when they will so justify being given to the judgment debtor or his attorney. Upon the hearing and examination into the sufficiency of a surety, witnesses may be required to attend and evidence may be procured and introduced in the same manner as in trial of civil cases. Upon such hearing and examination, the court shall make its order, in writing, approving or disapproving the sufficiency of the surety or sureties on such undertaking. In case the court disapproves of the surety or sureties on any undertaking, a new undertaking may be filed and served, and to any undertaking given under the provisions of this act the same objection to the sureties may be made, and the same proceedings had as in case of the first undertaking filed and served.

History: Enactment approved March 9, 1903, Stats. and Amdts. 1903, p. 102.

As to qualifications of sureties, in general, see, post, § 1057 and note.

§ 712½. NEW UNDERTAKING; WHEN TO BE GIVEN. When objection is made to the undertaking upon the ground that the estimated value of the property claimed, as stated in the undertaking, is less than the market value of the property claimed, the person, corporation, partnership or association may accept the estimated value stated by the judgment creditor in said objection, and a new undertaking may be at once filed with the judgment creditor's estimate stated therein as the estimated value, and no objection shall thereafter be made upon that ground; if the judgment creditor's estimate of the market value is not accepted, the person, corporation, partnership or association giving the undertaking shall move the court in which the execution issued, upon ten days' notice to the judgment debtor, to estimate the market value of the property claimed and described in the undertaking, and upon the hearing of such motion witnesses may be required to attend and testify, and evidence

be produced in the same manner as in the trial of civil actions. Upon the hearing of such motion, the court shall estimate the market value of the property described in the undertaking, and if the estimated value made by the court exceeds the estimated value as stated in the undertaking, a new undertaking shall be filed and served, with the market value determined by the court stated therein as the estimated value.

History: Enactment approved March 9, 1903, Stats. and Amdts. 1903, p. 103.

§ 713. JUSTIFICATION OF SURETIES. The sureties shall justify on the undertaking as required by section one thousand and fifty-seven of the Code of Civil Procedure.

History: Enactment approved March 9, 1903, Stats. and Amdts. 1903, p. 103.

§ 713½. WHEN UNDERTAKING BECOMES EFFECTUAL. The undertaking shall become effective for the purpose herein specified ten days after service of copy thereof on the judgment debtor, unless objection to such undertaking is made as herein provided, and in case objection is made to the undertaking filed and served, then the undertaking shall become effective for such purposes when an undertaking is given as herein provided.

History: Enactment approved March 9, 1903, Stats. and Amdts. 1903, p. 103.

CHAPTER II.

PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.

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| § 714. Debtor required to answer concerning his property, when. | § 718. Witnesses required to testify. |
| § 715. Proceedings to compel debtor to appear. In what cases he may be arrested. What bail may be given. | § 719. Judge may order property to be applied on execution. |
| § 716. Any debtor of the judgment debtor may pay the latter's creditor. | § 720. Proceedings upon claim of another party to property, or on denial of indebtedness to judgment debtor. |
| § 717. Examination of debtors of judgment debtor, or of those having property belonging to him. | § 721. Disobedience of orders, how punished. |

§ 714. DEBTOR REQUIRED TO ANSWER CONCERNING HIS PROPERTY, WHEN. When an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, issued to the sheriff of the county where he resides, or if he does not reside in this state, to the sheriff of the county where the judgment-roll is filed, is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return is made, is entitled to an order from a judge of the court, requiring such judgment debtor to appear and answer concerning his property before such judge, or a referee appointed by him, at a time and place specified in the order; but no judgment debtor must be required to attend before a judge or referee out of the county in which he resides, or in which he has a place of business.

History: Enacted March 11, 1872; re-enactment of § 238 Practice Act; amendment approved March 9, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 5; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 157, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 685, Kerr's Stats. and Amdts. 1906-7, p. 459.

SUPPLEMENTARY PROCEEDINGS—IN GENERAL.

- 1-5. As to construction of section—Examination of judgment-debtor.
6. Contempt—Failure to appear for examination.
7. Same—Correction of intermediate mistakes—Before final order.
- 8, 9. Creditors' bill—Used as substitute for statutory proceeding.
10. Debts secured by mortgage—Attached by garnishment.
11. Distinction—Between above section and section 715, post.
12. Same—Under Practice Act.
13. Proceedings supplementary to execution—Nature of.
14. Same—As supplanting proceeding in equity.
- 15, 16. Same—Is entirely statutory.
- 17, 18. Proceeding is in original cause.
19. Property or credits in hands of debtor of judgment-debtor.
20. Punishment of judgment-debtor—For contempt of order.
21. Purpose of proceedings.
22. Patent-right—Application of to satisfaction of judgment.

1. **As to construction of section—Examination of judgment-debtor.**—Under the provisions of this chapter, debtor of judgment-debtor may be fully examined as to property, credits, money, or other assets in his possession, or under his control. Witnesses may be examined and judge may order any property of judgment-debtor, not exempt from execution, or due to judgment-debtor, to be applied towards satisfaction of judgment.—*Matteson & W. M. Co. v. Conley*, 144 Cal. 483, 485, 77 Pac. 1042.

2. **The examination of the judgment-debtor under this and the following section is the same;** it covers the same field and has the same purpose, namely, that of having disclosed by an examination of the debtor some property not exempt from execution which the judgment-creditor may have subjected to sale under his execution.—*People ex rel. Dorris v. McKamy*, 28 Cal. App. 196, 151 Pac. 743.

3. **There need be no other showing of facts than that of the execution being returned unsatisfied,** because the return of the execution itself unsatisfied presupposes that search for property of the debtor has been fruitless.—*People ex rel. Dorris v. McKamy*, 28 Cal. App. 196, 151 Pac. 743.

4. **After an examination has been held under this and the following section and the creditor has been given the privilege of fully examining his debtor as to his property,** he can not subject the debtor to a second examination without disclosing to the court some new facts, such as that other facts have become known to the cred-

itor of which he was not apprised at the former examination, or matters of like kind.—*People ex rel. Dorris v. McKamy*, 28 Cal. App. 196, 151 Pac. 743.

5. **This chapter relates only to proceedings supplementary to execution and it is not necessary that the provisions should be resorted to before beginning action against one who has been garnisheed under sections 543 and 544.**—*Marshall v. Wentz*, 28 Cal. App. 540, 153 Pac. 244.

6. **Contempt—Failure to appear for examination.**—It is the duty of the president of a corporation upon being served with an order directing the corporation and its president to appear and answer concerning its property upon supplementary proceedings, to appear and comply with the order, and may be adjudged guilty of contempt if he fails to do so.—*Drew v. Superior Court*, 180 Cal. 711, 182 Pac. 417.

As to punishment of judgment-debtor for contempt of order, see par. 20, this note.

7. **Same—Correction of intermediate mistakes—Before final order.**—Contempt proceedings will not be reviewed by certiorari until final order for the purpose of correcting jurisdictional mistakes.—*Frost v. Superior Court*, 41 Cal. App. 580, 183 Pac. 206.

8. **Creditors' bill—Used as substitute for statutory proceeding under this chapter,** falls to state facts sufficient to constitute cause of action where bill does not show that remedies at law have been exhausted, or that execution has been returned unsatisfied.—*Matteson & W. M. Co. v. Conley*, 144 Cal. 483, 486, 77 Pac. 1042. See *Pacific Bank v. Robinson*, 57 Cal. 520, 522, 40 Am. Rep. 120; *Mesmer v. Jenkins*, 61 Cal. 151, 153; *Herrlich v. Kaufmann*, 99 Cal. 271, 27 Am. St. Rep. 50, 33 Pac. 857.

9. **Creditors' bill in equity to reach the property of the judgment-debtor not subject to execution will not lie in this state so long as the statutory proceedings provided by this and following sections afford an adequate legal remedy.**—*Phillips v. Price*, 153 Cal. 148, 94 Pac. 617.

10. **Debts secured by mortgage—Attached by garnishment.**—Debts secured by mortgage, like other debts, may be attached by garnishment, but in no other way; and their payment may be enforced under provisions of code relating to proceedings supplementary to execution.—*McGurren v. Garrity*, 68 Cal. 566, 568, 9 Pac. 839.

11. **Distinction—Between above section and section 715, post,** seems to be that under latter supplementary proceedings may be commenced before return of execution, provided it has been issued, and that in such case an affidavit is necessary showing that judgment-debtor has property which he refuses to apply to satisfaction of judgment; but where execution has been returned unsatisfied, party is entitled to order without any affidavit as provided

In this section.—*Collins v. Angell*, 72 Cal. 513, 515, 14 Pac. 135.

12. Same—Under Practice Act.—Difference between above section (§ 238 Practice Act) and section 715, post (§ 239 Practice Act), consists in this: that latter allows plaintiff to proceed earlier and in more stringent manner. Under one section creditor can only examine judgment-debtor after execution returned, while under other he can examine him before return and also have him arrested upon proper showing. Under both sections same property may be made liable when ascertained.—*Adams v. Hackett*, 7 Cal. 187, 201.

13. Proceedings supplementary to execution—Nature of.—Proceedings supplementary to execution, under our code, are substitute for creditors' bill, as formerly used in chancery.—*Matteson & W. M. Co. v. Conley*, 144 Cal. 483, 485, 77 Pac. 1042. See *Adams v. Hackett*, 7 Cal. 187, 200, 201; *McCullough v. Clark*, 41 Cal. 298, 302; *Pacific Bank v. Robinson*, 57 Cal. 520, 522, 40 Am. Rep. 120; *Habenicht v. Lissak*, 78 Cal. 351, 357, 12 Am. St. Rep. 63, 5 L. R. A. 713; 20 Pac. 874; *High v. Bank of Commerce*, 95 Cal. 386, 29 Am. St. Rep. 121, 30 Pac. 556; *Herrlich v. Kaufmann*, 99 Cal. 271, 27 Am. St. Rep. 50, 33 Pac. 857. *Colo. Hexter v. Clifford*, 5 Colo. 168. *N. Y. Lynch v. Johnson*, 48 N. Y. 27, 33. *Wis. Graham v. La Crosse & M. R. Co.*, 10 Wis. 459.

14. Same—As supplanting proceedings in equity unless some special grounds exist under which to invoke power of chancery. Complaint, as substitute for proceedings in this chapter, is entirely insufficient where it does not show that remedies at law have been exhausted or would be unavailing, and where there is not only failure to aver return of an execution nulla bona, or at all, but there is an affirmative averment that judgment-debtor has always been "fully able to pay the whole of said judgment and execution, and has always had ample moneys and properties to make said payment."—*Herrlich v. Kaufmann*, 99 Cal. 271, 277, 27 Am. St. Rep. 50, 33 Pac. 857.

15. Same—Is entirely statutory.—*Bryant v. Bank of California*, 2 Cal. Unrep. 128, 7 Pac. 128, 130. See *Hassie v. God Is with Us Cong.*, 35 Cal. 378.

16. As proceeding is statutory, requirements of statute must be complied with.—

Bryant v. Bank of California, 2 Cal. Unrep. 128, 7 Pac. 128, 130.

17. Proceeding is in original cause auxiliary and supplemental thereto, and not in nature of new action.—*Collins v. Angell*, 72 Cal. 513, 516, 14 Pac. 135.

18. Proceeding is separate proceeding in original action in which court where action is pending is called upon to exercise its jurisdiction in aid of judgment in action.—*Bryant v. Bank of California*, 2 Cal. Unrep. 128, 7 Pac. 128, 130.

19. Property or credits in hands of debtor of judgment-debtor can not be applied to satisfaction of judgment in separate action, as party can not be sued upon debt by one to whom he is not indebted. Proceedings provided by law must be followed where such property is sought to be applied on judgment.—*Matteson & W. M. Co. v. Conley*, 144 Cal. 483, 485, 77 Pac. 1042.

20. Punishment of judgment-debtor—For contempt of order.—Where judgment-debtor, for purpose of defeating process of court and order directing him to turn over property to apply upon judgment, had procured, upon his own motion, delay in proceedings pending which he voluntarily and contumaciously disabled himself from complying with order he anticipated being made, court rightfully adjudges him guilty of contempt.—*Ex parte Kellogg*, 64 Cal. 343, 345, 30 Pac. 1030. See *Galland v. Galland*, 44 Cal. 475, 478.

See par. 6, this note.

As to contempt proceedings, generally, see, post, § 1209 and note.

21. Purpose of proceedings supplementary to execution is to insure simplicity and economy, and therefore such proceedings should receive liberal construction, and main intention and spirit of act should be fairly carried out.—*Adams v. Hackett*, 7 Cal. 187, 201.

22. Patent-right—Application of to satisfaction of judgment.—Judgment-debtor may be compelled, in proceedings supplementary to execution, to deliver patent-right in satisfaction of judgment to receiver appointed to dispose of it in aid of execution.—*Pacific Bank v. Robinson*, 57 Cal. 520, 522, 40 Am. Rep. 120.

§ 715. PROCEEDINGS TO COMPEL DEBTOR TO APPEAR. IN WHAT CASES HE MAY BE ARRESTED. WHAT BAIL MAY BE GIVEN. After the issuing of an execution against property, and upon proof, by affidavit of a party or otherwise, to the satisfaction of a judge of the court, that any judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment, such judge may, by an order, require the judgment debtor to appear, at a specified time and place, before such judge, or a referee appointed by him, to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor

toward the satisfaction of the judgment as are provided upon the return of an execution. Instead of the order requiring the attendance of the judgment debtor, the judge may, upon affidavit of the judgment creditor, his agent or attorney, if it appear to him that there is danger of the debtor absconding, order the sheriff to arrest the debtor and bring him before such judge. Upon being brought before the judge, he may be ordered to enter into an undertaking, with sufficient surety, that he will attend from time to time before the judge or referee, as may be directed during the pendency of proceedings and until the final termination thereof, and will not in the meantime dispose of any portion of his property not exempt from execution. In default of entering into such undertaking he may be committed to prison.

History: Enacted March 11, 1872, re-enactment of § 239 Practice Act as amended 1854 (Stats. 1854, p. 84); amendment approved March 9, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 5.

SUPPLEMENTARY PROCEEDINGS—COMPELLING DEBTOR TO APPEAR.

1. Affidavit—As basis for commencing proceedings.
2. Compelling debtor to appear.
3. Construction of section.
4. Debtor of judgment-debtor—Supplementary proceedings—Bar of statute of limitations.
5. Decision in proceedings concludes both parties.
6. Equitable circumstances to justify suit—Need not be shown.
7. Findings not required.
8. Issues not required.
9. Judgment as "property"—Within meaning of section.
10. Judgment-debtor can not again litigate same matters.
11. Parties to proceeding.
12. When proceeding may be commenced.
13. Witnesses—May be called and examined on either side.

See, also, ante, § 714 and note.

As to correction of intermediate jurisdictional mistakes before final order, see, ante, § 714, note par. 7.

1. Affidavit—As basis for commencing proceedings.—Affidavit under this section and, post, section 717, as basis for commencing proceedings, takes place of creditor's bill in chancery, and, as legal substitute for that proceeding, must not only contain necessary averments to give court jurisdiction over it, but must also be filed in court or delivered to clerk for that purpose.—*Bryant v. Bank of California*, 2 Cal. Unrep. 128, 7 Pac. 128, 130.

2. Compelling debtor to appear.—Where the execution has been issued and not returned there must be an affidavit showing that the execution is unsatisfied and that the debtor has property which he refuses to apply toward satisfaction of the judgment.—*People ex rel. Dorris v. McKamy*, 28 Cal. App. 196, 151 Pac. 743.

3. Construction of section.—In this section it is provided that where it is sought to subject property to levy of execution, same proceedings may be had as those prepared after return of execution, and this expressly refers to sections 717 et seq.—*Carter v. Los Angeles Nat. Bank*, 116 Cal. 370, 374, 48 Pac. 332.

4. Debtor of judgment-debtor—Supplementary proceedings—Bar of statute of limitations.—The fact that the debt sought to be applied in satisfaction of the judgment is barred by the statute of limitations is a sufficient answer to the proceeding, notwithstanding garnishment of the debt prior to judgment and at a time when it was not barred, where the notice of garnishment failed to include the same, creating no liability thereon in favor of the attachment-creditor and against the garnishee.—*Clyne v. Easton*, 148 Cal. 292, 83 Pac. 36.

5. Decision in the proceedings concludes both parties to the action or proceeding.—*McCullough v. Clark*, 41 Cal. 298, 304.

6. Equitable circumstances to justify suit—Need not be shown.—No equitable circumstances need be shown to justify suit.—*Carter v. Los Angeles Nat. Bank*, 116 Cal. 370, 374, 48 Pac. 332.

7. Findings not required.—It is not incumbent upon court to make express findings in special proceedings in aid of execution.—*Lyons v. Marcher*, 119 Cal. 382, 383, 51 Pac. 559.

8. Issues not required.—Proceeding is only summary method of purging debtor's conscience and compelling disclosure of any property he may have which is subject to execution. No formal issues are required to be framed in proceedings supplementary to execution, for it would be generally impossible to frame specific issues in advance of examination of judgment-debtor. Object of proceeding is to compel him to give information concerning his property, and until disclosure is made there is nothing upon which an issue can be framed.—*McCullough v. Clark*, 41 Cal. 298, 302. See *Lyons v. Marcher*, 119 Cal. 382, 383, 51 Pac. 559.

9. Judgment as "property" — Within meaning of section.—When proceedings are under this section (§ 239 Practice Act) creditor may reach any property liable to execution, and judgment is property within meaning of this section.—*Adams v. Hackett*, 7 Cal. 187, 203.

10. Judgment-debtor can not again litigate same matters in an independent action, as, if he claims that property was exempt from execution and court erred in ordering it to be applied to satisfaction of judgment, he has plain and adequate remedy by appeal.—*McCullough v. Clark*, 41 Cal. 298, 303.

11. Parties to proceeding.—Judgment-creditor and debtor are parties to proceeding, and each is at liberty to call and ex-

amine witnesses in response to any contested fact which may be brought in issue in course of proceeding.—*McCullough v. Clark*, 41 Cal. 298, 303.

12. When proceeding may be commenced.—Proceedings under this section and section 719, post, can only be taken after judgment is rendered and execution issued thereon.—*Wells v. Torrance*, 119 Cal. 437, 439, 51 Pac. 626.

13. Witnesses.—May be called and examined on either side; and after hearing case court or referee is to decide what property, if any, judgment-debtor has which is subject to be applied to satisfaction of judgment, and to direct its application accordingly.—*McCullough v. Clark*, 41 Cal. 298, 302.

§ 716. ANY DEBTOR OF THE JUDGMENT DEBTOR MAY PAY THE LATTER'S CREDITOR. After the issuing of an execution against property, and before its return, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution; and the sheriff's receipt is a sufficient discharge for the amount so paid.

History: Enacted March 11, 1872, re-enactment of § 240 Practice Act.

ANY DEBTOR OF JUDGMENT-DEBTOR MAY PAY JUDGMENT-CREDITOR.

1. Construction of section.
2. Even if sheriff disqualified from levying execution.
3. Payment of debt by garnishee.

1. Construction of section.—This section in no way trenches upon sovereignty of state, nor does it impose upon any officer of state any duties which could embarrass his performance of official duties.—*Skelly v. Westminster S. Dist.*, 103 Cal. 652, 659, 37 Pac. 643.

2. Even if a sheriff were disqualified from levying execution, on general principles, upon the judgment against himself and his sureties, the other judgment-debtors had the right, under this section, after the execution had regularly issued, to satisfy the same without a formal levy. Upon

making such payment, and the money having gone to the party entitled to receive it, they were entitled to have the judgment against them satisfied of record.—*Buckeye Refining Co. v. Kelly*, 163 Cal. 8, 15, 124 Pac. 536.

3. Payment of debt by garnishee.—Where plaintiff recovered judgment against defendants and thereafter assigned said judgment, and subsequent to assignment, and before notice thereof to defendants, defendants paid portion of judgment to sheriff who had served garnishment upon them in one action, and portion to constable upon execution held by him for collection in another action; held that payment so made by defendants to constable and sheriff did not satisfy judgment pro tanto as against assignee.—*Brown v. Ayres*, 33 Cal. 525, 529, 91 Am. Dec. 655.

Right of plaintiff to summon and charge himself as garnishee, 55 L. R. A. 353.

§ 717. EXAMINATION OF DEBTORS OF JUDGMENT DEBTOR, OR OF THOSE HAVING PROPERTY BELONGING TO HIM. After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon proof by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding fifty dollars, the judge may, by an order, require such person or corporation, or

any officer or member thereof, to appear at a specified time and place before him, or a referee appointed by him, and answer concerning the same.

History: Enacted March 11, 1872, substantial re-enactment of § 241 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 157, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 685, Kerr's Stats. and Amdts. 1906-7, p. 459.

EXAMINATION OF DEBTORS OF JUDGMENT-DEBTOR.

1. Affidavit—Sufficiency of.
2. Same—Purpose of.
3. Adverse claim of title by garnishee.
4. Complaint in nature of creditors' bill.
5. Construction of section.
6. Constitutionality of section.
7. Creditor's election to proceed.
8. Debts subject to garnishment.
9. Default—Can not be entered upon affidavit.
- 10, 11. Examination of party necessary.
12. Jurisdiction — Showing sufficient to confer.
13. Moneys held by officer—Not taken at time of arrest.
14. Order to pay moneys—In custody of officers.
15. Proceedings do not imply any notice of garnishment.
- 16, 17. Second examination of judgment-debtor.
18. Showing as to notice of garnishment—Not required.
- 19-22. Supplementary proceedings—Not adequate remedy—Creditors' bill lies.
23. Word "debt"—As used in law of garnishment.

As to unwarranted character of order to third person claiming an interest to deliver goods in his possession, see, post, § 719, note pars. 6, 7.

1. Affidavit—Sufficiency of.—An affidavit inaugurating supplementary proceeding is sufficient compliance with statute, when.—See *Coffee v. Haynes*, 124 Cal. 561, 563, 564, 71 Am. St. Rep. 99, 57 Pac. 482.

2. Same—Purpose of.—Affidavit serves no other purpose than as basis to set proceedings in motion. It is not pleading like complaint, to which party summoned is to plead, and in default of pleading thereto to be taken in proceeding as true.—*Hathaway v. Brady*, 26 Cal. 581, 590.

3. Adverse claim of title by garnishee.—Fund can not be reached by proceedings supplementary to execution, where the garnishee denies possession or control of any credits or other property of judgment-debtor and asserts title to assets in himself. In such case supplementary proceedings do not supersede remedy by action for reason that they are not adequate to accomplish purpose of action.—*Rapp v. Whittier*, 113 Cal. 429, 431, 45 Pac. 703. See *Swift v.*

Arents, 4 Cal. 390; *Herrlich v. Kaufmann*, 99 Cal. 271, 27 Am. St. Rep. 50, 33 Pac. 857; *Lewis v. Chamberlain*, 108 Cal. 525, 41 Pac. 413.

4. Complaint in nature of creditors' bill is proper procedure where adverse claim or title is set up by garnishee to funds sought to be subjected to satisfaction of judgment against debtor.—*Rapp v. Whittier*, 113 Cal. 429, 431, 45 Pac. 703.

As to creditors' bill when remedy by supplementary proceeding is inadequate, see pars. 19-21, this note.

5. Construction of section.—The above section and section 720, post, even though it be admitted that they have any application to an officer holding property of judgment-debtor by virtue of legal process issued against him, neither section, however, confers on court power to order such property sold, nor to direct that proceeds thereof be paid to clerk of court.—*Brown v. Moore*, 61 Cal. 432, 435.

6. Constitutionality of section.—Provisions of this section and of section 719, post, are constitutional.—*Coffee v. Haynes*, 124 Cal. 561, 564, 71 Am. St. Rep. 99, 57 Pac. 482.

7. Creditor's election to proceed.—The creditor has his election to proceed against debtor of judgment-debtor under provisions of this section (§ 241 Practice Act), or he may proceed against immediate debtor either under section 714, ante (§ 238 Practice Act), or in section 715, ante (§ 239 Practice Act).—*Adams v. Hackett*, 7 Cal. 187, 202.

8. Debts subject to garnishment.—Proceedings under this and succeeding sections can reach everything which could formerly have been made to contribute to payment of judgment, by aid of creditor's bill, and where it was held that creditor's bill would reach choses in action arising from torts committed on property of judgment-debtor, to which his creditor would have right to resort.—*Staples v. May*, 87 Cal. 178, 191, 25 Pac. 346. See *Hudson v. Piets*, 11 Paige (N. Y.) 180.

9. Default—Can not be entered upon affidavit.—It is simply basis for order for purpose of acquiring jurisdiction of party who was before stranger to case.—*Hathaway v. Brady*, 26 Cal. 581, 590.

10. Examination of party necessary.—There is nothing in this and succeeding sections authorizing court to make order for application of property of judgment-debtor in hands of third party, to satisfaction of

judgment, without first ascertaining, by examination of party alleged to have property in his possession, truth of such allegation.—*Hathaway v. Brady*, 26 Cal. 581, 589.

11. Judgment can not be rendered without examination of garnishee.—*Hibernia Sav. & L. Soc. v. Superior Court*, 56 Cal. 265.

12. Jurisdiction—Showing sufficient to confer.—Where on examination of garnishee in supplementary proceedings, referee ordered garnishee to pay certain sum, but denied costs, and action was subsequently commenced by judgment-creditor against garnishee for amount "and costs," held that where it was shown that copies of order and of affidavit, on which supplementary proceedings were based, requiring garnishee to appear for examination before referee, were duly served upon him, and that in obedience thereto he appeared and was examined; this was sufficient to give court jurisdiction of his person in supplementary proceedings, and judgment for principal amount in subsequent action was proper after modification by striking therefrom amount of costs in supplementary proceedings.—*Bronzan v. Drobaz*, 93 Cal. 647, 652, 29 Pac. 254.

13. Moneys held by an officer.—Not taken at time of arrest, nor from person of defendant, and having no connection whatever with cause of arrest, and having come into possession of officer with consent and by direction of owner, is not held in official capacity, and officer owes no official duty to dispose of it in such capacity; and such money may be reached by garnishment upon proceedings supplementary to execution.—*Coffee v. Haynes*, 124 Cal. 561, 567, 71 Am. St. Rep. 99, 57 Pac. 482.

14. Order to pay moneys.—In custody of officers.—Court exceeds its power in making order requiring officers holding property of judgment-debtor by virtue of legal process issued against him, to pay to clerk of superior court proceeds of property sold under execution held by officers against judgment-debtor, and for disobedience of such void order officers can not be lawfully punished for contempt.—*Brown v. Moore*, 61 Cal. 432, 435; *Williams v. Dwinelle*, 51 Cal. 442; *Quimbo Appo v. The People*, 20 N. Y. 531.

15. Proceedings do not imply any notice of garnishment.—It is special proceeding, which can only be inaugurated after execution has been issued and returned unsatisfied in whole or in part. It may be commenced by affidavit or other proof showing that any person has property of judgment-debtor.—*Carter v. Los Angeles Nat. Bank*, 116 Cal. 370, 374, 48 Pac. 332.

16. Second examination of judgment-debtor.—An order subjecting a judgment-debtor to a second examination upon proceedings supplemental to execution can not be had without disclosing some new facts. Such an order is unwarranted in a case C. C. P.—115

where the second affidavit is identical with the first, except that it sets forth that the defendant withdrew a certain amount of money from a bank, but does not allege that the affiant did not at the time of the first examination have full knowledge of the facts concerning the withdrawal of the money.—*People ex rel. Dorris v. McKamy*, 28 Cal. App. 196, 151 Pac. 743.

17. An order made upon such an examination that the salary of the debtor was not necessary for the support of his family, because he had not satisfactorily accounted for certain money which he had months before drawn from a bank, is unauthorized, where his testimony is uncontradicted that he spent such bank money for election expenses and litigation.—*People ex rel. Dorris v. McKamy*, 28 Cal. App. 196, 151 Pac. 743.

18. Showing as to notice of garnishment.—Not required.—No showing is required to effect that notice of garnishment has been served upon person alleged to have property of judgment-debtor.—*Carter v. Los Angeles Nat. Bank*, 116 Cal. 370, 374, 48 Pac. 332.

19. Supplementary proceedings.—Not adequate remedy.—Creditors' bill lies.—The general rule is that, since the above section and the following sections to and including section 720, post, provide for proceedings supplementary to execution, a resort must be had to such proceedings before a creditors' bill will lie; but where such statutory proceedings do not afford an adequate remedy, as in the case where there has been a void transfer of personal property by the judgment-debtor and the transferee claims title, such supplementary proceedings do not suspend the remedy by an action under creditors' bill.—*Henderson v. Denehy, American Tile Co.*, — Cal. App. —, 191 Pac. 558, applying the doctrine in *Rapp v. Whittier*, 113 Cal. 429, 45 Pac. 703; *Phillips v. Price*, 153 Cal. 146, 94 Pac. 617.

As to complaint in nature of creditors' bill, see par. 4, this note.

20. Proceedings supplementary to execution have not superseded or abolished the right of one to bring a suit in the nature of a credited bill, and where one asserts title under a transfer from a debtor and adversely to him, it is not necessary to pursue the course here provided for; it would avail nothing, and in such case, the proceedings here provided do not supersede the remedy by action, for the reason that they are not adequate to accomplish the purposes of the action.—*Union Collection Co. v. Snell*, 5 Cal. App. 130, 132, 89 Pac. 859.

21. The action to compel a debtor of the judgment-debtor to apply the debt due the latter to the satisfaction of the judgment is a statutory "proceeding supplementary to execution" and is designed to take the place of the equitable remedy by creditors' bill—formerly the only method of reaching assets

which could not be seized on execution.—*Nordstrom v. Corona City Water Co.*, 155 Cal. 206, 211, 100 Pac. 242.

22. Resting upon the doctrine applicable generally to proceedings in courts of chancery that equitable relief can not be had except where the plaintiff appears to be without a plain, speedy and adequate remedy at law, and creditors' bill in equity to reach indebtedness due a judgment-debtor can not be maintained where the relief sought may be obtained under this and the following sections. But where these statu-

tory proceedings do not afford an adequate remedy, relief by creditors' bill may still be had.—*Phillips v. Price*, 153 Cal. 146, 147, 148, 94 Pac. 617.

23. Word "debt"—As used in law of garnishment includes only legal debts—causes of action upon which defendant in attachment, under common-law practice, could maintain an action of debt, or indebitatus assumpsit—and not mere equity claims.—*Hassie v. God Is with Us Cong.*, 35 Cal. 378, 385, 386; *Redondon B. Co. v. Brewer*, 101 Cal. 322, 326, 35 Pac. 896.

§ 718. WITNESSES REQUIRED TO TESTIFY. Witnesses may be required to appear and testify before the judge or referee, upon any proceeding under this chapter, in the same manner as upon the trial of an issue.

History: Enacted March 11, 1872, re-enactment of § 242 Practice Act.

1. **President of corporation—Duty to appear for corporation.**—It is the duty of the president to appear and answer for a corporation in supplementary proceedings and he

is not authorized to wait to be subpoenaed as a witness.—*Drew v. Superior Court*, 180 Cal. 711, 182 Pac. 417.

§ 719. JUDGE MAY ORDER PROPERTY TO BE APPLIED ON EXECUTION. The judge or referee may order any property of the judgment debtor, not exempt from execution, in the hands of such debtor, or any other person, or due to the judgment debtor, to be applied toward the satisfaction of the judgment; but no such order can be made as to money or property in the hands of any other person or claimed to be due from him to the judgment debtor, if such person claims an interest in the property adverse to the judgment debtor or denies the debt.

History: Enacted March 11, 1872, re-enactment in part of § 243 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 157, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 685, Kerr's Stats. and Amdts. 1906-7, p. 459.

ORDERING PROPERTY TO BE APPLIED ON EXECUTION.

1. Claim of interest — As warehouseman, under lien.
2. Court is not bound by garnishee's denial, when.
3. Funds in hands of garnishee—Claimed by garnishee to be held by him in trust.
4. Judgment by default—Can not be entered.
5. Order to third person—To apply property to satisfaction of judgment.
6. Same—To deliver goods in which he claims an interest—Unwarranted.
7. Same—Violation of order not contempt.
8. Proceedings—Must be strictly pursued.
9. Remedies of judgment-creditor—Election.
10. Reversal of judgment upon which proceedings based—Effect of.
11. Rulings on evidence — No final order entered—Appeal does not lie.

12. Writ of review—Will issue where default is entered.

See, also, ante, § 544 and note.

1. **Claim of interest—As warehouseman, under lien.**—One who claims a warehouseman's lien on property claims an interest therein within the meaning of section 719, ante.—*Colyear v. Superior Court*, 40 Cal. App. 462, 181 Pac. 74.

2. **Court is not bound by the garnishee's denial** of the debt if the undisputed facts show that the debt really existed at the time of service of the writ of execution. The mere denial by the garnishee of the indebtedness which the other averments and admissions of the parties showed to be an erroneous conclusion from the whole transaction should not be deemed sufficient to divest the court of jurisdiction to make the order provided for in this section.—*Finch v. Finch*, 12 Cal. App. 274, 279, 107 Pac. 594.

3. Funds in hands of garnishee—Claimed by garnishee to be held by him in trust and specially appropriated for payment of certain debts, and in which garnishee claims to have no personal interest as to part ordered to be paid in supplementary proceedings, in absence of explicit findings of referee as to whether such funds were, under circumstances, to apply to payment of such debts, or whether or not debts to which fund was to be applied remained unpaid, was within peculiar province of referee to decide upon all facts of transaction, and that in absence of explicit findings, court will assume that referee found facts necessary to support judgment.—*Parker v. Page*, 38 Cal. 522, 525.

4. Judgment by default—Can not be entered under statute in proceedings supplementary to execution.—*Hibernia Sav. & L. Soc. v. Superior Court*, 56 Cal. 265.

5. Order to third person—To apply property to satisfaction of judgment must be based upon answers of party summoned, and such other testimony as may be adduced in connection with answers.—*Hathaway v. Brady*, 26 Cal. 581, 590.

6. Same—To deliver goods in which he claims an interest—Unwarranted.—An order in a proceeding supplementary to execution directing a third party having possession of goods belonging to the judgment-debtor, directing the delivery of such goods to the judgment-creditor, is wholly unwarranted where such party claimed an interest in the goods.—*Colyear v. Superior Court*, 40 Cal. App. 462, 181 Pac. 74.

7. Same—Violation of order not contempt.—Violation of order no ground for contempt.—*Colyear v. Superior Court*, 40 Cal. App. 462, 181 Pac. 74.

8. Proceedings—Must be strictly pursued, but for purposes of decision it will be as-

sumed that they were regular.—*Hathaway v. Brady*, 26 Cal. 581, 590.

9. Remedies of judgment-creditor—Election.—The law provides three remedies for judgment-creditors who seek to recover as against third persons: (1) by supplementary proceedings provided for in above section; (2) by a separate action to establish the indebtedness if it be denied and to recover the debt as authorized by section 720, post, and (3) by a proceeding to enforce the statutory liability imposed upon the garnishee by section 544, ante.—*Finch v. Finch*, 12 Cal. App. 274, 284, 107 Pac. 594.

10. Reversal of judgment upon which proceedings based—Effect of.—Reversal of the judgment upon which proceedings are based ends proceedings, and if garnishee has complied with order directing him to pay over money he will be entitled to recover the amount paid.—*Turner v. Markham*, 156 Cal. 68, 69, 103 Pac. 319.

11. Rulings on evidence—No final order entered—Appeal does not lie from.—On an examination in supplementary proceedings where exceptions are taken to rulings on the admissibility of evidence, but there was no final judgment entered in the matter as contemplated in the above section, and the court entered no final order determining any right or liability, the rulings upon the admissibility of the proposed evidence were not orders taken the meaning of section 963, post, respecting "special orders made after final judgment," and for that reason no appeal lies.—*Watson v. Pryor*, — Cal. App. —, 193 Pac. 797, applying the doctrine in *McGuire v. Drew*, 83 Cal. 225, 23 Pac. 312.

12. Writ of review—Will issue where default is entered upon proceedings supplementary to execution in superior court upon judgment rendered in justices' court.—*Hibernia Sav. & L. Soc. v. Superior Court*, 56 Cal. 265.

§ 720. PROCEEDINGS UPON CLAIM OF ANOTHER PARTY TO PROPERTY, OR ON DENIAL OF INDEBTEDNESS TO JUDGMENT DEBTOR. If it appears that a person or corporation, alleged to have property of the judgment debtor, or to be indebted to him, claims an interest in the property adverse to him, or denies the debt, the judgment creditor may maintain an action against such person or corporation for the recovery of such interest or debt; and the court or judge may, by order, forbid a transfer or other disposition of such interest or debt, until an action can be commenced and prosecuted to judgment. Such order may be modified or vacated by the judge granting the same, or the court in which the action is brought, at any time, upon such terms as may be just.

History: Enacted March 11, 1872, re-enactment of § 244 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 157, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 686, Kerr's Stats. and Amdts. 1906-7, p. 459.

CLAIM BY ANOTHER PARTY—DENIAL OF INDEBTEDNESS.

1. Action based upon order—Proof required.
2. Action by creditors in supplementary proceedings.
- 3-6. Same—Order of court—Sufficiency of.
7. Same—Order to sue—Creditors' bill in equity.
- 8, 9. Same—To enforce garnishment.
10. Adverse claim of garnishee—Is substantially set forth and interpleaded, when.
11. Same—Action to adjust.
12. Same—Not adjudication of rights, when.
13. Same—Order to surrender property mentioned in affidavit.
- 14, 15. Constitutionality of statute.
16. Conveyance—By judgment-debtor.
- 17, 18. Same—Of property to third person—By garnishee.
19. Creditors who are entitled to trust fund.
- 20, 21. Denial in bad faith and for purpose of delay—Authority of court.
22. Distinction—Between actions based upon garnishment.
23. Due process of law.
24. Findings as to bad faith.
25. Foreclosure of equitable mortgage—Jury properly denied.
26. Garnishee—May pay money into court—Action under section.
27. Indebtedness denied by garnishee—Order to commence action.
28. Remedy of creditor—Against fraudulent assignee.
29. Transfer of property—May be restrained.

See, ante, § 717 and note.

1. Action based upon order—Proof required.—In action based upon order under this section, plaintiff is required to aver and prove existence of order and of proceedings upon which order was found, as without proceedings, order would be nullity, and without order action can not be maintained. —*Bryant v. Bank of California*, 2 Cal. Unrep. 128, 7 Pac. 128, 129.

2. Action by creditors in supplementary proceedings.—Though setting forth distinct causes of action, the creditors may bring a consolidated action to enforce mechanics' liens, and in such an action a single judgment is proper. —*Nordstrom v. Corona City Water Co.*, 155 Cal. 210, 100 Pac. 242.

3. Same—Order of court—Sufficiency of.—An order of court, authorizing an action to be brought hereunder, substantially complying with the law, though not following the precise language of this section, is sufficient to permit such action. —*Nordstrom v.*

Corona City Water Co., 155 Cal. 209, 100 Pac. 242.

4. Order under this section is not essential to right of action against garnishee after supplemental proceedings to point of securing denial of indebtedness to judgment-debtor.—*Nordstrom v. Corona City Water Co.*, 155 Cal. 206, 209, 100 Pac. 242.

5. Although order does not follow the precise language of the section, if when read in the light of the proceedings leading up to its making it substantially complies with the law, it is sufficient.—*Nordstrom v. Corona City Water Co.*, 155 Cal. 206, 209, 100 Pac. 242.

6. Where the fund garnished is claimed by one claiming to be the assignee of the judgment-debtor by assignment prior to the levy, the proper course is to authorize the bringing of a suit by the judgment-creditor making such assignee a party.—*Schino v. Cinquini*, 7 Cal. App. 244, 247, 94 Pac. 83.

7. Same—Order to sue—Creditors' bill in equity.—Where it appears that the person charged with holding property belonging to a judgment-debtor claims title to the property for himself, or denies the debt, relief may be sought by creditors' bill in equity without proceeding hereunder, since this section could give him nothing more than the right to sue. —*Phillips v. Price*, 153 Cal. 150, 94 Pac. 617.

8. Same—To enforce garnishment.—The garnishee can make no defense to an action brought under the authority of this section, that did not exist at the date of the garnishment levied upon him; and a subsequent judgment obtained by him against the deceased judgment-debtor is no such defense, and can not be set off against the demand of the judgment-debtors, based upon the lien of the garnishment. —*Nordstrom v. Corona City Water Co.*, 155 Cal. 211, 100 Pac. 242.

9. The right to maintain an action such as is here authorized, for the recovery of debts due the judgment-creditor, is in no way dependent upon any precedent garnishment of such debts under the authority of section 688, ante.—*Nordstrom v. Corona City Water Co.*, 155 Cal. 211, 100 Pac. 242.

10. Adverse claim of garnishee—Is substantially set forth and interpleaded when. upon examination, he fully informs court of all such adverse claims. —*Deering v. Richardson-Kimball Co.*, 109 Cal. 73, 84, 41 Pac. 801.

11. Same—Action to adjust.—Where there is no pretense of bad faith on part of garnishee, and no dispute as to facts as to adverse claims to funds, judge is authorized only to make an order to effect that action might be brought against garnishee, to which action other persons claiming liens upon property may be made parties, to end that all adverse claims might be adjusted, and conclusively settled in such action. —*Deering v. Richardson-Kimball Co.*, 109 Cal.

73, 83, 41 Pac. 801. See *Roberts v. Landecker*, 9 Cal. 262; *Parker v. Page*, 38 Cal. 522; *Robinson v. Tevis*, 38 Cal. 612, 614; *Hartman v. Olvera*, 51 Cal. 501, 502; *Ex parte Hollis*, 59 Cal. 406, 414.

12. **Same—Not adjudication of rights, when.**—Order of judge on proceedings supplementary to execution where garnishee claims property is not an adjudication of rights of parties. His only power in premises is to make an order authorizing judgment-creditor to institute action in proper court, and if he choose to do so, to forbid transfer pending action.—*High v. Bank of Commerce*, 103 Cal. 525, 527, 37 Pac. 508; *McDowell v. Bell*, 86 Cal. 615, 25 Pac. 128.

13. **Same—Order to surrender property mentioned in affidavit,** can not be legally made except upon admission of garnishee that property is property of judgment-debtor.—*Lewis v. Chamberlain*, 108 Cal. 525, 527, 41 Pac. 413.

14. **Constitutionality of statute.**—Statute is not unconstitutional in that judgment-debtor has, under it, no notice of supplementary proceedings after judgment affecting his rights of property.—*High v. Bank of Commerce*, 95 Cal. 386, 388, 29 Am. St. Rep. 121, 30 Pac. 556. See *Hexter v. Clifford*, 5 Colo. 168; *Gibson v. Haggerty*, 37 N. Y. 555; *Lynch v. Johnson*, 48 N. Y. 27, 32.

15. **Compare:** *Bryant v. Bank of California*, 2 Cal. Unrep. 128, 7 Pac. 128, 131 (concurring opinion of Ross, J.); also *Bryant v. Bank of California*, 2 Cal. Unrep. 567, 8 Pac. 644 (opinion of Myrick, J.).

16. **Conveyance—By the judgment-debtor.**—Code provisions relating to proceedings supplementary to execution, without provisions contained in this section, can not take place of creditor's bill, where judgment-debtor had "conveyed" property to third person who claimed title under such conveyance.—*Lewis v. Chamberlain*, 108 Cal. 525, 528, 41 Pac. 413.

17. **Same—Of property to third person—By garnishee.**—Where on day affidavit was filed for instituting proceedings supplementary to execution garnishee conveyed property to one W, who subsequently conveyed to M, and court, upon examining garnishee, found and adjudged that property was property of judgment-debtor, and that neither garnishee nor W ever had any interest therein, and ordered that execution issue in case, in which all proceedings were conducted, and property be subjected to satisfaction of judgment, and that receiver be appointed to take possession of property and subject same to satisfaction of judgment; held, that court exceeded jurisdiction, and writ of prohibition would issue restraining court and judge thereof from further proceedings.—*McDowell v. Bell*, 86 Cal. 615, 616, 25 Pac. 128.

18. Only power of court to make order in reference to property conveyed by garnishee is to authorize creditor to institute action in proper court against parties claiming

property, for recovery of same, and subjection thereof to satisfaction of debt, and forbid transfer of property until such action can be commenced and prosecuted to judgment.—*McDowell v. Bell*, 86 Cal. 615, 616, 25 Pac. 128. See *Hartman v. Olvera*, 51 Cal. 501.

19. **Creditors who are entitled to trust fund under arrangement between judgment-debtor and garnishee,** are not concluded by proceeding supplementary to execution, since they are not parties to it, and therefore are not bound by it, and may yet, by action in nature of bill of interpleader, settle rights of all parties interested.—*Parker v. Page*, 38 Cal. 522, 527.

20. **Denial in bad faith and for purpose of delay—Authority of court.**—Court may make order authorizing judgment-creditor to institute action against garnishee only when garnishee, in good faith, denies that he has property of judgment-debtor, or is in any way indebted to him, but where it is evident that garnishee is acting in bad faith in denying indebtedness to judgment-debtor, and makes denial only in form, and for purpose of vexation and delay, court may treat it as fraudulent and disregard it, and order may be made directly without recourse to action.—*Parker v. Page*, 38 Cal. 522, 526.

21. **Denial of debt or adverse claim to property contemplated in this section,** is claim or denial in good faith, and not mere fraudulent or sham denial resorted to for purposes of delay.—*Parker v. Page*, 38 Cal. 522, 527.

22. **Distinction—Between actions based upon garnishment under section 544, ante, and proceedings under this section,**—as to, see *Carter v. Los Angeles Nat. Bank*, 116 Cal. 370, 374, 48 Pac. 322.

23. **Due process of law.**—To make order in relation to property which garnishee claimed to own in his own right, requiring its application in satisfaction of judgment of another, would be to deprive garnishee of property upon summary proceeding and without due process of law.—*Lewis v. Chamberlain*, 108 Cal. 525, 527, 41 Pac. 413. See *McDowell v. Bell*, 86 Cal. 615, 25 Pac. 128.

24. **Findings as to bad faith.**—When referee or court disregards adverse claim or denial on this ground, better practice is so to state in finding, in order that its action may be subject to review in appellate court, but where statement of garnishee is so meager and unsatisfactory that referee may well have treated his denial of debt as evasive and made in bad faith, it will be presumed to have been so found in support of judgment.—*Parker v. Page*, 38 Cal. 522, 527.

25. **Foreclosure of equitable mortgage—Jury properly denied.**—An action on a promissory note and to foreclose an alleged equitable mortgage, is equitable in character and a jury is properly denied.—*Vance v. Gilbert*, 178 Cal. 574, 174 Pac. 42.

26. Garnishee—May pay money into court—Action under section.—Garnishee may pay moneys into court, thereby relieving himself of all responsibility, and court may order action under this section, and that all persons claiming to be interested be made parties.—*Deering v. Richardson-Kimball Co.*, 109 Cal. 73, 85, 41 Pac. 801.

27. Indebtedness denied by garnishee—Order to commence action.—Neither referee nor court has power to compel payment of alleged indebtedness explicitly denied by garnishee on his examination. In such

case court may only order creditor to institute action against garnishee to determine question of indebtedness.—*Hartman v. Olvera*, 51 Cal. 501, 503.

28. Remedy of creditor—Against fraudulent assignee is by direct action where good faith of assignment is in issue.—*Hartman v. Olvera*, 51 Cal. 501, 503.

29. Transfer of property—May be restrained.—The court may in such action forbid the transfer of the property.—*Colyear v. Superior Court*, 40 Cal. App. 462, 181 Pac. 74.

§ 721. DISOBEDIENCE OF ORDERS, HOW PUNISHED. If any person, party, or witness disobey an order of the referee, properly made, in the proceedings before him under this chapter, he may be punished by the court or judge ordering the reference, for a contempt.

History: Enacted March 11, 1872, re-enactment of § 245 Practice Act.

TITLE X.

ACTIONS IN PARTICULAR CASES.

Chapter I. ACTIONS FOR THE FORECLOSURE OF MORTGAGES, §§ 726-729.

- II. ACTIONS FOR NUISANCE, WASTE, AND WILFUL TRESPASS, IN CERTAIN CASES. ON REAL PROPERTY, §§ 731-735.
- III. ACTIONS TO DETERMINE CONFLICTING CLAIMS TO REAL PROPERTY, AND OTHER PROVISIONS RELATING TO ACTIONS CONCERNING REAL ESTATE, §§ 738-751.
- IV. ACTIONS FOR THE PARTITION OF REAL PROPERTY, §§ 752-801.
- V. ACTIONS FOR THE USURPATION OF AN OFFICE OR FRANCHISE, §§ 802-810.
- VI. OF ACTIONS AGAINST STEAMERS, VESSELS, AND BOATS, §§ 813-827.

CHAPTER I.

ACTIONS FOR THE FORECLOSURE OF MORTGAGES.

§ 726. Proceedings in foreclosure suits.

§ 727. Surplus money to be deposited in court.

§ 728. Proceedings when debt secured falls due at different times.

§ 729. Oath and undertaking of commissioner.

§ 726. PROCEEDINGS IN FORECLOSURE SUITS. There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions of this chapter. In such action the court may, by its judgment, direct the sale of the encumbered property (or so much thereof as may be necessary), and the application of the proceeds of the sale to the payment of the costs of court, and the expenses of the sale, and the amount due plaintiff, including, where the mortgage provides for the payment of attorney's fees, such sum for such fees as the court shall find reasonable, not exceeding the amount named in the mortgage.

[Appointment of commissioner to sell—Undertaking of.] The court may, by its judgment, or at any time after judgment, appoint a commissioner to sell the encumbered property. It must require of him an undertaking in an amount fixed by the court, with sufficient sureties, to be approved by the judge, to the effect that the commissioner will faithfully perform the duties of his office according to law. Before entering upon the discharge of his duties he must file such undertaking, so approved, together with his oath that he will faithfully perform the duties of his office. If it appear from the sheriff's return, or from the commissioner's report, that the proceeds are insufficient, and a balance still remains due, judgment must then be docketed by the clerk in the manner provided in this code for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien on the real estate of such judgment debtor, as in other cases in which execution may be issued.

[Who not necessary parties.] No person holding a conveyance from or under the mortgager of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action, and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been a party to the action.

[Commissioner must sell, how.] If the court appoints a commissioner for the sale of the property, he must sell it in the manner provided by law for the sale of like property by the sheriff upon execution; and the provisions of chapter one, title nine, part two, of this code are hereby made applicable to sales made by such commissioner, and the powers therein given and the duties therein imposed on sheriffs are extended to such commissioner.

[Death, inability, or absence of commissioner—Elisor appointed to sell.] In all cases heretofore, now or hereafter pending in the courts of this state, in the event of the death, absence from the state, other disability or disqualification of the commissioner appointed to sell encumbered property under the foregoing provisions of this section, the court may, upon the happening of either the death, absence from the state, other disability or disqualification of the commissioner, appoint an elisor to perform the duties of such commissioner which are then to be performed in such action.

[Elisor to give undertaking.] The elisor so appointed shall give the undertaking, and take the oath hereinbefore provided to be given and taken by a commissioner, before entering upon the discharge of his duties, and shall thereafter perform all duties left unperformed by the commissioner whom he is appointed to succeed, with like effect as if such duties had been performed by the commissioner.

If the land mortgaged consists of a single parcel, or of two or more contiguous parcels, situated in two or more counties, the court may, in its judgment, direct the whole thereof to be sold in one of such counties by the sheriff,

commissioner or elisor, as the case may be, and upon such proceedings, and with like effect, as if the whole of the property were situated in that county.

History: Enacted March 11, 1872, founded on § 246 Practice Act as amended 1860 (Stats. 1860, p. 303); amendment approved March 9, 1893, Stats. and Amdts. 1893, p. 118; March 26, 1895, Stats. and Amdts. 1895, p. 98; February 26, 1901, Stats. and Amdts. 1900-1, p. 48; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 158, held unconstitutional, see history, § 5 ante.

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201. Element of actual knowledge—Of existence of any conveyance.

202. Grant by mortgage—Scope of decree.

203. Heirs of deceased mortgageor.

204. Holder of adverse title—Being made party defendant.

205. Holder of deed—Not recorded when action was commenced.

206, 207. Holder of second mortgage—Covering two separate tracts.

208, 209. Same—Upon two distinct tracts.

210. Holder of unrecorded deed—Executed subsequently to mortgage.

211. Indorsers of note—Secured by mortgage.

212. Interest of defendant in foreclosure suit—Being shown to be adverse.

213. Interest prior to mortgage.

214. Junior lienholders—Must be made parties defendant.

215. Junior mortgagee—Is under no obligation to intervene.

216. Same—Made party defendant, may file answer.

217. Same—Need not answer or set up his claim.

218. Making all parties defendant in whose favor any interest appears.

219. Mortgageor proper party—Necessary party where deficiency judgment is sought.

220. Same—Same—Grantee of mortgageor as sole defendant.

221. Same—Quitclaiming to a third person without mention of mortgage.

222, 223. Neglect of junior mortgagee to set up note and mortgage.

224, 225. Only issue tendered to junior mortgagee.

226. Only proper or necessary parties defendant.

227. Person who purchases prior to action for foreclosure.

228. Purchaser at sale for street-assessment or tax.

229. Record of deed and not actual notice.

230. Second mortgagee—Is not required to bring suit.

231. Surety on note.

232. Those who acquired property subsequently to commencement of action.

IX. PORTION OF PROPERTY ONLY FORECLOSED—WAIVER AS TO BALANCE.

233. A mortgage can not be foreclosed by piecemeal.

234. Mortgage given as additional security for debt.

235. Mortgage is merged in judgment by foreclosure.

236. Omitting part of security.

237. Same—Debt being secured by two mortgages.

X. PRESCRIBING MANNER OF SALE.

238. Consent of party as to manner of sale.

239. Decree must be warranted by pleadings.

240. Directing that property be sold in one or several parcels.

241. Duty of commissioner—In selling property—To follow decree.

242. Leaseholders of portion of lands—Rights being subsequent.

243. No express provision is made as to mode of making sale.

244. Officer must follow directions of judgment.

245. Owner of right of way over mortgaged premises.

246. Real property and personal property mortgaged.

247. Request of defendant to sheriff.

248. Sale en masse—After failure of separate bids.

249. Sale of several parcels en masse.

250. Two mortgages—One by principal, and the other by surety, securing same note.

251. Same—Same—When sale void.

XI. PURCHASER FROM MORTGAGEOR ASSUMING MORTGAGE-DEBT.

252. An agreement of grantee of mortgageor to discharge mortgage-debt.

253. Same—Becomes guarantor of deficiency.

254. Same—May be abandoned.

255. Compelling mortgageor to pay.

256. Deficiency judgment against purchaser.

257. Same—Only upon security—Mortgaged premises becoming exhausted.

258. Formal promise to pay mortgage-debt by grantee of mortgageor—Is not necessary.

259. Grantor must be personally liable for debt assumed.
260. Liability of mortgageor is contingent.
261. Mortgageor is discharged from personal liability, when.
262. The mortgagee may proceed against mortgageor alone.
263. No personal liability upon mortgage-debt exists—Except for deficiency.
264. Provision that mortgages are to be settled.
265. Purchaser becomes principal debtor.
266. Statute of limitations runs against mortgage-obligation.
267. Substitution of liability.

XII. STATUTE OF LIMITATIONS—APPLICATION OF.

268. Absence of mortgageor from state.
269. Debt secured by mortgage being barred.
270. Default in interest—Does not set the statute running.
271. Laches can not affect.
272. Lien of mortgage being barred.
273. Obligation of co-mortgageors would not be affected.
274. One mode and manner only of enforcing judgments of foreclosure.
275. Recovery of mortgage-debt—Limitation of form of action.
276. Renewal of note—After same has become barred.
277. Same—By mortgageor.
278. Stipulation—Can not extend time, when.
279. Third persons having subsequently acquired interest.

XIII. VACATING SALE.

280. Burden of proof—Upon party who comes into court.
281. Discretion of court—As to irregularities.
282. Effect of former invalid sale.
283. Inadequacy of price—Is not sufficient ground.
284. Injury must be shown—In general.
285. Same—Party to action can not claim absolute right.
286. Provision entitling judgment-debtor to elect order in which property is to be sold.
287. Report of a commissioner.
288. Rule undoubtedly is to consider every fair sale as final.
289. Stranger to action—Will not be permitted to intrude.
290. Suit to vacate—Sufficiency of complaint.

I. IN GENERAL.

As to mortgage not being deemed a conveyance, whatever its terms, see, post, § 744 and note.

1. **Acknowledgment of mortgage**—Action against original mortgageor, in an, an acknowledgment of the mortgage is not essential to its validity and the note and unacknowledged mortgage are admissible in evidence against him.—*West v. Mears*, 17 Cal. App. 719, 121 Pac. 700.

2. **Action being brought on note alone**—Defendant may demur to complaint on ground that it is doubtful or uncertain whether in fact note set forth by copy, and which stated that it was secured by mortgage, was in fact secured by mortgage, but in absence of such demurrer complaint is sufficient to sustain judgment by default for amount of note. Allegations of answer could not be considered in determining matter.—*Hibernia Sav. & L. Soc. v. Thornton*, 117 Cal. 481, 483, 484, 49 Pac. 573.

3. **Action to foreclose mortgage**—Where interest only is due on note, and judgment being entered directing sale of property to satisfy such amount, then due, and thereafter moving court as more becomes due of principal or interest for order directing more of such property to be sold to satisfy same, does not contravene provision that there shall be one action for recovery of any debt secured by mortgage.—*Byrne v. Hoag*, 126 Cal. 283, 285, 58 Pac. 688.

4. **Adjudication of personal liability**—Is necessary to authorize clerk to docket judgment for deficiency.—*Herd v. Tuohy*, 133 Cal. 55, 61, 65 Pac. 139.

5. **Agreement for sale of land as whole**.—Such an agreement in a deed of trust or mortgage is held a valid contract and enforceable as such.—*Humboldt Sav. Bank v. McCleverty*, 161 Cal. 288, 119 Pac. 82.

6. **Allegation of non-payment**—Held sufficient in following instance: Where complaint alleged "that interest was paid thereon to the 27th day of March, 1896, which said payments had been indorsed on said promissory note, and sum of four thousand five hundred dollars, United States gold coin, principal sum in said promissory note and mortgage, together with the interest thereon at rate of eight per cent per annum, from 27th day of March, 1896, still remains due and unpaid from defendant to plaintiff."—*Schwind v. Hall*, 129 Cal. 40, 42, 43, 61 Pac. 573.

7. **Compare**: *Ryan v. Holliday*, 110 Cal. 335, 337, 42 Pac. 891.

8. **Allegation that "there is now due and owing"**—Is sufficient to sustain judgment by default. It is true that allegation is in form of legal conclusion in which material fact was merely implied, but in absence of any demurrer such faults of pleading are cured by judgment.—*Penrose v. Winter*, 135 Cal. 289, 291, 67 Pac. 772.

9. **Allegation that "whole of said note is owing," etc.**—Not an allegation of what.—

Allegation "that whole of said note is owing from defendants to plaintiff," is not an averment of fact of non-payment and where defendants demur to complaint for want of sufficient statement of facts, their demurrer should be sustained.—*Knox v. Buckman Con. Co.*, 139 Cal. 598, 599, 73 Pac. 428. See *Penrose v. Winter*, 135 Cal. 289, 291, 67 Pac. 772.

10. **Compare:** *Schwind v. Hall*, 129 Cal. 40, 43, 61 Pac. 573.

11. **Amendment of decree—**By motion, when.—Decree entered by court ordering property to be sold by sheriff, while order made and entered on same day, appointing commissioner to discharge same duty, was but an oversight of court, not calling for appeal, but it might have been remedied by simple motion to amend and correct decree.—*McDermot v. Barton*, 106 Cal. 194, 197, 39 Pac. 538.

12. **Appeal, effect of—**Bond of three hundred dollars only is required to stay execution of judgment under decree of foreclosure upon appeal from such judgment.—*Snow v. Holmes*, 64 Cal. 232, 30 Pac. 806.

13. **Same—**Stay-bond in double amount for which premises are to be sold, need not be given on appeal by mortgagee from decree of foreclosure. Bond for waste occupation and deficiency is all that can be required other than three-hundred dollar bond on appeal.—*Boob v. Hall*, 105 Cal. 413, 417, 38 Pac. 977.

As to proceedings in foreclosure suit being stayed by appeal from decree and giving of three-hundred-dollar bond only, see, post, § 929 and note.

As to undertaking on appeal, see, post, § 941 and note.

14. **Assignee of deceased mortgageor—**Bringing in administrator subsequently appointed.—See *California Title Ins. & T. Co. v. Muller*, 3 Cal. App. 54, 84 Pac. 453.

15. **Attachment can not be had when** debt is secured by mortgage, for there can be no action maintained in such case without foreclosure of mortgage.—*Barbieri v. Ramelli*, 84 Cal. 174, 175, 176, 24 Pac. 113.

16. **Averment that plaintiff is owner of note—**Is not averment of an issuable fact.—It is but averment of conclusion of law which follows from other facts averred. It is immaterial and might have been omitted where conclusion of law necessarily follows from other facts stated. Denial of this averment does not raise material issue.—*Wedderspoon v. Rogers*, 32 Cal. 569, 572; *Poorman v. Mills & Co.*, 35 Cal. 118, 121, 95 Am. Dec. 90; *Monroe v. Fohl*, 72 Cal. 568, 570, 14 Pac. 514; *Bank of Shasta v. Boyd*, 99 Cal. 604, 606, 34 Pac. 337.

17. **Averment that principal sum of note and mortgage was due at commencement of action** is sufficiently expressed where complaint sets out in full note and mortgage sued on which show on their face that principal was due and payable about two years before commencement of action; and

it is averred that "no part of principal mentioned in said promissory note and mortgage has ever been paid," etc., and that "principal sum of said promissory note is unpaid and is owing by defendant to plaintiff." These averments are entirely sufficient to show what contract sued on was, and that appellants had violated it by not paying note after its maturity.—*Luddy v. Pavkovich*, 137 Cal. 284, 285, 70 Pac. 177.

18. **Breach of contract to pay—**Must be alleged in action for foreclosure of mortgage, as it is of essence of cause of action. Allegation "that interest on said note and mortgage has been paid in full up to 11th day of September, 1894, and there is now due and owing to plaintiff the sum of \$1200, with interest thereon at rate of twelve per cent per annum from 11th day of September, 1894," is not equivalent of averment of non-payment. The language, "there is now due," is but conclusion of law and not averment of fact.—*Ryan v. Holliday*, 110 Cal. 335, 337, 42 Pac. 891.

19. **Distinguished:** *Schwind v. Hall*, 129 Cal. 40, 43, 61 Pac. 573; *Penrose v. Winter*, 135 Cal. 289, 291, 292, 67 Pac. 770.

20. **Commissioner—**Appointment of, does not go to substance of decree.—*Granger v. Sheriff*, 140 Cal. 190, 194, 73 Pac. 816.

As to refusal of commissioner to continue sale, see par. 75, this note.

21. **Same—**Appointment of "referee" instead of "commissioner"—Collateral attack.—Any defect in using the word "referee" instead of "commissioner," as herein employed, can be taken advantage of only on appeal, and not by collateral attack; and where such referee was really the commissioner provided for herein, to act in place of the sheriff in making the sale, his return of such sale is prima facie evidence of its truth, and when it shows a sale of the property for \$5000 less than the amount of the judgment, a deficiency judgment was properly entered for that amount.—*Hibernia Sav. & L. Soc. v. Boyd*, 155 Cal. 196, 100 Pac. 239.

22. **Same—**Law authorizes appointment of, and in naming commissioner court does not and need not interfere with office of sheriff or remove that officer. Court simply designates another person to perform duty as law says it may do.—*Granger v. Sheriff*, 140 Cal. 190, 194, 73 Pac. 816.

23. **Complaint—**As to sufficiency of.—A complaint in an action for the foreclosure of a mortgage which omits to allege that the plaintiff was the owner and holder of the note at the time it exercised the option, prescribed by the note, to declare and treat the whole of the principal and accrued interest due and payable upon the default in the payment of interest as in the note provided, is sufficient as against general demurrer, where it declares that the defendants executed the note and mortgage, that the balance due thereon is due, owing and unpaid from defendant to plaintiff, and that

the plaintiff exercised its option to declare the whole sum due.—*Rock Ridge Park Co. v. Wells*, 27 Cal. App. 281, 149 Pac. 792.

24. Such a complaint is not insufficient because of the omission to allege that the note was delivered to the plaintiff, where it is alleged that the mortgage was delivered.—*Rock Ridge Park Co. v. Wells*, 27 Cal. App. 281, 149 Pac. 792.

25. **Same—Filing complaint—Effect on prior judgment in ejectment.**—The filing of a complaint in foreclosure is not a waiver of the judgment in a prior ejectment suit, or a recognition of the instrument in form of a deed as a mortgage, where it appears that such deed was deposited under an agreement that it should be held for a certain time, and if the debt for which it was given as security was not then paid, the deed delivered to the grantee was in satisfaction of the debt.—*Simon v. McCoy*, 28 Cal. App. 523, 153 Pac. 406.

26. **Copy of note set forth in complaint** stating "this note secured by mortgage of even date herewith" is not an averment that note was secured by mortgage, and such recital can not, as matter of pleading, be treated as equivalent of such averment.—*Hibernia Sav. & L. Soc. v. Thornton*, 117 Cal. 481, 483, 49 Pac. 573.

27. **Court—Has no jurisdiction in foreclosure proceedings** to reach its hand out into an independent action of partition and take control and jurisdiction of such action. It has merely jurisdiction to foreclose mortgage sued on and order mortgaged premises sold, and to foreclose rights of all parties holding under and subject to mortgage.—*Towle Bros. Co. v. Quinn*, 141 Cal. 382, 385, 74 Pac. 1046.

28. **Same—Is without jurisdiction to render judgment in foreclosure proceedings** on land situated outside of county, although description of lands in mortgage erroneously recites such lands are in county in which action was brought.—*Rogers v. Cady*, 104 Cal. 288, 291, 43 Am. St. Rep. 100, 38 Pac. 81.

29. **Decree on foreclosure—Must direct sale of encumbered property**, and application of proceeds of sale to payment of costs of court and expenses of sale, and amount due to plaintiff. It would be error for court to enter mere money judgment against defendant for amount ascertained to be due on note.—*Crim v. Kessing*, 89 Cal. 478, 487, 23 Am. St. Rep. 491, 26 Pac. 1074.

30. **Same—Should only contain statement of amount due plaintiff**, designation of defendants who are personally liable for debt, and direction that mortgaged premises, or such portion thereof as may be necessary, be sold according to law and proceeds applied to payment of expenses of sale, costs of action, and debt. Nothing further is required. All else is ministerial, and is expressly regulated by statute, which is not made clearer or more binding by being copied into judgment.—*Leviston v. Swan*, 33 Cal. 480, 483; *Hooper v. McDade*, 1 Cal. App. 733, 82 Pac. 1116.

31. **Default in payment of interest—Election of holder.**—Provision in note being that upon default in paying interest, principal should become due at election of holder, assertion of such election merely puts holder in position of holder of note which upon its face declares in first instance that upon default in interest whole principal should immediately become due. Declaration of plaintiff's election by bringing action does not put it out of his power to waive penalty, which may be done by accepting interest and dismissing action. He still has same power to waive penalty which he would have had if note had originally provided for maturity of principal upon default in payment of interest.—*California Sav. & L. Soc. v. Culver*, 127 Cal. 107, 112, 59 Pac. 292.

32. **Same—Mortgage providing for.**—Note providing for interest payable semi-annually and mortgage providing that upon default in payment of interest, that mortgagee may cause premises to be sold, gives mortgagee right to bring action for foreclosure upon default in payment of interest, although note does not provide for such default.—*Phelps v. Mayers*, 126 Cal. 549, 550, 58 Pac. 1048. See *Yoakam v. White*, 97 Cal. 286, 289, 32 Pac. 238.

33. **Compare:** *Van Loo v. Van Aken*, 104 Cal. 269, 271, 37 Pac. 925.

34. **Same—Right to foreclose.**—Decision that mortgagee could not foreclose for interest in arrears because there was no express agreement that he might do so, is opposed to current authority and to reasonable construction of statute.—*Van Loo v. Van Aken*, 104 Cal. 269, 271, 37 Pac. 925. See *Yoakam v. White*, 97 Cal. 286, 288, 32 Pac. 238.

35. **Denial that plaintiff owner and holder of note and mortgage creates no issue**, and that being only denial, judgment upon pleadings should be ordered.—*Clemens v. Luce*, 101 Cal. 432, 436, 35 Pac. 1032. See *Bank of Shasta v. Boyd*, 99 Cal. 604, 606, 34 Pac. 337.

36. **Deposit of mortgagee in bank of mortgagee** can not be set off by such mortgagee bank against note and mortgage due and owing them by mortgagee. Lien given on mortgaged premises was intended to be in lieu and exclusive of all implied liens, and there is no reason why bank should be given right to forcibly and against consent of depositor appropriate his money, when, if it came into court to do so, action would not lie.—*McKean v. German-American Sav. Bank*, 118 Cal. 334, 340, 50 Pac. 656.

37. **Determination of conflicting claims.**—It is within the sound discretion of the trial court, in an action for the foreclosure of a mortgage, to give the plaintiff judgment for the relief asked and postpone the determination of conflicting claims between the defendants in which the plaintiff is not interested and which do not affect the relief which he asks.—*Rowley v. Davis*, 169 Cal. 678, 147 Pac. 958.

38. It is not abuse of discretion in an action for the foreclosure of a mortgage, where there is no defense to the plaintiff's action, to make a decree of foreclosure reserving for future determination certain litigation between the mortgageors and third parties in which the plaintiff has no interest, involving the validity of their attachment and judgment liens on the property, and attacking the alleged conveyance of the land as having been made with the intent to defraud them.—*Rowley v. Davis*, 169 Cal. 678, 147 Pac. 958.

39. Such practice does not imperil or prejudice the defendant's right of redemption; it would run from the time of sale and the amounts to be paid would depend on the price paid at the sale.—*Rowley v. Davis*, 169 Cal. 678, 147 Pac. 958.

40. Where it is charged in foreclosure proceedings that adverse claims have been fraudulently acquired to defeat the rights of the mortgagee, they are proper subjects for consideration.—*Title Ins. & Trust Co. v. California Devel. Co.*, 171 Cal. 174, 152 Pac. 542.

41. The rule that adverse titles are not to be adjudicated in actions to foreclose mortgages does not apply when the only adverse party is in fact an agent of the plaintiff.—*Title Ins. & Trust Co. v. California Devel. Co.*, 171 Cal. 174, 152 Pac. 542.

42. Duty of plaintiff—Is to proceed without unreasonable delay to have decree for sale of property executed, and upon failure to do so it becomes duty of court, upon complaint of any party to suit interested in its execution, to direct that its execution be proceeded with. It would be vain to bestow upon court of equity power to make decree which it had no power to enforce, and yet such would be case if its execution depended upon pleasure or convenience of plaintiff.—*Thomas v. San Diego College Co.*, 111 Cal. 358, 363, 43 Pac. 965; *Rowe v. Blake*, 112 Cal. 637, 643, 44 Pac. 1084.

43. Evidence—Outside of mortgage showing that there is no such property as that which mortgage purports to describe would demonstrate that there was no lien, and debt would not be one secured by mortgage upon real estate.—*Otto v. Long*, 127 Cal. 471, 476, 59 Pac. 895.

44. Fact that some of personal property was not mortgageable would not render mortgage void as to other property covered by it.—*San Francisco Breweries v. Schurtz*, 104 Cal. 420, 426, 38 Pac. 92.

45. Form of judgment.—This section prescribes no form for the judgment. The principal object of the proceeding is to cause the sale of the incumbered property and the application of the proceeds of sale to the payment of the debt secured.—*Morris v. Hartley*, 26 Cal. App. 61, 146 Pac. 73.

46. Former attempt at foreclosing note and mortgage—Being void does not operate as waiver of mortgage lien, nor of right to

thereafter foreclose same.—*Ludwig v. Murphy*, 143 Cal. 473, 475, 77 Pac. 150.

47. Injunction—Will lie at instance of mortgagee to stop commission of waste upon mortgaged premises, when he makes out proper case in equity and shows that threatened acts will materially impair the value of property subject to lien, so as to render it inadequate security for mortgaged debt.—*Lavenson v. Standard S. Co.*, 80 Cal. 245, 247, 13 Am. St. Rep. 147, 22 Pac. 184.

As to injunction by mortgagee or other lienholder against enforcement of liens or claims against specific property, see note 61 L. R. A. 785, 786.

As to right of mortgagee to injunction to prevent impairment of security, see, ante, § 526 and note.

As to when court may grant injunction during foreclosure, see, post, § 745 and note.

48. Holder of note—Transfer of real property to—Right to sell.—Under the provisions of the above section where the maker of a promissory note which is past due and unpaid, in consideration of the holder's agreement to refrain for five days from suing upon the note effects and delivers to such holder of the note a grant deed to specified real estate, and also a separate agreement wherein such liability and default is recited, and it is provided that if said indebtedness is not paid within five days thereafter the grantee is authorized to sell the property, either at public or private sale, without notice, and credit the amount received therefor upon the indebtedness, there being no intent from the part of parties giving and of those receiving said deed that it shall be given and received as security for the payment of the note, upon default in the payment of the indebtedness within the five days the grantee is not obliged to bring an action in order to realize upon such property, but may proceed in accordance with the written agreement.—*Blakely v. Bryson*, 43 Cal. App. 735, 185, Pac. 685.

49. Insertion by clerk in decree—Of amount of costs as claimed by plaintiff before same have been taxed and ascertained is mere clerical misprision which does not affect validity of decree of foreclosure in other respects, nor make order of sale issued thereon invalid. Assuming them to be erroneous, they were not void, and validity of sale thereunder was not thereby affected.—*Janes v. Bullard*, 107 Cal. 130, 132, 40 Pac. 108.

50. Instruction to jury.—In such an action, the refusal to instruct the jury that if they believe from the evidence that the plaintiff elected to sell the engine (the mortgaged property) at public auction at the time and place mentioned in the notices of sale posted by it but did not so make said sale at public auction, then their verdict should be for the defendants, is prejudicial error, where the only evidence offered of a sale at the time and place stated

in the notices was that of the plaintiff; and the defendants offered evidence of their presence at the place of sale at the time mentioned in the notices and that no sale was then made.—*J. I. Case Threshing Machine Co. v. Copren Bros.*, 32 Cal. App. 194, 162 Pac. 647.

51. In such an action the question as to whether the property was sold goes to the foundation of the plaintiff's cause of action, and the fact that the defendants were given credit for the sum alleged to have been bid, and were therefore uninjured by what was in fact done, is immaterial.—*J. I. Case Threshing Machine Co. v. Copren Bros.*, 32 Cal. App. 194, 162 Pac. 647.

52. Interest becoming due and payable on note secured by mortgage, is debt secured by mortgage.—*Van Loo v. Van Aken*, 104 Cal. 269, 37 Pac. 925.

53. It is not part of duty of sheriff, as such, in absence of statutory provision, to sell property under sale in foreclosure.—*McDermot v. Barton*, 106 Cal. 194, 198, 39 Pac. 538.

54. Judgment imposing personal liability for debt—Upon person who is not party to note is erroneous, and must be modified, as under such judgment plaintiff could enter deficiency judgment against such party not personally liable; and it is not answer to such objection for plaintiff to say that he will not avail himself of this power.—*Garrison Inv. Co. v. Arndt*, 144 Cal. 64, 66, 77 Pac. 770.

55. Jurisdiction of court—In actions of foreclosure over parties and subject-matter continues until foreclosure is completed by failure to redeem, and its jurisdiction extends to purchaser who by his bid submits himself to it.—*Van Loben Sels v. Bunnell*, 131 Cal. 489, 492, 63 Pac. 773.

56. Liens on personal property—May exist in many forms other than by way of mortgage, and although every mortgage is a lien, it is not every lien that is a mortgage. Essential element of mortgage is transfer or conveyance of mortgaged property from mortgageor to mortgagee.—*People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029.

57. Merger of liens—Deed of trust of mortgaged realty does not supersede or merge a prior mortgage, in the absence of an intention that it should have that effect, and where the language of the deed of trust indicates an intention that the mortgage should continue to exist, it can not be deemed that the new security supplants or merges the old.—*Crisman v. Lanterman*, 149 Cal. 651, 87 Pac. 89.

58. Money paid by mortgageor to mortgagee between commencement of action and foreclosure sale under agreement that same be credited upon amount due to mortgagee from mortgageor can be recovered back by mortgageor where mortgagee fails to make proper credits for such amount so received.

—*Maddux v. County Bank*, 129 Cal. 665, 669, 79 Am. St. Rep. 143, 62 Pac. 264.

59. Mortgage covering real and personal property—Is valid and may be foreclosed in same proceedings, and real and personal property sold under same decree.—*San Francisco Breweries v. Schurtz*, 104 Cal. 420, 426, 38 Pac. 92. See *Tregear v. Etiwanda W. Co.*, 76 Cal. 537, 540, 9 Am. St. Rep. 245, 18 Pac. 658.

60. Mortgaged property being situate in different counties, mortgagee may commence action of foreclosure in either county and in single action obtain judgment for foreclosure of mortgage upon property in other county.—*Kent v. Williams*, 146 Cal. 3, 10, 79 Pac. 527. See *Murphy v. Superior Court*, 138 Cal. 69, 72, 70 Pac. 1070.

61. New or additional security taken—Effect of.—The taking of new or additional security operates to destroy an existing lien only where the destruction is worked by virtue of a positive declaration of law, where it is worked by the agreement and contract of the parties, where it is worked by necessary intentment growing out of the agreement of the parties, in that the taking of the later security is inconsistent with the continued existence thereafter of the lien, and, finally, where the nature of the earlier or later security, as that it is concealed or undisclosed, gives rise to a situation where it would partake of fraud upon other claimants to permit the earlier lien to be held valid, whereupon equity interposes and declares it to have been waived or lost by the taking of later security, or what is in effect the same, erects a bar to its enforcement.—*Martin v. Becker*, 169 Cal. 301, Ann. Cas. 1916D, 176, 146 Pac. 665.

62. The law never contemplated that because a man had taken a mortgage he could not take other independent security for his debt, and, if the contract for such security permitted it, enforce such contract without reference to the mortgage debt.—*Martin v. Becker*, 169 Cal. 301, Ann. Cas. 1916D, 176, 146 Pac. 665.

63. A materialman does not lose his right to a mechanic's lien by taking a mortgage upon the real property of the contractor for the value of the material sold to him, either by virtue of above section or by the application of any rule of decision holding that the taking of either security destroys the right to such lien.—*Martin v. Becker*, 169 Cal. 301, Ann. Cas. 1916D, 176, 146 Pac. 665.

64. Note and mortgage set out in full as exhibit in complaint are sufficiently referred to by allegation that defendant executed to plaintiff certain note and certain mortgage to secure same, and that copy of said note is set out in said mortgage, and said mortgage is herein attached and marked "Exhibit B."—*Savings Bank v. Burns*, 104 Cal. 473, 477, 38 Pac. 102. See *Ward v. Clay*, 82 Cal. 502, 505, 23 Pac. 50, 227; *Whitby v. Rowell*, 82 Cal. 635, 23 Pac. 40, 382.

65. Note assigned as collateral security—May be foreclosed and sold under decree in special cases, and where maker of note which was pledged to plaintiff resides in distant state, and it is not shown that he has any real estate in California subject to seizure and sale, it would impose hardship on pledgee to be enforced to pursue him with legal process.—*Donohoe v. Gamble*, 38 Cal. 340, 353, 354, 99 Am. Dec. 399.

66. Same—Need not be foreclosed according to provisions of above section, though case might, perhaps, be stated that would authorize holder of collateral note to have decree of sale (dis. op. of Rhodes, J.).—*Donohoe v. Gamble*, 38 Cal. 340, 355, 99 Am. Dec. 399.

67. Note not being due when action commenced, judgment decreeing foreclosure is erroneous. Plaintiff might have taken judgment for sale of so much of mortgaged premises as might be necessary to satisfy interest then due, but order for sale of all premises was erroneous.—*Hunt v. Dohrs*, 39 Cal. 304, 305.

68. Note secured by mortgage—Is not negotiable within law merchant or within our Civil Code when the mortgage provides for attorney's fees in event of foreclosure.—*Meyer v. Weber*, 133 Cal. 681, 685, 65 Pac. 1110.

69. Same—Note, though negotiable in form, is in law not negotiable if secured by mortgage of even date which makes it payable primarily out of peculiar fund,—at least as against one having knowledge of mortgage.—*Hays v. Plummer*, 126 Cal. 107, 109, 77 Am. St. Rep. 153, 58 Pac. 447.

70. Object of suit of foreclosure is to subject to judicial sale, and vests in purchaser thereunder same title or estate in mortgaged property which mortgagee had at time of execution of mortgage.—*Beronio v. Ventura Co. L. Co.*, 129 Cal. 232, 237, 79 Am. St. Rep. 118, 61 Pac. 958.

71. Omission of seal of court from order of sale under decree of foreclosure renders process erroneous merely.—*Hager v. Astorg*, 145 Cal. 548, 553, 79 Pac. 68.

72. Original note being surrendered and marked "paid" on its face, is not conclusive of extinguishment of debt which mortgage was given to secure in case where original note was replaced by new note and where mortgage given to secure it was allowed to stand as before. In such case original debt is not extinguished.—*Bonestell v. Bowle*, 128 Cal. 511, 515, 61 Pac. 78. See *Welch v. Allington*, 23 Cal. 322, 323; *Steinhart v. National Bank*, 94 Cal. 362, 366, 28 Am. St. Rep. 132, 29 Pac. 717.

73. Proceedings in foreclosure of street-assessment—Are quite analogous to those of foreclosure of mortgage upon real property, and as no mode is specifically pointed out for sale of real property under judgment therein, it can not be held that appointment of commissioner to sell property under such judgment was beyond jurisdiction of court C. C. P.—116

or even erroneous.—*Crane v. Cummings*, 137 Cal. 201, 204, 69 Pac. 984.

74. Provision for deficiency judgment under above section is not unconstitutional.—*County Bank v. Goldtree*, 129 Cal. 160, 164, 61 Pac. 785.

As to deficiency judgment, see Part VI, this note.

75. Refusal of commissioner to postpone sale at request of judgment-debtor is not an abuse of discretion in all cases, and sale will not be vacated where no reason is given why sale should have been postponed.—*Connick v. Hill*, 127 Cal. 162, 166, 59 Pac. 832.

As to appointment of commissioner to make sale, see pars. 21-23, this note.

76. Release of portion of mortgaged premises—Consent of mortgagee is necessary in order that mortgagee may let go part of his security to purchaser from mortgagee, at less than its value, it may be, and then look to mortgagee to make up deficiency.—*Woodward v. Brown*, 119 Cal. 283, 292, 63 Am. St. Rep. 108, 51 Pac. 2, 542.

77. Same—Effect of waiver of security.—Allowing release of part of security, and providing for deficiency judgment at same time, would allow mortgagee to thus get judgment which could be enforced against mortgagee precisely as if mortgagee had first waived security and brought suit on note.—*Woodward v. Brown*, 119 Cal. 283, 293, 63 Am. St. Rep. 108, 51 Pac. 2, 542.

78. Same—Gross injustice would be done to mortgagee to hold him liable for deficiency which mortgagee has, without mortgagee's authority or consent, created. Deficiency, which code directs may take form of personal judgment, is deficiency arising from sale of all mortgaged security, and not part of it.—*Woodward v. Brown*, 119 Cal. 283, 292, 63 Am. St. Rep. 108, 51 Pac. 2, 542.

79. Same—Purpose of law.—All security could be released if part of security could be released, and thus purpose of law would be defeated,—purpose of law being to confine mortgagee to one action, and all his security as primary fund for payment of debt.—*Woodward v. Brown*, 119 Cal. 283, 293, 63 Am. St. Rep. 108, 51 Pac. 2, 542.

80. Separate mortgages on real and personal property—No joinder.—Foreclosure of three mortgages and general judgment in aggregate amounts due on them, where two of such mortgages were on same real estate and other on personal property, is unauthorized. There is no lien upon personal property for amounts due on mortgages covering real estate, or upon real property for amount due on chattel mortgage, and there should be separate sales of real and personal property, for amounts due upon them respectively.—*Taylor v. Ellenberger*, 128 Cal. 411, 414, 60 Pac. 1034.

81. Service by publication—No valid judgment for deficiency being possible because of service by publication, still, when

properly ascertained, deficiency constitutes subsisting indebtedness then due from defendant to plaintiff, and plaintiff may bring an action setting forth all facts, and will be entitled to personal judgment thereon.—*Blumberg v. Birch*, 99 Cal. 416, 417, 418, 37 Am. St. Rep. 67, 34 Pac. 102.

82. Personal judgment for deficiency can not be docketed against defendant served by publication only.—*Blumberg v. Birch*, 99 Cal. 416, 417, 37 Am. St. Rep. 67, 34 Pac. 102.

83. **Set-off—Mortgage-debt and deposit in bank.**—A bank can not use a mortgage-debt as a set-off in an action by a depositor or his creditor for the amount of a deposit.—*Marble Co. v. Merchants Nat. Bank*, 15 Cal. App. 351, 115 Pac. 59.

84. **Sheriff—Has no duty to perform** in case of sale of real property under foreclosure, where court appoints commissioner to make such sale.—*McDermot v. Barton*, 106 Cal. 194, 197, 39 Pac. 538.

85. **Same—May by virtue of his office** and general powers given him execute foreclosure decree under writ issued to him without other appointment issued by court, and he may do so without any writ. Naming him in decree confers no new powers upon him, but merely authorizes exercise in that particular case of such as he already possess.—*Granger v. Sheriff*, 140 Cal. 190, 194, 195, 73 Pac. 816.

86. **Successive foreclosures—When required by circumstances.**—For distinct debts secured by same mortgage are not prohibited by above section. Power of court of equity in proper case to direct sale of property on foreclosure of mortgage, saving from effect of such sale further lien secured by same or some other encumbrance, is fully established.—*Stockton Sav. & L. Soc. v. Harrold*, 127 Cal. 612, 620, 621, 60 Pac. 165.

87. **Surety on note of third person** which is secured by mortgage of such person would have right to demand that mortgagee should first apply property of principal which had been mortgaged to discharge of debt. On other hand, guarantor, as distinguished from surety, for payment of debt upon default, could be proceeded against by principal creditor without proceeding to realize upon other securities, or without going into equity to foreclose his mortgage.—*Adams v. Wallace*, 119 Cal. 67, 70, 51 Pac. 14.

88. **Trust-deed—Assuming that trust-deed is not within above section**, still there are other considerations to be weighed in determining whether creditor who has accepted such deed as security has not contracted to pursue terms of deed when he attempts to forcibly collect debt. Grantor retains right to conveyance on payment, and to sale as provided in case of default, seems to be indicated in decision.—*Herbert Kraft Co. v. Bryan*, 140 Cal. 73, 81, 73 Pac. 745.

89. **Same—Deficiency remaining after sale under trust-deed** may be collected by creditor in an action at law.—*Sacramento*

Bank v. Copsey, 133 Cal. 663, 665, 85 Am. St. Rep. 242, 66 Pac. 8, 205; *Herbert Kraft Co. v. Bryan*, 140 Cal. 73, 80, 73 Pac. 745.

90. **Same—Foreclosure of—Agreement as to sale in whole or in part.**—Where the agreement of a deed of trust authorizes the sale of the property in whole or in part, in the discretion of the trustee, it is not to be regarded as a stipulation that the property should be sold as a whole, but the trustees are bound to exercise their discretion for the best interests of all the parties concerned.—*Humboldt Sav. Bank v. McCleverty*, 161 Cal. 289, 119 Pac. 82.

As to foreclosure of trust-deeds, see note 82 Am. St. Rep. 345.

As to right of bondholder to sue for enforcement of trust-deed, see notes 20 L. R. A. 535-539; 16 L. R. A. (N. S.) 1006.

91. **Same—Same—Deed of trust of homestead.**—Where the deed of trust covers property a portion of which is subsequently filed upon as a homestead by the wife of the debtor, after whose death it survives to the wife, the latter becomes, as to the enforcement of the trust, a surety, and as such has a right to have the debtor's property first sold to pay the debt.—*Humboldt Sav. Bank v. McCleverty*, 161 Cal. 290, 119 Pac. 82.

92. **Same—Has no feature in common with mortgage** except that it is executed to secure an indebtedness, and on trust-deed suit for foreclosure and sale will not lie if contract of parties is that upon default trustee shall sell, and there is no equity in adjudging foreclosure.—*Koch v. Briggs*, 14 Cal. 256, 263, 73 Am. Dec. 651; *Fuquay v. Stickney*, 41 Cal. 583, 587; *Whitmore v. San Francisco Sav. Union*, 50 Cal. 145, 150; *Grant v. Burr*, 54 Cal. 298, 301; *Bateman v. Burr*, 57 Cal. 480, 483; *Durkin v. Burr*, 60 Cal. 360, 361; *Savings & L. Soc. v. Derring*, 66 Cal. 281, 286, 5 Pac. 353; *Partridge v. Shepard*, 71 Cal. 470, 478, 12 Pac. 480; *More v. Calkins*, 95 Cal. 435, 437, 438, 29 Am. St. Rep. 128, 30 Pac. 583; *Savings & L. Soc. v. Burnett*, 106 Cal. 514, 528, 39 Pac. 922; *Herbert Kraft Co. v. Bryan*, 140 Cal. 73, 80, 73 Pac. 745.

93. **Three essential things provided for by above section** are to make mortgaged property primary fund out of which satisfaction is to be had, to give plaintiff personal judgment for balance which remained due after exhaustion of mortgaged property, and to confine recovery to one action.—*Toby V. Oregon Pac. R. Co.*, 98 Cal. 490, 494, 495, 33 Pac. 550.

94. **Unverified answer—To complaint which sets forth copy of note and mortgage** admits genuineness and due execution of such instrument.—*Waldrip v. Black*, 74 Cal. 409, 411, 16 Pac. 226.

95. **Water-rights—Notice of.**—Except as provided in this section, the open and visible possession and use of water-rights by a subsequent recorded purchaser to a prior unrecorded purchaser would be sufficient to charge all subsequent purchasers with notice of his rights, whether his deed was

recorded or not.—*Shurtleff v. Kehrre*, 163 Cal. 24, 29, 30, sub nom. *Shurtleff v. Bracken*, 163 Cal. 24, 29, 30, 124 Pac. 724.

96. Written agreement by mortgagee.—To extend date of payment of note upon consideration of payment of portion of principal and to pay interest monthly thereafter, is virtually renewal of note and mortgage, and suit to foreclose commenced at date prior to time to which note and mortgage as extended became due should be dismissed as premature.—*Seaton v. Fiske*, 128 Cal. 549, 551, 61 Pac. 666.

II. ATTORNEY'S FEES—A. IN GENERAL.

As to an act to abolish attorney's fees and other charges in foreclosure suits, see Stats. 1873, 1874, p. 707, approved March 27, 1874.

As to constitutionality of statutes allowing an attorney's fees, see note 79 Am. St. Rep. 178-186.

97. Allowance of in a decree of foreclosure of a mortgage, as a lien upon the mortgaged premises, held erroneous, but not prejudicial, or available to sustain a charge of fraud in action to set aside and vacate such decree on that ground.—*Bell v. Thompson*, 147 Cal. 692, 82 Pac. 327.

98. Same.—Editorial note.—It is a matter for regret that the learned justice who wrote this opinion appeared not to appreciate the importance of the conclusion reached, or recognize the need of citing the authorities upon which the court relied, if any, to sustain it in the face of adverse criticism. While it may be true, as stated, that the estate itself could not successfully claim injury resulting from the inclusion of attorney's fees in the decree of foreclosure, unless such fees constitute a preferred-creditors' claim, the creditors whose unsecured claims were thus postponed, possibly set aside permanently by reason of such inclusion, were injured, and did possess ground of complaint. Were they unrepresented? Has the doctrine that the administratrix is the lawful representative of the creditors and the beneficiaries of the estate been nullified?

99. Allowance of in supreme court.—Mortgagee is not entitled to attorney's fees in first instance in supreme court upon appeal taken by mortgageor.—*Fender v. Robinson*, 135 Cal. 26, 27, 66 Pac. 969.

100. Compare: *Beckman v. Skaggs*, 61 Cal. 362, 363.

101. Allowed for same reason that costs are allowed, although no part of costs, as necessary incident to judgment.—*Rapp v. Spring Valley G. Co.*, 74 Cal. 532, 533, 16 Pac. 325.

102. Amount allowed — Discretion of court.—The amount which will be allowed as attorney's fees on foreclosure of mortgage rests peculiarly in the discretion of the trial court. While the amount of money involved should be considered, the compensation is not to be determined by a percent-

age calculated thereon. It is the extent of the responsibility which an attorney assumes by reason of the amount involved in foreclosure proceedings which he is conducting that is to be taken into consideration together with his actual services in the foreclosure proceedings for the purpose of fixing his compensation.—*Patten v. Pepper Hotel Co.*, 153 Cal. 460, 471, 96 Pac. 296.

103. Same.—Must not exceed amount provided for by mortgage.—*Monroe v. Fohl*, 72 Cal. 568, 571, 14 Pac. 514.

104. Same.—Must not exceed amount provided for by note.—*Hewitt v. Dean*, 91 Cal. 5, 14, 27 Pac. 423.

105. Averment that fee claimed was reasonable amount is not necessary; attorney's fee was not cause of action, but incident to it.—*McNamara v. Oakland B. & L. Assoc.*, 131 Cal. 336, 347, 63 Pac. 670. See *Carriere v. Minturn*, 5 Cal. 435, 436; *Monroe v. Fohl*, 72 Cal. 568, 571, 14 Pac. 514; *Rapp v. Spring Valley G. Co.*, 74 Cal. 532, 533, 16 Pac. 325; *First Nat. Bank v. Holt*, 87 Cal. 158, 161, 25 Pac. 272; *White v. Allatt*, 87 Cal. 245, 248, 25 Pac. 420.

106. Court to determine reasonable amount for fee.—It is not necessary to allege in complaint what sum would be reasonable attorney's fee in case. Court is to determine reasonable amount of this fee within limits of contract contained in mortgage.—*Damon v. Quinn*, 143 Cal. 75, 77, 76 Pac. 818.

107. Evidence as to employment and value of services of counsel need not be given where mortgage provides for reasonable counsel fees upon foreclosure, and complaint alleges that certain sum is reasonable to be allowed as fees for prosecution in such action, although reasonableness of fees claimed was denied by answer. Attorney brought action and tried it, which appears from record, and no further evidence of employment was required. Duty of fixing amount of compensation was cast on court and no evidence of value of services was necessary.—*Woodward v. Brown*, 119 Cal. 283, 309, 63 Am. St. Rep. 108, 51 Pac. 2, 542; *Hotaling v. Monteith*, 128 Cal. 556, 557, 558, 61 Pac. 95.

108. Mortgage providing for reasonable attorney's fees in event of foreclosure, and complaint alleging amount to be allowed, such fees should be allowed by court. Obvious purpose of action is to recover amount due on note by foreclosure of mortgage and sale of mortgaged property, and it was only to aid plaintiff in accomplishing these ends that allowance of attorney's fees was authorized by mortgage and asked for in complaint.—*First Nat. Bank v. Holt*, 87 Cal. 158, 161, 25 Pac. 272.

109. Need not be actually paid by plaintiff, nor need there be any express agreement for payment of such fees.—*Rapp v. Spring Valley G. Co.*, 74 Cal. 532, 535, 16 Pac. 325.

110. Not part of costs, or recoverable as such, although provided for by terms of contract, but are in nature of special damages expressly authorized by contract to be recovered in addition to general damages, and must be expressly averred with right in defendant to defend specially against their allowance.—*Brooks v. Forington*, 117 Cal. 219, 221, 48 Pac. 1073.

111. Prayer—That mortgaged premises be sold and proceeds applied to amount found due and for general relief, but not in terms asking an award of counsel fees, will not warrant allowance of counsel fees in case of default.—*Brooks v. Forington*, 117 Cal. 219, 221, 48 Pac. 1073. See *Thrasher v. Moran*, 146 Cal. 683, 684, 81 Pac. 32.

112. Same—That proceeds of sale be applied to payment of amount found due on note and mortgage, with interest, disbursements, costs, and counsel fees, and complaint alleging that mortgage provides that in case of foreclosure plaintiff should be entitled to certain per cent as counsel fees, is sufficient prayer, and counsel fees should be allowed thereon, though defendant has suffered default.—*Thrasher v. Moran*, 146 Cal. 683, 684, 81 Pac. 32.

III. ATTORNEY'S FEES—B. ALLOWANCE OF DENIED.

113. As to foreclosure of securities, attorney's fees can not be allowed where there is no stipulation therefor in mortgage.—*Clemens v. Luce*, 101 Cal. 432, 437, 35 Pac. 1032.

114. Attorney being paid stipulated amount per month for all services from plaintiff, and it not appearing that such can be at all apportioned to services rendered in foreclosure proceedings, and it not appearing that sum allowed by court as counsel fees will belong to attorney, or will receive any other direction than going to plaintiff, counsel fees can not be allowed in action to foreclose mortgage.—*Bank of Woodland v. Treadwell*, 55 Cal. 379, 380, 381; *Rapp v. Spring Valley G. Co.*, 74 Cal. 532, 535, 16 Pac. 325.

115. Attorney must be entitled to receive fees himself.—They can not be allowed for services rendered or to be rendered by attorney, unless that attorney be entitled to receive them to himself. Object of law allowing counsel fees is not to afford an opportunity under cover of name for speculation on part of creditor, but to reimburse him in proper amount for sums which he pays or becomes liable to pay, or to relieve him of burden of paying counsel fees.—*Bank of Woodland v. Treadwell*, 55 Cal. 379, 380.

116. Mortgage providing for foreclosure in case of default in payment of interest according to terms of note which it secures, but making no provision for payment of attorney's fees; and note, though providing for attorney's fees for collection thereof does not provide that such note, principal and interest, shall become due upon default in any payment of interest, right to bring

action after default of mortgagee without any demand of payment is limited to purposes for which action is to be brought, viz., foreclosure of mortgage, and does not include attorney's fees.—*Clemens v. Luce*, 101 Cal. 432, 437, 35 Pac. 1032.

117. Neither note nor mortgage providing for payment of attorney's fees, no such fees can be allowed by law.—*Clemens v. Luce*, 101 Cal. 432, 436, 35 Pac. 1032.

118. Note not giving holder right to bring action before its maturity, that right being created by mortgage alone and limited to foreclosure of mortgage, if holder would claim attorney's fees provided in note (mortgage not providing for attorney's fees), he should be required to give notice of his option to claim whole amount to be due as much as though action was brought upon note alone. If such notice is not given, judgment for attorney's fees is erroneous.—*Clemens v. Luce*, 101 Cal. 432, 437, 35 Pac. 1032.

IV. ATTORNEY'S FEES—C. LIEN ON MORTGAGED PREMISES.

119. Mortgage providing that in suit for its foreclosure "a decree may be had to sell premises in manner prescribed by law, and out of money arising from such sale to retain principal and interest, together with costs and charges of making such sale, and of suit for foreclosure, including counsel fees at rate of five per cent upon amount which may be found due," is an express provision that counsel fees are to be regarded as part of costs, and that if suit be brought, there should be entered therein a decree to retain said counsel fees, and creates an obligation for their payment upon mortgagee of same nature as his obligation to discharge other costs of foreclosure and authorizes court to include them in its decree as part of obligation secured by mortgage. *O'Neal v. Hart*, 116 Cal. 69, 70, 47 Pac. 926. See *Haensel v. Pacific States Sav. & B. Co.*, 135 Cal. 41, 44, 67 Pac. 38.

120. Note containing agreement for attorney's fees in case suit is brought being set out in complaint, and following this is allegation that conveyance of land was made to secure payment of "said note," shows that payment of attorney's fees as well as principal and interest of such note was secured. Mortgagee would therefore be entitled to judgment for an attorney's fee, as provided, and also to make such fee lien upon mortgaged premises.—*County Bank v. Goldtree*, 129 Cal. 160, 163, 61 Pac. 785.

121. Compare: *Clemens v. Luce*, 101 Cal. 432, 437, 35 Pac. 1032; *Boob v. Hall*, 107 Cal. 160, 162, 40 Pac. 117; *Irvine v. Perry*, 119 Cal. 352, 357, 51 Pac. 544, 949; *Russell v. Findley*, 122 Cal. 478, 479, 55 Pac. 143; *Commercial Sav. Bank v. Hornberger*, 140 Cal. 16, 21, 73 Pac. 625.

122. Note providing for reasonable attorney's fees, and complaint alleging and it being found true by court that mortgage was given "to secure payment of said note,"

shows an agreement for attorney's fee which appears to have been secured by mortgage, and it would be so treated in decree of foreclosure.—*Peachy v. Witter*, 131 Cal. 316, 319, 63 Pac. 468.

V. ATTORNEY'S FEES—D. PERSONAL JUDGMENT FOR.

123. Mortgage nowhere having provision that it was given to secure payment of any attorney's fee, but only being given as security for payment of certain amount of money with interest thereon, as specified in certain note, attorney's fees can not be made lien upon land.—*Clemens v. Luce*, 101 Cal. 432, 436, 35 Pac. 1032.

124. Mortgage specifying that in decree of foreclosure may be included reasonable counsel fee to be fixed by court, together with all payments made by mortgagee for specified purposes, all of which payments should be deemed to be secured by mortgage and payable to mortgagee out of proceeds of sale, is security for repayment of such designated sums, but does not declare that mortgage lien should extend to and protect attorney's fees and in such case mortgageor is not entitled to have those fees included in amount of mortgage lien, but must rely alone upon personal judgment.—*Klokke v. Escailler*, 124 Cal. 297, 298, 56 Pac. 1113. See *Irvine v. Perry*, 119 Cal. 352, 357, 51 Pac. 544, 949; *Cortelyou v. Jones*, 132 Cal. 131, 132, 64 Pac. 119; *Haensel v. Pacific States Sav. L. & B. Co.*, 135 Cal. 41, 45, 67 Pac. 38; *Luddy v. Pavkovich*, 137 Cal. 284, 285, 286, 70 Pac. 177.

125. Obligation for payment of attorney's fees being included in note, but not secured by mortgage, and note providing that judgment might be entered for counsel fees in such suit, counsel fees were property included in same action, but right to judgment for such fees was same as it would have been in action upon promissory note with such clause, of which no part was secured by mortgage.—*Clemens v. Luce*, 101 Cal. 432, 437, 35 Pac. 1032.

126. Unless mortgage be given to secure payment of attorney's fees, such fees may not be included as part of mortgage upon foreclosure. If mortgageor contracts for allowance of attorney's fees, but does not secure payment of them in mortgage deed, fees are in nature of special damage, which may be pleaded and recovered against mortgageor; but for them mortgagee may have only personal judgment.—*Klokke v. Escailler*, 124 Cal. 297, 298, 56 Pac. 1113.

VI. JUDGMENT FOR DEFICIENCY.

As to manner of giving and entering judgments, generally, see, ante, §§ 664-680½ and notes.

As to mortgage not being a personal obligation unless there is an express covenant therein to that effect, see *Kerr's Cyc. Civ. Code*, 2d ed., § 2928 and note.

127. Deficiency—Mortgageor and indorser or guarantor of note.—An action to recover the amount due on a promissory note can not be maintained, as to the mortgageor, separate and apart from an action to foreclose the mortgage, the mortgaged property constituting, as to such mortgageor, a primary fund for the discharge of the debt, and no personal judgment can be entered against the mortgageor in the absence of a deficiency after exhausting the mortgage security; but the indorser or guarantor of the note stands upon a different footing, and may be sued upon his liability without the foreclosure of the mortgage.—*Kinsel v. Ballou*, 151 Cal. 760, 91 Pac. 620.

128. Docketing deficiency—Duty of clerk.—Where the judgment of foreclosure provides for the sale of the property, and for a judgment against the mortgageor for any deficiency existing after application of the proceeds of the sale, and the property is sold for five thousand dollars less than the judgment, it is the duty of the clerk to docket the deficiency in that amount, as herein provided.—*Hibernia Sav. & L. Soc. v. Boyd*, 155 Cal. 196, 100 Pac. 239.

129. Example of deficiency judgment without sale, ship mortgaged and lost at sea.—*Toby v. Oregon Pac. R. Co.*, 98 Cal. 490, 495, 33 Pac. 550.

130. Land primarily liable—Mortgageor liable simply for deficiency.—Under the provisions of the above section where a mortgage is given upon land to secure the payment of a promissory note, the mortgageor's debt can not be collected by action, except by foreclosing the mortgage, and the mortgageor can not be adjudged liable only for money realized upon the foreclosure-sale which has been applied upon the debts and costs.—*Braun v. Crew*, 183 Cal. 728, 192 Pac. 531, following the doctrine in *Biddel v. Brizzolara*, 64 Cal. 362, 30 Pac. 609; *Brown v. Willis*, 67 Cal. 230, 7 Pac. 682.

131. Where the mortgaged property has been conveyed by the mortgageor, the relation of principal and sureties springs up between the land and the mortgageor, he being the surety and the land the principal debtor, and he becomes at once entitled to all the protection which the law gives to sureties.—*Braun v. Crew*, 183 Cal. 728, 192 Pac. 531, following the doctrine in *Crisman v. Lanterman*, 149 Cal. 651, 117 Am. St. Rep. 167, 87 Pac. 89; *Bridge v. Connecticut Mut. Life Ins. Co.*, 167 Cal. 774, 782, 141 Pac. 375, and approving *Murray v. Marshall*, 94 N. Y. 616.

As to release of mortgageor as surety by mortgagee's dealing with vendee who has assumed and agreed to pay the mortgage, see notes 16 L. R. A. 85; 4 L. R. A. (N. S.) 666.

132. Mortgage security to be first exhausted.—The mortgage security must be exhausted before recourse can be had to the bank account or personal responsibility of the debtor.—*Gnarini v. Swiss-American Bank*, 162 Cal. 181, 183, 121 Pac. 726.

133. Particular mode of entering personal judgment for deficiency is not important matter in policy inaugurated by above section. Important matter was to prevent multiplicity of suits and to compel creditor to first exhaust his security. Mode provided for entry of judgment is mere matter of convenience, in fact privilege given to mortgagee.—*Savings Bank v. Central Market Co.*, 122 Cal. 28, 36, 54 Pac. 273.

134. Personal action for deficiency.—The holder of promissory notes secured by a mortgage on personal property is not precluded by above section from bringing and maintaining a personal action for the balance due on the notes, after having made a sale of the property under the power contained in the mortgage, and giving the mortgageor credit therefor, as in such a case the notes are not "secured" by mortgage at the time of the commencement of the action.—*J. I. Case Threshing Machine Co. v. Copren Bros.*, 32 Cal. App. 194, 162 Pac. 647.

135. Personal judgment for deficiency.—Can not be entered until after sale of mortgaged property by sheriff, and sheriff's return showing deficiency, but such contention is too technical to give effect to evident intent of lawmakers in many cases.—*Toby v. Oregon Pac. R. Co.*, 98 Cal. 490, 493, 495, 33 Pac. 550.

136. Return of sheriff.—Makes absolute personal liability that before was conditional and liquidates and renders certain damages for which mortgageor is personally liable. Such return must follow and depend upon decree for sale of premises.—*Biddel v. Brizzolara*, 64 Cal. 354, 362, 30 Pac. 609.

137. Rule that mortgageor only undertakes to pay deficiency which may remain after return is made of result of sale on foreclosure is not altogether or literally true. He undertakes to pay debt, but if there exists valid lien to secure its payment, result is same as though his contract had only been to pay deficiency. If, however, without fault on part of mortgagee, lien be lost, he may be held for entire debt.—*Otto v. Long*, 127 Cal. 471, 477, 59 Pac. 895.

138. Until after sale of mortgaged premises there can be no personal judgment docketed against defendant mortgageor.—*Crim v. Kessing*, 89 Cal. 478, 487, 23 Am. St. Rep. 491, 26 Pac. 1074.

139. Until decree is entered for sale of mortgaged premises, mortgageor can not legally be compelled to pay any part of it, no matter what its form, and liability which shall then accrue to him is liability to pay only deficiency which shall appear on sheriff's return.—*Biddel v. Brizzolara*, 64 Cal. 354, 362, 30 Pac. 609; *Brown v. Willis*, 67 Cal. 235, 236, 7 Pac. 682; *McKean v. German-American Sav. Bank*, 118 Cal. 334, 336, 50 Pac. 656.

140. Until judgment is docketed for balance due plaintiff, it does not become lien

on real property of judgment-debtor.—*Culver v. Rogers*, 28 Cal. 520, 526. See *Chapin v. Broder*, 16 Cal. 403, 421; *Hibberd v. Smith*, 50 Cal. 511, 518; *Frost v. Meetz*, 52 Cal. 664, 671.

VII. ONE ACTION ONLY ON OBLIGATION.

As to foreclosure suit a bar to action at law, see note 4 L. R. A. 205, 206.

As to right of person whose debt is secured by trust-deed, pledge, mortgage, or other lien to maintain an action at law to recover judgment on debt, see note 73 Am. St. Rep. 559, 568.

141. A single action only to recover debt—As to waiver.—The rule that there can be but one action for the recovery of a debt secured by mortgage is intended for the benefit of the primary debtor, and may be waived.—*Martin v. Becker*, 169 Cal. 301, Ann. Cas. 1916D, 176, 146 Pac. 665.

142. Same.—One action for the recovery of a debt secured by mortgage.—The mortgageor is entitled to insist that the mortgagee shall look to the security furnished by the lien of the mortgage, and where the mortgagee releases the mortgage, the estate of the unconsenting mortgageor can not be held liable for any deficiency existing after application of the proceeds arising from such release upon the mortgage debt.—*Crisman v. Lanterman*, 149 Cal. 651, 87 Pac. 89.

143. Bringing action in another state and obtaining personal judgment against maker of note, secured by mortgage in this state, is waiver of security of such mortgage, and action can not be maintained thereafter in this state for enforcement of security, although judgment of other state was wholly unsatisfied.—*Ould v. Stoddard*, 54 Cal. 613, 614.

144. Compare: *Felton v. West*, 102 Cal. 266, 270, 36 Pac. 676.

145. Chattel mortgage.—A single action only.—Under the provisions of the above section in the case of a chattel mortgage securing the payment of a promissory note, there can be but one action for the enforcement of the debt secured thereby, and where the plaintiff sues upon the note and prosecutes it to judgment this constitutes a waiver of the remedy by foreclosure of the mortgage.—*Craiglow v. Williams*, 514 Cal. App. 45, 188 Pac. 76, following doctrine in *Biddel v. Brizzolara*, 64 Cal. 354, 30 Pac. 609; *Brown v. Willis*, 67 Cal. 235, 7 Pac. 682; *Barbieri v. Ramelli*, 84 Cal. 154, 23 Pac. 1086; *Toby v. Oregon Pac. R. Co.*, 98 Cal. 490, 33 Pac. 550; *McKean v. German-American Bank*, 118 Cal. 334, 50 Pac. 656; *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542; *Meyer v. Weber*, 133 Cal. 681, 65 Pac. 1110; *Crisman v. Lanterman*, 149 Cal. 651, 117 Am. St. Rep. 167, 87 Pac. 89; *Gnarini v. Swiss-American Bank*, 162 Cal. 181, 121 Pac. 726.

146. Same.—Action on note prosecuted to judgment.—Bar to foreclosure.—In a case in

which a party executed a promissory note and secured the same by the execution of a chattel mortgage upon property located in this state, and the note was sued upon in the state of Ohio, and there prosecuted to judgment in Ohio, and the Ohio judgment unpaid, an execution issued thereon having been returned wholly unsatisfied; in an action brought in this state to foreclose the mortgage it was held that by electing to bring the action on the note alone in the state of Ohio, the plaintiff had waived his right to the security of the mortgage.—*Ould v. Stoddard*, 54 Cal. 613.

147. Same—Construction of section.—In the above case in construing the above section the court said: "It is not difficult to discover the policy which dictated the enactment of this statute. The tendency of modern legislation is to prevent multiplicity of suits, and no one doubts the wisdom of it. In order to give to this statute the force and effect which the legislature intended that it should have we must hold that, by prosecuting an action upon the note secured by the mortgage to final judgment, the plaintiff has exhausted his remedy upon both the note and the security. To hold otherwise would be to hold that there may be two actions, where the statute declares there can be but one."—*Ould v. Stoddard*, 54 Cal. 613.

148. Same—Mere commencement of an action in a jurisdiction in which the property mortgaged is situated securing the payment of an obligation evidenced by a promissory note, and the subsequent dismissal of that action without the court having taken action thereon, does not constitute a waiver of the right to foreclose the mortgage, although prosecuting such action to final judgment might have done so.—*Brice v. Walker*, — Cal. App. —, 194 Pac. 721.

149. In a case in which the owner of a note and mortgage, two days before the day when plaintiff's right of action would have been barred by the statute of limitations, he filed a complaint on the note without reference to the mortgage, and four days later he filed an amended complaint which, in addition to the matter alleged in the original complaint, counted also on the mortgage. The court overruled a motion to strike from the files the amended complaint which was based on the ground that such complaint wholly changed the cause of action, and also overruled a demurrer based on the ground that the right of action counted upon in the amended complaint was barred, the court said that the cause of action set up in the original and that set up in the amended complaint was simply the obligation sought to be enforced—that is to say, the obligation to pay the money agreed to be paid—and that the only change that took place was in the remedy by which it was sought to enforce the obligation. While the doctrine of election of remedies was not discussed in that opinion it was an

implied element in the decision of the implication was against waiver by an election.—*Frost v. Whitter*, 132 Cal. 421, 84 Am. St. Rep. 53, 64 Pac. 705.

150. Construction of section—As applicable to grantors and sureties.—The provisions of the above section that "there can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real or personal property" was enacted for the benefit of the principal debtor and to relieve him for liability from a multiplicity of actions, and does not apply to an individual guarantor or surety, or to subsequent indorser upon a promissory note, nor in fact to any case where there is no privity of contract between the two existing obligations,—that is, where the primary debt and the obligation under it are separate and distinct obligations.—*Murphy v. Hellman Commercial Trust & Sav. Bank*, 43 Cal. App. 579, 185 Pac. 485, following doctrine in *Martin v. Becker*, 169 Cal. 301, 304, Ann. Cas. 1916D, 171, 146 Pac. 665.

151. Same—As applicable to primary debtor only, and not to an individual guarantor or surety, or to a subsequent indorser upon a note, nor to any case where there is no privity of contract existing between the two obligations; e. g., where the primary debt and mortgage debt are separate and distinct obligations.—*Murphy v. Hellman Commercial Trust & Sav. Bank*, 43 Cal. App. 579, 185 Pac. 485.

152. Same—As applicable to what rights.—This section must be construed to have reference to the enforcement of those rights only which are necessary to the recovery of the debt and the foreclosure of the lien given to secure it and not to any collateral agreement in the mortgage which does not affect the interest of the parties in the mortgaged property.—*Ely v. Williams*, 6 Cal. App. 455, 458, 92 Pac. 393.

153. There is nothing in this section which will prevent a pledgee from having an action to recover the debt without first exhausting the subject of his pledge.—*Jones v. Evans*, 6 Cal. App. 88, 92, 91 Pac. 532.

154. Same—As inapplicable, when.—This section, providing that there can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage, is clearly inapplicable to the case where the lessor resorted to the summary action of unlawful detainer for non-payment of rent against an assignee of the lessee; certainly he did not lose his right to foreclose as against the original lessee, a chattel mortgage given as security for the payment of damages on account of any breach of the lease.—*Schehr v. Berkey*, 166 Cal. 157, 135 Pac. 41.

155. This section does not contemplate from the language "there can be but one action for the recovery of any debt . . . secured by mortgage upon real or personal property," that because a person has taken

a mortgage he can not take other independent security for his debt, and where the contract for such security permitted, enforce such contract without reference to the mortgage security.—*Martin v. Becker*, 169 Cal. 301, Ann. Cas. 1916D, 176, 146 Pac. 665.

156. **Same—As not applying in actions against stranger to mortgage.**—The provisions of the above section making an action to foreclose a mortgage securing the payment of a promissory note, the only remedy to enforce payment of the obligation secured by the mortgage is not available as a defense in an action to enforce the payment of the obligation commenced against a person who was not a party to the mortgage agreement.—*King v. Harford*, — Cal. App. —, 191 Pac. 998.

157. **Same—Absurd conclusions to be avoided.**—A construction must not be given statute which would lead to absurd results or to conclusions plainly not contemplated by legislature. Certainly it was not intent to prohibit ordinary transaction of putting up collaterals to secure an indebtedness, nor to limit such collaterals to mortgages which can be foreclosed in same action.—*Merced Sec. Sav. Bank v. Casaccia*, 103 Cal. 641, 645, 37 Pac. 648.

158. **Construction of law—Is such as to suppress mischief of multiplicity of suits and harassing of debtor by two actions, and to advance remedy by compelling creditor to exhaust his security before proceeding personally against debtor.**—*Felton v. West*, 102 Cal. 266, 269, 36 Pac. 676.

159. **Distinction—Between mortgage and pledge** is clearly recognized by Civil Code, and in case of pledge, pledgee may resort to judicial sale, or may, on notice without suit, sell property, latter remedy not being given in case of mortgage. Above section refers to mortgages only, and contains nothing to prevent pledgee from having his action to recover debt without first exhausting subject of pledge.—*Ehrlich v. Ewald*, 66 Cal. 97, 98, 4 Pac. 1062; *Savings Bank v. Middlekauff*, 113 Cal. 463, 467, 45 Pac. 840.

160. **Early California practice—Course pursued under old chancery system may be adopted** in foreclosure of mortgages, and decree may be taken adjudging amount due upon personal obligation of mortgageor, and directing sale of premises and application of proceeds to its payment, and application after sale for ascertainment of any deficiency and execution for same; or they may take formal judgment for amount due in first instance. In latter case proceeds can be applied by officer making sale immediately upon judgment, and no further proceeding will be necessary on part of court to ascertain deficiency.—*Rowland v. Leiby*, 14 Cal. 156, 157; *Englund v. Lewis*, 25 Cal. 337, 349.

161. **Same—Legal and equitable relief may be had in same action, result being that in foreclosure cases formal judgment**

in personam may be rendered against defendant for amount due, with provisions for its enforcement against property upon which lien is established.—*Englund v. Lewis*, 25 Cal. 337, 348.

162. **Same—Mortgage is made for mortgagee's security and not for mortgageor's protection.** In taking security, mortgagee does not waive mortgageor's personal liability, either in toto or pro tanto. Mortgagee may waive security at any stage and proceed upon personal liability created by contract.—*Englund v. Lewis*, 25 Cal. 337, 359.

163. **Same—Personal judgment rendered at law, and decree in equity awarded at same time, plaintiff may proceed to enforce either at his election, but he can not proceed upon both at same time.** This theory is to effect that there are two judgments, either of which may be enforced regardless of other, with qualification that they can not enforce both at same time, and that satisfaction of one is satisfaction of other.—*Englund v. Lewis*, 25 Cal. 337, 357.

164. **Same—Personal money judgment and decree foreclosing mortgage and directing land to be sold for purpose of satisfying such personal judgment may be recovered in foreclosure suit; but if party does not obtain personal judgment, but contents himself with decree in use under old chancery practice, such decree does not become lien, and no lien attaches under such judgment until after sale has been had and deficiency, if there be any, is ascertained and docketed, and then only for amount of such deficiency.** This twofold judgment is fruit of our system of practice, and exemplifies its superiority. Under old system two suits would have been necessary in order to accomplish same result.—*Englund v. Lewis*, 25 Cal. 337, 357.

165. **Same—Personal money judgment in favor of all parties holding notes against defendant may be rendered before sale of property.**—*Cormerais v. Genella*, 22 Cal. 116, 125, 126.

166. **Same—Provision that there should be one action for recovery of any debt, etc., relates entirely to "action," and not form of judgment which court may render in action.**—*Cormerais v. Genella*, 22 Cal. 116, 125.

167. **Effect of enforcing mechanics' lien.**—In this action for the foreclosure of a mortgage, the contention of the mortgageors that the right to foreclose the same on any of the claims intended to be covered by the mortgage was waived by the action of the mortgagee in commencing suits to enforce mechanics' liens, is untenable, for the reason that such actions relate to claims omitted from the complaint, although secured by the mortgage.—*Post v. Becker*, 26 Cal. App. 392, 147 Pac. 98.

168. **Election to foreclose chattel mortgage under this section does not bar action of replevin for the mortgaged property**

where the mortgage gives the right of possession upon default.—*Ely v. Williams*, 6 Cal. App. 455, 458, 92 Pac. 393.

169. Enforcing lien—By attachment commenced prior to mortgage.—There is no difference between commencing and enforcing an attachment suit, while there is valid mortgage existing to secure debt, and prosecuting action already commenced after mortgage is given to secure debt which is subject of that action. Mortgage subserves same purpose in both cases, which is to secure debt, and after it is given, law steps in and limits action to foreclosure proceeding to enforce debt.—*Commercial Bank v. Kershner*, 120 Cal. 495, 498, 52 Pac. 848.

170. Fact of exhaustion of security—Controls right to personal judgment.—Language of provision for docketing personal judgment for balance shown to be due by return of sheriff is used because it is usual manner by which application of primary fund and deficit remaining is ascertained, but after all it is existence of fact of exhaustion of security and of deficiency remaining which entitle plaintiff to personal judgment against defendant, and where they exist, and can only reasonably be ascertained by other means, they are not to be ignored because made apparent in different way.—*Toby v. Oregon Pac. R. Co.*, 98 Cal. 490, 495, 33 Pac. 550.

171. Inquiry whether there is such property as that which mortgage purports to cover, or whether for any reason it fails to create lien, does not violate policy of statute nor rule announced in former decision.—*Otto v. Long*, 127 Cal. 471, 476, 59 Pac. 895.

172. Intention of legislature—In enacting provision that there could be but one action for recovery of any debt secured by mortgage was to prevent multiplicity of suits upon transactions of this character. If one suit could be maintained upon note, and another upon mortgage by which it is secured, then no change has been effected in law by this enactment, because mortgagee was previously limited to those two actions. Law now in force provides for single action, in which mortgagee can secure all that he formerly could by two actions, and necessity of two actions is therefore entirely obviated.—*Ould v. Stoddard*, 54 Cal. 613, 615.

173. Judgment for defendant on pleadings—Can not be granted in action brought on note alone, although note was secured by mortgage, where complaint does not set forth facts showing that note was so secured by mortgage. Answer setting forth such facts is not sufficient.—*Hibernia Sav. & L. Soc. v. Thornton*, 117 Cal. 481, 482, 483, 49 Pac. 573.

174. Mistake—Causing mortgagee not to secure lien upon anything, he may bring personal action for debt alone. He should not go through senseless form of foreclosure when confessedly he does not have lien.—*Otto v. Long*, 127 Cal. 471, 477, 59 Pac. 895.

175. Mortgage given as additional security for debt then being enforced by action pending, is no exception to statute, and plaintiff may not proceed with his first action and then foreclose on balance, if there be any.—*Commercial Bank v. Kershner*, 120 Cal. 495, 498, 52 Pac. 848.

176. Mortgaged premises constitute fund which must be first exhausted before personal judgment can be had against mortgageor.—*Bull v. Coe*, 77 Cal. 54, 60, 11 Am. St. Rep. 235, 18 Pac. 808; *Lavenson v. Standard S. Co.*, 80 Cal. 245, 248, 13 Am. St. Rep. 147, 22 Pac. 184; *Hall v. Arnott*, 80 Cal. 348, 354, 22 Pac. 200.

177. Mortgageor—Having neither possession nor any estate, title, or interest of any kind or character in mortgaged premises at time of execution of mortgage, and never at any time acquiring any, it is evident that debt is not one secured by lien upon real estate. One can not by his contract create lien upon property which he does not possess, and to which he has no title of any character whatever.—*Otto v. Long*, 127 Cal. 471, 476, 477, 59 Pac. 895.

178. Same—In good faith asserting claim to property or having color of title or asserting equity in reference to property, mortgagee would be compelled to foreclose. But mortgageor having no claim of title, nor there being any mistake such as could be corrected in court of equity, personal action upon note without foreclosing mortgage does not violate provisions of this section.—*Otto v. Long*, 127 Cal. 471, 477, 59 Pac. 895.

179. Note, and mortgage securing same—Being assigned as collateral security for indebtedness, may be foreclosed by assignee without his bringing action upon indebtedness which they secured. Such mortgage is not to secure principal debt, but is merely collateral matter, and suit to foreclose it was not action for recovery of principal debt, but was action for preservation of security.—*Merced Sec. Sav. Bank v. Casaccia*, 103 Cal. 641, 644, 645, 37 Pac. 648; *McArthur v. Magee*, 114 Cal. 126, 128, 129, 45 Pac. 1068.

180. One action for recovery of any debt—Relates to civil actions commenced and prosecuted in courts of justice of this state, and does not embrace and control proceeding sanctioned by common law, which in no legal sense can be called actions at law or suits of equity.—*Wilson v. Brannan*, 27 Cal. 258, 271.

181. Personal judgment after deficiency—Under foreign jurisdiction.—Note secured by mortgage on property in another state may be sued on in this state and personal judgment recovered after foreclosure of mortgage in foreign state, and deficiency entered.—*Felton v. West*, 102 Cal. 266, 268, 269, 271, 36 Pac. 676.

182. Same—Section refers to actions brought in courts of California for purpose of foreclosing mortgages upon property situated in state of California, and not mort-

gages upon property outside of state.—*Felton v. West*, 102 Cal. 266, 270, 36 Pac. 676.

183. Compare: *Ould v. Stoddard*, 54 Cal. 613, 614.

As to personal judgment in new action after foreclosure under service by publication, see, ante, pars. 81, 82, this note.

184. Proceeds of sale of whole of mortgaged premises constitute primary fund out of which debt, secured by mortgage, must be paid.—*Porter v. Muller*, 65 Cal. 512, 513, 4 Pac. 531.

185. Relation of mortgageor and mortgagee—Is not created when vendor of property retains lien on land for portion of purchase-money which remains unpaid. There is therefore no statutory prohibition upon right to personal action to enforce debt when it becomes due.—*Longmaid v. Coulter*, 123 Cal. 208, 215, 55 Pac. 791.

186. Replevin of chattels—Where mortgagee is entitled to possession.—Mortgage providing that mortgagee be entitled to possession of chattels upon default of payment of interest or principal gives mortgagee right to bring action of replevin for such possession upon condition broken, and such action does not contravene provisions of above section that there should be one action for recovery of any debt secured by mortgage. Agreement as to possession of mortgaged property is but incident to mortgage and unless it can be enforced recognition given it would have no value.—*Harper v. Gordon*, 128 Cal. 489, 491, 492, 61 Pac. 84.

187. Second foreclosure—After cancellation of first decree.—Where a mortgagee under two separate mortgages to secure the same debt, in a suit to foreclose omitted, by mistake, one of the mortgages, he may maintain an independent suit to cancel the judgment, and having done so may maintain a second suit to foreclose, thus avoiding the bar of this section (dictum).—*Bacon v. Bacon*, 150 Cal. 487, 89 Pac. 317, citing *Gerig v. Loveland*, 130 Cal. 512, 62 Pac. 830.

188. Second mortgagee—Has right to personal action for debt after his lien has been extinguished by reason of default of mortgageor and foreclosure by first mortgagee. Lien of second mortgagee is extinguished by foreclosure and sale under prior mortgage. Such loss of lien is not voluntary release of security, but it was lost by reason of fault of mortgageor in not paying first mortgage. If there had been surplus, and second mortgagee had failed to get it by his neglect, it might be different.—*Savings Bank v. Central M. Co.*, 122 Cal. 28, 36, 54 Pac. 273. See *Toby v. Oregon Pac. R. Co.*, 98 Cal. 490, 494, 33 Pac. 550.

189. Security being of value, action on note which is secured by mortgage can not be maintained on note alone.—*Bartlett v. Cottle*, 63 Cal. 366, 367.

190. Compare: *Barbieri v. Ramelli*, 84 Cal. 154, 157, 23 Pac. 1086.

191. Security being valueless.—Contention that at time action was commenced security was not equal to amounts due on indebtedness secured by prior mortgages, was no ground for maintaining action upon note alone.—*Barbieri v. Ramelli*, 84 Cal. 154, 156, 23 Pac. 1086.

192. Same—Word "secured" does not mean security shall be adequate, or that in case prior liens upon it will exhaust money derived from land conveyed as security on sale of it, then plaintiff is relieved from bringing action to foreclose. Proper construction of language is that if mortgage on its face purports to be security to plaintiff, then he must bring his action for foreclosure. This word has reference only to purport of mortgage as it appears on its face. Interpretation of it is not proper when meaning is sought in something outside of mortgage instrument.—*Barbieri v. Ramelli*, 84 Cal. 154, 156, 23 Pac. 1086.

193. Security of mortgage debt can not be waived by plaintiff, and he is not authorized to bring action on indebtedness alone.—*Barbieri v. Ramelli*, 84 Cal. 154, 156, 23 Pac. 1086.

194. Compare: *Bartlett v. Cottle*, 63 Cal. 366, 367.

195. Tendency of modern legislation is to prevent multiplicity of suits.—*Ould v. Stoddard*, 54 Cal. 613, 615.

VIII. PARTIES TO ACTION TO FORECLOSE.

As to effect of default judgment against holder of adverse or paramount title, see note 68 Am. St. Rep. 360-362.

As to joining persons severally liable upon instrument, see, ante, § 383 and note.

As to judgment against one party and action proceeding as to others, see, ante, § 599 and note.

As to litigation of paramount title in suit to foreclose mortgage, see note 68 Am. St. Rep. 354-362.

As to litigation of tax-titles in foreclosure suits, see note 68 Am. St. Rep. 359, 360.

As to order of sale and proper parties in foreclosure proceedings, see note 63 Am. St. Rep. 130.

As to parties defendant in foreclosure proceedings, see note 36 Am. St. Rep. 574.

As to parties not summoned in action on joint contract being summoned after judgment, see, post, § 989 and note.

As to proceedings against unknown owners, generally, see note 87 Am. St. Rep. 358-368.

As to proceedings for enforcement of mortgage where mortgageor has died, see, post, §§ 1493, 1569, 1570 and notes.

As to proceedings where there are several defendants and part only are served, see, ante, § 414 and note.

As to unknown claimants being barred by foreclosure proceedings, see note 87 Am. St. Rep. 366.

As to whether or not subsequent purchasers and encumbrancers are necessary or proper parties in foreclosure suit, see note 1 Am. St. Rep. 189, 190.

196. As to who may be parties plaintiff—A lessor.—A lessor may maintain an action for the foreclosure of a chattel mortgage given to secure the faithful performance of the covenants and conditions of a lease, even though prior to the institution of such action the lessor has recovered a judgment in an unlawful detainer proceeding for the restitution of the premises, forfeiture of the lease and the amount due for rent and where this breach of the lease, viz., the non-payment of rent, was the basis of both actions.—*Ashcroft Estate Co. v. Nelson*, 26 Cal. App. 400, 147 Pac. 101.

197. In an action for the foreclosure of a mortgage against the mortgageor and various persons who had successively assumed the payment of the mortgage debt, an order granting a new trial as to one of the defendants, on stipulation of plaintiff and such defendant, without notice to the other defendants, is not erroneous, as the judgment in favor of the plaintiff is not res judicate, as to any issue between the defendants themselves, and such other defendants are not interested parties in the new trial of the issues raised between the plaintiff and such defendant.—*Robson v. Superior Court*, 171 Cal. 588, 154 Pac. 8.

198. Adverse claim to land—In opposition to mortgageor and mortgagee can not be tried in equitable action of foreclosure.—*Peachy v. Witter*, 131 Cal. 316, 320, 63 Pac. 468. See *McComb v. Spangler*, 71 Cal. 418, 423, 12 Pac. 347; *Ord v. Bartlett*, 83 Cal. 428, 430, 23 Pac. 705; *Emeric v. Alvarado*, 90 Cal. 444, 470, 27 Pac. 356; *Cody v. Bean*, 93 Cal. 578, 579, 29 Pac. 223; *Sichler v. Look*, 93 Cal. 600, 608, 609, 29 Pac. 220; *Williams v. Cooper*, 124 Cal. 666, 669, 57 Pac. 577; *Murray v. Etchepare*, 129 Cal. 318, 319, 61 Pac. 930.

199. Assignor of note and mortgage guaranteeing payment—Proper defendant.—On the foreclosure of a mortgage securing the payment of a note, brought by an assignee of the holder of such mortgage and note, who indorsed it at the time of the transfer and guaranteed payment, such assignor is a proper party defendant, notwithstanding the provisions of the above section, for the reason that by such indorsement the assignor of the note made an entirely individual contract upon which he was liable without the principal debtor.—*Titus v. Woods*, 45 Cal. App. 541, 188 Pac. 68, applying the doctrine in *Bull v. Coe*, 77 Cal. 54, 11, Am. St. Rep. 235, 18 Pac. 808; *Adams v. Wallace*, 119 Cal. 67, 51 Pac. 14; *Kinsel v. Ballou*, 151 Cal. 754, 91 Pac. 620. See *Cooke v. Mesmer*, 164 Cal. 332, 128 Pac. 917.

200. Claims of prior encumbrancers—May be adjudicated by court in foreclosure

proceedings where such encumbrancers are made parties. They are not necessary parties, but are always proper parties, and it is good practice to join them for purpose of liquidating their claims.—*Van Loben Sels v. Bunnell*, 131 Cal. 489, 494, 63 Pac. 773.

201. Element of actual knowledge—Of existence of any conveyance, in absence of its recordation, is not within terms of section. It is unnecessary to make any person party to action of foreclosure whose conveyance from mortgageor subsequent to mortgage is unrecorded at time action is commenced, while at same time it binds such person by decree in action as conclusively as though he had in fact been made party to suit.—*Hager v. Astorg*, 145 Cal. 548, 550, 79 Pac. 68.

202. Grant by mortgage—Scope of decree.—Under the provisions of the above section a decree in an action for the foreclosure of a mortgage is binding upon the mortgageor, although not served with process, where prior to the commencement of the action the mortgageor had conveyed the property by grant deed and the record showed no reservation of any interest in the premises, and the grantee appeared and defended the action.—*Hawley v. State Assurance Co.*, 182 Cal. 111, 187 Pac. 1.

203. Heirs of deceased mortgageor are not necessary parties defendant in action to foreclose.—*Finger v. McCaughey*, 119 Cal. 59, 60, 51 Pac. 13. See *Bayly v. Muehe*, 65 Cal. 345, 349, 3 Pac. 467, 4 Pac. 486; *Monterey Co. v. Cushing*, 83 Cal. 507, 512, 23 Pac. 700; *Collins v. Scott*, 100 Cal. 446, 452, 34 Pac. 1085.

204. Holder of adverse title—Being made party defendant to foreclose suit, and facts being set forth by plaintiff from which he claims that such adverse title is subordinate to his mortgage, and issues upon such facts are presented for adjudication without objection on part of defendant, judgment of court thereon will not be void. Court may decline to pass upon question as not germane to suit of foreclosure, or it may determine that such claim of defendant is unfounded or that his interest in premises is subordinate to mortgage, or it may render decree of foreclosure subject to prior rights of such defendant. Subject-matter of such controversy would be within jurisdiction of court, and if parties thereto submit controversy to its determination, judgment rendered will be as conclusive upon them as if rendered in action especially brought for that purpose and will not be subject to collateral attack.—*Beronio v. Ventura County L. Co.*, 129 Cal. 232, 237, 79 Am. St. Rep. 118, 61 Pac. 958. See *Helck v. Reinheimer*, 105 N. Y. 470, 12 N. E. 37; *Goebel v. Iffia*, 111 N. Y. 170, 18 N. E. 649; *Cromwell v. MacLean*, 123 N. Y. 474, 25 N. E. 932.

205. Holder of deed—Not recorded when action was commenced is not necessary party defendant in foreclosure proceedings, although such deed was executed prior to

commencement of action.—*Hibernia Sav. & L. Soc. v. Cochran*, 141 Cal. 653, 656, 75 Pac. 315.

203. Holder of second mortgage—Covering two separate tracts of land can not, in action of foreclosure by holder of first mortgage on one of said tracts, come in by way of cross-complaint or otherwise and have his mortgage on separate tract included in such action. As to property not involved in action, it is same as if it had been mortgaged by separate mortgage, and could not be foreclosed in action brought to foreclose mortgage upon another and separate tract.—*Brill v. Shively*, 93 Cal. 674, 675, 29 Pac. 324; *Pauly v. Rogers*, 121 Cal. 294, 296, 53 Pac. 808.

207. Compare: *Stockton Sav. & L. Soc. v. Harrold*, 127 Cal. 612, 620, 60 Pac. 165.

208. Same—Upon two distinct tracts may come in by way of cross-complaint in action to foreclose first mortgage upon one of such tracts only, and have his mortgage on other and separate tract foreclosed in same action. There is wide difference between coming in by answer and coming in by way of cross-complaint in such cases.—*Stockton Sav. & L. Soc. v. Harrold*, 127 Cal. 612, 620, 60 Pac. 165; *Newhall v. Bank of Livermore*, 136 Cal. 533, 537, 69 Pac. 248.

209. Distinguishing: *Brill v. Shively*, 93 Cal. 674, 675, 29 Pac. 324; *Pauly v. Rogers*, 121 Cal. 294, 296, 297, 53 Pac. 808.

210. Holder of unrecorded deed—Executed subsequent to mortgage need not be made party to foreclosure proceedings, but such proceedings are conclusive against such person as though he had been made party to action.—*Breedlove v. Norwich U. F. Ins. Soc.*, 124 Cal. 164, 166, 56 Pac. 770.

211. Indorsers of note—Secured by mortgage are properly joined as parties defendant in action to foreclose mortgage.—*Hubbard v. University Bank*, 125 Cal. 684, 685, 58 Pac. 297.

212. Interest of defendant in foreclosure suit—Being shown to be adverse or superior to that covered by the mortgage, proper action of court is to dismiss him from suit.—*Beronio v. Ventura Co. L. Co.*, 129 Cal. 232, 237, 79 Am. St. Rep. 118, 61 Pac. 958. See *Ord v. Bartlett*, 83 Cal. 428, 430, 23 Pac. 705; *Cody v. Bean*, 93 Cal. 578, 579, 29 Pac. 223; *Hoppe v. Hoppe*, 104 Cal. 94, 102, 37 Pac. 894.

213. Interest prior to mortgage, of party made defendant in foreclosure suit is not affected by judgment therein under usual allegation in complaint for foreclosure that defendant other than mortgageor claims interest in premises, and that such interest is subsequent and subordinate to that created by mortgage. Such averment is not material to plaintiff's cause of action, nor is it issuable fact, and whether court rendered judgment upon default of defendant or upon issue created by his denial of this averment, without setting forth character

of his interest, any prior interest held by him is not affected by such judgment.—*Beronio v. Ventura Co. L. Co.*, 129 Cal. 232, 237, 79 Am. St. Rep. 118, 61 Pac. 958; *Cady v. Purser*, 131 Cal. 552, 560, 82 Am. St. Rep. 391, 63 Pac. 844.

214. Junior lienholders—Must be made parties defendant in foreclosure proceedings in order to make foreclosure effectual, and this implies that their rights when brought into court should be adjudicated, and provision be made for them in decree of foreclosure by proper disposition of surplus proceeds of sale of mortgaged premises.—*Hibernia Sav. & L. Soc. v. London & L. F. Ins. Co.*, 138 Cal. 257, 260, 71 Pac. 334.

215. Junior mortgagee—Is under no obligation to intervene, file cross-complaint, or set up his mortgage and obtain foreclosure in action brought by holder of prior mortgage.—*Savings Bank v. Central M. Co.*, 122 Cal. 28, 34, 54 Pac. 273.

216. Same—Made party defendant, may file answer setting up his mortgage and asking that any surplus derived from sale of security be applied as credit upon his note. By following such course, he in no sense brings action to foreclose his mortgage, and is not barred from thereafter bringing such action if other lands are included in his mortgage.—*Pauly v. Rogers*, 121 Cal. 294, 297, 53 Pac. 808. See *Brill v. Shively*, 93 Cal. 674, 675, 29 Pac. 324.

217. Same—Need not answer or set up his claim by cross-complaint or otherwise, in foreclosure proceedings brought by holder of prior lien, although made party defendant to such suit.—*Greenebaum v. Davis*, 131 Cal. 146, 148, 82 Am. St. Rep. 338, 63 Pac. 165.

218. Making all parties defendant in whose favor any interest appears of record is all that is required to be done by plaintiff in foreclosure suit in order to extinguish all outstanding interest in land.—*Spaulding v. Howard*, 121 Cal. 194, 198, 53 Pac. 563.

219. Mortgageor proper party—Necessary party where deficiency judgment is sought.—Under the provisions of the above section the grantor under a mortgage securing the payment of a promissory note is a proper party to the action, and is a necessary party in those instances in which the plaintiff relies upon a personal deficiency judgment and prays for same in his complaint.—*Hutchison v. Bar*, 183 Cal. 182, 190 Pac. 799.

220. Same—Same—Grantee of mortgage as sole defendant.—In an action seeking to foreclose a mortgage in a case in which the mortgaged property has been conveyed to another, where the plaintiff abandons his right to a deficiency judgment against the mortgageor, and the answer shows that the mortgage had divested himself of the title to the property and that the defendant grantee was the sole owner

at the time of the commencement of the action, the mortgagee is no longer a necessary party and the plaintiff may proceed to judgment and sale against the grantee as sole defendant.—*Hutchison v. Bar*, 183 Cal. 182, 190 Pac. 799, applying the doctrine in *San Diego Realty Co. v. Hill*, 168 Cal. 637, 143 Pac. 1021, and approving the doctrine in *McLaughlin v. Stewart*, 1 Ontario L. Rep. 295.

221. Same—Quitclaiming to a third person without mention of mortgage, and such third person afterward conveying premises to party by deed containing recital that such party assumed and agreed to pay such mortgage, does not make last-named grantee liable to mortgagee for any deficiency judgment because such grantee makes no promise and enters into no contract with mortgagee.—*Ward v. De Oca*, 120 Cal. 102, 104, 105, 42 Pac. 130.

222. Neglect of junior mortgagee to set up note and mortgage.—Holder of second mortgage made party defendant in action to foreclose first mortgage should set up such note and mortgage by appropriate pleadings, and court should decree that out of proceeds of sale of property, such holder of such second mortgage receive payment after satisfaction of first mortgage. Party thus having means in his power, if he neglects to use them, and suffers recovery to be had against him in competent tribunal, he is forever precluded from maintaining action on his second mortgage.—*Brown v. Willis*, 67 Cal. 235, 236, 7 Pac. 682.

223. Compare: *Greenebaum v. Davis*, 131 Cal. 146, 148, 82 Am. St. Rep. 338, 63 Pac. 165.

224. Only issue tendered to junior mortgagee, by merely making him party to suit to foreclose brought by prior mortgagee, being in allegation that right or claim of junior mortgagee is subject to lien claimed by plaintiff in foreclosure suit, as to any possible defense such junior mortgagee may have to such issue so tendered, he is concluded by decree whether he appears or not, but beyond this doctrine does not and can not go.—*Savings Bank v. Central M. Co.*, 122 Cal. 28, 34, 54 Pac. 273.

225. Compare: *Brown v. Willis*, 67 Cal. 235, 236, 7 Pac. 682.

226. Only proper or necessary parties defendant to suit for foreclosure are mortgagee and those who claim an interest in property derived subsequent to date of mortgage. Titles adverse to that of mortgagee or superior to that covered by mortgage are not proper subjects for determination of such action.—*Beronio v. Ventura Co. L. Co.*, 129 Cal. 232, 237, 79 Am. St. Rep. 118, 61 Pac. 958. See *San Francisco v. Lawton*, 18 Cal. 465, 474, 79 Am. Dec. 187; *Croghan v. Minor*, 53 Cal. 15, 16; *Marlow v. Barlew*, 53 Cal. 456, 461; *Ord v. Bartlett*, 83 Cal. 428, 430, 23 Pac. 705; *Cody v. Bean*, 93 Cal. 578, 579, 29 Pac. 223; *Sichler v. Look*, 93 Cal. 600, 608, 609, 29 Pac. 220; *Williams*

v. Cooper, 14 Cal. 666, 669, 57 Pac. 577; *Murray v. Etchepare*, 129 Cal. 318, 319, 61 Pac. 930; *Peachy v. Witter*, 131 Cal. 316, 320, 63 Pac. 468.

227. Person who purchases prior to action for foreclosure, subject to mortgage, and who fails to record his deed prior to commencement of action, and of whose interest mortgagee had no notice at time he commenced his action, never can become necessary party in sense that it is necessary to bring him in, in order that foreclosure decree effectual against him may be rendered. For all purposes of obtaining jurisdiction mortgagee fully represents him.—*Hibernia Sav. & L. Soc. v. Cochran*, 141 Cal. 653, 656, 75 Pac. 315.

228. Purchaser at sale for street-assessment or tax is not within class referred to by section as being necessary parties. Such title is not subject to mortgage, but is superior and hostile thereto and can not be litigated in action to foreclose mortgage. Section refers to those holding from or under mortgagee.—*Wilson v. California Bank*, 121 Cal. 630, 54 Pac. 119.

229. Record of deed and not actual notice determines right of grantee to be made party to action for foreclosure in order to be bound by decree.—*Filipini v. Trobock*, 134 Cal. 441, 446, 66 Pac. 587.

230. Second mortgagee—Is not required to bring suit to recover his debt at such time as first mortgagee may see fit to do so, and especially when it is apparent that should second mortgagee foreclose he would receive nothing. There is no theory upon which mortgagee can complain that he did not do so.—*Savings Bank v. Central M. Co.*, 122 Cal. 28, 34, 54 Pac. 273.

231. Surety on note, which is further secured by mortgage in form of deed executed by principal maker, may be sued and personal judgment recovered against him, although mortgagee may have lost his rights against mortgaged property by failing to enforce them in action of foreclosure brought by prior mortgagee.—*Carver v. Steele*, 116 Cal. 116, 118, 119, 58 Am. St. Rep. 156, 47 Pac. 1007; *Adams v. Wallace*, 119 Cal. 67, 70, 51 Pac. 14.

232. Those who acquired property subsequently to commencement of action, in face of recorded lis pendens, or with actual notice of suit, are not necessary parties.—*Hibernia Sav. & L. Soc. v. Cochran*, 141 Cal. 653, 656, 75 Pac. 315.

IX. PORTION OF PROPERTY ONLY FORECLOSED—WAIVER AS TO BALANCE.

As to alienation of different parcels of mortgaged lands, see note 29 Am. Dec. 727.

As to effect of release of part of mortgaged tract, see note 29 Am. Dec. 747, 748.

As to proceedings generally to enforce a mortgage for part of a mortgage debt, see note 37 L. R. A. 737-759.

233. A mortgage can not be foreclosed by piecemeal, and legal effect of omitting from decree of foreclosure portion of mortgaged premises is waiver of mortgage lien as to that portion.—*Mascarel v. Raffour*, 51 Cal. 242; *Hall v. Arnott*, 80 Cal. 348, 355, 22 Pac. 200.

234. Mortgage given as additional security for debt then being enforced by pending action in which attachment has issued is waived where mortgagee proceeds with such attachment, although property sold under such attachment may have left deficiency.—*Commercial Bank v. Kershner*, 120 Cal. 495, 498, 52 Pac. 848.

235. Mortgage is merged in judgment by foreclosure, and new action can not be maintained to foreclose mortgage on parcel of land omitted in former action of foreclosure on same mortgage.—*Mascarel v. Raffour*, 51 Cal. 242.

236. Omitting part of security in action to foreclose mortgage, is waiver of mortgage upon such omitted portion.—*Bull v. Coe*, 77 Cal. 54, 59, 11 Am. St. Rep. 235, 18 Pac. 808.

237. Same—Debt being secured by two mortgages, foreclosure upon one of these has effect to waive and nullify lien of other.—*Stockton Sav. & L. Soc. v. Harrold*, 127 Cal. 612, 616, 60 Pac. 165. See *Hall v. Arnott*, 80 Cal. 348, 353, 22 Pac. 200; *Commercial Bank v. Kershner*, 120 Cal. 495, 500, 52 Pac. 848.

As to court directing sale where debt is secured by two mortgages, see pars. 250, 251, this note.

X. PRESCRIBING MANNER OF SALE.

As to order of sale of land aliened by mortgageor, see note 41 Am. St. Rep. 627.

As to sale of property en masse, see note 100 Am. St. Rep. 150.

238. Consent of party as to manner of sale.—Even if judgment contains express direction as to form and manner of sale, if party to action consents that officer may disregard this provision, he will not afterward be permitted to object to such disregard.—*Humboldt Sav. & L. Soc. v. March*, 136 Cal. 321, 324, 68 Pac. 968.

239. Decree must be warranted by pleadings.—Decree prescribing order in which certain lots foreclosed upon must be sold, was departure from usual form, and not warranted by allegations of pleading, where prayer of complaint was general one that mortgaged property be sold, and finding was that property should be sold according to prayer of complaint.—*Carmichael v. McGillivray*, 57 Cal. 8, 10.

240. Directing that property be sold in one or several parcels is within jurisdiction of court, and officer making sale is bound to follow directions contained in judgment. Such judgment is not void, and if erroneous, its terms could not be disregarded by offi-

cer charged with execution of it.—*Hopkins v. Wiard*, 72 Cal. 259, 262, 13 Pac. 687.

241. Duty of commissioner—In selling property—To follow decree and order of sale as to manner in which such property is to be sold, whether in separate parcels or in one parcel.—*Meux v. Trezevant*, 132 Cal. 487, 489, 64 Pac. 848.

See par. 244, this note.

242. Leaseholders of portion of lands—Rights being subsequent to mortgage which includes such lands in connection with others, have the right to come into foreclosure proceedings and obtain judgment directing that portion of lands not covered by their lease be first sold in order to satisfy judgment.—*Mack v. Shafer*, 135 Cal. 113, 116, 117, 67 Pac. 40.

243. No express provision is made as to mode of making sale of mortgaged premises under decree of foreclosure. In absence of such provision, court, under its power to direct sale, may direct how it should be made.—*Hopkins v. Wiard*, 72 Cal. 259, 261, 13 Pac. 687.

244. Officer must follow directions of judgment.—Judgment containing specific directions as to how property should be sold, such directions must be followed by officer. Question is not what decree ought to have been, but what it is, and any sale made under it not authorized by its terms can not stand.—*Hopkins v. Ward*, 72 Cal. 259, 261, 262, 13 Pac. 687.

See par. 241, this note.

245. Owner of right of way over mortgaged premises subordinate to mortgage has right to come into foreclosure suit and obtain order that such portion of mortgaged premises as are not covered by such right of way should be first sold to satisfy mortgage debt.—*Merced Security Sav. Bank v. Simon*, 141 Cal. 112, 113, 74 Pac. 356.

246. Real property and personal property mortgaged.—Where there is a mortgage covering real and personal property, comprising parts of a single working plant or utility, in which each part is necessary to give value to the others and where a dismemberment of the system would destroy or greatly impair the usefulness or value of its component parts, the propriety of a decree directing sale in entirety without redemption, is well settled, and such rule is not confined to property of a public service corporation.—*Title Ins. & Trust Co. v. California Devel. Co.*, 171 Cal. 174, 152 Pac. 542.

247. Request of defendant to sheriff.—Judgment directing that lands be sold as whole and in one parcel, must be carried out, although defendant may request sheriff to sell in separate parcels.—*Hopkins v. Wiard*, 72 Cal. 259, 260, 13 Pac. 687.

248. Sale en masse—After failure of separate bids.—Each distinct parcel being first offered for sale, and no bids received, provision that sheriff must sell in separate parcels when so required by judgment—

debtor does not apply, and in such case property may then be offered and sold as whole, and sale will be upheld, unless other reasons appear for setting it aside.—*Mars-ton v. White*, 91 Cal. 37, 40, 27 Pac. 588; *Hibernia Sav. & L. Soc. v. Behnke*, 121 Cal. 339, 341, 53 Pac. 812; *Connick v. Hill*, 127 Cal. 162, 164, 59 Pac. 832; *Anglo-California Bank v. Cerf*, 142 Cal. 303, 305, 75 Pac. 902.

249. Sale of several parcels en masse instead of separately is proper where sheriff first offers such parcels of land for sale separately and is unable to sell same because of no bidders. It must be assumed from fact that sheriff was unable to sell parcels separately, and could only sell them as whole, that lands were more valuable taken together than separately.—*Hibernia Sav. & L. Soc. v. Behnke*, 121 Cal. 339, 341, 53 Pac. 812.

250. Two mortgages—One by principal, and the other by surety, securing same note.—The court may direct sale of both tracts of land, en masse, in the event no bid was received for either, when separately offered; and if the decree does not so provide, a sale so made is not void, in the absence of a showing of fraud or injury; and, even if voidable, can only be vacated if attacked by a direct proceeding instituted within a reasonable time.—*Bechtel v. Wier*, 152 Cal. 446, 93 Pac. 75.

As to same debt secured by two mortgages, see par. 237, this note.

251. Same—Same—When sale void.—Only when conducted in a manner prohibited by statute, or in a manner which would not have been in the power of the court to authorize, in the first instance; and it is immaterial, in this regard, whether the departure was from the statutory mode, or that prescribed by the decree of foreclosure.—*Bechtel v. Wier*, 152 Cal. 445, 93 Pac. 75.

XI. PURCHASER FROM MORTGAGEOR ASSUMING MORTGAGE-DEBT.

As to grantee of mortgageor assuming payment of mortgage-debt and his liability therefor, see notes 26 Am. Rep. 660-667; 44 Am. Rep. 232, 233; 78 Am. Dec. 72-90.

As to purchaser of mortgaged land liable for mortgage-debt, see notes 5 L. R. A. 276-293; 23 L. R. A. 131.

252. An agreement of grantee of mortgageor to discharge mortgage-debt is an obligation in hands of mortgageor which mortgagee may enforce for his own benefit, when he seeks to obtain satisfaction of mortgage-debt, to same extent that it could be enforced by mortgageor.—*Hopkins v. Warner*, 109 Cal. 133, 137, 41 Pac. 868.

253. Same—Becomes guarantor of deficiency.—The grantee of mortgaged premises, who agrees to assume and pay the mortgage, is nothing more than a guarantor or indemnifier against any deficiency that may arise after the sale of the premises.—

Sherwood v. Lowell, 34 Cal. App. 365, 167 Pac. 554.

See par. 256, this note.

254. Same—May be abandoned.—An agreement of purchaser of mortgageor to pay mortgage-debt may be abandoned at any time by consent of both parties thereto, and they may mutually agree to release each other from performance of such obligation, and mortgagee being stranger to contract can have no greater rights than mortgageor himself would have.—*Biddel v. Brizzolara*, 64 Cal. 354, 361, 30 Pac. 609.

255. Compelling mortgageor to pay.—Grantees of mortgageor against whom deficiency judgment was entered in foreclosure proceedings, upon being compelled to pay such deficiency may proceed against mortgageor for collection of amount so paid, although such grantees were not personally liable to mortgagee, and through their own neglect failed to appear in such action of foreclosure or make any defense thereto.—*Treat v. Craig*, 135 Cal. 91, 93, 67 Pac. 7.

256. Deficiency judgment against purchaser.—Agreement on part of grantee of mortgageor to pay mortgage-debt upon granted premises for which his grantor is liable, renders grantee liable therefor to mortgagee, and in action for foreclosure of mortgage, if mortgaged premises are insufficient to satisfy mortgage-debt, judgment may be rendered against him as well as against mortgageor for amount of deficiency.—*Williams v. Naftzger*, 103 Cal. 438, 440, 37 Pac. 411; *Hopkins v. Warner*, 109 Cal. 133, 136, 41 Pac. 868; *Roberts v. Fitzallen*, 120 Cal. 482, 484, 52 Pac. 818.

See par. 253, this note.

257. Same—Only upon security.—Mortgaged premises becoming exhausted can deficiency judgment be entered against purchaser assuming mortgage-debt.—*Williams v. Naftzger*, 103 Cal. 438, 440, 37 Pac. 411; *Hopkins v. Warner*, 109 Cal. 133, 136, 41 Pac. 868; *Roberts v. Fitzallen*, 120 Cal. 482, 484, 52 Pac. 818.

258. Formal promise to pay mortgage-debt by grantee of mortgageor—Is not necessary in order to render him liable therefor, if his intention to assume debt appears from consideration of entire instrument. Obligation may be oral or in separate instrument; it may be implied from transaction of parties, or it may be shown by circumstances under which purchase was made, as well as by language used in agreement.—*Hopkins v. Warner*, 109 Cal. 133, 137, 41 Pac. 868.

259. Grantor must be personally liable for debt assumed.—Grantee of mortgageor who has agreed to pay mortgage-debt is liable to mortgagee for deficiency judgment, and such right in mortgagee springs from well-known rule in equity that creditor is entitled to benefit of any obligations or security given by his debtor to one who has become security of such debtor for payment

of debt. This principle, however, is applicable only to case where mortgageor-grantor is himself personally liable for mortgage-debt.—*Ward v. De Oca*, 120 Cal. 102, 105, 52 Pac. 130.

260. Liability of mortgageor is contingent on fact that sale of mortgaged premises should fail to satisfy debt and costs. Purchaser from mortgageor who agrees to pay mortgage-debt indemnifies him against foregoing contingency.—*Biddel v. Brizzolara*, 64 Cal. 354, 362, 30 Pac. 609.

261. Mortgageor is discharged from personal liability when mortgagee extends time of payment to grantee of mortgageor who has assumed payment of mortgage-debt.—*Herd v. Tuohy*, 133 Cal. 55, 61, 65 Pac. 139.

262. The mortgagee may proceed against mortgageor alone for any deficiency in proceeds of sale, or he may avail himself of his right to proceed in same action against mortgageor and grantee of mortgageor who has assumed payment of mortgage-debt. If he proceeds against mortgageor alone, and judgment is docketed against him for any deficiency, mortgageor has right of action against grantee upon his agreement to assume mortgage-debt.—*Hopkins v. Warner*, 109 Cal. 133, 137, 41 Pac. 868.

263. No personal liability upon mortgage-debt exists—Except for deficiency therein after sale of mortgaged premises, and prior to such sale mortgageor would have no right of action against his grantee who has agreed to pay mortgage as part of purchase price; but to avoid circuity of action, and to protect mortgageor as intermediate party from being compelled to pay debt and then seek redress from his grantee who has assumed to pay mortgage-debt, equity permits mortgagee to bring all parties who are liable for debt, whether primarily or ultimately, before court and have their rights adjusted in single suit.—*Hopkins v. Warner*, 109 Cal. 133, 137, 41 Pac. 868.

264. Provision that mortgages are to be settled at such time and in such manner as grantee might determine, in agreement between mortgageor and purchaser from him of mortgaged premises, and further provision to hold mortgageor harmless as against such mortgages, must be construed as an assumption on part of such grantee to pay mortgage-debt.—*Hopkins v. Warner*, 109 Cal. 133, 138, 41 Pac. 868.

265. Purchaser becomes principal debtor.—Grantee of mortgageor who assumes payment of mortgage as part of purchase-price becomes, as to mortgageor, principal debtor, and mortgageor surety.—*Williams v. Naftzger*, 103 Cal. 438, 440, 37 Pac. 411; *Hopkins v. Warner*, 109 Cal. 133, 136, 41 Pac. 868; *Roberts v. Filtzallen*, 120 Cal. 482, 484, 52 Pac. 818.

266. Statute of limitations runs against mortgage-obligation, for that is grantee's liability; and not against promise to pay mortgage as new and independent agree-

ment.—*Hopkins v. Warner*, 109 Cal. 133, 136, 41 Pac. 868.

As to statute of limitations generally, see Part XII, this note.

267. Substitution of liability.—An agreement to pay mortgage-debt by purchaser from mortgageor causes, as between mortgageor and his grantee, substitution of liability to mortgagee by which grantee becomes principal debtor to mortgagee, and mortgageor merely surety.—*Hopkins v. Warner*, 109 Cal. 133, 137, 41 Pac. 868.

XII. STATUTE OF LIMITATIONS—APPLICATION OF.

That execution on foreclosure decree must issue within five years, see, ante, § 681 and note par. 33.

268. Absence of mortgageor from state.—Running of statute as against holders of judgment-liens against mortgaged property is not stayed by reason of absence of mortgageor from state, and such holders of judgment-liens may successfully plead statute, although mortgageor may still be liable.—*Brandenstein v. Johnson*, 140 Cal. 29, 30, 73 Pac. 744.

269. Debt secured by mortgage being barred, it necessarily follows that mortgage is also barred.—*Newhall v. Sherman, Clay & Co.*, 124 Cal. 509, 512, 57 Pac. 387.

270. Default in interest—Does not set the statute running.—Provision of mortgage making whole sum of principal and interest due upon default of payment of interest does not set statute of limitations running in case such default occurs, and note and mortgage may be foreclosed within four years from their maturity, although it may be more than four years subsequent to default of payment of interest.—*Richards v. Daley*, 116 Cal. 336, 338, 48 Pac. 220.

271. Laches can not affect.—Party holding valid mortgage lien has absolute right to an effectual foreclosure by action begun at any time within four years from time cause of action occurs, irrespective of and in face of any degree of laches or delay.—*Ludwig v. Murphy*, 143 Cal. 473, 475, 77 Pac. 150.

272. Lien of mortgage being barred by statute of limitations, although original debt on note is binding because of renewed agreement taking it out of statute, note can not be sued on alone, where such note was secured by mortgage.—*Biddel v. Brizzolara*, 64 Cal. 354, 363, 30 Pac. 609.

273. Obligation of co-mortgageors would not be affected by failure to present claim, or its presentation and allowance, against estate of deceased joint mortgageor. Nor could such failure or presentation stop running of statute in their favor. Mortgagee must present his claim for allowance, or he can have no deficiency judgment entered against estate, but must look only to mortgaged property, and if he would charge joint mortgageor, he must bring his action against him within four years from matur-

ity of principal obligation.—*Vandall v. Teague*, 142 Cal. 471, 476, 76 Pac. 35.

274. One mode and manner only of enforcing judgments of foreclosure is prescribed by this section, and every process which may be required to clearly enforce it must be taken out within five years after entry. Judgment for deficiency does not become new and independent judgment by being docketed.—*Bowers v. Crary*, 30 Cal. 621, 624.

275. Recovery of mortgage-debt—Limitation of form of action here prescribed is applicable solely to debts secured by mortgages of property situated in California, and has no application to mortgages of property situated in other states or foreign countries.—*McGue v. Rommel*, 148 Cal. 545, 83 Pac. 1000.

276. Renewal of note—After same has become barred by statute of limitations is not renewal of mortgage given as security therefor.—*Wells v. Harter*, 56 Cal. 342, 344.

277. Same—By mortgageor who has sold property covered by mortgage to purchaser who agrees to pay such mortgage-debt, and who thereafter retransfers such property to mortgageor, does not give mortgagee right to foreclose his mortgage against such property after statute of limitations has run against such mortgage, although such note was not barred by statute. Mortgagee could not take decree for sale because of statute. He could not take personal judgment for deficiency because such deficiency could be ascertained only after decree for sale of premises and return of such sale.—*Biddel v. Brizzolara*, 64 Cal. 354, 362, 30 Pac. 609.

278. Stipulation—Can not extend time, when.—If A make mortgage on his own property to B to secure debt owing from C. action to foreclose mortgage must be brought within four years from time when debt becomes due. Time could not be prolonged to any stipulation between B and C to which A was not privy, nor could C by absenting himself from state indefinitely postpone bar of statute and render it nugatory as to A.—*Filipini v. Trobock*, 134 Cal. 441, 446, 66 Pac. 587.

279. Third persons having subsequently acquired interest in mortgaged property may invoke aid of statute as against mortgagee, even though mortgageor, as between himself and mortgagee, has waived its protection, and there is no difference in principle between suspension of running of statute resulting from express waiver by mortgageor, and one caused by his voluntary act in absenting himself from state.—*Brandenstein v. Johnson*, 140 Cal. 29, 31, 73 Pac. 744.

XIII. VACATING SALE.

As to failure of sheriff to give notice of execution-sale not vitiating such sale, see note 65 Am. Dec. 480.
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As to inadequacy of price not being ground for setting aside judicial sale, see note 100 Am. St. Rep. 150.

As to penalty prescribed for officer selling without notice, see, ante, § 693 and note.

As to sale being required to be public, see, ante, § 694 and note.

As to sales under execution generally, see, ante, §§ 691-700 and notes.

As to setting aside judicial sales, see note 9 L. R. A. 731.

280. Burden of proof—Upon party who comes into court and asks to set aside sale, to show such irregularity or material departure from statute as would justify court in setting it aside.—*Connick v. Hill*, 127 Cal. 162, 165, 59 Pac. 832.

281. Discretion of court—As to irregularities.—Whether motion to vacate sale of property made in execution of judgment, on account of several irregularities on part of officer making sale, should be granted, rests very largely in discretion of court before which motion is made; and it is immaterial whether such irregularity consists in disregarding provisions of statute for making sale, or failing to observe and follow some express direction in judgment.—*Humboldt Sav. & L. Soc. v. March*, 136 Cal. 321, 323, 68 Pac. 968.

282. Effect of former invalid sale.—Fact that commissioner made invalid sale which court on plaintiff's motion set aside for insufficient notice, etc., would not invalidate sale afterwards made. Nor was later sale invalidated by fact that there was one publication of notice of sale having wrong date, there being sufficient publication after it was amended.—*May v. Hatcher*, 130 Cal. 627, 629, 63 Pac. 33.

283. Inadequacy of price—Is not sufficient ground upon which to annul sale, particularly under our practice, where judgment-debtor is allowed to redeem.—*Connick v. Hill*, 127 Cal. 162, 165, 59 Pac. 832. See *Smith v. Randall*, 6 Cal. 47, 52, 65 Am. Dec. 475; *Central Pac. R. Co. v. Creed*, 70 Cal. 497, 501, 11 Pac. 772; *Humboldt Sav. & L. Soc. v. March*, 136 Cal. 321, 324, 68 Pac. 968; *Anglo-California Bank v. Cerf*, 142 Cal. 303, 305, 75 Pac. 902; *Summerville v. March*, 142 Cal. 554, 558, 100 Am. St. Rep. 145, 76 Pac. 388.

284. Injury must be shown—In general.—Affidavit that defendant was injured by sale of several lots in one parcel instead of separately as he had requested sheriff to so sell them, is clearly insufficient where only showing is that such sale tended to reduce number of bidders, and that it deprived defendant of right to redeem lots separately. There is no showing that defendant could redeem or that he would have tried to redeem. It must appear that there has been material departure from mandates of decree or law covering such sales to injury of party applying to have same set aside. Injury will not be presumed from mere

irregularity.—*Meux v. Trezevant*, 132 Cal. 487, 490, 64 Pac. 848.

285. Same—Party to action can not claim absolute right to have sale on foreclosure vacated, unless he show that he has sustained injury by reason of irregularity complained of.—*Humboldt Sav. & L. Soc. v. March*, 136 Cal. 321, 324, 68 Pac. 968.

286. Provision entitling judgment-debtor to elect order in which property is to be sold.—A provision that judgment-debtor may direct order in which property real or personal shall be sold, whenever such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, and that sheriff must follow such direction, applies to sales under decree of foreclosure where decree is silent as to manner or order for which separate parcels should be sold. It does not, however, render sale of separate parcels en masse, in disregard of its requirements, absolutely void. Such sale is voidable and on timely application will ordinarily be set aside.—*Marston v. White*, 91 Cal. 37, 40, 27 Pac. 588.

287. Report of a commissioner appointed under this section, like the return of a sheriff, is prima facie evidence of the

facts stated therein.—*Hibernia Savings & L. Soc. v. Boyd*, 155 Cal. 193, 196, 100 Pac. 239.

288. Rule undoubtedly is to consider every fair sale as final, and upon any application for resale of property, where sale has been fair and free from fraud, rights of purchaser of such property will be taken into account.—*Hopkins v. Wiard*, 72 Cal. 259, 263, 13 Pac. 687.

289. Stranger to action—Will not be permitted to intrude himself into controversy unless he shall have clearly shown that he has such interest in property sold, and also that by reason of manner in which sale was conducted, he will be injuriously affected if sale is permitted to stand.—*Humboldt Sav. & L. Soc. v. March*, 136 Cal. 321, 324, 68 Pac. 968.

290. Suit to vacate—Sufficiency of complaint.—In such a suit, the failure of the complaint specifically to allege the date of the judgment or the court in which it was rendered, can not be taken advantage of on general demurrer. The presumption will be that the judgment was rendered by the superior court of the county in which the property was situated.—*Flood v. Templeton*, 152 Cal. 159, 92 Pac. 78.

§ 727. SURPLUS MONEY TO BE DEPOSITED IN COURT. If there be surplus money remaining, after payment of the amount due on the mortgage, lien, or encumbrance, with costs, the court may cause the same to be paid to the person entitled to it, and in the meantime may direct it to be deposited in court.

History: Enacted March 11, 1872, re-enactment of § 247 Practice Act.

1. Deposit of moneys in court.—Act concerning money deposited in courts of record in this state (Stats. 1863-1864, p. 468) repealed by new section 2104, post, added in

1874; sections 572 and 573, ante, in force in 1873, merely provided for different case.—*Heppe v. Johnson*, 73 Cal. 265-268, 14 Pac. 833.

§ 728. PROCEEDINGS WHEN DEBT SECURED FALLS DUE AT DIFFERENT TIMES. If the debt for which the mortgage, lien, or encumbrance is held, is not all due, as soon as sufficient of the property has been sold to pay the amount due, with costs, the sale must cease; and afterwards, as often as more becomes due, for principal or interest, the court may, on motion, order more to be sold. But if the property can not be sold in portions, without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper.

History: Enacted March 11, 1872, substantial re-enactment of § 248 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 159, held unconstitutional, see history, § 5 ante.

DEBT SECURED—FALLING DUE AT DIFFERENT TIMES.

1. Action of court in ordering sale—Order after judgment.

2, 3. Court not determining any sums to become due in future—Effect of.

4. Decree—Making provision for future sales—Effect of.

5. Same—Not embracing demand—Section does not apply.
6. Same—Showing amount due, and to become due, is proper.
- 7, 8. Default in payment of interest—Right to foreclose.
9. Fact plaintiff treats whole amount as due—Effect of.
10. Failure to execute first order of sale—Effect of.
11. Intention of parties—As shown by note and mortgage.
12. Judgment for principal of promissory note—Erroneous, when.
13. Mortgage given to secure payment of several notes—Falling due at different times, effect of.
14. Mortgage providing for foreclosure in case of default—Effect of.
- 15, 16. Omission to provide in judgment for subsequent sale—Effect of.
17. Proper practice on behalf of plaintiff—Motion.
18. Second and subsequent mortgage—When proper to join.

1. Action of court in ordering sale—Order after judgment.—Action of court in ordering sale of property to satisfy instalments as they become due subsequent to decreeing foreclosure in amount originally found due, is not further judgment in such action, but is only an "order" after judgment.—*Byrne v. Hoag*, 126 Cal. 283, 287, 58 Pac. 688.

2. Court not determining any sums to become due in future—Effect of.—In those cases in which the court does not determine that any sums would be due in future, and no provision being made in decree for any future sales of property to meet instalments yet to become due, mortgagee is not compelled to resort to motion under above section, nor, indeed, would it be proper to do so. Better practice in such case would be by new and independent action.—*Higgins v. San Diego Sav. Bank*, 129 Cal. 184, 187, 188, 61 Pac. 943.

3. Compare: *Byrne v. Hoag*, 126 Cal. 283, 287, 58 Pac. 688.

4. Decree—Making provision for future sales—Effect of.—A decree of the court making provision for future sales to enforce payment of further instalments of debt, which court in its decree determined would be due in future, simpler and less expensive mode of procedure is provided by motion by above section.—*Higgins v. San Diego Sav. Bank*, 129 Cal. 184, 187, 188, 61 Pac. 943.

5. Same—Not embracing demand—Section does not apply.—Decree entered upon mortgage in former foreclosure proceedings not embracing demand upon which subsequent independent action upon same mortgage was founded, and latter demand having arisen only since entry of decree

in former action, and its amount never having been judicially ascertained, no relief could be had under provisions of above section.—*McDougal v. Downey*, 45 Cal. 165, 166; *Higgins v. San Diego Sav. Bank*, 129 Cal. 184, 187, 188, 61 Pac. 943.

6. Same—Showing amount due, and to become due, is proper.—A decree of court showing amount due and sums yet to become due is proper, and above section then authorizes plaintiff to move court for sale of sufficient of property to satisfy each unmatured instalment as it would fall due.—*Bank of Napa v. Godfrey*, 77 Cal. 612, 617, 20 Pac. 142.

7. Default in payment of interest—Right to foreclose.—Mortgage providing for payment of note "according to terms and conditions thereof," and that "in default of payment of note by its terms," mortgagee might foreclose, does not compel mortgagee to delay foreclosure until there has been default in payment of whole note, principal and interest, but only that there must be default in paying note according to its terms. Mortgagee under such circumstances has right to foreclose for interest due in case of default before maturity of note, but question as to whether mortgagee might foreclose for full amount of principal and interest not decided.—*Yoakam v. White*, 97 Cal. 286, 289, 32 Pac. 238; *Phelps v. Mayers*, 126 Cal. 549, 551, 58 Pac. 1048.

8. Compare: *Van Loo v. Van Aken*, 104 Cal. 269, 271, 37 Pac. 925.

9. Fact plaintiff treats whole amount as due—Effect of.—The fact that plaintiff treats whole amount of note as due does not make it so, as against terms of note set out in and made part of pleading, nor could issue be thereby confined to mere question whether note was then due or not. Real issue in case as presented by pleadings being whether or not plaintiff was entitled to recover upon note and to foreclose mortgage according to its terms, judgment authorizing subsequent sale for unmatured portions of note as they fell due was proper.—*Bank of Napa v. Godfrey*, 77 Cal. 612, 616, 20 Pac. 142.

10. Failure to execute first order of sale—Effect of.—Court has power to make order for sale for subsequent instalments as they become due, although no sale had been made to satisfy amount found due when suit was commenced. Above provision is construed for benefit of debtor to prevent sale of more of his property than is necessary to pay amount due, and where, instead of selling part of land to satisfy amount due and then ceasing, plaintiff forebears and sells none at all, defendant has suffered no injury and can not object.—*Bank of Napa v. Godfrey*, 77 Cal. 612, 617, 618, 20 Pac. 142. See *Dupee v. Salt Lake V. L. & T. Co.*, 20 Utah 103, 77 Am. St. Rep. 902, 57 Pac. 845, construing above section.

11. Intention of parties—As shown by note and mortgage.—Note providing for compounding of interest if not paid as it falls due, and mortgage which secures same not being given to secure payment of note according to its terms, but as security for stipulated amount of money payable at specified time, etc., shows intention of parties that compounding of interest should be only consequence of default in its payment, and mortgage should not be foreclosed until after maturity of said note.—*Van Loo v. Van Aken*, 104 Cal. 269, 271, 37 Pac. 925. See *Yoakam v. White*, 97 Cal. 286, 289, 32 Pac. 238.

12. Judgment for principal of promissory note—Erroneous when complaint shows that note was not due when action was commenced, but in such case plaintiff might take judgment for sale of so much of mortgaged premises as might satisfy interest then due.—*Hunt v. Dohrs*, 39 Cal. 304, 305.

13. Mortgage given to secure payment of several notes—Falling due at different times, and it being objected that one of notes was not due at commencement of action to foreclose such mortgage, it is sufficient answer that such note became due before trial of case and rendition of judgment, and that under such conditions, court had jurisdiction to decree foreclosure of mortgage to satisfy all of such notes.—*Bostwick v. McEvoy*, 62 Cal. 496, 502.

14. Mortgage providing for foreclosure in case of default—Effect of.—Mortgage providing that if mortgageor should fail to make any payments as provided by note which it secures, then mortgagee may foreclose and from proceeds pay whole amount of said note, entitles mortgagee right to foreclose for full amount of principal and interest upon default in payment according

to terms of note, and mortgageor can not raise objection that only such amount of mortgaged property should have been ordered sold as was necessary to pay amounts due at time of foreclosure proceedings.—*Maddox v. Wyman*, 92 Cal. 674, 675, 28 Pac. 338.

15. Omission to provide in judgment for subsequent sale—Effect of.—An omission to provide in judgment for subsequent sale of any portion of mortgaged premises in case of default in payment of note, or interest thereon as it matures, is supplied by the above section.—*Byrne v. Hoag*, 126 Cal. 253, 287, 58 Pac. 688.

16. Compare: *Higgins v. San Diego Sav. Bank*, 129 Cal. 184, 187, 188, 61 Pac. 943.

17. Proper practice on behalf of plaintiff—Motion.—The proper practice on behalf of plaintiff in this regard is to file motion reciting proceedings in case, and that other instalments of money due upon note have matured, and asking for sale of property or enough thereof to satisfy amount due. Filing of petition is not proper practice, although court may consider petition as motion.—*Bank of Napa v. Godfrey*, 77 Cal. 612, 617, 20 Pac. 142; *Byrne v. Hoag*, 126 Cal. 283, 287, 58 Pac. 688.

18. Second and subsequent mortgage—When proper to join.—A second and subsequent mortgage being brought into foreclosure suit instituted by first mortgagee may be foreclosed in same action although not due at time suit was commenced, if due at time case was decided and decree entered. In such instance it is correct to have decree provide for sale of premises to satisfy such second mortgage.—*Orange Growers' Bank v. Duncan*, 133 Cal. 254, 256, 65 Pac. 469; *Windt v. Gilleran*, 135 Cal. 94, 95, 66 Pac. 970.

§ 720. OATH AND UNDERTAKING OF COMMISSIONER. The commissioner, before entering upon his duties, must be sworn to perform them faithfully, and the court making the appointment shall require of him an undertaking, with sufficient sureties, to be approved by the court, in an amount to be fixed by the court, to the effect that he will faithfully perform the duties of commissioner, according to law.

[**Verified report of sale.**] Within thirty days after such sale, the commissioner must file with the clerk of the court in which the action is pending, a verified report and account of the sale, together with the proper affidavits, showing that the regular and required notice of the time and place of the sale was given, which report and account shall have the same force and effect as the sheriff's return in sales under execution.

[**Compensation of commissioner.**] In all cases of sales made by a commissioner, the court in which the proceedings are pending shall fix a reasonable

compensation for the commissioner's services, but in no case to exceed the sum of ten dollars.

History: •Enactment approved March 9, 1893, Stats. and Amdts. 1893, p. 119; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 159, held unconstitutional, see history, § 5 ante.

1. Written affidavit of commissioner.—Provision requiring commissioner to be sworn to perform duties faithfully does not require that he make written affidavit or that affidavit must be filed anywhere. Contention that the fact that no written affidavit of commissioner was on file in

clerk's office, and that clerk's register of actions did not show that such affidavit had been filed, conclusively proved that no oath was taken and that no other evidence was admissible on subject, is untenable.—*May v. Hatcher*, 130 Cal. 627, 629, 63 Pac. 33.

CHAPTER II.

ACTIONS FOR NUISANCE, WASTE, AND WILFUL TRESPASS, IN CERTAIN CASES, ON REAL PROPERTY.

§ 731. Nuisance defined; abatement of; actions instituted, by whom.

§ 732. Waste, actions for.

§ 733. Trespass for cutting or carrying away trees, etc., actions for.

§ 734. Measure of damages in certain cases under the last section.

§ 735. Damages in actions for forcible entry, etc., may be trebled.

§ 731. NUISANCE DEFINED; ABATEMENT OF; ACTIONS INSTITUTED, BY WHOM. An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as the same is defined in section thirty-four hundred and seventy-nine of the Civil Code, and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered therefor.

A civil action may be brought in the name of the people of the state of California to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of the Civil Code, by the district attorney of any county in which such nuisance exists, or by the city attorney of any town or city in which such nuisance exists, and each of said officers shall have concurrent right to bring such action for a public nuisance existing within a town or city, and such district attorney, or city attorney, of any county or city in which such nuisance exists must bring such action whenever directed by the board of supervisors of such county or whenever directed by the legislative authority of such town or city.

History: Enacted March 11, 1872, re-enactment of § 249 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 159, held unconstitutional, see history, § 5 ante; amendment approved March 18, 1905, Stats. and Amdts. 1905, p. 130.

NUISANCE.

1. Accompanying the ownership of every species of property—Is corresponding duty.
2. Action for damages—Resulting from obstruction of highway.
- 3, 4. Same—Same—Obstruction of public streets.
5. Same—Same—Same—Incident, and collateral to, work.

6. Same—Same—Same—The duty to place lights and erect barriers.
7. Action for nuisance—Must be in equity—Damages mere incident.
8. Same—Common-law action.
9. "Attractive nuisance"—Action for negligence in maintaining.
10. Same—Contributory negligence.
11. Same—Negligence of electric company in maintaining guy-wire where children might swing on it.

12. **Blasting**—As not ipso facto a nuisance.
13. **Same**—In uninhabited and untraveled region.
14. **Board of supervisors**—Interfering with free use and enjoyment of property.
15. **Business being necessary or useful**—Presumption.
16. **Causing injury to right in lands.**
17. **Same**—Nuisance irrespective of calculation of damage.
18. **Criminal remedy**—Does not exclude civil.
19. **Damages**—In addition to abatement of nuisance.
20. **Same**—Circumstances of aggravation must be pleaded.
21. **Same**—Penalty prescribed by Political Code.
22. **Same**—Remedying evil complained of after commencement of action.
23. **Same**—Use of sewer by city in vicinity of plaintiff's land.
24. **Different elements of damage**—Arising from same nuisance.
25. **Effect of nuisance**—Which extends to dwelling houses of neighbors.
26. **Franchise from municipality**—To run cars.
27. **General demand for jury**—Refusal of.
28. **Injunction and damages**—In general.
29. **Same**—Stay of injunction pending appeal.
30. **Injury to right in land**—Injunction.
31. **Jurisdiction**—Constitution has conferred upon superior court original.
32. **Same**—Damages incidental.
33. **Same**—Equitable, through injunction.
34. **Same**—Where acts are crime as well as nuisance.
35. **Same**—Same—What may be abated.
36. **Landlord**—Not liable for consequences of nuisance, when.
37. **Legitimate business**—Founded upon a local custom.
38. **Obstruction to free use of property.**
39. **Obstruction to right of way.**
40. **Operation of steam engine**—Using oil as fuel.
41. **Parties**—Action in name of county, when.
42. **Same**—Attorney-general has authority to institute action.
43. **Same**—City has right to maintain action.
44. **Same**—Obstruction affecting plaintiff in common with public.
45. **Same**—One co-tenant can enjoin threatened injury.
- 46, 47. **Same**—Provision of Political Code as to removal of obstruction.
48. **Same**—Right to maintain obstruction to private way.
- 49, 50. **Same**—Road-overseer as to public highway.
51. **Person can not use his own property, how.**
52. **Preliminary injunction**—Ought not to be granted, when.
53. **Proof that way is public way**—When necessary.
54. **Public nuisance**—Action by private individual.
55. **Same**—Fact that nuisance is public.
56. **Same**—Failing to show that other and adjacent property-owners in town will not suffer.
57. **Same**—Injury which may entitle private person to maintain.
58. **Same**—Many nuisances may occasion injury to an individual.
59. **Same**—Mere allegation that alleged nuisance is specially injurious.
60. **Same**—Municipality having right of action affords no good reason for denying person.
61. **Same**—Obstruction to highway which also cuts off access.
62. **Same**—Prescriptive right can not be set up in favor of public nuisance.
63. **Res judicata**—Judgment in action to abate nuisance, when a bar.
64. **Separate causes of action**—For distinct nuisances.
65. **Unwarrantable use of own property**—Damages.
66. **Verdict of jury**—Advisory only.
67. **Wall of adjoining building**—Which prevents plaintiff from raising and repairing.
68. **Wrong-doer**—Who contributes to damage.
69. **Same**—Right to injunction.

As to action of ejectment against railroad, see, ante, § 454 and note.

1. **Accompanying the ownership of every species of property**—Is corresponding duty to so use it as that it shall not abuse rights of other recognized owners.—*People v. Gold Run D. & M. Co.*, 66 Cal. 138, 151, 56 Am. Rep. 80, 4 Pac. 152.

2. **Action for damages—Resulting from obstruction of highway.**—One who unlawfully obstructs a public highway is an insurer against any accident resulting therefrom, and one who obstructs by virtue of a license is chargeable with ordinary care.—*Stockton Automobile Co. v. Confer*, 154 Cal. 405, 97 Pac. 881.

3. **Same—Same—Obstruction of public streets.**—A private contractor, who does public work under contract with a municipality, is responsible for damages for injuries resulting from his negligence; he is bound to erect barriers and place lights, and

when this is done, the question of their sufficiency for the purpose intended, the protection of the public, is for the jury.—*Stockton Automobile Co. v. Confer*, 154 Cal. 405, 97 Pac. 881.

4. The responsibility of the street superintendent with reference to the placing of lights and erection of barriers, for the protection of the public while street work is being done, is fixed by the provisions of the general street law (*Vrooman act*, Stats. 1885, pp. 160, 161, §§ 22, 23, II *Henning's General Laws*, 3d ed., p. 3085). The municipality is not responsible.—*Stockton Automobile Co. v. Confer*, 154 Cal. 405, 97 Pac. 881.

5. Same—Same—Same—Incident, and collateral to, work.—While the street superintendent is not ordinarily liable for injuries resulting from the personal negligence of the contractor in leaving an obstruction not an incident, but collateral, to the work being done, yet where he has received notice and neglects to require removal he can not escape responsibility on the ground that the obstruction is a collateral one.—*Stockton Automobile Co. v. Confer*, 154 Cal. 410, 97 Pac. 881.

6. Same—Same—Same—The duty to place lights and erect barriers is imposed upon every one who obstructs the public streets for any lawful purpose; but when this is done, and they are of a character to afford such warning and protection as the public is entitled to, their removal without the fault of the person charged with the duty of putting them in place relieves such person of responsibility for injuries resulting therefrom.—*Stockton Automobile Co. v. Confer*, 154 Cal. 407, 97 Pac. 881.

7. Action for nuisance—Must be in equity—Damages mere incident.—At common law action to prevent threatened nuisance must have been brought in equity, as that court alone was competent to administer proper relief. The above section defining nuisance declares it to be subject of action, and declares that it may be enjoined or ordered to be abated, and judgment may also award damages for injury. Relief that was attainable in equity must also be sought in that forum, for statute has made no change in that respect, but has simply permitted recovery of damages in same action without resorting to separate action at law—claim for damages being regarded as mere incident to main action.—*Courtwright v. Bear R. & A. W. & M. Co.*, 30 Cal. 573, 576.

8. Same—Common-law action.—At common law an action on case for damages was usual remedy for injuries occasioned by nuisance, but in that action nuisance could not be ordered to be abated. Where injury was such that it could not be adequately compensated by damages at law, or its nature was such that it would be constantly recurring grievance, resort could be had to court of equity which would

afford proper relief by injunction or order that nuisance be abated.—*Courtwright v. Bear R. & A. W. & M. Co.*, 30 Cal. 573, 576.

9. "Attractive nuisance"—Action for negligence in maintaining.—In such an action, based upon the negligence of the defendant in allowing a guy-wire to hang in such a position as to attract children to swing thereon, where such swinging would be likely to bring it in contact with a high tension electric wire, an instruction which took these questions from the jury is held erroneous.—*Pierce v. United Gas & El. Co.*, 161 Cal. 176, 184, 118 Pac. 700.

As to swinging of United States supreme court from the "humane" to the "hard" doctrine regarding "attractive nuisances," see *United Zinc & Chemical Co. v. Britt*, — U. S. —, 66 L. ed. —, 42 Sup. Ct. Rep. 299, 94 Cent. L. J. 347.

10. Same—Contributory negligence.—It is held to be a question for the jury whether the injured person had attained such an age that he was not within the protection of the "attractive nuisance" doctrine in determining whether he was guilty of contributory negligence or not.—*Pierce v. United Gas & El. Co.*, 161 Cal. 176, 187, 118 Pac. 700.

11. Same—Negligence of electric company in maintaining guy-wire where children might swing on it to their probable injury, although not itself dangerous, such guy-wire might, on account of the proximity of high tension electric wires, readily become so, and constituted an "attractive nuisance" as the same is understood in the decisions.—*Pierce v. United Gas & El. Co.*, 161 Cal. 176, 181, 118 Pac. 700.

12. Blasting—As not *ipso facto* a nuisance.—The process of blasting, without reference to the locality, is not so intrinsically dangerous as to constitute a nuisance *per se*, so as to render the blaster liable for injuries, without regard to the question of whether he was or was not negligent.—*Houghton v. Loma Prieta Lumber Co.*, 152 Cal. 500, 503, 14 Ann. Cas. 1159, 14 L. R. A. (N. S.) 913, 93 Pac. 82; *Houghton v. Loma Prieta Lumber Co.*, 152 Cal. 574, 576, 14 Ann. Cas. 1159, 93 Pac. 377.

13. Same—In uninhabited and untraveled region.—Where the injury complained of was incurred by a traveler as a result of blasting by a contractor in the construction of a road through an uninhabited, practically untraveled, wild, mountainous region, the contractor and not the employer is alone responsible, and he only for negligence.—*Houghton v. Loma Prieta Lumber Co.*, 152 Cal. 576, 14 Ann. Cas. 1159, 93 Pac. 377.

14. Board of supervisors—Interfering with free use and enjoyment of property of plaintiff, who is owner of right of way for toll road and entitled to possession thereof, and action of such supervisors being to deprive him of his toll, sufficient case in equity is presented to sustain injunction against county enjoining it from interfer-

ing with or obstructing use of plaintiff's property by asserting adverse claim thereto, and denying him right to collect tolls.—*Welsh v. County of Plumas*, 80 Cal. 338, 343, 22 Pac. 254.

As to obstruction of free use of property, see par. 38, this note.

15. Business being necessary or useful—Presumption always is that there is proper place and proper manner for carrying it on. It can hardly be said that it is lawful business which can not be carried on without detriment to surrounding people.—*Tuebner v. California St. R. Co.*, 66 Cal. 171, 174, 4 Pac. 1162.

16. Causing injury to right in lands.—Wrongfully causing water to flow upon another's land which would not flow there naturally is to create nuisance per se. It is injury to right in land, and it can not be continued because other people (whether jurors or not) might have low estimate of damages which it causes, and especially is this so when continuance of wrongful act might ripen into right in nature of easement of servitude.—*Learned v. Castle*, 78 Cal. 454, 460, 18 Pac. 872, 21 Pac. 11. See *Merced M. Co. v. Freman*, 7 Cal. 317, 322, 68 Am. Dec. 262; *Hicks v. Michael*, 15 Cal. 107, 116; *Leach v. Day*, 27 Cal. 643, 646; *More v. Massini*, 32 Cal. 590, 594; *Richards v. Dower*, 64 Cal. 62, 64, 28 Pac. 113.

17. Same—Nuisance irrespective of calculation of damage.—Large portion of water flowing onto and over plaintiff's land being caused to flow there by acts of defendants, although it was true that any damages done from water so caused to flow by defendants was mingled with water from other sources which was larger in volume than that brought there by defendants, and though it may have been difficult to separate mingled elements of mischief and calculate with any great exactness the proportionate amount of damage done by each, yet this is no warrant for finding that all damage was done by other water and practically none by water poured on plaintiff's lands by defendants' acts.—*Learned v. Castle*, 78 Cal. 454, 460, 18 Pac. 872, 21 Pac. 11.

18. Criminal remedy—Does not exclude civil.—Fact that acts complained of are made misdemeanor by Penal Code and punishable as such, does not make them less nuisance, nor imply that legislature intended to make criminal remedy exclusive of civil.—*People v. Truckee L. Co.*, 116 Cal. 397, 402, 39 L. R. A. 581, 48 Pac. 374.

As to jurisdiction and abatement where acts are crimes as well as nuisance, see pars. 34, 35, this note.

19. Damages—In addition to abatement of nuisance.—Nuisance may be abated, and if property has been rendered temporarily valueless by reason of obstruction, plaintiff may be restored to full enjoyment of his property, and be paid for it besides.—*Hop-*

kins v. Western Pac. R. Co., 50 Cal. 190, 194.

As to abatement of nuisances not prejudicing right of any person to recover damages for its past existence, see *Kerr's Cyc. Civ. Code*, 2d ed., § 3484 and note.

As to allegation of damages in action to enjoin nuisance, see, ante, § 526 and note par. 287.

As to rule as to measure of damages, see note 13 L. R. A. 322.

20. Same—Circumstances of aggravation must be pleaded in such manner that there may be no ambiguity or uncertainty in determining that they are set forth solely for purpose of establishing claim to punitive damages, otherwise such damages will not be allowed. If they are pleaded in such manner as would be proper in action brought to recover damages other than those for trespass, complaint for that reason will be subject to demurrer for misjoinder of causes of action.—*Lamb v. Harbaugh*, 105 Cal. 680, 690, 39 Pac. 56.

21. Same—Penalty prescribed by Political Code as damages for obstruction to highway is to be enforced only as provided for in such code. Action in name of county to abate such obstruction as a nuisance rests upon general equity powers of court, and not on sections of Political Code, and penalty can not be recovered in such action.—*County of Sierra v. Butler*, 136 Cal. 547, 551, 69 Pac. 418.

22. Same—Remedying evil complained of after commencement of action does not interfere with plaintiff's right to recover damages for injury sustained before commencement of suit.—*Tuebner v. California St. R. Co.*, 66 Cal. 171, 175, 4 Pac. 1162.

23. Same—Use of sewer by city in vicinity of plaintiff's land constitutes nuisance which he is entitled to have abated. Trial court finding that city discharged its sewage through an open trough, but not finding that such sewage was discharged onto or over plaintiff's lands, confines damages to those resulting from use of such open sewer.—*Adams v. Modesto*, 131 Cal. 501, 503, 63 Pac. 1083.

24. Different elements of damage—Arising from same nuisance do not constitute different causes of action.—*Astill v. South Yuba W. Co.*, 146 Cal. 55, 57, 79 Pac. 594.

25. Effect of nuisance—Which extends to dwelling houses of neighbors to such an extent as to render their occupancy materially uncomfortable, is a private nuisance as to each person thus injured for which he may have his private action in which the nuisance may be enjoined or abated as well as damages recovered.—*Melvin v. E. B. & A. L. Stone Co.*, 7 Cal. App. 327, 329, 94 Pac. 390.

26. Franchise from municipality—To run cars.—A franchise from municipality to run cars along a street is not franchise to ma-

terially injure plaintiffs in their property rights.—*Tuebner v. California St. R. Co.*, 66 Cal. 171, 175, 4 Pac. 1162.

27. General demand for jury—Refusal of.—A general demand for jury to try entire cause consisting of legal and equitable issues may be properly refused.—*Meek v. De Latour*, 2 Cal. App. 261, 83 Pac. 300, 301.

28. Injunction and damages—In general.—Where the operation of a cement plant results in the destruction of the adjoining property, the owners of the latter will not be limited to their legal remedy of damages for the value thereof, since this would be the unauthorized seizure of private property for other than a public use. Hence, in such case, where an injunction restraining such operation has been ordered, the appellate court will not stay the operation of such injunction, pending appeal, notwithstanding defendant's property is a very important enterprise, and its value much greater than that of the plaintiffs, even though the appellants offer to furnish a bond equal to the value of all their property to indemnify them.—*Hulbert v. California Portland Cement Co.*, 161 Cal. 239, 244, 118 Pac. 928.

29. Same—Stay of injunction pending appeal.—Upon the question as to whether a court of equity should refuse an injunction where plaintiff's injury from the denial of the relief would be far less than that of the defendant if the injunction were granted, it is held that consideration should be left to the hearing on the merits of the appeal, and that it was not properly determinable on a motion to stay proceedings pending such appeal; a stay of execution being neither necessary nor proper to the complete exercise of appellate jurisdiction (*Sloss, Angellotti and Shaw, J. J.*).—*Hulbert v. California Portland Cement Co.*, 161 Cal. 239, 255, 118 Pac. 928.

30. Injury to right in land—Injunction.—The injury being to right in land, right to injunction does not depend upon extent of damage measured by money standard. The main object of action is to declare nuisance, and prevent continuance by mandatory injunction.—*Learned v. Castle*, 78 Cal. 454, 461, 462, 18 Pac. 872, 21 Pac. 11.

31. Jurisdiction—Constitution has conferred upon superior court original jurisdiction "in all cases of equity," and also "of actions to abate or prevent nuisance." If plaintiff would merely seek judgment for damages sustained, his action may be brought either in superior court or in justices' court, according to amount of damages claimed by him. If he seek abatement or prevention of nuisance, he can bring his action only in superior court. Such action may be maintained in that court whether he seeks in addition thereto to recover damages in excess of three hundred dollars, or even if no damages are claimed.—*Mc-*

Carthy v. Gaston R. M. & Min. Co., 144 Cal. 542, 545, 78 Pac. 7.

32. Same—Damages incidental.—Action to abate a nuisance is action in equity, and demand for damages is but incidental to main purpose of suit.—*Meek v. De Latour*, 2 Cal. App. 274, 83 Pac. 300, 301.

33. Same—Equitable, through injunction.—Prevention or abatement of nuisance is to be accomplished by means of injunction, either prohibitive or mandatory, and action therefor is within equitable jurisdiction of court, and is to be governed by principles prevailing in that jurisdiction.—*McCarthy v. Gaston R. M. & Min. Co.*, 144 Cal. 542, 544, 78 Pac. 7.

34. Same—Where acts are crime as well as nuisance.—While a court of equity has no jurisdiction to enjoin the commission of acts which, if committed, such as the indecent exposure defined in section 311 of the Penal Code, yet where the threatened acts in addition to being an indictable offense also constitute a public nuisance courts of equity are vested with jurisdiction to interpose their injunctive process to prevent injury which will result from the maintenance thereof.—*Weis v. Superior Court*, 30 Cal. App. 730, 159 Pac. 464.

35. Same—Same—What may be abated.—Any act which is an offense against public decency, or any public exhibition which is offensive to the senses, whether of sight, sound, or smell, or which tends to corrupt public morals or disturb the good order and welfare of society is a public nuisance for the abatement of which the district attorney may bring an action in the name of the people.—*Weis v. Superior Court*, 30 Cal. App. 730, 159 Pac. 464.

36. Landlord—Not liable for consequences of nuisance, when.—A landlord is not liable for consequences of nuisance in connection with building in possession and control of his tenant unless nuisance occasioning injury existed at time premises were demised, or structure was in such condition that it would be likely to become nuisance in ordinary and reasonable use of same for purpose for which it was constructed or let, and landlord failed to repair it.—*Kalis v. Shattuck*, 69 Cal. 593, 597, 58 Am. Rep. 568, 11 Pac. 346; *Riley v. Simpson*, 83 Cal. 217, 218, 7 L. R. A. 622, 23 Pac. 293.

37. Legitimate business—Founded upon a local custom may grow into a force to threaten safety of people and destruction to public and private rights, and when it develops into that condition, custom upon which it was founded becomes unreasonable because dangerous to public and private rights, and cannot be invoked to justify continuance of business in an unlawful manner.—*People v. Gold Run D. & M. Co.*, 66 Cal. 138, 151, 56 Am. Rep. 80, 4 Pac. 1152.

38. Obstruction to free use of property so as to interfere with its comfortable enjoyment is nuisance and may be enjoined, or abated. Such obstruction must necessarily have an actual existence before it can be nuisance, and objection that injunction ought not to be granted because it appeared that obstruction sought to be enjoined actually existed at and before time of filing complaint can not be sustained. Judgment might be in direct terms that obstruction be removed and nuisance abated; but mandatory injunction restraining defendant from obstructing or maintaining any obstruction has same effect.—*Gardner v. Stroever*, 89 Cal. 26, 30, 26 Pac. 618.

As to board of supervisors interfering with free use and enjoyment of property, see par. 14, this note.

39. Obstruction to right of way.—Any person creating or assisting to create and maintain obstruction upon right of way is liable to be sued for its abatement and for damages.—*Hardin v. Sin Claire*, 115 Cal. 460, 463, 47 Pac. 363.

40. Operation of steam engine—Using oil as fuel and generating large amount of smoke and soot in the immediate proximity of dwelling houses and by means of which the property is damaged and rendered incapable of comfortable and convenient occupation may constitute a nuisance which the owner of the property may have enjoined in his personal action therefor.—*Melvin v. E. B. & A. L. Stone Co.*, 7 Cal. App. 327, 329, 94 Pac. 390.

41. Parties—Action in name of county, when.—County has special interest in preservation of county roads which authorizes it to resort to such remedial measures as will preserve these highways for free and unobstructed use of public.—County of *Sierra v. Butler*, 136 Cal. 547, 550, 69 Pac. 418. See *People ex rel. Bryant v. Holladay*, 93 Cal. 241, 248, 27 Am. St. Rep. 146, 29 Pac. 54; *San Francisco v. Buckman*, 111 Cal. 25, 30, 43 Pac. 396.

As to all persons engaged in commission of wrongful acts which constitute nuisance being enjoined generally or severally, see, ante, § 526 and note pars. 247-249.

As to parties defendant in actions of injunction, see, ante, § 526 and note pars. 242-250.

As to relator not being necessary, but attorney-general may maintain action upon his own information to abate nuisance, see *Kerr's Cyc. Civ. Code*, 2d ed., § 3493 and note par. 23.

As to right of county to maintain action to enjoin nuisance with reference to highway because it has special interest in preservation of road, see *Kerr's Cyc. Civ. Code*, 2d ed., § 3493 and note pars. 7, 8.

As to road-overseer commencing action to abate an encroachment to highway as a

nuisance in case such encroachment is not removed upon demand, see *Kerr's Cyc. Pol. Code*, 2d ed., § 2734 and note.

As to several abutting owners joining as plaintiffs, see, ante, § 526 and note par. 250.

42. Same—Attorney-general has authority to institute action to abate obstructions upon public street which constitute public nuisances, and he may bring action for such purpose in name of people.—*People v. Beaudry*, 91 Cal. 213, 220, 27 Pac. 610.

43. Same—City has right to maintain action to prevent unlawful obstruction of street as would people of state.—*People ex rel. Bryant v. Holladay*, 93 Cal. 241, 248, 27 Am. St. Rep. 146, 29 Pac. 54; *San Francisco v. Buckman*, 111 Cal. 25, 30, 43 Pac. 396.

44. Same—Obstruction affecting plaintiff in common with public at large, although in greater degree, he cannot have his private action, but if he is thereby obstructed in free use of his property and its comfortable enjoyment by him is thereby interfered with and to some extent prevented, can it be said he suffers only in common with public at large? Whether certain alleged obstructions amount to nuisance or not, is not question for court, but for jury to decide.—*Blanc v. Klumpke*, 29 Cal. 156, 159.

45. Same—One co-tenant can enjoin threatened injury.—Co-tenants being entitled to use of all waters, outsider diverting any from them injures all and each of them, and is guilty of trespass on rights of each and every one of such co-tenants, and each of them has right to have preventive power of court of justice to put stop to his illegal acts.—*Lytle Creek W. Co. v. Perdew*, 65 Cal. 447, 454, 4 Pac. 426.

46. Same—Provision of Political Code as to removal of obstruction from highway does not seem to provide for case where cause of obstructions is remote from highway and could not be removed by road overseer under any authority given him by statute; and where obstruction could be removed in no other effectual way than closing down mining operations of defendant, only effective method to reach injury and prevent its continuance is by bill in equity to enjoin defendants from doing acts complained of, and such action is properly brought in name of county.—County of *Sierra v. Butler*, 136 Cal. 547, 551, 69 Pac. 418.

47. Compare: *San Benito County v. Whitesides*, 51 Cal. 416; *Balley v. Dale*, 71 Cal. 34, 37, 11 Pac. 804; *Hall v. Kauffman*, 106 Cal. 451, 452, 39 Pac. 756.

48. Same—Right to maintain obstruction to private way to detriment of owner thereof does not exist in favor of special administrators, although such obstruction was formerly placed there by decedent. They can not maintain nuisance as long as

they remain special administrators and claim that injured party can maintain no action to abate or enjoin it. They are properly made parties defendant, and plaintiff, upon proving his case, would be entitled to judgment against them enjoining or abating nuisance, and for such damages as they, by their wrongful acts, had caused him to suffer.—*Hardin v. Sin Claire*, 115 Cal. 460, 463, 47 Pac. 363.

49. Same—Road-overseer as to public highways.—Action to abate nuisance caused by obstruction to public highway should be brought in name of road-overseer; action in name of county can not be supported.—*San Benito County v. Whitesides*, 51 Cal. 416; *Bailey v. Dale*, 71 Cal. 34, 37, 11 Pac. 804; *Hall v. Kauffman*, 106 Cal. 451, 452, 39 Pac. 756.

50. Distinguished: *County of Sierra v. Butler*, 136 Cal. 547, 550, 69 Pac. 418.

51. Person can not use his own property, how.—It is a general rule of law that a person may not use his own property, even in and about business lawful in itself, if it be used in such manner as to seriously interfere with another's enjoyment of his right in use of his property.—*Tuebner v. California St. R. Co.*, 66 Cal. 171, 173, 4 Pac. 1162.

52. Preliminary injunction—Ought not to be granted, when.—Alleged nuisances ought not to be abated by preliminary injunction in ordinary cases, since it might appear on trial that alleged nuisance was not nuisance, or that plaintiff had no right to sue for its abatement in his own name.—*Gardner v. Stroever*, 89 Cal. 26, 29, 26 Pac. 618.

As to mandatory preliminary injunction being seldom justified, see ante § 525 and note par. 15.

53. Proof that way is public way—When necessary.—Proof that way is public way is necessary in action on behalf of people to abate nuisance upon such alleged highway.—*People ex rel. Howland v. Dreher*, 101 Cal. 271, 274, 35 Pac. 867. See *People ex rel. Schnell v. Sausalito L. & F. Co.*, 106 Cal. 621, 622, 40 Pac. 11.

54. Public nuisance—Action by private individual.—Obstruction to public highway so as to prevent travel will not cause special injury to an individual such as will enable him to maintain action to abate nuisance, even when such highway constitutes only means by which individual can reach his property.—*Hargro v. Hodgdon*, 89 Cal. 623, 628, 26 Pac. 1106. See *Aram v. Schallenberger*, 41 Cal. 449, 450; *San Jose R. Co. v. Brooks*, 74 Cal. 463, 465, 16 Pac. 250.

As to act which affects considerable number of persons being none the less nuisance because the extent of the annoyance or damage is unequal, see *Kerr's Cyc. Pen. Code*, 2d ed., § 371.

As to definition of public nuisances, see *Kerr's Cyc. Pen. Code*, 2d ed., § 370 and note.

As to injury being required to be special in character before private party may restrain obstruction to public highway, see ante § 526 and note pars. 83, 84.

As to littoral and riparian owners being entitled to injunction to restrain nuisance where their injury is different in kind from that suffered by general public, see *Kerr's Cyc. Civ. Code*, 2d ed., § 3493 and note par. 12.

As to obstructing highways being nuisance, see note 16 *Am. St. Rep.* 209.

As to penalty for maintaining a public nuisance, see *Kerr's Cyc. Pen. Code*, 2d ed., § 373a.

As to private person maintaining action for public nuisance if it is specially injurious to himself, see *Kerr's Cyc. Civ. Code*, 2d ed., § 3493 and note.

As to private right of action for public nuisance on highways, see note 8 *L. R. A.* 832.

As to public nuisances generally, see *Kerr's Cyc. Civ. Code*, 2d ed., §§ 3490-3495 and notes.

As to public nuisance on highways, see note 8 *L. R. A.* 830-832.

As to remedies against public nuisance, see *Kerr's Cyc. Civ. Code*, 2d ed., § 3491.

As to right of private persons or corporations to occupy or obstruct public streets, see note 1 *Am. St. Rep.* 480-484.

As to suffering from injury or annoyance from a nuisance in a different degree only from general public but not different in kind, not giving right of private action to abate nuisance, see *Keer's Cyc. Civ. Code*, 2d ed., § 3493 and note par. 12.

55. Same—Fact that nuisance is public does not deprive individual of his action in cases where, as to him, it is private obstruction to free use and enjoyment of his private property.—*Fisher v. Zumwalt*, 128 Cal. 493, 496, 61 Pac. 82.

56. Same—Failing to show that other and adjacent property-owners in town will not suffer like detriment and injury with plaintiff makes complaint fatally defective. Though complaint does allege that there are other such property-owners, yet pleading is to be construed most strongly against pleader and designation of premises as in certain town gives rise to presumption that there are other inhabitants and owners of property therein. If there were no other inhabitants of town so situated as to be injured by alleged nuisance, complaint should, in some form, affirmatively disclose that fact, since it is essential to show special injury to plaintiff.—*Siskiyou L. & M. Co. v. Rostel*, 121 Cal. 511, 513, 53 Pac. 1118.

57. Same—Injury which may entitle private person to maintain action to abate public nuisance must be injury to plaintiff's property, or to private right incidental to such private property; and where injury is of this nature, injured person may maintain action, although private rights of indefinite number of other persons may be infringed and injured in same way by same nuisance.—Lind v. San Luis Obispo, 109 Cal. 340, 344, 42 Pac. 437.

58. Same—Many nuisances may occasion injury to an individual for which action will not lie by him, in his private capacity, unless he can show special damage to his person or property differing in kind and degree from that which is sustained by other persons who are subjected to similar injury. Among such may be mentioned invasion of common and public right which every one may enjoy, such as use of highway, or canal, or public landing place. This class of nuisances is confined, in most cases, to where there has been invasion of right which is common to every person in community, and not to where wrong has been done to private property or private rights of individuals, although many individuals may have been injured in same manner and by same means.—Fisher v. Zumwalt, 128 Cal. 493, 495, 61 Pac. 82. See Lewiston T. Co. v. Shasta W. R. Co., 41 Cal. 562, 565; Payne v. McKinley, 54 Cal. 532, 533; Sullivan v. Royer, 72 Cal. 248, 250, 1 Am. St. Rep. 51, 13 Pac. 655; McCloskey v. Kreling, 76 Cal. 511, 513, 18 Pac. 483; Gardner v. Stroeve, 89 Cal. 28, 29, 26 Pac. 618; Hargro v. Hodgdon, 89 Cal. 623, 628, 26 Pac. 1106; Lind v. San Luis Obispo, 109 Cal. 340, 343, 42 Pac. 437; Siskiyon L. & M. Co. v. Rostel, 121 Cal. 511, 513, 53 Pac. 1118; Spring Valley W. W. v. Fifield, 136 Cal. 14, 15, 68 Pac. 108. **Mass.** Wesson v. Washburn Iron Co., 95 Mass. (13 Allen) 95, 90 Am. Dec. 181; Stetson v. Faxon, 36 Mass. (19 Pick.) 147, 31 Am. Dec. 123. **N. J.** Ross v. Butler, 19 N. J. Eq. (4 C. E. Gr.) 294, 97 Am. Dec. 654. **N. Y.** Lansing v. Smith, 4 Wend. 9, 21 Am. Dec. 89.

59. Same—Mere allegation that alleged nuisance is specially injurious to plaintiff is insufficient in action by private person to abate public nuisance. Such allegation is mere conclusion of law. Specific facts must be alleged showing that maintenance of nuisance results in special injury to him.—Spring Valley W. W. v. Fifield, 136 Cal. 14, 15, 68 Pac. 108.

60. Same—Municipality having right of action affords no good reason for denying person all remedies for actual loss and injuries which he may sustain in his person or property by unlawful acts of another, although it may be valid ground for refusing redress to individuals for mere invasion of common public right.—Lind v. San Luis Obispo, 109 Cal. 340, 344, 345, 42 Pac. 437.

61. Same—Obstruction to highway which also cuts off access from party's premises to public highway, to such extent becomes private nuisance, and party's complaint is not that it obstructs street or road, but that it prevents him from reaching it.—Hargro v. Hodgdon, 89 Cal. 623, 628, 26 Pac. 1106.

62. Same—Prescriptive right can not be set up in favor of public nuisance where action is brought by private party who has suffered special injury in consequence thereof.—Bowen v. Wendt, 103 Cal. 236, 238, 37 Pac. 149.

63. Res judicata—Judgment in action to abate nuisance, when a bar.—A judgment in action to abate particular thing as nuisance is bar to consequent action to cause removal of this same thing as an obstruction. The thing was as much nuisance when called an obstruction as when called nuisance; nature of action was not changed by change of name of thing objected to.—Phelar v. Quinn, 130 Cal. 374, 379, 62 Pac. 623.

64. Separate causes of action—For distinct nuisances may be set up in same complaint without being subject to demurrer for misjoinder.—Astill v. South Yuba W. Co., 146 Cal. 55, 58, 79 Pac. 594.

65. Unwarrantable use of own property—Damages.—An unwarrantable use of property by one person which works injury to right of another in enjoyment of his own property produces thereby such material nuisance, discomfort, and inconvenience as in law imports damage to such party.—Meyer v. Metzler, 51 Cal. 142, 144.

66. Verdict of jury—Advisory only.—The verdict of a jury would be advisory only in action to abate nuisance, and neither party would be entitled to jury as matter of right.—Meek v. De Latour, 2 Cal. App. 274, 83 Pac. 300, 301.

As to trial by jury generally in suits for injunction, see, ante, § 526 and note pars. 336-347.

67. Wall of adjoining building—Which prevents plaintiff from raising and repairing his own building, which improvement he is desirous of making, amounts to obstruction to free use of plaintiff's property, and one which interferes with its comfortable enjoyment by him, and is therefore nuisance.—Meyer v. Metzler, 51 Cal. 142, 144.

68. Wrong-doer—Who contributes to damage can not escape entirely because his proportional contribution to result can not be accurately measured.—Learned v. Castle, 78 Cal. 454, 460, 18 Pac. 872, 21 Pac. 11.

69. Same—Right to injunction in such case does not depend upon extent of damages measured by money standard, maxim "de minimis non curat lex" not applying.—Learned v. Castle, 67 Cal. 41, 7 Pac. 34.

§ 732. WASTE, ACTIONS FOR. If a guardian, tenant for life or years, joint tenant, or tenant in common of real property, commit waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be judgment for treble damages.

History: Enacted March 11, 1872, re-enactment of § 250 Practice Act; repeal by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 159, held unconstitutional, see history, § 5 ante.

WASTE.

1. As to construction of statute—Remedial.
2. Act of waste—Done under honest claim of right.
3. Same—By tenant—Removal of beet-tops.
4. Common-law and statutory liability—Distinguished.
5. Co-tenants out of possession—May at any time enter into equal enjoyment.
6. Cutting down and destroying trees—Upon the boundary line.
7. Damages—Are not necessarily confined to compensation.
8. Same—Increased but remedy same.
9. Injury must be shown by mortgagee—Before he can maintain action.
10. Just construction of section—Requires what.
11. Purpose of section—Is not to establish rule of treble damages.
12. Taking ore from mine during term—Effect of.
13. "Waste"—Is not an arbitrary term.

1. As to construction of statute—Remedial.—The above section is remedial, although providing for treble damages.—*Jahns v. Nolting*, 29 Cal. 507, 513.

2. Act of waste—Done under honest claim of right, or as result of honest mistake as to defendant's right, it would not be just to visit so severe penalty upon him, and no strained construction of words should be allowed to have this effect.—*Isom v. Rex C. O. Co.*, 140 Cal. 678, 680, 74 Pac. 294.

3. Same—By tenant—Removal of beet tops.—Under a lease for beet farming, which provides against waste, and that the land is "to be farmed in accordance with the customs and directions of the Spreckels Sugar Company, or its field superintendent," where it was customary to leave the beet tops on the ground to be plowed under for fertilizer to prevent impoverishment of the soil, the lessor is entitled to an injunction against the lessee from waste by diverting the latter's share of such beet tops from the land.—*Corey v. Struve*, 16 Cal. App. 310, 313, 116 Pac. 975.

4. Common-law and statutory liability—Distinguished.—At common law acts committed by tenant for life or years which would constitute waste would not be waste when committed by tenant in common. Statute now makes co-tenants liable for

those acts which constitute waste when committed by tenant for life or years, and we must resort to common law to ascertain whether acts complained of would be waste had they been committed by tenant for life or years.—*McCord v. Oakland Q. M. Co.*, 64 Cal. 134, 139, 49 Am. Rep. 686, 27 Pac. 863.

5. Co-tenants out of possession—May at any time enter into equal enjoyment of possession of premises, and their neglect to do so may be regarded as an assent to sole occupation of other. This, however, does not imply that co-tenants will be held to assent to commission of waste by sole occupant.—*McCord v. Oakland Q. M. Co.*, 64 Cal. 134, 139, 49 Am. Rep. 686, 27 Pac. 863.

6. Cutting down and destroying trees—Upon the boundary line of which the owners of the adjoining estates are tenants in common is waste and injunction will lie against the same.—*Scarborough v. Woodill*, 7 Cal. App. 39, 41, 93 Pac. 383.

As to trespass in cutting or carrying away trees, see, post, § 733 and note.

7. Damages—Are not necessarily confined to compensation for waste and injury only, but value of rents and profits may enter into estimate of damages.—*Tewksbury v. O'Connell*, 25 Cal. 262, 265.

8. Same—Increased, but remedy same.—Statute presents instance in which no new right of action or remedies for private injuries are created, but damages authorized to be recovered are enhanced.—*Jahns v. Nolting*, 29 Cal. 507, 513.

9. Injury must be shown by mortgagee—Before he can maintain action.—By parity of reasoning, the vendor who holds the legal title as security for the purchase money, must show that he would sustain some injury before he can maintain the action (dictum).—*Conde v. Sweeney*, 16 Cal. App. 157, 163, 116 Pac. 319.

10. Just construction of section—Requires, what.—A just construction of section would seem to require infliction of treble damages only when waste was committed wilfully, wantonly, or maliciously.—*Isom v. Rex C. O. Co.*, 140 Cal. 678, 680, 74 Pac. 294.

11. Purpose of section—Is not to establish rule of treble damages in all actions for waste, but rather to leave matter to discretion of court. Word "may," used in section is not mandatory term, except where it is construed to mean, "must," and it is never so construed where neither lan-

guage nor policy of statute demands such unusual interpretation.—*Isom v. Rex C. O. Co.*, 140 Cal. 678, 679, 74 Pac. 294; *Isom v. Book*, 142 Cal. 666, 667, 76 Pac. 506.

12. **Taking ore from mine during term—Effect of.**—The taking of ore from mine during his term, it being sole subject of demise, tenant for years is not guilty of waste. That is what he paid rent for.—

McCord v. Oakland Q. M. Co., 64 Cal. 134, 139, 49 Am. Rep. 686, 27 Pac. 863.

13. **"Waste"—Is not an arbitrary term** to be implied inflexibly without regard to quantity or quality of estate, nature and species of property, or relation to it of person charged to have committed wrong.—*McCord v. Oakland Q. M. Co.*, 64 Cal. 134, 140, 49 Am. Rep. 686, 27 Pac. 863.

§ 733. TRESPASS FOR CUTTING OR CARRYING AWAY TREES, ETC., ACTIONS FOR. Any person who cuts down or carries off any wood or underwood, tree or timber, or girdles or otherwise injures any tree or timber on the land of another person, or on the street or highway in front of any person's house, village, or city lot, or cultivated grounds; or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, is liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor, in a civil action, in any court having jurisdiction.

History: Enacted March 11, 1872, re-enactment of § 251 Practice Act; repeal by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 159, held unconstitutional, see history, § 5 ante.

CUTTING OR CARRYING AWAY TREES—TRESPASS.

1. As to construction of section—Not mandatory.
2. Complaint—Not averring that trespass was wilful.
3. Innocent mistake—As to boundary or location.
4. Proof that defendant wilfully and maliciously removed trees.

As to damages for wrongful injuries to timber, trees, and underwood on lands of another, or removal thereof, see *Kerr's Cyc. Civ. Code*, 2d ed., § 3346 and note.

As to right of owner of abutting property to cut down shade trees along highway, planted by him, see *Kerr's Cyc. Pol. Code*, 2d ed., § 2742 and note.

1. As to construction of section—Not mandatory.—The above section is not mandatory.—*Isom v. Rex C. O. Co.*, 140 Cal. 678, 680, 74 Pac. 294.

2. **Complaint—Not averring that trespass was wilful**, but only that entry and cutting of timber was wrongful and without plaintiff's leave, does not come within purview of above section, and, though stating an action good at common law entitling plaintiff to recover his actual damages, does not state case in which damages can be trebled.—*Barnes v. Jones*, 51 Cal. 303, 306, 307; *Stewart v. Sefton*, 108 Cal. 197, 206, 41 Pac. 293; *Isom v. Rex C. O. Co.*, 140 Cal. 678, 680, 74 Pac. 294.

3. **Innocent mistake—As to boundary or location** of tract of land claimed by defendant takes case out of above section where party making such mistake cuts down and carries away trees he innocently believes are his own property.—*Barnes v. Jones*, 51 Cal. 303, 305.

4. **Proof that defendant wilfully and maliciously removed trees** knowing them to be property of plaintiff, is necessary to entitle plaintiff to treble damages.—*Stewart v. Sefton*, 108 Cal. 197, 206, 41 Pac. 293.

§ 734. MEASURE OF DAMAGES IN CERTAIN CASES UNDER THE LAST SECTION. Nothing in the last section authorizes the recovery of more than the just value of the timber taken from uncultivated woodland for the repair of a public highway or bridge upon the land, or adjoining it.

History: Enacted March 11, 1872, re-enactment of § 252 Practice Act; repeal by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 159, held unconstitutional, see history, § 5 ante.

§ 735. DAMAGES IN ACTIONS FOR FORCIBLE ENTRY, ETC., MAY BE TREBLED. If a person recover damages for a forcible or unlawful entry in or upon, or detention of any building or any cultivated real property, judg-

ment may be entered for three times the amount at which the actual damages are assessed.

History: Enacted March 11, 1872, re-enactment of § 253 Practice Act; repeal by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 159, held unconstitutional, see history, § 5 ante.

TREBLE DAMAGES IN FORCIBLE DETAINER.

1. Construction of section—As to power of court and jury.
2. Same—Same—As to treble damages.
3. Complaint—Need not contain claim for treble damages.
4. Damages for rental only being found—Effect of.
5. Mandamus—Will not lie to compel trial court, to do what.

1. **Construction of section—As to power of court and jury.**—Construing section 3294 Civil Code, and section 1174, post, with above section, it is held that the power of the jury is limited to the assessment of the actual damages sustained, and that the sole power of determining whether the circumstances are such as to justify the entry of judgment for treble damages as herein authorized.—*San Francisco & Suburban Home Building Soc. v. Leonard*, 17 Cal. App. 254, 270, 119 Pac. 405.

2. **Same—Same—As to treble damages.**—Construing section 3294 Civil Code and sec-

tion 1174, post, with this section it is held that the power thus specially given the court to enter judgment for treble damages or rent was intended to be exercised only where the evidence discloses that the defendant has committed the tortious act charged against him wantonly or by oppression or with malice, express or implied.—*San Francisco & Suburban Home Building Soc. v. Leonard*, 17 Cal. App. 254, 271, 119 Pac. 405.

3. **Complaint—Need not contain claim for treble damages,** but rather claim for damages which jury is competent to assess. Office of trebling damages belongs to court.—*Tewksbury v. O'Connell*, 25 Cal. 262, 265.

4. **Damages for rental only being found Effect of.**—In a case in which damages for rental is found, damages could not be trebled.—*Nolan v. Hentig*, 138 Cal. 281, 283, 71 Pac. 440.

5. **Mandamus—Will not lie to compel trial court to render judgment for treble damages.** Party has plain, speedy, and adequate remedy by appeal.—*Early v. Mannix*, 15 Cal. 149.

CHAPTER III.

ACTIONS TO DETERMINE CONFLICTING CLAIMS TO REAL PROPERTY, AND OTHER PROVISIONS RELATING TO ACTIONS CONCERNING REAL ESTATE.

- § 738. Action to quiet title [to real or personal property]; validity of gift; jury trial.
- § 739. When plaintiff can not recover costs.
- § 740. If plaintiff's title terminates pending the suit, what he may recover, and how verdict and judgment to be.
- § 741. When value of improvements can be allowed as a set-off.
- § 742. An order may be made to allow a party to survey and measure the land in dispute.
- § 743. Order, what to contain, and how served. If unnecessary injury done, the party surveying to be liable therefor.
- § 744. A mortgage must not be deemed a conveyance, whatever its terms.

- § 745. When court may grant injunction; during foreclosure; after sale on execution, before conveyance.
- § 746. Damages may be recovered for injury to the possession after sale and before delivery of possession.
- § 747. Action not to be prejudiced by alienation, pending suit.
- § 748. Mining claims, actions concerning to be governed by local rules.
- § 749. How service may be made in action relating to real property. [Repealed.]
- § 749[a]. Determination of adverse claim to real property; unknown owner.
- § 750. Notice to unknown owners, how served.
- § 751. Judgment to be in accordance with evidence.

§ 738. ACTION TO QUIET TITLE [TO REAL OR PERSONAL PROPERTY]; VALIDITY OF GIFT; JURY TRIAL. An action may be brought by any person against another who claims an estate or interest in real or personal property, adverse to him, for the purpose of determining such adverse claim; provided, however, that whenever in an action to quiet title to, or to deter-

mine adverse claims to, real or personal property, the validity or interpretation of any gift, devise, bequest or trust, under any will, or instrument purporting to be a will, whether admitted to probate or not, shall be involved, such will, or instrument purporting to be a will, is admissible in evidence; and all questions concerning the validity of any gift, devise, bequest or trust therein contained, save such as under the constitution belong exclusively to the probate jurisdiction, shall be finally determined in such action; provided, that if the said will shall have been admitted to probate and interpreted by a decree of the superior court sitting in probate which decree has become final such interpretation shall be conclusive as to the proper construction of said will, or any part thereof, so construed, in any action under this section; and provided, however, that nothing herein contained shall be construed to deprive a party of the right to a jury trial in any case where, by the law, such right is now given.

History: Enacted March 11, 1872, substantial re-enactment of § 254 Practice Act; amendment approved March 26, 1895, Stats. and Amdts. 1895, p. 73; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 159, held unconstitutional, see history, § 5 ante; amendment approved May 23, 1921, Stats. and Amdts. 1921, p. 542. In effect July 29, 1921.

ACTION TO QUIET TITLE.

- I. IN GENERAL, 1-114.
- II. PARTIES PLAINTIFF, 115-191.
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- IV. PLEADINGS — COMPLAINT, ANSWER, CROSS-COMPLAINT, INTERVENTION, ETC., 210-233.
- V. TRIAL, JUDGMENT, AND APPEAL, 234-277.
- VI. RIGHT TO JURY, 278-304.
- VII. PROCEEDINGS UNDER McENERNEY ACT, 305-324.
- VIII. PROCEEDINGS TO PUT IN POSSESSION, 325-328.

I. IN GENERAL.

- 1. Action authorized by above section — Is in nature of an action in rem.
- 2. Action gives remedy greater than old bill of peace.
- 3. Same—Enlarged jurisdiction.
- 4. Action hereunder—Instead of action at law, followed by bill in equity.
- 5. An apparently good record-title — Cloud to be removed hereunder.
- 6, 7. Any proper relief given in action hereunder — Within section 580, ante.
- 8. Benefits of bill of peace—Obtained hereunder.
- 9. Between two claiming equitable titles — But not by equitable against legal.
- 10. Cloud upon title—Defense resting in extrinsic evidence.
- 11-13. Same—True test of—Need of evidence dehors.

- 14. Same—Same—Does not exist in stranger to title.
- 15. Same—Same—If claim rests on void judgment.
- 16. Same—Same—One who is not party or privy to judgment.
- 17, 18. Condition precedent to bringing action.
- 19. Same—Payment of mortgage.
- 20. Consolidation of actions—May be ordered, when.
- 21-24. Construction of section—As to object.
- 25. Same—Section authorizes court to define interests of both parties.
- 26. Same — Title paramount entitles plaintiff to decree.
- 27. Contract — Action not designed to obtain judicial construction of.
- 28. Costs — Are controlled by section 1022, post.
- 29. Decree hereunder—More affirmative of legal rights than mere judgment for possession.
- 30. Deed for conveyance — Does not make grantee trustee.
- 31. Difference between actions—Under Practice Act and code.
- 32, 33. Distinction — Between old suit in chancery and suits hereunder.
- 34. Disturbance in possession — Not necessary.
- 35. Same—Formerly action by claimant to real estate to remove claim by defendant.
- 36. Same—Under this statute.
- 37. Easement, claim to—Is adverse claim to real property.

38. Equitable interest—Can not support claim against legal title.
39. Equitable title—As against legal title—Must be specifically alleged.
- 40-42. Equities—Only, involved.
43. Same—Superiority of, asserted hereunder.
44. Equity—Rule of, applicable.
45. Errors at trial—If minor, not noticed.
46. Estate for years—May be subject to action.
- 47-51. Every description of depreciating claim determined.
52. Imperfect title — Deraigned from grantor — Not strengthened by title founded upon tax-sale.
53. Injunction, prayer for—Does not change character of action.
54. Instalment-contract for purchase of real property — Forfeiture under time clause.
55. Issues, whether legal or equitable—Need not appear till after answer.
56. Judgment—A muniment of title of successor to plaintiff.
57. Same—Execution and sale show title.
58. Same—Same—But against stranger must be supplemented by proof of title in him.
59. Jurisdiction—Whether action is at law or in equity—In superior court.
- 60, 61. Knowledge of assertion of claim by party out of possession.
62. Laches—Plaintiff in continuous possession not guilty of.
63. Legal, distinguished from equitable, title to be shown.
64. Legal rights—Determined in suit in equity.
65. Same—There is no difficulty in so conducting suit under this section.
- 66-69. Limitation of action—State a party.
70. Mineral lands — Adverse title to, hereunder.
71. Same—Governed by practice in state courts, not by rules of United States land-office.
72. Mining claims—Action to quiet title to is not under section 2326, federal statutes.
73. Same—Jurisdiction of action to determine adverse claim to, depends upon state constitution.
74. Same — State statute of limitations of five years controls.
75. Same—Rights to dependent on laws of United States, but suit regardless of United States land-office.
76. Misjoinder of causes of action.
77. Same—A cause of action to acquire title to lands can not be united with, what.
78. Mortgagee, claim of — Not disposed of in action hereunder.
79. Same — Although plaintiff can not have his title quieted.
80. Navigable waters — Grant of soil under, gives no right to obstruct.
81. Object of these sections.
82. Ownership in plaintiffs—And lack of title or equity in defendants determined.
83. Partition, right to—Justifies action hereunder.
84. Personal property—Not subject of action to quiet title.
85. Pipe-line and water-right — Claims to, real property.
- 86, 87. Plaintiff's title must be superior.
88. Possession in plaintiff — Not now required in order to maintain action.
89. Same—Was essential under Practice Act.
90. Publication of summons — May be made in action to quiet title.
91. Record-title against possessory-title — A cloud upon title.
92. Relief in equity—Enlarged by this section.
93. Right to purchase—May possibly be quieted as against trespass.
94. Separate property of spouses — In action for divorce.
95. State tide-land commissioners — Can grant no title to land above shoreline at ordinary high-tide.
96. State's title to lands — Determined hereunder.
97. Statute of limitations — Bar to action.
98. Same — Action barred by five-year limitation.
99. Same — Does not run while action pending.
100. Same—Rule to determine delay.
101. Subsequent action upon judgment—In action to determine adverse claim.
102. Terms of section broad—Include all adverse claims.
103. Time to commence action—Limited only by continuous adverse possession.
- 104, 105. Trust, title in—Will not sustain action hereunder.
106. Same—Conveyance of legal title can not be enforced.
107. User, claim to right of, an adverse claim to real estate.
108. Same — As distinct from right of possession, determined hereunder.

- 109. Void certificate of tax collector—A cloud upon title.
- 110. Void proceedings—Not support to cloud upon title.
- 111. Water-right—A claim to real estate and subject to action hereunder.
- 112. Same—Easement may be determined in action hereunder.
- 113. Same—Riparian rights of defendants, determined in action hereunder.
- 114. Writ of possession—Issued when action in ejectment dismissed.

II. PARTIES PLAINTIFF.

- 115. Action under code—Brought by person out of possession.
- 116. Administrator—Action by, same as action by legal owner.
- 117. Same—Difference between legal and equitable estates unimportant.
- 118. Same—Same—Only one form of action.
- 119. Same—Has right of action.
- 120. Same—Right of possession sole test.
- 121. Administrator's right to possession.
- 122. Adverse possession—Title perfected by, sustains action.
- 123. Same—Against record-title.
- 124. Same—Beyond statute of limitations.
- 125-127. After-acquired title—Setting up by supplemental complaint.
- 128, 129. Appropriator of water—Rights of.
- 130. Same—Right to water—As "real property."
- 131. Attorney-general—May bring action for state.
- 132. Same—To determine adverse claims to real property owned by state.
- 133. Same—To land under waters of bay of San Francisco.
- 134. Certificate of purchase from state—Justifies action hereunder.
- 135. Same—Claim under, against certificate of sale in foreclosure.
- 136, 137. Claimant not in possession.
- 138, 139. Complaint hereunder—Is case in equity.
- 140. Same—Must state facts and not mere conclusion of law.
- 141. Same—Nature of defendant's title may be stated in.
- 142. Same—Need not allege company a corporation, not claiming under it.
- 143. Same—Need not allege nature of defendant's claim.
- 144. Same—Where equity shown in plaintiff, amended.
- 145. Contract—Assignee under, may sue if contract not fulfilled.
- 146. Same—Basis of claim, facts to be proved showing validity of.
- 147. Same—Purchase under, no action till payment.
- 148. Effect of payment of taxes by another—Mistake, and not claim of title.
- 149. Equitable title—Owner of can not maintain action against owner of legal title.
- 150. Estoppel—By acts of plaintiff.
- 151. Same—For failure, with knowledge, to give notice.
- 152. Same—Not created by act of defendant's tenant.
- 153. Franchise for wagon-road—Supports action against county.
- 154. Same—Right to, determined.
- 155. Grantee of mortgaged land—May maintain action hereunder.
- 156. Heir may not sue—In absence of some default, or fraud or refusal to act.
- 157. Heirs and devisees—Controversy between.
- 158. Holder of certificate of purchase from the state—Tide-lands within the two-mile limit.
- 159. Holder of equitable title—As against a holder of legal title.
- 160. Holder of legal title—May maintain action hereunder.
- 161. Homestead-claim to land claimed as mineral.
- 162. Judgment for plaintiff in ejectment—Concludes defendant from subsequent suit.
- 163. Lessee against his lessor.
- 164. Lien prior in date—Supports action against subsequent lienholders.
- 165. Mortgageor—May maintain action hereunder.
- 166. Optionee in unilateral contract to sell real estate—May maintain action hereunder.
- 167. Owner—Of estate or interest in land less than estate in fee.
- 168. Same—Of servitude—Claim to have water flow.
- 169. Same—Same—Owner of the right to cut growing timber.
- 170. Same—Of two-thirds in possession against title to one-third.
- 171. Party necessary to action in foreclosure—May bring action hereunder.
- 172. Party prevailing—Ejected pendente lite—Entitled to writ of possession.
- 173. Patent from United States—Supports suit against imperfect Mexican grant.
- 174. Same—Statute of limitations runs only from date of issue.

175. Same—Same—In action brought to quiet title to land which constituted portion of Mexican grant.
 176. Possession—Plaintiff out of and defendant in.
 177. Possessory title—Against one obtained by fraud.
 178. Same—Gives all remedies of holder of record-title.
 179. Pre-emption laws, claim under—Is a cloud upon title.
 180. Same—Source of title, claims from.
 181. Sheriff's deeds—In different suits.
 182. Same—Deed in foreclosure against invalid mortgage-lien.
 183. State—May sue for encroachment of proprietary rights.
 184. Statute of limitations — Action barred by five years' limitation.
 185. Same—Beneficiary to enforce trust—Runs against, only after repudiation of trust by trustee.
 186. Same—Plea of does not change action.
 187. Same—Successor in interest bound by rule against grantor.
 - 188, 189. Tenants in common—In general.
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 195. Bringing in new parties.
 196. Defendant—Who does not himself claim some right.
 197. Equitable estate, or right of possession.
 198. Estoppel — Company, answering under name as sued, estopped from denying its name.
 199. Finding that defendant made improvements—Immaterial.
 200. Intervention — Judgment-lien claimant.
 201. Joint grantees—Claim of one of two is a cloud upon title.
 202. Mexican grant not presented to land commissioners—A defense.
 203. Permissive occupation by railroad company—Not disturbed by action hereunder.
 204. Same—Where defendant, and owner of land, waived compensation.
 205. Persons claiming title to use of water from same source as plaintiff—Properly joined as defendants.
 206. Prescription, title by — Bars action hereunder.
 207. Taxes need not be paid by defendant —If assessment void.
 208. Trustee's title—Not affected by action of cestui que trust.
 209. Undivided interest in mining claim —Title to, determined.
- IV. PLEADINGS—COMPLAINT, ANSWER, CROSS-COMPLAINT, INTERVENTION, ETC.
- 210-212. Complaint—Allegation of fraud.
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 - 214, 215. Same—Sufficiency of.
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 219. A cross-complaint—In general.
 - 220, 221. Same—Necessity for cross-complaint.
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 223. Same—Equitable defense.
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 225. Same—Of the tenant of administrator of deceased owner.
 - 226, 227. Ejectment—An administrator may plead in answer, what.
 228. Fraud—Need not be pleaded, when.
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 237. Contingent, expectant, or possible right—Not coupled with interest —Decree need not provide as to.
 238. Decree quieting title—Proper, when.
 - 239, 240. Dismissal of action.
 - 241, 242. Effect of decree or judgment.
 243. Effect of proof of legal title.
 244. Equitable title—Evidence to establish.
 245. Evidence—Admissibility.
 246. Same—Deed admissible, when.
 - 247-253. Same—Of title.
 254. Same—Of unprobated will.
 255. Same—Possession.
 256. Same—Prima facie evidence of tax deeds—Applicable to state taxes only.
 - 257-259. Same—Sufficiency of.
 260. Same — Same — Presumptions indulged.
 261. Finding—As to ownership in easement.
 - 262, 263. Same—Immaterial finding.
 264. Same—Reversal for want of support of.

- 265. Forfeiture — In opening, plaintiff need not show forfeiture by defendant.
- 266. Husband — Competent witness to prove community property in action to quiet title.
- 267. Same — In action to quiet title against administrator of estate.
- 268. Same—Not included under section 1880, post.
- 269. Instructions—Review on appeal.
- 270. Judgment for defendant for costs, when.
- 271. Nonsuit—Judgment of.
- 272. Patented mining claim — Right shown by *pedis possessio*, or compliance with statute.
- 273. Re-embursement of taxes.
- 274. Right to possession proved—Further rights to be adjudicated.
- 275. Theory on which cause tried—Not changed in appellate court.
- 276. Same—As to plaintiff in possession, if right established.
- 277. Void tax-sale—Action to quiet title —Re-embursement of purchaser in amounts expended for redemption.

VI. RIGHT TO JURY.

- 278-284. As to right to jury trial.
- 285. Complaint framed in particular form—Does not deprive one of jury.
- 286. Defendant—Must allege title to have jury.
- 287. Same—Ousted from mining claim, right to jury.
- 288. Either party may demand jury.
- 289. Equitable relief—Prayer for does not deprive party of jury.
- 290. Intervener — Whether entitled to jury.
- 291. Issues purely equitable—Do not entitle to jury.
- 292. Jury — Must be demanded before trial.
- 293. Same—Party desiring jury must conform to rule of court.
- 294. Same—Pleadings, sufficiency of to entitle to jury to be made by defendant.
- 295. Same—Plaintiff claiming ownership and possession, defendant claiming adversely.
- 296. Same—Right to—Depends on facts in each case.
- 297. Same—Same—Not avoided by calling action equitable.
- 298. Same—Same—Action is not in violation of constitution.
- 299. Same—Where action in effect is one to recover possession.

- 300, 301. Same—Where defendant was in possession.
- 302-304. Legal issues of equitable nature—Discretion of court.

VII. PROCEEDINGS UNDER McENERNEY ACT.

- 305. As to when action may be brought.
- 306. Affidavit filed with complaint.
- 307, 308. Same—Sufficiency of affidavit.
- 309. Same—Waiver of objection to affidavit.
- 310. Complaint to set aside in part decree under—Sufficiency of.
- 311. Construction of act—Remedial in nature.
- 312-314. Costs in.
- 315. Findings—Sufficiency of—Equitable interest claimed in cross-complaint.
- 316. Interest entitling to maintain action.
- 317. Memorandum as to adverse claimants—Absence of.
- 318. Possession—Sufficiency of.
- 319-323. Proof of possession by plaintiff—Necessity of.
- 324. Rules of practice.

VIII. PROCEEDINGS TO PUT IN POSSESSION.

- 325, 326. As to generally.
- 327, 328. Alias writ of possession.

I. IN GENERAL.

As to action to quiet title to placer-mining claim, and necessity for proof of discovery of mineral prior to location, see, post, § 478, note pars. 1 and 2.

As to entry on real estate sufficient or valid as claim, see, ante, § 320 and note.

As to entry upon real estate insufficient or invalid as claim, see, ante, § 320 and note.

As to filing of notice of pendency of action, see, ante, § 409 and note.

As to granting of injunction in action to quiet title, see, ante, § 526 and note.

As to instrument executed by a stranger to the title constituting a cloud thereon, see note, Ann. Cas. 1912C, 834.

As to power of a court of equity to cancel a restrictive covenant in a deed as a cloud on title, see note, Ann. Cas. 1912A, 765.

1. Action authorized by above section—Is in nature of an action in rem.—In such action the rule is elementary and practically universal that no party will be permitted to interpose to defeat the *prima facie* title of another party to the thing derived by him from a third party unless such attacking party pleads or shows in some authorized manner that he has some right, title or interest in the thing.—*Williams v. City of San Pedro*, 153 Cal. 44, 50, 94 Pac. 234.

2. Action gives remedy greater than old bill of peace.—Purpose of this section is

evidently to afford remedy similar in character to that of old bill of peace, but extending it to cases which latter remedy did not reach.—*Angus v. Craven*, 132 Cal. 691, 696, 64 Pac. 1091.

3. Same—Enlarged jurisdiction may be administered by federal courts of equity as well as state courts.—See *Devine v. City of Los Angeles*, 202 U. S. 313, 50 L. ed. 652, 28 Sup. Ct. Rep. 652.

4. Action hereunder—Instead of action at law, followed by bill in equity.—Under this section, one having legal title is not required to bring his action at law and then, after recovery of possession, to file bill to quiet his title or possession against equitable claims asserted by defendant in ejectment, and to have such claims decreed to be invalid, but may secure both ends in one proceeding.—*People ex rel. Love v. Center*, 66 Cal. 551, 556, 5 Pac. 263, 6 Pac. 481.

5. An apparently good record—title—Cloud to be removed hereunder.—An apparently good record-title would certainly be a cloud upon title acquired by adverse possession under statute of limitations. It is of record, and, when produced, makes out prima facie case which can only be defeated by evidence of adverse possession which is not of record, unless established in judicial proceeding, but rests in parol and is liable to be lost and established with difficulty.—*Arrington v. Liscom*, 34 Cal. 365, 371, 94 Am. Dec. 722.

As to cloud on title, see pars. 10-16, this note.

6. Any proper relief given in action hereunder—Within section 580, ante.—An action to quiet title can not be maintained by owner of an equitable estate against holder of legal title, under complaint containing only usual averments commonly made in such action; but where facts upon which plaintiff's claim is based are alleged, there is authority to grant any proper relief within limitations of section 580, ante, and appropriate remedies, such as cancellation, reconveyance, or decrees quieting title or establishing or enforcing trusts or determining priorities of opposing equities, may be had as between proper parties under our system, whenever they are required upon equitable considerations, and are justified by pleadings and proved in case.—*De Leonis v. Hammel*, 1 Cal. App. 390, 394, 82 Pac. 349, 351.

7. Where general relief is demanded, and if allegations of complaint to quiet title are true plaintiff's title is paramount to that of any defendant claiming lien by mortgage made by plaintiff, obtained by fraud whether her deed was procured by fraud and without consideration, or whether it was in fact mortgage, she is entitled to have her rights determined.—*De Leonis v. Hammel*, 1 Cal. App. 390, 394, 82 Pac. 349, 351.

8. Benefits of bill of peace—Obtained hereunder.—There is no difficulty in so conducting suit under this section as to fully protect legal rights of parties and at

same time secure beneficial result authorized by court of equity in bills of peace—which is repose from further litigation. Indeed, remedy under statute is eminently simple, direct, and efficacious for this purpose.—*Curtis v. Sutter*, 15 Cal. 259, 263.

9. Between two claiming equitable titles—But not by equitable against legal.—While, where both parties claim under equitable titles, an action may be brought hereunder to determine which has the superior, the action can not be maintained by the holder of a mere equitable title or interest against the holder of the legal title.—*Buchner v. Malloy*, 155 Cal. 255, 100 Pac. 687.

See pars. 38, 149, 159, this note.

10. Cloud upon title—Defense resting in extrinsic evidence.—Whenever the defense to a deed must rest in extrinsic evidence, a cloud is cast upon the title which equity may be invoked to remove.—*Las Animas & San Joaquin Land Co. v. Preciado*, 167 Cal. 580, 140 Pac. 239.

As to claim of one of two joint grantees, constituting a cloud on title, see par. 200, this note.

As to pre-emption claim under the pre-emption laws constituting a cloud on title, see par. 179, this note.

As to record title constituting a cloud upon possessory title, see par. 91, this note.

As to void certificate of tax-collector constituting a cloud upon title, see par. 109, this note.

As to void proceedings not constituting a cloud upon title, see par. 110, this note.

11. Same—True test of—Need of evidence dehors.—Where sale of land was made by tax-collector which was void because for sum greater than authorized by law, as section 3776 of Political Code does not require that certificate shall specify particulars of "amount paid," or "amount of assessment," non constat that deed would necessarily do so, if executed, and if it did not, evidence would be required dehors recitals of deed to ascertain illegality of any of items, to collect which sale was made, and cloud would then be cast on title.—*Axtell v. Gerlach*, 67 Cal. 483, 484, 8 Pac. 34; *Roman Catholic Archbishop v. Shipman*, 69 Cal. 586, 591, 11 Pac. 343; *Chase v. City Treasurer*, 122 Cal. 540, 542, 55 Pac. 414.

12. Where statute made an assessment a lien upon lands, and there was nothing upon face of assessment to show that lien was not in all respects valid, if, by reason of matters outside of assessments, as it is recorded, this apparent lien is shown not to be valid encumbrance, assessment constitutes cloud upon title which one is entitled to have removed by an action under this section.—*Bolton v. Gilleran*, 105 Cal. 244, 253, 38 Pac. 881.

13. The true test as to whether or not an instrument will cast a cloud upon the title of property is: Would the owner, in an action of ejectment brought by the adverse party, founded upon the deed, be required

to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist; if the proof would be unnecessary, no shade would be cast by the presence of the deed.—*Thompson v. Pack*, 219 Fed. 624.

14. Same—Same—Does not exist in stranger to title.—Where, if plaintiff succeed, it must be on ground that no title passed from Spain to defendant by mesne conveyance, and, in that event, conveyance from defendant would not cast any cloud upon plaintiff's title, circumstances would not justify action under this section. They would be like any other conveyances from strangers to title and be of no more effect than so much waste paper.—*Curtis v. Sutter*, 15 Cal. 259, 266.

15. Same—Same—If claim rests on void judgments.—Where judgments under which defendant is said to claim are void upon their face, they constitute no cloud and no basis for action to quiet title under this section.—*Hyde v. Redding*, 74 Cal. 493, 500, 16 Pac. 380.

16. Same—Same—One who is not party or privy to judgment is not affected by it, and neither judgment nor an execution-sale of land effected by it can change his right in land or create cloud upon his title.—*Roman Catholic Archbishop v. Shipman*, 69 Cal. 586, 590, 11 Pac. 343.

17. Condition precedent to bring action.—Formal re-entry upon the land by the grantor is not essential as a prerequisite to the bringing of an action to quiet title and for a reconveyance of the property.—*Firth v. Los Angeles Pac. Land Co.*, 28 Cal. App. 399, 152 Pac. 935.

18. Under above section, authorizing an action in the nature of an action to quiet title to be brought by any person against another who claims an interest in real property adverse to him for the purpose of determining such adverse claim, an owner need not, as a condition precedent to a suit against a mortgagee, tender a return of the amount received and due upon the mortgage.—*Mentry v. Broadway Bank & Trust Co.*, 20 Cal. App. 388, 129 Pac. 470.

19. Same—Payment of mortgage.—The rule that the plaintiff in an action to quiet title must pay an outlawed mortgage-debt as a condition to having his title quieted against it has no application to a plaintiff who is not the original mortgageor and does not claim under such mortgage.—*Klumpke v. Henley*, 24 Cal. App. 35, sub nom. *Klumpke v. Moreno*, 140 Pac. 313.

20. Consolidation of actions—May be ordered when pending action for partition, one of the parties commences action against other to enforce trust relative to property involved.—*Bixby v. Bent*, 59 Cal. 522, 531.

21. Construction of section—As to object.—The object of action is to finally settle and determine as between parties all conflicting claims to property in controversy, and to decree to each such interest or estate

therein as he may be entitled to.—*Peterson v. Gibbs*, 147 Cal. 1, 5, 81 Pac. 121, 123.

22. Whether this section permits of the determination as between the heirs and devisees of questions relating to the validity of the provisions of the will, or which would determine their rights as between themselves in advance of the final decree of distribution of the estate, raised but not decided.—*Estate of Sutro*, 155 Cal. 727, 733, 102 Pac. 920.

23. While the proceeding authorized by this section may be broader in some respects than the suit in equity called by the same name, it does not authorize the adjudication of the right, claim, interest or title of any one not before the court where the service of summons is made constructively; the proceeding becomes to a certain extent one in rem, but the decree entered in such a case can not adjudicate the rights of any person not included in the constructive service any more than it can do so where the persons named in the summons have not been personally served within the state. In case of other personal or constructive service, only the interest of the persons served and of those whom they expressly or virtually represent are affected by the decree.—*County of Los Angeles v. Winans*, 13 Cal. App. 234, 252, 109 Pac. 640.

24. This section authorizes the owner of any interest in real property to bring an action to quiet his title against any one claiming adversely to him. He is not required to join the owner of any other interest.—*McCleary v. Broddus*, 14 Cal. App. 60, 111 Pac. 125.

25. Same—Section authorizes court to define interests of both parties.—This section authorizes an action "for purpose of determining" any adverse claim that may be asserted thereon by defendant to land in controversy, and this does not mean that court has simply to ascertain as against plaintiff, shown to have legal interest, whether or not such defendant has some interest, but also that court shall declare and define interest held by defendant, if any, so that plaintiff may have decree finally adjudicating extent of his own interest in property in controversy claimed.—*Peterson v. Gibbs*, 147 Cal. 1, 5, 81 Pac. 121, 123.

26. Same—Title paramount entitles plaintiff to decree.—Where, if allegations of complaint in action under this section are true, plaintiff's title is paramount to that of any defendant claiming lien by mortgage, she is entitled, in such action, to have her right determined, and especially where deed obtained from her, under which defendant claims title, was procured by fraud and without consideration.—*De Leonis v. Hammel*, 1 Cal. App. 390, 394, 82 Pac. 349, 351.

27. Contract—Action not designed to obtain judicial construction of.—This action was not designed to enable one who had executory contract for purchase of land to obtain judicial construction of his contract, nor ought it to be construed as enabling

such person to call in those claiming adversely to his vendor, and compel them to try their claim of title, when judgment, if in favor of adverse title, will not bind vendor.—*Cooper v. Birch*, 137 Cal. 472, 473, 70 Pac. 291.

28. Costs—Are controlled by section 1022, post, in action to quiet title, and where plaintiff recovers judgment to part of property sued for he is entitled to costs as of course, although defendant be adjudged owner of remaining portion of property.—*Sierra Union W. & M. Co. v. Wolff*, 144 Cal. 430, 433, 77 Pac. 1038.

As to costs where allowed to plaintiff as of course, see, post, §§ 1022 et seq. and notes.

As to lien of tax as cloud on title, see note 22 L. R. A. 699.

29. Decree hereunder—More affirmative of legal rights than mere judgment for possession.—A decree, in suit under this section, that defendant has no right, title, or interest in certain land, would seem to be more affirmative, as final adjudication with respect to legal rights of parties, than would be mere judgment for recovery of possession. The law to some extent leaves open to be proved by evidence dehors record what rights might have been asserted in action of ejectment.—*People ex rel. Love v. Center*, 66 Cal. 551, 562, 5 Pac. 263, 6 Pac. 481.

30. Deed for convenience—Does not make grantee trustee.—Where plaintiff, upon purchasing land, had conveyance made, as mere matter of convenience, to defendant, who then conveyed to plaintiff, and, some time afterwards, such deed was, without being recorded, delivered back to defendant, who then, probably with consent of plaintiff, destroyed it, record title appearing at commencement of suit in defendant, latter was not constituted as trustee, and plaintiff was entitled to recover in action to quiet title against defendant.—*Weygant v. Bartlett*, 102 Cal. 224, 225, 36 Pac. 417.

31. Difference between action—Under Practice Act and code.—Now, as formerly, in an action under this section, defendant may assert legal estate or an equity which he may claim to have in force, difference being that, while under former statute, possession of plaintiff was evidence prima facie that he was seized in fee, now plaintiff out of possession, as against defendant in possession, may prove in himself legal, paramount title, which entitles him to possession.—*People ex rel. Love v. Center*, 66 Cal. 551, 556, 5 Pac. 263, 6 Pac. 481.

32. Distinction—Between old suit in chancery and suits hereunder.—Distinction between suits to determine adverse claims under old chancery practice and provisions of this section is clear. They are different not merely in form (for we have no forms of action in common-law sense), but in purpose. In former case proceeding is aimed at particular instrument or piece of evi-

dence which is dangerous to plaintiff's rights and which may be ordered to be destroyed in whosoever's hands it may happen to be. In latter, proceeding is for purpose of stopping mouth of person who has asserted or is asserting claim to plaintiff's property, whether such claim is founded upon evidence or utterly baseless.—*Castro v. Barry*, 79 Cal. 443, 446, 21 Pac. 946; *Dranga v. Rowe*, 127 Cal. 506, 509, 59 Pac. 944.

33. An action under this section to determine adverse claim is an improvement upon old bill of peace. Statute enlarges class of cases in which equitable relief could formerly be sought in quieting title. It is not necessary, as formerly, that plaintiff should first establish his right by action at law; nor is it necessary that adverse claim should be of any particular character.—*Castro v. Barry*, 79 Cal. 443, 446, 21 Pac. 946.

34. Disturbance in possession—Not necessary.—Under this section it is unnecessary for plaintiff to delay seeking equitable interposition of court until he has been disturbed in his possession by institution of suit against him and until judgment in suit has been passed in his favor. He could immediately, under this section, upon knowledge of assertion of claim, require nature and character of adverse estate or interest to be produced, exposed, and judicially determined, and question of title be thus forever quieted.—*Curtis v. Sutter*, 15 Cal. 259, 262; *Donahue v. Meister*, 88 Cal. 121, 125, 25 Pac. 1096.

35. Same—Formerly action by claimant to real estate to remove claim by defendant, who also claimed that plaintiff had wrongfully and unlawfully entered on such premises and ousted defendant therefrom, could not have been maintained at all; plaintiff would have been compelled to wait until defendant chose to disturb his possession by an action. The code enables one in his position to commence legal contest; but when he thus brings defendant into court, he must be prepared to meet any pertinent issues which latter may tender, and to try them in way in which defendant has right under constitution to have them tried.—*Donahue v. Meister*, 88 Cal. 121, 124, 25 Pac. 1096.

36. Same—Under this statute it is unnecessary for plaintiff to delay seeking equitable interposition of court, until he has been disturbed in his possession by institution of suit against him, and until judgment in such suit has passed in his favor.—*Curtis v. Sutter*, 15 Cal. 259, 263.

37. Easement, claim to—Is adverse claim to real estate.—Where title to land becomes vested in party in possession, either by prescription or otherwise, all adverse claims to easements must, from nature of case, cease; for one can not have an adverse claim against one's self. But this reason does not apply to case before user, and hence, unless there is merger, if intention to appropriate land to use be shown, claim to land will include claim to use part of it,

and this, as part of general claim, will be adverse to owner.—*Cavanaugh v. Wholey*, 143 Cal. 164, 168, 76 Pac. 979.

38. Equitable interest.—Can not support claim against legal title.—In action under this section, plaintiff can not have judgment in direct contradiction to material allegations of his complaint; if any cause of action can be brought to determine adverse claim upon equitable interest, which is doubted it can not be brought against holder of legal title.—*Von Drachenfels v. Doolittle*, 77 Cal. 295, 296, 19 Pac. 518; *Chase v. Cameron*, 133 Cal. 231, 65 Pac. 460; *De Leonis v. Hammel*, 1 Cal. App. 390, 394, 82 Pac. 349.

See pars. 19, 149, 159, this note.

39. Equitable title.—As against legal title—Must be specifically alleged.—For defendant to avail himself, in action to quiet title, of an equitable title as against legal title of plaintiff, it should be specifically pleaded, but otherwise he is not "called upon" to do more than to negative plaintiff's cause of action.—*United States L. Assoc. v. Pacific Imp. Co.*, 139 Cal. 370, 378, 69 Pac. 1064, 72 Pac. 988.

40. Equities — Only, involved.—Where both parties assert merely equities in the land, an action under this section may be maintained to determine which party has the superior equity.—*Buchner v. Malloy*, 155 Cal. 253, 255, 100 Pac. 687.

41. Contract for sale of real estate which for any reason is incapable of specific enforcement can not form the basis of a valid claim to an interest therein, and where such claim is asserted the owner of the real estate is entitled to a decree quieting his title thereto.—*Jolliffe v. Steele*, 9 Cal. App. 212, 215, 98 Pac. 544.

42. The owner of any estate or interest in land of which the law takes cognizance is entitled under this section to have the claim adverse to his interest, such as it is, determined.—*German Am. Sav. Bank v. Gollmer*, 155 Cal. 681, 687, 102 Pac. 932.

43. Same.—Superiority of, asserted hereunder.—There are cases in this state holding that possessor of an equitable title can not bring action to quiet such title against holder of legal title, and this is general doctrine; but there is no reason why this section does not vest in holder of an equitable title right to come before court and have his equities declared superior to any and all opposing equities. If there are adverse and antagonistic equities, there is no sound policy which would deny claimants thereunder and adjudication by virtue of provisions of this section of code.—*Tuffree v. Polhemus*, 108 Cal. 672, 676, 41 Pac. 806.

44. Equity—Rule of, applicable.—The rule that he who seeks equity must do equity is applicable to an action to determine adverse claims under this section, to the same extent as in suits of the character formerly cognizable in equity to remove a cloud or

cancel an instrument.—*Holland v. Hotchkiss*, 162 Cal. 366, 370, 123 Pac. 258.

45. Errors at trial.—If minor, not noticed.—In action under this section, minor errors in rulings of court, and admission or rejection of evidence when whole case is before court, not to be noticed.—*Smith v. Brannan*, 13 Cal. 107, 116.

As to trial generally, see Part V, this note.

46. Estate for years.—May be subject to action under this section.—*German Am. Sav. Bank v. Gollmer*, 155 Cal. 681, 687, 102 Pac. 932.

47. Every description of depreciating claim determined.—Adverse claim to estate, or interest, which has no just foundation in law or equity, is cloud upon title and impairs market value of property and obstructs its alienation, and is basis of suits brought by one of defendants against plaintiff and against his tenants, and title may be quieted in such action under this section.—*Brooks v. Calderwood*, 34 Cal. 563, 565.

48. Statute giving this right of action to party in possession does not confine remedy to case of adverse claimant setting up legal title, or even equitable title, but act intended to embrace every description of claim whereby plaintiff might be deprived of property, or its title clouded, or its value depreciated, or whereby plaintiff might be incommoded or damaged by assertion of outstanding title already held or to grow out of adverse condition.—*Head v. Fordyce*, 17 Cal. 149, 151; *Joyce v. McAvoy*, 31 Cal. 273, 287, 89 Am. Dec. 172.

49. Party has right to be quieted in his title whenever any claim is made to real estate of which he is in possession, effect of which claim might be litigation, or loss to him of property.—*Head v. Fordyce*, 17 Cal. 149, 151; *Horn v. Jones*, 28 Cal. 194, 202.

50. Plaintiff has right of action against defendants who pretended and gave out in speeches that he (plaintiff) has no valid title to land and that legal title is in themselves, and that they are entitled to possession thereof, and that thereby they have cast cloud upon his title and caused many persons to believe it to be worthless and thereby greatly impaired its market value.—*Ayres v. Bensley*, 32 Cal. 620, 628.

51. This section allows action to be brought by any person against another who claims estate or interest adverse to him. Its language is very broad. If plaintiff is out and defendant is in possession, nevertheless action can be maintained; so, also, if plaintiff and defendant each claims to be owner in fee. In last case question who has better right may be tried in action in form usually called (for want of better name) "ejectment," but it may be also tried in action under this section.—*People ex rel. Love v. Center*, 66 Cal. 551, 562, 5 Pac. 263, 6 Pac. 481.

52. Imperfect title — Derelict from grantor.—Not strengthened by title founded

on tax-sale.—Plaintiff can prevail in action to quiet title only on strength of her own title, and since she derails by conveyance from grantor, who has previously made deed of grant to third party, and not through such third party at all, it is obvious that her claims against plaintiff derive no support from title of first grantor founded on tax-sale, whether that sale was valid or invalid.—*McGrath v. Wallace*, 116 Cal. 548, 551; 48 Pac. 719.

53. Injunction, prayer for — Does not change character of action.—Where plaintiff averred ownership and right of possession in certain mining claim, and that defendants were in possession wrongfully, and unlawfully withheld same and were taking large quantities of ore therefrom, and prayed for injunction and for decree for restitution of lands and mining claim, fact that complaint asks for injunction does not make action one of equitable nature, and action is one of law, and in form one of ejectment.—*Haggin v. Kelly*, 136 Cal. 481, 482, 69 Pac. 140.

54. Instalment-contract for purchase of real property.—Forfeiture under time clause.—An action to quiet title to real property and to declare forfeit the rights of the purchaser under such a contract by reason of failure to make the payments within the time fixed by the contract, held to be an action to determine adverse claims under the provisions of this section.—*McDonald v. Kingsbury*, 16 Cal. App. 248, 116 Pac. 380.

55. Issues, whether legal or equitable.—Need not appear till after answer.—Until answer comes in, in action under this section, setting forth defendant's claim, it need not appear that issues to be tried will be legal, as distinguished from equitable issues. A proceeding by which he may compel another to expose, and have adjudicated, nature of interest on which he is asserting an adverse claim against estate of former, is one to be conducted in court of equity, and discovery of nature of adverse claim precedes this adjudication.—*People ex rel. Love v. Center*, 66 Cal. 551, 562, 5 Pac. 263, 6 Pac. 481; *Hyde v. Redding*, 74 Cal. 493, 498, 16 Pac. 380.

56. Judgment.—A muniment of title of successor to plaintiff.—In action to quiet title, and judgment in favor of plaintiff, although nominally in his favor, becomes muniment of title to successor in interest, and his consent or knowledge or authority is not necessary to justify entry of judgment in his favor by clerk.—*Baker v. Brickell*, 102 Cal. 620, 623, 36 Pac. 950.

57. Same.—Execution and sale show title.—Where plaintiff, in seeking to quiet title, claims under execution-sale based upon judgment against judgment-debtor, in such case it was necessary for plaintiff, in making out prima facie right, to recover as against defendant, only to show judgment of court of competent jurisdiction, execution thereon and sale thereunder and trans-

mission of title to plaintiff. — *Reilly v. Wright*, 117 Cal. 77, 79, 48 Pac. 970.

58. Same — Same — But against stranger must be supplemented by proof of title in him.—In action to quiet title as against judgment-debtor, production of judgment, execution, and sheriff's deed is prima facie evidence of plaintiff's right to recover; but if action is against stranger to judgment, plaintiff must also show that judgment-debtor had title or possession at date of lien or sale.—*Reilly v. Wright*, 117 Cal. 77, 80, 48 Pac. 970.

59. Jurisdiction.—Whether action is at law or in equity.—In superior court.—Whether, when brought under code, action be called action at law, in which statute authorizes judgment determining estate or interest claimed by defendant, or be called suit in equity to quiet plaintiff's title against adverse claim, superior court has jurisdiction. If it be considered action at law, defendant may demand jury.—*People ex rel. Love v. Center*, 66 Cal. 551, 563, 5 Pac. 263, 6 Pac. 481.

60. Knowledge of assertion of claim by party out of possession.—It is sufficient under this section if, while plaintiff is in possession of property, party out of possession claim estate or interest adverse to him. He can immediately, upon knowledge of assertion of such claim, require nature and character of adverse estate or interest to be produced, exposed, and judicially determined, and question of title be thus forever quieted.—*Curtis v. Sutter*, 15 Cal. 259, 263.

61. Under section 254 of Practice Act, owner in possession, upon knowledge of assertion of adverse claim, could require nature and character of adverse estate or interest "to be produced, exposed, and judicially determined."—*People ex rel. Love v. Center*, 66 Cal. 551, 555, 5 Pac. 263, 6 Pac. 481.

62. Laches.—Plaintiff in continuous possession not guilty of.—Where plaintiff has been in possession of land, he can not be guilty of laches in beginning of suit to remove cloud at any time before action has been brought to disturb his possession, or to deprive him of any enjoyment of his right. The continued assertion of adverse claim constitutes, from day to day, new cause of action.—*Hyde v. Redding*, 74 Cal. 493, 500, 16 Pac. 380.

63. Legal, distinguished from equitable, title to be shown.—In action to quiet title to real property, plaintiff must establish legal, as distinguished from merely equitable, title.—*Fudickar v. East Riverside I. Dist.*, 109 Cal. 29, 38, 41 Pac. 1024.

64. Legal rights.—Determined in suit in equity.—It does not follow from fact that suit is brought in equity that determination of questions purely of legal character in relation to title will necessarily be withdrawn from ordinary cognizance of court of law. The court sitting in equity may direct, whenever in its judgment it may become

proper, issue to be framed upon pleadings and submitted to jury, under provisions of this section.—*Curtis v. Sutter*, 15 Cal. 259, 262; *Donahue v. Meister*, 88 Cal. 121, 126, 25 Pac. 1096.

65. *Same*—There is no difficulty in so conducting suit under this section as to fully protect legal rights of parties, and at same time to secure beneficial results afforded by court of equity in bills of peace, which mean repose from further litigation.—*Curtis v. Sutter*, 15 Cal. 259, 262; *People ex rel. Love v. Center*, 66 Cal. 551, 555, 5 Pac. 263, 6 Pac. 481; *Donahue v. Meister*, 88 Cal. 121, 126, 25 Pac. 1096.

66. *Limitation of action—State a party.*—Under section 315, ante, an action by the state to quiet title to lands may be brought at any time within ten years after clause of action accrues.—*People v. Banning Co.*, 167 Cal. 643, 140 Pac. 587.

67. The running of the statute of limitations does not depend upon the presumption of the existence of any grant, but it operates upon the state with respect to any property not dedicated to public use, as soon as adverse possession thereof begins.—*People v. Banning Co.*, 167 Cal. 643, 140 Pac. 587.

68. An action by the state to quiet title to swamp lands is barred by the provisions of section 315, ante, where they have been held in actual adverse possession for more than ten years by a claimant under a state patent.—*People v. Banning Co.*, 167 Cal. 643, 140 Pac. 587.

69. An action by the state to quiet title to swamp and overflowed lands which have been held in actual adverse possession against it for more than ten years, is barred by the statute of limitations.—*People v. Banning Co.*, 167 Cal. 643, 140 Pac. 587.

70. *Mineral lands—Adverse title to, hereunder.*—An action may be brought under this section for purpose of determining adverse title claimed by defendants to mineral lands, veins, lodes, and ledges described in complaint, of which plaintiff claimed to be owner.—*Bulwer Consol. Min. Co. v. Standard Consol. Min. Co.*, 83 Cal. 613, 614, 23 Pac. 1109.

71. *Same—Governed by practice in state courts, not by rules in United States land-office.*—Action to quiet title is not contest in United States land-office, and is to be governed and determined by practice and rules of pleading governing in state courts in ordinary suits brought to settle disputes as to interest in land. Want of title in plaintiff will render it unnecessary to examine title of defendant.—*Schroder v. Aden G. Min. Co.*, 144 Cal. 628, 630, 78 Pac. 20.

72. *Mining claims—Action to quiet title to is not under section 2326 federal statutes.*—Action to quiet title to mining property is not action brought under section 2326 (6 Fed Stats. Ann., 2d ed., p. 563), of

revised statutes of United States to determine which of parties is best entitled to purchase from United States but only ordinary action to quiet title. Proceedings in land-office of United States are utterly immaterial here, unless they tend to show title or right of possession in one of the parties.—*Altoona Q. Min. Co. v. Integral Q. Min. Co.*, 114 Cal. 100, 101, 45 Pac. 1047.

73. *Same—Jurisdiction of actions to determine adverse claim to, depends upon state constitution.*—Under state laws each party to mining claim may bring action to determine adverse claim, but jurisdiction and procedure governing action depend entirely upon our state constitution and laws. This action seems well adapted to object sought to be accomplished by congressional law, for rights of parties are wholly determined by act of congress, and involve same questions as to relative rights of parties which officers of land-office would otherwise have been required to pass upon.—*Altoona Q. Min. Co. v. Integral Q. Min. Co.*, 114 Cal. 100, 102, 45 Pac. 1047.

74. *Same—State statute of limitations of five years controls.*—Laws of state constitute part of laws by which mining right is determined. It must therefore follow that, where possession has continued for five years before adverse right exists, it is equivalent to allowable one under laws of congress.—*Altoona Q. Min. Co. v. Integral Q. Min. Co.*, 114 Cal. 100, 105, 45 Pac. 1047.

75. *Same—Rights to, dependent on laws of United States, but suit regardless of United States land-office.*—Rights of parties to mining claim will be entirely determined by laws of United States granting right to enter upon mineral lands and to extract metals therefrom, and to acquire title thereto, but suit must be tried in every respect as if no contest was pending in land-office of United States in regard to right to purchase same.—*Altoona Q. Min. Co. v. Integral Q. Min. Co.*, 114 Cal. 100, 103, 45 Pac. 1047.

As to inclosure of mining claims, see, ante, § 325 and note.

76. *Misjoinder of causes of action.*—Three causes of action, to wit: action annulling and setting aside fraudulent conveyance from one of defendants, action under this section to determine adverse claims to real property, and action of ejectment to recover possession of said land, with rents and profits thereof, can not be united and joined in one statement without being separately set forth, as distinct causes of action.—*Pfister v. Dascey*, 65 Cal. 403, 404, 4 Pac. 393.

77. *Same—A cause of action to acquire title to lands can not be united with cause of action against a surviving trustee to compel conveyance, and demurrer for misjoinder of actions in such case should be sustained.*—*Reynolds v. Lincoln*, 71 Cal. 183, 186, 7 Pac. 176, 12 Pac. 449.

See, post, Parts II, III, this note.

78. Mortgagee, claim of.—Not disposed of in action hereunder.—Where plaintiff has brought action to quiet title against defendant, claiming that he holds simply a mortgage as security for money due, court can not decree that, upon failure of plaintiff to pay amount remaining unpaid on mortgage, all his right and title to mortgaged premises shall cease and determine, and title of defendant thereto shall be good and valid, and plaintiff shall be barred from asserting any claim, interest, or title, unto said premises. The proper judgment would be that, upon failure of plaintiff to pay said amount within time specified by court, action should be dismissed.—*Boyce v. Fisk*, 110 Cal. 107, 116, 42 Pac. 473.

79. Same —Although plaintiff can not have his title quieted, where he has land subject to his own mortgage, while money for which mortgage was given remains unpaid, still defendant can have no affirmative remedy for his debt barred by statute.—*Boyce v. Fisk*, 110 Cal. 107, 116, 42 Pac. 473.

80. Navigable waters —Grant of soil under, gives no right to obstruct.—It is undoubtedly true that grant of soil under navigable waters carries with it no right to obstruct navigation and that state may enjoin its grantees or their successors from erecting or maintaining structures which will impair or interfere with exercise of public right, if interference is of character that constitutes it public nuisance, and where each of several defendants seems to act independently of others in erecting and maintaining separate structures, which are alleged to obstruct navigation of bay and estuary, each may be liable in separate action by attorney-general to quiet title of state thereto.—*People v. Oakland W. F. Co.*, 118 Cal. 234, 248, 50 Pac. 305.

81. Object of these sections is to enable plaintiff to dispel whatever may be regarded by third persons, as well as by defendant, as cloud upon his title, for even though defendant makes no adverse claim, third persons may regard plaintiff's title as being subject to an adverse claim of defendant, which would be cloud upon plaintiff's title, depreciating its value, and which he would be entitled to have removed by decree of court, so that his record title may appear perfect to all persons whom it may thereafter concern.—*Bulwer Consol. Min. Co. v. Standard Consol. Min. Co.*, 83 Cal. 589, 609, 23 Pac. 1102.

82. Ownership in plaintiffs—And lack of title or equity in defendants determined.—Plaintiffs entitled to possession of premises may bring an action against defendants to obtain judgment that plaintiffs are legally owners of certain lands, that defendants have no legal estate, nor any equities such as would entitle them to retain possession as against title of estate: and that they have no equities which would justify decree in their favor as against legal owner in possession.—*People ex rel. Love v. Center*, 66 Cal. 551, 559, 5 Pac. 263, 6 Pac. 481.

83. Partition, right to —Justifies action hereunder.—If action for partition will lie in given case, then action by holder of equitable title against parties claiming adverse equities should be recognized and countenanced under this section of code.—*Tuffree v. Polhemus*, 108 Cal. 670, 677, 41 Pac. 806.

84. Personal property —Not subject of action to quiet title.—If property described in complaint in action to quiet title be not real property, action can not be maintained, for no action will lie in this state merely to quiet title to personal property.—*Fudickar v. East Riverside Irr. Dist.*, 109 Cal. 29, 36, 41 Pac. 1024.

As to action to determine adverse claims to personality, see, post, § 1050 and note.

85. Pipe-line and water-right—Claims to, real property.—A claim by plaintiff in action to quiet title to certain water-right, and pipe-line and canal used in carrying of same, is claim to real property, and such claim may be maintained.—*Fudickar v. East Riverside Irr. Dist.*, 109 Cal. 29, 36, 41 Pac. 1024.

86. Plaintiff's title must be superior.—In suit to quiet title, plaintiff must obtain judgment upon strength of his own title, and if it be shown that he has no title, it becomes immaterial to inquire into defendant's rights.—*Schroder v. Aden Gold Min. Co.*, 144 Cal. 628, 630, 78 Pac. 20.

87. In an action to quiet title the plaintiff must rely exclusively on the strength of his own title, not on the weakness of that of his adversary.—*Klumpke v. Henley*, 24 Cal. App. 35, sub nom. *Klumpke v. Moreno*, 140 Pac. 313.

88. Possession in plaintiff—Not now required in order to maintain action to quiet title.—*People ex rel. Love v. Center*, 66 Cal. 551, 555, 5 Pac. 263, 6 Pac. 481; *Brusie v. Gates*, 80 Cal. 462, 465, 22 Pac. 284; *Landreagan v. Peppin*, 94 Cal. 465, 466, 29 Pac. 771; *Casey v. Leggett*, 125 Cal. 672, 58 Pac. 264; *Reiner v. Schroeder*, 146 Cal. 411, 416, 80 Pac. 517; *More v. Steinbach*, 127 U. S. 70, 84, 32 L. ed. 51, 56, 8 Sup. Ct. Rep. 1067.

89. Same—Was essential under Practice Act.—Possession by plaintiff at time of commencement of action was essential under section 254 of Practice Act.—*Rico v. Spence*, 21 Cal. 504, 510; *Lyle v. Rollins*, 25 Cal. 437, 440; *Ferris v. Irving*, 28 Cal. 645, 647; *Sepulveda v. Sepulveda*, 39 Cal. 13, 18.

As to occupation, unless adverse, deemed to be under legal title, see, ante, § 321 and note.

As to possession of part, whether possession of whole, see, ante, §§ 322, 323 and notes.

As to presumption of possession by one holding legal title, see, ante, § 321 and note.

As to right of possession not affected by descent cast, see, ante, § 327 and note.

As to when possession will be presumed, see, ante, § 321 and note.

90. Publication of summons—May be made in action to quiet title, and judgment against nonresident based thereon is not void although he does not appear, as judgment, so far as it settles title, is in nature of one in rem.—*Perkins v. Wakeham*, 86 Cal. 580, 581, 583, 21 Am. St. Rep. 67, 25 Pac. 51.

As to publication of summons generally, see, ante, §§ 412 et seq. and notes.

91. Record-title against possessory-title—A cloud upon title.—Adverse possession ripened into title, with paper title in defendant which has ceased to have vitality, and was incapable of affording the basis of any rights or claim as against plaintiff, recognized in law or equity, but which was nevertheless of record, while evidence of plaintiff rests in part in parol, constitutes cloud upon plaintiff's title, and tends to depreciate its value, and plaintiff is at all times liable to be called upon to litigate it. Such facts present proper case for determining adverse claim of defendant, and for removing cloud under statute.—*Arrington v. Liscom*, 34 Cal. 365, 388, 94 Am. Dec. 722.

As to cloud on title, see pars. 10-16, this note.

92. Relief in equity—Enlarged by this section.—This statute enlarges class of cases in which equitable relief could formerly be sought in quieting title. It authorizes interposition of equity in cases where previously bills of peace would not lie.—*Curtis v. Sutter*, 15 Cal. 259, 262.

93. Right to purchase—May possibly be quieted as against trespass.—The provisions of this section have been held to be broad enough to include equitable title to real property, and it may be that right to purchase, under act of 1887, may, under some circumstances, be quieted as against unlawful trespass. Question is, whether plaintiff has established right under allegation of ownership, such as would entitle it to relief asked.—*San Jose L. & W. Co. v. San Jose R. Co.*, 129 Cal. 673, 677, 62 Pac. 269, affirmed 189 U. S. 177, 47 L. ed. 765, 23 Sup. Ct. Rep. 487.

94. Separate property of spouses—In action for divorce.—Title to same, when put in issue in such an action, may be determined by the court as fully as in any other action more directly involving such title, and when so determined becomes res adjudicata in all future actions relating thereto. *Allen v. Allen*, 159 Cal. 201, 113 Pac. 160.

95. State tide-land commissioners—Can grant no title to land above shore-line at ordinary high tide.—Plaintiff can not bring action to quiet adverse title to land, where plaintiff derails his title under deed of state tide-land commissioners, state not having any title to land at that time boundary of which was not below shore-line of Mission Bay at ordinary high tide, but was within limits of pueblo of city of San Francisco.—*United States L. Assoc. v. Pacific Imp. Co.*, 139 Cal. 370, 376, 69 Pac. 1064, 72 Pac. 988.

96. State's title to lands—Determined hereunder.—Under this section action may be brought by people of state, not only to annul patent, but for decree that plaintiffs, out of possession, are legal owners entitled to possession, and that defendants have acquired no rights under act of legislature. That question is to be determined upon evidence that defendants or their predecessors did, or did not, reclaim lands, or at least that governor and attorney-general had so certified, as required by acts of legislature (Stats. 1877-8, p. 358).—*People ex rel. Love v. Center*, 66 Cal. 551, 566, 5 Pac. 263, 6 Pac. 481.

97. Statute of limitations—Bar to action.—Plea of statute of limitations may be interposed in action in equity as well as one in law, and this without changing character of action; indeed, "one of defenses peculiar to court of equity is lapse of time."—*Hancock v. Plummer*, 66 Cal. 337, 338, 5 Pac. 514.

98. Same—Action barred by five-year limitation.—In action to correct mistake in conveyance, to compel defendant to execute deed conveying to plaintiff land, executed by mistake in former conveyances, and to quiet plaintiff's title thereto, action is not barred except by five-year limitation statute.—*Murphy v. Crowley*, 140 Cal. 141, 146, 73 Pac. 820.

99. Same—Does not run while action pending.—Statute of limitations as between parties to action of partition does not run while such action is pending.—*Christy v. Spring Valley W. W.*, 97 Cal. 21, 28, 31 Pac. 1110.

100. Same—Rule to determine delay.—Where defendant asserts no equitable rights, and, whatever may be said as to form of action, it is simply to recover land, statute of limitations plainly furnishes rule by which to determine whether delay to assert right is fatal.—*Anzar v. Miller*, 90 Cal. 342, 346, 27 Pac. 299.

As to certain disabilities excluded from time to commence actions, see, ante, § 328 and note.

As to landlord and tenant, presumption as to tenant's possession, see, ante, § 326 and note.

As to occupation deemed under legal title, unless adverse, see, ante, § 321 and note.

As to persons under disabilities excluded from time to commence action, see, ante, § 328 and note.

As to seisin within five years, when necessary in action or defense arising out of title, see, ante, §§ 318, 319 and notes.

As to when state, people of, will not sue, see, ante, §§ 315, 316 and note.

101. Subsequent action upon judgment.—In action to determine adverse claim.—One claiming title to mining ground may bring action, under this section to quiet title, against defendant denying his title, and claiming title thereto by former judgment of court, in which said action has

been brought, said former action being of same nature as this, to determine adverse claim of defendants to property mentioned and described in complaint.—*Russell v. Brosseau*, 65 Cal. 605, 606, 4 Pac. 643.

102. Terms of section broad—Include all adverse claims.—This section is very broad in its terms and includes all adverse claims, from claim of title in fee to smallest leasehold, and unquestionably it is duty of defendant to set out his case, whatever it may be, when called upon under this section of code. If he has an adverse claim, which will support issue at law upon which he desires jury trial, it is his duty to set out that claim, make that issue, and demand jury trial.—*Landregan v. Peppin*, 94 Cal. 465, 467, 29 Pac. 771.

103. Time to commence action—Limited only by continuous adverse possession.—Time to commence action under this section is limited only by continuous adverse possession of lands for ten years on part of defendant. Mere assertion of adverse claim, without possession, or any proceedings to enforce it, can never ripen into legal or equitable right as against one seized of legal estate, when adverse claim was first asserted. Each day's assertion of adverse claim gives cause to "quiet title" until such action has been brought.—*People ex rel. Love v. Center*, 66 Cal. 551, 565, 5 Pac. 263, 6 Pac. 481.

104. Trust, title in—Will not sustain action hereunder.—Where the legal title was conveyed to the wife, and the purchase money was paid from the community property (the husband's earnings after marriage), and wife took title in her name without his knowledge or consent, and held it adversely to him, she took and held it in trust for marriage community. Trust resulted from fact that purchase money was community property. Having at least legal title, she could convey to defendants, and, if plaintiff is entitled to any relief against them, it can be only adjudicated that they hold legal title in trust for benefit of community, but such right is not appropriate to action merely to quiet title under this section.—*Shanahan v. Crampton*, 92 Cal. 9, 13, 28 Pac. 50.

105. Plaintiff, surviving husband, who, with his wife, had agreed that all property then standing in name of either of them was community property, including land mentioned in complaint, which land was covered by mortgage held by plaintiff and his wife, at time of death of latter, as security for promissory note payable to them jointly, and plaintiff and one McKinlay, special administrator of wife's estate, obtained judgment and decree in action for foreclosure of mortgage, and defendant became nominal purchaser at sale, and thereafter became administrator as successor to McKinlay,—since defendant, Kingery, administrator, held individually, legal title in trust, plaintiff could not maintain action

against him in any event.—*Yoakam v. Kingery*, 126 Cal. 30, 32, 58 Pac. 324.

106. Same—Conveyance of legal title can not be enforced by action under this section, where same is held in trust for plaintiff by defendant.—*Harrigan v. Mowry*, 84 Cal. 456, 467, 22 Pac. 658, 24 Pac. 48. See *Frost v. Spitley*, 121 U. S. 552, 30 L. ed. 1010, 7 Sup. Ct. Rep. 1129.

107. User, claim to right of—An adverse claim to real estate.—If one in adverse possession of land of another should construct reservoir on land occupied, with canal or pipe-line laid therefrom to his lands, in vicinity, and should, during long period, habitually use it for that purpose, and more especially if it could be put to no other use, this would clearly indicate his intention to permanently use site of reservoir and canal exclusively for that purpose, and, under maxim *omne majus continet in se minus*, claim thus to use it would be necessarily involved in general adverse claim to land.—*Cavanaugh v. Wholey*, 143 Cal. 164, 168, 76 Pac. 979.

108. Same—As distinct from right of possession, determined hereunder.—Where in action to quiet title, precise question to be considered is whether there can be claim of right adverse to owner by one in possession,—this question can not be otherwise answered than in affirmative; for not only may there be claim of such right distinct from claim to possession, but where there is no such antecedent claim, and user of way is such as to show intention permanently to devote land to use, adverse claim to land will necessarily include claim to use land for particular use indicated, and will thus constitute adverse claim to right of way used.—*Cavanaugh v. Wholey*, 143 Cal. 164, 168, 76 Pac. 979.

As to venue of action to quiet title, see, ante, § 392 and note.

109. Void certificate of tax-collector—A cloud upon title.—Where certificate of sale issued by tax-collector was void, because land was sold for sum greater by one dollar than was authorized by law, upon supposition that deed itself, when executed, may not properly show purchaser's title to be void, and no actual cloud rested on plaintiff's title, an action to cancel certificate under this section is proper one.—*Axtell v. Gerlach*, 87 Cal. 483, 8 Pac. 34; *Ormsby v. Ottman*, 29 C. C. A. 295, 85 Fed. 492, 498.

As to cloud on title, see pars. 10-16, this note.

110. Void proceedings—Not support to cloud upon title.—Where adverse claim of defendant rests upon proceedings which are void upon their face, this objection is not available in action to determine an adverse claim under this section. Such an action may be maintained against person who claimed under void tax-deed; judgment in such action that defendants have no right, title, or interest in or lien upon land in question, is equivalent to judgment can-

celing all papers and proceedings upon which defendant's claim is founded and has same effect. Defendants having no right, title, or interest in or lien upon lands in question, are not injured by this part of judgment, which purports to cancel assessments and certificates of sale upon which their adverse claim was founded.—*Kittle v. Bellegarde*, 86 Cal. 556, 564, 25 Pac. 556.

As to cloud on title, see pars. 10-16, this note.

111. Water-right—A claim to real estate and subject of action hereunder.—If, in action to quiet title, in allegations of complaint pleader denominates his claim as mere right of way, but on trial, language of conveyances, which are part of complaint, and which control as to description, shows that there is definite interest or estate in canal or pipe-line, that interest is corporeal estate, and not an easement or servitude at all, and to that estate water-right is appurtenant, and right to which may be determined under action in this section.—*Fudickar v. East Riverside Irr. Dist.*, 109 Cal. 29, 30, 37, 41 Pac. 1024.

See, also, pars. 37, 128-130, this note.

112. Same—Easement may be determined in action hereunder.—Action may be brought under this section to quiet title to claim of right of way for water-ditch, alleged to have existed as easement upon land, which had been obviously and permanently used by plaintiff, "whose estate" was "transferred, for benefit thereof, at time when transfer was agreed upon or completed."—*Riverside L. & Irr. Co. v. Jensen*, 73 Cal. 550, 554, 15 Pac. 131.

See par. 37, this note.

113. Same—Riparian rights of defendants, determined in action hereunder.—In action to quiet alleged title of plaintiff to use of water of certain stream in San Bernardino county, defendants alleging that they and their predecessors in interest were owners of body of land situate upon creek several miles above land of plaintiff, that they had right to use water as riparian proprietors and for irrigation, domestic use and watering of stock, by virtue of an appropriation and continuous adverse use thereunder, upon issues presented by pleadings, it was duty of court to determine and declare extent of right of defendants, as well as that of plaintiff.—*Southern Cal. Inv. Co. v. Wilshire*, 144 Cal. 68, 69, 77 Pac. 767.

114. Writ of possession—Issued when action in ejectment dismissed.—Where plaintiff began action in ejectment against defendant for recovery of premises upon same day that he began action to quiet title under this section, and latter action came to judgment first, and thereupon, by stipulation of parties, ejectment was dismissed, each party paying his own costs, judgment of dismissal, whatever its effect, could not be set up to defeat motion for writ of possession.—*Landregan v. Peppin*, 94 Cal. 465, 469, 29 Pac. 771.

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As to right of personal representative to maintain action to quiet title, see note Ann. Cas. 1913A. 996-999.

As to sufficiency of possession by agent or tenant to enable principal or landlord to maintain the action, see note 18 Ann. Cas. 860.

As to title sufficient to enable a person to maintain an action to quiet title, see *Kerr's Cyc. Civ. Code*, 2d ed., § 1006 and note.

115. Action under code—Brought by person out of possession.—This section of code is like section 254 of Practice Act, except that, since adoption of code, action may be brought by one out of possession.—*People v. Center*, 66 Cal. 551, 555, 5 Pac. 263, 6 Pac. 481; *Casey v. Leggett*, 125 Cal. 664, 672, 54 Pac. 264.

As to adverse parties, see, ante, §§ 322-325 and notes.

As to claimant out of possession, see pars. 136, 137, this note.

As to parties to action, see, ante, §§ 379 et seq. and notes.

As to tenant holding landlord's title, see, post, § 1926 subd. 4 and note.

116. Administrator—Action by, same as action by legal owner.—An action brought by administrator, to set aside deed of conveyance of land made to defendant by plaintiff's intestate few days before her death, to quiet title on ground that alleged deed was absolutely void, for want of capacity in grantor, and that, in fact, no such deed was made by him, case is but ordinary case of suit brought to quiet title by legal owner, and there can be no doubt of competency of administrator to maintain it.—*Collins v. O'Laverty*, 136 Cal. 31, 32, 68 Pac. 327.

117. Same—Difference between legal and equitable estates unimportant.—An executor or administrator may maintain action under this section, necessary in order to protect his possession or reduce to possession property of estate held by others. In application of this rule difference between legal and equitable estates is of no practical importance; they are both estates originating by law, held under law, and in that sense are legal estates.—*Collins v. O'Laverty*, 136 Cal. 32, 35, 68 Pac. 327.

118. Same—Same—Only one form of action.—In this state there is but one jurisdiction and one form of action of rights, legal and equitable, both classes being regarded as equally real or as equally unreal,—that is to say, on legal side of court, legal title is alone regarded; on equity side, equitable title only, legal title being regarded as non-existent except so far as may be necessary to effectuate equitable right; an action therefore could have been maintained by plaintiff's intestate in her lifetime, and it follows therefore that by express provision of this code, action to

quiet title may be now maintained by her administrator.—*Collins v. O'Lavery*, 136 Cal. 32, 35, 68 Pac. 327.

119. Same—Has right of action.—Administrator has interest in decedent's real estate, within meaning of this statute, and, if another is asserting claim adversely to such interest, he may maintain action under this section.—*Pennie v. Hildreth*, 81 Cal. 127, 130, 22 Pac. 398.

120. Same—Right of possession sole test.—Sole test of administrator's right to action to determine title to land is right of estate to possession of property. If right exists, then right of action exists; and it will make no difference if, in order to recover property to possession of which estate is entitled, it should become necessary to cancel voidable deed, or otherwise, according to equitable practice, to dispose of outstanding legal title.—*Collins v. O'Lavery*, 136 Cal. 32, 35, 68 Pac. 327.

121. Administrator's right to possession.—by law of this state, all property of deceased—real and personal—remains in possession of administrator until administration of estate is had, when decree of distribution is made by probate court, and suit under this section is properly brought in his name and is prosecuted for benefit of estate.—*Curtis v. Sutter*, 15 Cal. 259, 264.

122. Adverse possession—Title perfected by, sustains action.—Party in possession, whose right is perfected by adverse possession during period prescribed by statute of limitations, as well as others, is entitled to bring his action, under section 254 of Practice Act, to determine adverse claim, or remove cloud which would thenceforth diminish value of his property.—*Liebrand v. Otto*, 56 Cal. 242, 248.

123. Same—Against record-title.—There is no reason why party, who has been in adverse possession for period of time, which, under statute of limitations, vests him with title against all the world, may not bring his suit against party claiming under record-title, to have claim determined and adjudged null and void as against him.—*Arrington v. Liscom*, 34 Cal. 365, 370, 94 Am. Dec. 722; *Liebrand v. Otto*, 56 Cal. 242, 247.

124. Same—Beyond statute of limitations.—Party in possession, whose right is perfected by adverse possession during period prescribed by statute of limitations, as well as others, is entitled to bring his action, under section 254 of Practice Act, to determine adverse claim or remove cloud which would thenceforth diminish value of his property.—*Arrington v. Liscom*, 34 Cal. 365, 371, 94 Am. Dec. 722.

125. After-acquired title—Setting up by supplemental complaint.—In an action to quiet title, the plaintiff has no right to set up, by supplemental complaint, after-acquired title, if in fact he had no title at the commencement of the action.—*Rowley v. Davis*, 34 Cal. App. 184, 167 Pac. 162.

126. But a title subsequently acquired from a defendant and cross-defendant may be set up in answer to a cross-complaint, tendering new issues relating to the date of filing of the cross-complaint, and such after-acquired title is available as a defense to the cross-action.—*Rowley v. Davis*, 34 Cal. App. 184, 167 Pac. 162.

127. A recorded instrument containing a declaration that a deed of trust was in fact intended as a mortgage, executed by the grantor in the deed of trust, was insufficient to impart notice, where it failed sufficiently to identify the deed of trust or the land conveyed.—*Rowley v. Davis*, 34 Cal. App. 184, 167 Pac. 162.

128. Appropriator of water—Rights of.—The right of the appropriator of water, who has posted the notice required by section 1422 Civil Code, although not as yet a title, is an interest in realty, which may be protected under the provisions of this section by an action to determine the validity of conflicting claims adverse to his own.—*Inyo Consol. Water Co. v. Jess*, 161 Cal. 516, 521, 119 Pac. 934.

As to a water-right being a claim to real property subject to an action hereunder, see pars. 111, 168, this note.

129. A court of equity may entertain an action to quiet title to water not immediately available and may grant appropriate relief. — *Byington v. Sacramento Valley West Side Canal Co.*, 170 Cal. 124, 148 Pac. 791.

130. Same—Right to water—As "real property."—The right of a stockholder in a mutual water company (under § 324 of Civil Code), by virtue of his ownership of stock, to receive a specified quantity of water for certain land is real property, and conflicting claims arising thereunder may be made the subject of an action under this section.—*Stone v. Imperial Water Co.*, 173 Cal. 39, 159 Pac. 164.

131. Attorney-general—May bring action for state.—Without any statute expressly conferring power, attorney-general may file information in nature of bill of chancery to annul patent or matter involved in suit immediately concerning interest of state.—*People ex rel. Pixley v. Stratton*, 25 Cal. 242, 243.

132. Same—To determine adverse claims to real property owned by state and for other incidental relief, action may be brought by attorney-general in name and on behalf of people of state. Authority which attorney-general has to institute such proceedings is derived from constitution and laws of state which give him authority to institute action in any case in which rights and interests of people of state are directly involved without any new authority expressly conferred by law. — *People v. Oakland W. F. Co.*, 118 Cal. 234, 238, 50 Pac. 305.

133. Same—To land under waters of bay of San Francisco.—Action may be brought

by attorney-general in behalf of people of state to quiet title to bay of San Francisco and all its arms, including creek or estuary of San Antonio Creek, and state having right, title, power and authority in, to, and over same, absolutely and completely, subject only to right of United States to supervision over navigable waters of said bay and arms thereof, so far as may be necessary in exercising its right to regulate commerce with foreign nations and among the several states.—*People v. Oakland W. F. Co.*, 118 Cal. 234, 240, 50 Pac. 305.

134. Certificate of purchase from state—Justifies action hereunder.—One who has bought land of state, and has paid full price thereof, may maintain action to quiet title where state has subsequently made sale of same land. Holder of certificate of purchase from state, which was merely naked trustee of legal title, and is bound to convey it to equitable owner on demand, had no power to sell land to another. Vested right to patent from state for public land is equivalent to patent, so far as state is concerned, and plaintiff's title was sufficient to support action against defendants.—*Pioneer L. Co. v. Maddux*, 109 Cal. 633, 641, 50 Am. St. Rep. 67, 42 Pac. 295.

As to holder of certificate to purchase tide-lands, see par. 153, this note.

135. Same—Claim under, against certificate of sale in foreclosure.—Action under this section may be maintained by plaintiff claiming under two certificates of purchase from state of California for land, as against defendant claiming under certificates of purchase under judgment in action foreclosing and annulling interest of defendant in certain certificate of purchase.—*Hyde v. Redding*, 74 Cal. 493, 494, 16 Pac. 380.

136. Claimant not in possession.—An action to quiet title may be maintained by a claimant not in possession.—*Phillips v. Menotti*, 167 Cal. 328, 139 Pac. 796.

See, also, par. 115, this note.

137. Person out of possession may maintain action to determine adverse claim, estate, or interest in land under above section.—See *More v. Steinbach*, 127 U. S. 70, 84, 32 L. ed. 51, 56, 8 Sup. Ct. Rep. 1067.

138. Complaint hereunder—In case in equity.—A complaint under this section, having no averments inconsistent with scope thereof, as heretofore construed, presents, on its face, case for equitable remedy. It seeks to have something done which court of law cannot do; it invokes decree of equity, not mere judgment at law, which, in its nature alone, is only for recovery of possession of specific real or personal property, or for damages.—*Angus v. Craven*, 132 Cal. 691, 696, 64 Pac. 1091.

139. In action under this section, complaint is to be treated as bill in equity, and general verdict of jury, therefore, may be disregarded.—*Brandt v. Wheaton*, 52 Cal. 430, 433; *Hancock v. Plummer*, 66 Cal. 337.

338, 5 Pac. 514; *Reynolds v. Lincoln*, 71 Cal. 183, 186, 9 Pac. 176, 12 Pac. 449.

140. Same—Must state facts and not mere conclusion of law.—In action to quiet title to land, mere allegation "that plaintiff is owner of right to purchase of defendant, Birch, all following described real property situated," etc., was mere conclusion of law, not equivalent to allegation that plaintiff is owner,—which will be considered as averment of ultimate fact, or as conclusion of law, according to circumstances,—and renders complaint insufficient.—*Cooper v. Birch*, 137 Cal. 472, 70 Pac. 291.

141. Same—Nature of defendant's title may be stated in.—This section evidently contemplates that, whether plaintiff be owner in fee or not, if defendant claims interest adversely to his right or title, such as it is, he is entitled, in action of this character, to have adverse claim determined. In this view of statute there is no reason why plaintiff may not state in complaint nature of his right and title against which defendant asserts adverse claim.—*Stoddart v. Burge*, 53 Cal. 394, 399.

142. Same—Need not allege company a corporation, not claiming under it.—Complaint under this section that alleges that plaintiff is in possession and claims title in fee to described premises, and that defendants, and each of them, claim estate or interest adverse to him, is sufficient. It was not necessary to allege that *Mona Lake Hydraulic Mining Company* is a corporation. Plaintiff was not claiming any right under it as a corporation.—*Butterfield v. Graves*, 138 Cal. 155, 156, 71 Pac. 510.

143. Same—Need not allege nature of defendant's claim.—In action under this section, it is not necessary to allege, in complaint, nature of estate or interest claimed by defendant.—*People ex rel. Love v. Center*, 66 Cal. 551, 562, 5 Pac. 263, 6 Pac. 481; *Hyde v. Redding*, 74 Cal. 493, 498, 16 Pac. 380; *Stratton v. California L. & T. Co.*, 86 Cal. 353, 361, 24 Pac. 1065.

144. Same—Where equities shown in plaintiff, amended.—Where evidence tends strongly to suggest that, though legal title is in defendant, plaintiff is equitably entitled to conveyance from defendant as purchaser, with notice of plaintiff's equity, the ends of justice would be best subserved by permitting plaintiff, who has filed sufficient complaint, to amend, so as to avail herself of her equities.—*Pioneer L. Co. v. Maddux*, 109 Cal. 633, 641, 50 Am. St. Rep. 67, 42 Pac. 295.

145. Contract—Assignee under, may sue if contract not fulfilled.—Where the plaintiff brought an action to quiet title to tract of land, defendant had right to a cross-complaint asking for specific performance of certain contract, between plaintiff and third party, where the third party had not performed the conditions set forth in contract, in regard to setting out trees and caring for them, by which he was to be-

come entitled to conveyance of part of land, which contract had been assigned by said party to defendant, and recover judgment against plaintiff in this action to quiet title.—*Fleishman v. Woods*, 135 Cal. 256, 258, 67 Pac. 276.

146. **Same—Basis of claim, facts to be proved showing validity of.**—If, in purely equitable action, rights of plaintiff depend entirely on contract, plaintiff must show existence of facts upon which validity of contract depends, even though defendant is not corporation, but merely assignee, because plaintiff must come into court of equity with clean hands.—*Pioneer L. Co. v. Maddux*, 109 Cal. 633, 641, 50 Am. St. Rep. 67, 42 Pac. 295.

147. **Same—Purchase under, no action till payment.**—Under contract to sell real estate, under which defendant had paid part of purchase-money, and for which defendant holds only lien, plaintiff can not bring action, and ask court of equity to quiet his title as against defendant, without restoring money which he has received under contract.—*Benson v. Shotwell*, 87 Cal. 49, 53, 60, 25 Pac. 249; *Heney v. Pesoll*, 109 Cal. 53, 59, 41 Pac. 819.

148. **Effect of payment of taxes by another—Mistake, and not claim of title.**—The right to maintain an action to quiet title to a strip of land can not be defeated by the fact that another has paid the taxes for a number of years, not under a claim of title, but simply under a mistaken assessment.—*Vanderbilt v. All Persons*, 163 Cal. 507, 126 Pac. 158.

149. **Equitable title—Owner of can not maintain action against owner of legal title.**—Can not be maintained by the owner of an equitable title against the owner of the legal title.—*Robinson v. Muir*, 151 Cal. 124, 90 Pac. 521.

See pars. 9, 38, 159, this note.

150. **Estoppel—By acts of plaintiff.**—In action to quiet title in favor of plaintiff who was estopped from claiming title to land, having asserted in solemn judicial proceeding that title of property mortgaged was in estate of his deceased wife, and not in himself, and surplus money received by him he had applied to payment of mortgage-debt, valid lien upon land for which he as well as estate was liable, and to payment of funeral expenses and costs of administration which he had incurred, and having conveyed property to defendant, put him in possession.—*Ions v. Hardison*, 112 Cal. 260, 268, 44 Pac. 572.

151. **Same—For failure, with knowledge, to give notice.**—Where wife executed, but did not deliver, her deed to her husband, who thereafter obtained possession of deed without her knowledge or consent, and, upon representations of his ownership, sold land to third party, and land thereafter, by mesne conveyances, came to defendant, who recorded deed and took possession and began to make improvements upon land, wife, in suit by her to quiet title, was estopped
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from setting up title, where it appeared that plaintiff did not repudiate what had been done by her husband, and no notice whatever was given or steps taken to inform the grantee that she disapproved of his transaction until commencement of action nearly three years after.—*Baillarge v. Clark*, 145 Cal. 589, 593, 79 Pac. 268.

152. **Same—Not created by act of defendant's tenant.**—It can not be claimed that plaintiffs are estopped from denying defendant's title to property claimed by plaintiff on ground that defendant came into possession by leave of defendant's tenant, admitting such to have been fact.—*Reed v. Calderwood*, 32 Cal. 109, 111.

153. **Franchise for wagon-road — Supports action against county.**—Plaintiff, claiming title to wagon-road under franchise from act of legislature, may bring action against county where board of supervisors, by declaring wagon-road public highway, denied plaintiff's right to collect proper tolls thereon, and thus asserted claim for and on behalf of county to plaintiff's interest in land embraced within wagon-road that is adverse to plaintiff's interest therein and prevents free use and enjoyment of his property, has right to have such adverse claim determined in form of action prescribed by this section.—*Welsh v. Plumas Co.*, 80 Cal. 338, 342, 22 Pac. 254.

154. **Same—Right to, determined.**—Claim to title to wagon-road as against adverse claim of county, where claimant claims to have accepted franchise as tendered by legislature, under which alone road could be acquired, but where plaintiff failed to prove such acceptance, was properly determined adversely to plaintiff in action under this section.—*Welsh v. Plumas Co.*, 94 Cal. 368, 29 Pac. 720.

155. **Grantee of mortgaged land—May maintain action hereunder.**—A grantee of mortgaged land who acquires title thereto from the original mortgagee after the note and mortgage have become barred by the statute of limitations, is entitled to a decree quieting his title to the land without paying the mortgage-debt.—*Muhs v. Hibernia Sav. & Loan Society*, 166 Cal. 760, 138 Pac. 352.

156. **Heir may not sue—In absence of some default or fraud or refusal to act on the part of the administrator.**—See, post, § 1581 and note.

157. **Heirs and devisees—Controversy between.**—Question as to whether this section was intended to permit a determination of controversies relating to the provisions of the will, as between the heirs and devisees, or to determine their rights, as between themselves, in advance of the final decree of distribution, raised but not decided.—*Estate of Sutro*, 155 Cal. 733, 102 Pac. 920.

158. **Holder of certificate of purchase from the state—Tide-lands within the two-mile limit.**—In such an action, where the

plaintiff is not in possession of the land, and his claim of title rests solely upon a certificate of purchase from the state, such certificate is only prima facie evidence of title, and may be successfully attacked by the defendants, although not themselves in possession, or offering evidence of title, on the ground that it is wholly void, under the provisions of section 3488 Political Code, forbidding the sale of such lands (Shaw, J., non-concurring in part).—*Williams v. City of San Pedro*, 153 Cal. 46, 94 Pac. 234.

As to certificate of purchase from the state justifying action hereunder, see par. 134, this note.

159. Holder of an equitable title—As against holder of legal title does not lie under this section.—*Buchner v. Malloy*, 155 Cal. 253, 255, 100 Pac. 687.

See pars. 9, 38, 148, this note.

160. Holder of legal title—May maintain action hereunder.—The holder of the legal title to land may sue any one claiming an interest adverse to him, and if defendant has an equitable right to the conveyance of the legal title, in the exercise of its chancery powers, the court may grant relief.—*Noyes v. Huffman*, 41 Cal. App. 676, 183 Pac. 285.

161. Homestead-claim to land claimed as mineral.—In action to quiet title, where title of plaintiff is entry of land in controversy as homestead under laws of United States, it was material question in case whether, at date of entry or homestead filing, land was known as "mineral land" within meaning of laws of United States, and so not subject to entry as homestead.—*Austin v. Gagan*, 3 Cal. Unrep. 532, 30 Pac. 790.

162. Judgment for plaintiff in ejectment—Concludes defendant from subsequent suit.—Under our system, defendant in action at law to recover lands against whom judgment has passed, can not subsequently, in distinct suit, assert legal right which existed when ejectment was commenced, nor subsequently claim relief based upon equity which was pleaded by cross-complaint in ejectment; so far judgment in favor of plaintiff in action of ejectment is conclusive of defendant's rights.—*People ex rel. Love v. Center*, 66 Cal. 551, 562, 5 Pac. 263, 6 Pac. 481.

163. Lessee against his lessor.—While an estate for years, under section 765 Civil Code, is merely a chattel real, yet it is expressly declared in section 761 Civil Code to be an interest in real property, and, since it is such an interest, its holder has the right, under the provisions of this section, to maintain it against an adverse claim. The denial by the owner of the fee of the existence of the leasehold is such an adverse claim, and it is held that the lessee of the term for years has the right hereunder to maintain the action here provided against the owner of the fee who makes such a denial.—*German American*

Sav. Bank v. Gollmer, 155 Cal. 687, 102 Pac. 932.

164. Lien prior in date—Supports action against subsequent lienholders.—Plaintiff claiming against judgment conclusive against defendants may, under this section, bring action to determine his title superior to title of defendant, claiming under sheriff's deeds antedating those of plaintiff and based upon judgment rendered prior to those of plaintiff, when liens, under which plaintiff claims title had its origin, are older than liens to which deeds of defendants relate.—*Brady v. Burke*, 90 Cal. 1, 3, 6, 27 Pac. 52.

165. Mortgagee—May maintain action hereunder.—Under above section, authorizing an action in the nature of an action to quiet title to be brought by any person against another who claims an interest in real property adverse to him for the purpose of determining such adverse claim, an encumbrance by way of mortgage is a claim adverse to the interest of the owner, and the mortgagee can bring an action to determine the extent of the mortgage lien.—*Mentry v. Broadway Bank & Trust Co.*, 20 Cal. App. 388, 129 Pac. 470.

166. Optionee in unilateral contract to sell real estate—May maintain action hereunder.—The owner of real estate may maintain an action to quiet his title thereto against the person to whom the option in a unilateral contract for its sale was given, who, for more than four years after execution of the option, has failed to make tender of performance.—*Levy v. Lyon*, 153 Cal. 214, 94 Pac. 881.

As to vendee under contract of sale having more equitable title see par. 191, this note.

167. Owner—Of estate or interest in land less than estate in fee can maintain action for determination of adverse claim made by another person, under this section, which provides that action may be brought by any person against another who claims estate or interest in real property adverse to him for purpose of determining such adverse claim.—*Pierce v. Felter*, 53 Cal. 18, 19.

168. Same—Of servitude—Claim to have water flow in a water-course comprehends the right to have such flow continue in such water-course over the lands affected. Such right is a servitude upon the land and to the extent of such easement and interest claimed in the land.—*Amestoy v. City of Los Angeles*, 5 Cal. App. 273, 276, 90 Pac. 42.
See pars. 111-113, 128-130, this note.

As to claim to an easement being an adverse claim to real property, see par. 37, this note.

169. Same—Same—Owner of the right to cut growing timber on land and easement in connection therewith has a right to maintain an action to quiet his title.—*Gazos Creek Mill & L. Co. v. Coburn*, 8 Cal. App. 150, 159, 96, Pac. 379.

170. Same—Of two-thirds in possession against title to one-third.—Absolute owner and holder of legal title to undivided two-thirds of certain premises, in actual possession thereof at time of commencement of action, has action under this section against one who is owner and holder of legal title to only one undivided one-third of same premises not in actual possession thereof.—*Ross v. Heintzen*, 36 Cal. 313, 321.

171. Party necessary to action in foreclosure—May bring action hereunder.—One not party to judgments foreclosing assessment liens, nor had any notice, actual or constructive, of pendency of actions thereon, but, on day of their rendition, became owner of land on which liens were decreed to exist, and his deeds, showing title to be in him, were duly recorded, thus, though not at beginning of actions, having become necessary party thereto, is entitled to assert his title by an action under this section.—*Brady v. Burke*, 90 Cal. 1, 3, 8, 27 Pac. 52.

172. Party prevailing — Ejected pendente lite—Entitled to writ of possession.—The rule that in action by one out of possession to determine adverse claim to property, party prevailing may have writ of possession, applies equally to one who prevails where she, although in possession when action was brought, is subsequently and during pendency turned out of possession; this does not change character of action from one in equity to one for recovery of possession.—*Polack v. Gurnee*, 66 Cal. 266, 269, 5 Pac. 229, 610.

173. Patent from United States—Supports suit against imperfect Mexican grant.—An action may be brought under this section and section 380, ante, to try title to recover possession by party deriving title under patent from United States in confirmation of grant from Mexican prefect in 1839, against defendant who claimed under unconfirmed grant to an Indian, under date of 1843, and who has right to plead statute of limitations.—*Anzar v. Miller*, 90 Cal. 342, 343, 27 Pac. 299.

174. Same—Statute of limitations runs only from date of issue.—Where plaintiff claimed title derived from liens of grantee from Mexican government, presented to board of land commissioners and by them confirmed, on which patent issued February 25, 1885, action commenced under this section on 21st of February, 1890, is subject to plea of statute of limitations, which does not begin to run until issuance of patent.—*Valentine v. Sloss*, 103 Cal. 215, 217, 37 Pac. 326, 410.

175. Same—Same—In action brought to quiet title to land which constituted portion of Mexican grant, and patent to which was not issued until May 21, 1877, and statute of limitations did not commence to run until that date, defendant can not successfully defend against such claim, unless she is able to show existence of perfect grant or that she had paid taxes during her

possession.—*Tuffree v. Polhemus*, 108 Cal. 670, 675, 41 Pac. 806.

176. Possession—Plaintiff out of and defendant in.—Provisions of this section allow action to be brought by any person against another who claims estate or interest adverse to him. Its language is very broad. If plaintiff is out of and defendant is in possession, nevertheless action could be maintained. So, also, if plaintiff and defendant each claims to be owner in fee.—*Hyde v. Redding*, 74 Cal. 493, 498, 16 Pac. 380.

177. Possessory title — Against one obtained by fraud.—Plaintiff claiming only possessory title in and upon public lands of United States, has right to bring action under this section against person who by means of false representations and pretenses has greatly embarrassed him in use, enjoyment, and disposition of his mining claim, interest in which has become greatly depreciated by reason of possibility of title in defendant resulting and growing out of such false and pretended claims.—*Pralus v. Pacific G. & S. M. Co.*, 35 Cal. 30, 34.

178. Same—Gives all remedies of holder of record-title.—A party whose adverse possession has practically ripened into title should be entitled to all remedies to quiet his possession that are incident to possession under written titles, which are in law and equity no more efficacious to protect owners in actual enjoyment of their possession under them.—*Arrington v. Liscom*, 34 Cal. 370, 386, 94 Am. Dec. 722.

179. Pre-emption laws, claim under—In cloud upon title.—One claiming to be owner of premises may bring action under this section against settler upon public lands claiming title thereto under pre-emption laws of United States.—*Byers v. Neal*, 43 Cal. 210, 214.

As to cloud on title, see pars. 10-16, this note.

180. Same—Source of title, claims from.—An action may be brought under this section aimed at particular conveyance from same source of title as that of plaintiff, but subsequent in time and claimed to be cloud upon plaintiff's title. Such action could have been maintained without aid of this section, and jurisdiction of court does not depend upon his provisions or upon possession of complaining party at time of institution of suit (conc. op. of *Sawyer, J.*).—*Ferris v. Irving*, 28 Cal. 645, 649.

181. Sheriff's deeds—In different suits.—Action may be brought under this section by one claiming title to property under sheriff's deed executed in case of foreclosure of mortgage to quiet his title against another who claims under sheriff's deed executed on foreclosure of mechanics' lien.—*Horn v. Jones*, 28 Cal. 194, 202.

182. Same—Deed in foreclosure against invalid mortgage-lien.—Plaintiff holding title by virtue of sheriff's deed may upon decree of foreclosure maintain action

against defendant claiming under invalid mortgage-lien, such lien being cloud upon plaintiff's title which he has right to have quieted.—*Withers v. Jacks*, 79 Cal. 297, 300, 21 Pac. 824.

183. State—May sue for encroachment of proprietary rights.—State of California possesses sovereign power over and proprietorship of bay of San Francisco and San Antonio Creek and beds thereof, and has right to protect and defend same from encroachment and to sue for relief in respect of any encroachment or infringement of its sovereign or proprietary rights therein, and for such purpose action may be brought by attorney-general of state.—*People v. Oakland W. F. Co.*, 118 Cal. 234, 240, 50 Pac. 305.

184. Statute of limitations—Action barred by five years' limitation.—Action by plaintiff as widow of party who had executed deeds of lands to his daughter, absolute and unlimited upon their face, is barred by statute of limitations, where action was not brought within five years after execution of such deeds.—*Page v. Page*, 143 Cal. 602, 603, 77 Pac. 452.

185. Same—Beneficiary to enforce trust—Runs against, only after repudiation of trust by trustee.—Statute of limitations does not commence to run against an action by beneficiary to enforce trust until after repudiation of trust by trustee, and action by widow of deceased grantor to quiet title against grantee is not action by beneficiary to enforce trust, but action to recover land, or to give title to land, and such action is barred in five years after it accrued.—*Page v. Page*, 143 Cal. 602, 604, 77 Pac. 452.

186. Same—Plea of does not change action.—Person claiming title to certain portions of rancho in Los Angeles county may bring action to quiet title thereto against defendant, setting up adverse possession thereof on her part for statutory period of five years. Claim that plea of statute of limitations changed character of action from one in equity to action in law, and therefore that defendant was entitled to jury trial, which she demanded and which was refused in court below, can not be sustained.—*Hancock v. Plummer*, 66 Cal. 337, 338, 5 Pac. 514.

187. Same—Successor in interest bound by rule against grantor.—Where party having executed deeds of property to child, has since that date died, any cause of action which he might have had to set aside deeds or to quiet his title to said lands upon proper grounds, accrued at date of delivery of deeds and was barred at least in five years from that time, and party, as successor in interest to such grantor, stands in his shoes and is bound by same limitation.—*Page v. Page*, 143 Cal. 602, 603, 77 Pac. 452.

188. Tenants in common—In general.—In an action by a tenant in common, the

plaintiff may recover possession of the whole premises, and such recovery would enure to the benefit of the other tenants in common so as to prevent the defendant from acquiring title as against them by adverse possession.—*Cassin v. Nicholson*, 154 Cal. 503, 98 Pac. 190.

189. Tenants in common may but need not join as plaintiffs in actions under this section.—*McCleary v. Broddus*, 14 Cal. App. 60, 111 Pac. 125.

190. Same—In possession against adverse claim of co-tenant.—One tenant in common of real estate in actual possession thereof may not maintain action under section 254 of Practice Act to determine validity of adverse claim to title by co-tenant.—*Ross v. Heintzen*, 36 Cal. 313, 321.

191. Vendee under contract of sale—Has mere equitable title.—Vendee under contract of sale of real property has a mere equitable interest and can not maintain such an action against a subsequent grantee of the legal title.—*City of Los Angeles v. Hannon*, 159 Cal. 47, 112 Pac. 878.

As to optionee in unilateral contract being able to maintain suit hereunder, see par. 166, this note.

III. PARTIES DEFENDANT.

192. Adverse possession and outstanding conveyance.—Where cause of action set up is adverse possession of some twelve years, under conveyance which gives title under statute of limitations and outstanding conveyance from same source of title, which, under circumstances alleged, became cloud, plaintiff has right to have same adjudged to be cloud and to have it removed under this section.—*Arrington v. Liscom*, 34 Cal. 365, 371, 94 Am. Dec. 722.

As to adverse possession taken by mistake or ignorance, see note 23 Am. St. Rep. 288.

As to adverse possession; what constitutes under claim founded on written instrument or judgment, see, ante, § 323 and note.

As to adverse possession, what constitutes under claim of title not founded on written instrument, see, ante, § 325 and note.

As to inclosures and boundaries to constitute adverse possession, see, ante, § 325 and note.

As to occupation under judgment, when adverse, see, ante, §§ 322, 323 and notes.

As to occupation under written instrument, as judgment, etc., when deemed adverse, see, ante, § 322 and note.

As to premises actually occupied under claim of title deemed to be held adversely, see, ante, § 324 and note.

As to relation of landlord and tenant as affecting adverse possession, see, ante, § 321 and note.

As to title by prescription, see *Kerr's Cyc. Civ. Code*, 2d ed., § 1007 and note.

As to what constitutes adverse possession, see, ante, §§ 322, 323 and notes.

193. Same — Obtained by collusion of tenants, is cloud upon title.—Persons in adverse possession of premises from 1853 to 1867 (at which time adverse claim that plaintiff obtained possession by collusion with tenant of theirs), are subject to action to quiet title under this section.—*Walsworth v. Johnson*, 41 Cal. 61, 62.

194. Any adverse claim—Against one in possession.—Plaintiff has right, under this section, to be quieted in his title whenever any claim is made to real estate of which he is in possession, effect of which claim might be litigation or loss to him of property.—*Head v. Fordyce*, 17 Cal. 149, 151; *Joyce v. McAvoy*, 31 Cal. 273, 288, 89 Am. Dec. 172.

195. Bringing in new parties.—In an action to quiet title, wherein the defense is made that the plaintiff's grantor held the property in trust for the defendants, the court properly strikes out paragraphs of a cross-complaint by which it is sought to bring in the plaintiff's grantor as a party and to compel him to account for the proceeds of sales to persons other than the plaintiffs of parcels of land included within the tract described in the patent, but different from the property directly in controversy.—*Andreson Co. v. Regenold*, 166 Cal. 44, 134 Pac. 999.

196. Defendant—Who does not himself claim some right, title, interest or possession has no status to question the validity of a conveyance of the property by a third person to the plaintiff.—*Williams v. City of San Pedro*, 153 Cal. 44, 50, 94 Pac. 334.

197. Equitable estate, or right of possession.—It is enough, to maintain action under Practice Act, section 254, that deed of defendant created equitable estate, or even right of possession.—*Smith v. Brannan*, 13 Cal. 107, 114.

198. Estoppel—Company, answering under name as sued, estopped from denying its name.—In action to quiet title under this section, where corporation appeared under name by which it was sued in complaint, being named as defendant, it will not be allowed to say it was not properly named, or that complaint did not show how it came to bear name, "*The Mona Lake Hydraulic Mining Company*" was made defendant and appeared by attorney, and proceedings are valid as to that company, whether name be that of corporation or person.—*Butterfield v. Graves*, 138 Cal. 155, 156, 71 Pac. 510.

199. Finding that defendant made improvements—Immaterial.—In action to quiet title, fact that defendant claimed in his answer to have made valuable and permanent improvements upon tract of land, while in possession thereof, is immaterial to case, and finding as to such allegation in answer was not required.—*Eshleman v. Malter*, 101 Cal. 233, 235, 35 Pac. 860.

200. Intervention—Judgment-lien claimant.—In an action to quiet title, a person claiming a judgment-lien on the property which is the subject-matter of the action, may be permitted to intervene, under the provisions of the above section.—*Robben v. Benson*, 43 Cal. App. 204, 185 Pac. 200, distinguishing *Isaacs v. Jones*, 121 Cal. 257, 53 Pac. 793, 1101.

201. Joint grantees—Claim of one of two is a cloud upon title.—Claim of defendants to title under one of two persons, to whom, after written petition to alcalde "that lot be granted to two jointly 'encompania,'" grant was executed jointly, was cloud upon title, to clear which suit was properly brought under this section.—*Lick v. Diaz*, 37 Cal. 437, 440.

As to cloud on title, see pars. 10-16, this note.

202. Mexican grant not presented to land commissioners — A defense.—Where claim of defendant under Mexican title was never presented to United States board of land commissioners for confirmation, and such defendant relied upon grant made in year 1843, and judicial possession, as perfect grant, not forfeited by non-presentation, claim that grant has not been presented to land commissioners is defense to action therefor.—*Anzar v. Miller*, 90 Cal. 342, 343, 27 Pac. 299.

As to clouds sufficient to sustain claims of adverse possession, see notes 14 Am Dec. 580; 88 Am. St. Rep. 701.

As to parties to bill to quiet title or remove cloud from title, see notes 1 L. R. A. 637, 10 L. R. A. 293.

203. Permissive occupation by railroad company—Not disturbed by action hereunder.—Where railroad company avers in its complaint to quiet title that it is owner in possession of certain strip of land, that defendant made agreement with predecessor of plaintiff that railroad company might go on and complete road over his land, provided it would put good depot on it, at which all regular passenger trains would stop, and when that was done he would make deed conveying right of way, under which agreement this railroad company entered upon land, and by defendant's permission and not adversely, and continued to occupy road after same was built, but did not construct depot or stop its trains as agreed, owner can not, after failure of railroad company to keep its agreement, maintain action to quiet title to land, remedy being by action to recover value of land and damages to defendant.—*Southern Cal. R. Co. v. Slauson*, 138 Cal. 342, 343, 94 Am. St. Rep. 58, 71 Pac. 352.

204. Same—Where defendant, and owner of land, waived compensation in advance for taking and occupying and using land, owned by him, and having permitted railroad company to enter upon land, construct and operate its railroad, and railway company was lawfully in possession of land,

owner can not recover in action to quiet title thereto.—*Southern Cal. R. Co. v. Slau-son*, 138 Cal. 342, 344, 94 Am. St. Rep. 58, 71 Pac. 352.

205. Persons claiming title to use of water from same source as plaintiff—Properly joined as defendants.—Plaintiffs, claiming title to water-right, may bring action to quiet same against defendants, whether cotenants or voluntary association or whether they hold as individuals. Defendants claim from same source as plaintiffs, and water used by them is diverted by same ditch, and their claims of right, whether several or united in use of water, affect right of plaintiffs, and they are therefore, even if their rights or claims are asserted as individuals, properly joined as parties defendant in action to quiet title of plaintiffs.—*Senior v. Anderson*, 115 Cal. 496, 507, 47 Pac. 454.

206. Prescription, title by—Bars action hereunder.—If defendant, in action to quiet title, shows occupancy sufficient to bar action to recover property so occupied, such occupancy confers title to land, denominated title by prescription, which is sufficient against all, and no title can be better or more absolute, and plaintiff, in such case, is not entitled to decree quieting title thereto. *Woodward v. Faris*, 109 Cal. 12, 18, 41 Pac. 781.

207. Taxes need not be paid by defendant—If assessment void.—While defendant's title is dependent solely upon question, of payment of taxes upon land in controversy, he having been in exclusive possession of same under claim of right for term longer than that required by statute, his claim would not be defeated by failure to pay taxes, when assessment thereof was absolutely void.—*Harvey v. Meyer*, 117 Cal. 60, 63, 48 Pac. 1014.

As to payment of taxes necessary to constitute adverse possession, see, ante, § 325 and note.

208. Trustee's title—Not affected by action of cestui que trust.—In action brought, in which plaintiff claimed to be owner of equitable title to property in litigation, and that defendant was owner of legal title thereto, as trustee, conceding that an action to quiet title was proper remedy, judgment would have availed plaintiff nothing. Her object was not to declare title as it really was,—which is effect of successful action to quiet title,—but purpose was to change title and vest in her legal title, that was outstanding in her trustee, and this could not be done by action to quiet title, but by one to close up trust, or to show that it had been closed, and to compel conveyance of legal title.—*Harrigan v. Mowry*, 84 Cal. 456, 458, 22 Pac. 658, 24 Pac. 48.

209. Undivided interests in mining claim—Title to, determined.—Where one is owner of, and in possession of, an undivided one-half of two mining claims, and defendants claim interest or interests in same undivided one-half of one of said mining claims,

and in same undivided five-eighths of other said mining claim, action may be brought under this section to determine whether or not said claim of defendants, and each of them, is adverse to plaintiff's estate therein, and without any right whatever, and whether said defendants have no right, estate, or title therein.—*Russell v. Brosseau*, 65 Cal. 605, 4 Pac. 643.

IV. PLEADINGS—COMPLAINT, ANSWER, CROSS-COMPLAINT, INTERVENTION, ETC.

210. Complaint—Allegation of fraud.—A complaint in an action to quiet title which contains a statement of the cause in the usual and general form is sufficient as against a general demurrer, notwithstanding it also alleges certain alleged fraudulent acts as the basis of the defendant's claim.—*Aalwyn v. Cobe*, 168 Cal. 165, 142 Pac. 79.

As to complaint hereunder and what must be averred in, see pars. 138, 144, this note.

211. In this action to quiet title wherein certain alleged fraudulent acts of the defendants are set forth as having clouded the plaintiff's title, the special demurrer was properly sustained on the ground that the complaint failed to show that the defendants ever had any title to the property, or that the alleged title of the plaintiff was derived through such persons, or that she had any antecedent title thereto.—*Aalwyn v. Cobe*, 168 Cal. 165, 142 Pac. 79.

212. It is held that there was no sufficient allegation of fraud.—*Aalwyn v. Cobe*, 168 Cal. 165, 142 Pac. 79.

213. Same—Allegation of possession not necessary.—In an action to quiet title under this section, no allegation of the possession of the land in question is essential. The action may be maintained by a person whether in or out of possession, and an allegation in the complaint that the plaintiff is "the owner in fee" of the premises is a sufficient statement of his right to maintain either that action or ejectment.—*Davis v. Crump*, 162 Cal. 513, 516, 123 Pac. 294.

214. Same—Sufficiency of.—In an action to quiet title to certain water, the allegations of the complaint, although somewhat general, are held sufficient, as against a general demurrer, to state facts constituting a good cause of action to quiet the plaintiff's title to such water, as part of his real estate, and to enjoin the threatened diversion.—*Shurtleff v. Kehrer*, 163 Cal. 24, sub nom. *Shurtleff v. Bracken*, 124 Pac. 724.

215. Complaint averring that plaintiff is owner and in possession of certain land; that defendant claims an interest therein adverse to plaintiff, and that such claim is without right, has every element required of a complaint to quiet title.—*Gray v. Walker*, 157 Cal. 381, 384, 108 Pac. 278.

216. Defendant's right—Answer.—In an action to quiet title, the defendants are entitled to rely on a claim of title based

on adverse possession, without specifically pleading it in their answer wherein they allege ownership in themselves.—*Jordan v. Beale*, 172 Cal. 226, 155 Pac. 990.

217. Same — Affirmative relief for defendant.—The defendant in an action to quiet title possesses the right to ask affirmative relief, either in his answer, by way of counter-claim, or by cross-complaint, even though the effect of a judgment that plaintiff's allegations are all untrue would insure to defendant every right and fully settle the question of title between the parties.—*Brooks v. White*, 22 Cal. App. 719, 136 Pac. 500.

218. The omission to answer a cross-complaint in an action brought under above section to determine conflicting claims to real property, confers no authority upon the clerk to enter the default of the plaintiff, or upon the court to render judgment otherwise than upon the merits, where the cross-complaint presents no new issues but simply alleges ownership and possession of the premises, and prays for the same affirmative relief as demanded in the answer to the original complaint.—*Brooks v. White*, 22 Cal. App. 719, 136 Pac. 500.

219. Cross-complaint—In general.—In an action to quiet a title to land, where the plaintiff claimed under a deed, and defendant claimed that the same had been delivered on a condition which had not been performed, since the consideration had totally failed, it was not necessary that defendant should have demanded by cross-complaint that the deed be delivered up and canceled.—*Stanton v. Freeman*, 19 Cal. App. 464, 126 Pac. 377.

220. Same — Necessity for cross-complaint.—While it is settled that a defendant called upon by plaintiff's action to quiet title to land to set up his own claim of title, may file a cross-complaint setting up his own alleged ownership and asking that he be adjudged the owner, or may do the same thing in his answer, ordinarily no such practice is essential to his protection, as a conclusion against the plaintiff upon the issues raised by the complaint and answer fully determines the title as between the parties, and protects the defendant against any claim of the plaintiff as to title as fully as an affirmative decree in his favor would do.—*Larkin v. Superior Court*, 171 Cal. 719, 154 Pac. 841.

221. Each party is an actor in such suit, a cross-complaint being unnecessary, and a decree quieting his title is awarded to the one establishing his case.—*Klumpke v. Henley*, 24 Cal. App. 35, sub nom. *Klumpke v. Moreno*, 140 Pac. 313.

222. Defenses — In general.—Where the defense to an action by the owner of the legal title consists merely of a denial of plaintiff's ownership and the assertion of title in defendant, such defense is not established by proof that the plaintiff is the owner of the legal title, subject to an equity

in favor of defendant.—*Robinson v. Muir*, 151 Cal. 124, 90 Pac. 521.

223. Same—Equitable defense.—In this state, where legal and equitable remedies are administered in the same tribunal, and there are no special forms of action, a defendant in ejectment may set up an equitable defense.—*Doherty v. Courtney*, 150 Cal. 608, 89 Pac. 434.

224. Same — Inadequate defense.—An equitable title may be set up in an action of this kind, but where such action is by the owner of the legal title proof of a mere equity in the defendant, it will not sustain a finding that defendant is the owner of the property.—*Robinson v. Muir*, 151 Cal. 124, 90 Pac. 521.

225. Same—Of tenant of administrator of deceased owner may be any that the administrator could have urged.—*Doherty v. Courtney*, 150 Cal. 608, 89 Pac. 434.

226. Ejectment — An administrator may plead, in answer to an action in ejectment brought by the grantee in a deed by his decedent, the equitable defense that the deed was procured by undue influence exercised by such grantee; and a tenant of the administrator, if sued by a mala fides purchaser from such grantee, may also set up the same defense.—*Doherty v. Courtney*, 150 Cal. 609, 89 Pac. 434.

As to damages for detention, in action in ejectment, and rights of successor in interest, see, post, § 746 and note.

227. The owner of the equitable title, if it is of such a character as entitles him to possession, may successfully plead the same in defense of an action in ejectment brought by the owner of the legal title.—*Doherty v. Courtney*, 150 Cal. 608, 89 Pac. 434.

228. Fraud—Need not be pleaded, when.—In an action to quiet title to a parcel of land, where defendant held under a trustee's deed, alleged to have been obtained by fraud, it was not necessary for plaintiff to plead fraud in its complaint. The trustee's sale was set up by the defendant as a defense to the action of the plaintiff. In such a case, proof of fraud, sufficient to avoid the trustee's sale and deed, was admissible without further pleading, since it was matter in avoidance of the defense set up in the answer.—*Jose Realty Co. v. Pavlicevich*, 164 Cal. 613, 130 Pac. 15, 16.

229. Fraud on creditors.—When plaintiff claims title by virtue of a conveyance the purpose of which was to defraud a creditor by means of a title taken in her own name as a secret trustee for the judgment-debtor, the court properly rendered judgment against her.—*Clifton v. Herrick*, 16 Cal. App. 485, 117 Pac. 622.

230. Intervention—Complaint in intervention in an action to quiet title to certain real estate which alleges the procurement of an assignment from the interveners by the plaintiff of their interest in the land upon false representations made as to the

value of such interest, states a cause of action.—*Phelps v. Grady*, 168 Cal. 73, 141 Pac. 926.

231. Such a complaint is, however, without equity where there has been a delay for seven years after the assignment in asserting the fraud, with every means of ascertaining the true valuation open and patent, notwithstanding the interveners resided in another state.—*Phelps v. Grady*, 168 Cal. 73, 141 Pac. 926.

232. **Special demurrer.**—The special demurrer was properly sustained for failure to show how the purported acts of fraud could cloud any title which she might have acquired.—*Aalwyn v. Cobe*, 168 Cal. 165, 142 Pac. 79.

233. **Striking out allegations of complaint.**—Error in striking allegations from the complaint in an action to quiet title is not prejudicial if the case is tried upon the theory that the allegations have not been stricken out and all the evidence that could be admitted thereunder is admitted.—*Klumpke v. Henley*, 24 Cal. App. 35, sub nom. *Klumpke v. Moreno*, 140 Pac. 313.

V. TRIAL, JUDGMENT, AND APPEAL.

As to conveyance of legal title not enforceable hereunder, see par. 106, this note.

As to decree hereunder being more affirmative of legal rights than mere judgment for possession, see par. 29, this note.

As to entry of judgment by default in an action to quiet title, see, ante, § 585 and note.

As to judgment as a muniment of title of successor of plaintiff, see par. 56, this note.

As to legal rights determined in, see pars. 64, 65, this note.

As to minor errors at trial not noticed, see par. 45, this note.

As to right to jury trial, see Part VI, this note.

234. **Appeal.**—In general.—The failure to find in an action by the state to quiet title to tide-lands that the defendant had by mesne conveyances succeeded to all the right and title of the original patentee, requires a reversal of the judgment in order that the defect may be supplied, for the appellate court can not make findings.—*People v. Southern Pac. R. R. Co.*, 166 Cal. 614, 138 Pac. 94.

235. Where, in a suit to quiet title, judgment is awarded the defendant on his plea of title by adverse possession, but on appeal it appears that the judgment is not supported by the findings, and there is no finding in favor of the plaintiff, the appellate court can not order judgment for the plaintiff on the findings, but will reverse the judgment and remand the cause for a new trial.—*Cohen v. Anderson*, 22 Cal. App. 634, 135 Pac. 1096.

236. A finding of the court as to the intention of the grantor in delivering a deed, based on evidence substantially conflicting.

will not be disturbed on appeal.—*Strange v. Strange*, 23 Cal. App. 281, 137 Pac. 1104.

As to findings generally, see pars. 261-264, this note.

237. **Contingent, expectant, or possible right.**—Not coupled with interest.—Decree need not provide as to.—Where land has been conveyed to a corporation organized to provide medical attendance and hospital accommodations, the right of the grantor's residuary devisee in the property under the rule that when a corporation is dissolved its property reverts to the grantor, is not such an interest as to require provision in a decree quieting title in an action brought by the corporation. Such right is a mere possibility not coupled with an interest.—*Victoria Hospital Assn. v. All Persons*, 49 Cal. Dec. 278, 147 Pac. 124.

238. **Decree quieting title.**—Proper when.—A decree quieting the title to land under the provisions of the above section is properly entered, although the action is brought under section 749 to determine conflicting claims, in those cases in which the issue of title is raised by the pleadings of the parties.—*Ernst v. Hall*, — Cal. App. —, 197 Pac. 809, following the doctrine in *Faxon v. All Persons*, etc., 166 Cal. 107, L. R. A. 1916B, 1209, 137 Pac. 909, distinguishing *Mondran v. Goux*, 51 Cal. 151; *Bryan v. Tormey*, 84 Cal. 126, 24 Pac. 319; *Shenandoah Min. & Mill. Co. v. Morgan*, 106 Cal. 409, 417, 39 Pac. 802, on the ground that the findings of the trial court in those cases were without the issues raised by the pleadings.

239. **Dismissal of action.**—The fact that a defendant in a suit to quiet title claims no interest in the property is not sufficient ground for a dismissal of the action as to him, if, instead of filing a disclaimer, he answers denying the plaintiff's ownership and right to the possession of the property.—*Johnston v. Baker*, 167 Cal. 260, 139 Pac. 86.

As to judgment of nonsuit, see par. 27, this note.

240. In such action the fact that one of the defendants, a city, has instituted an action against others involving a portion of the land claimed by the plaintiff, or that a part of it is used as a public street all as shown by the defendant's affidavit, is not a ground for dismissal as to the city.—*Johnston v. Baker*, 167 Cal. 260, 139 Pac. 86.

241. **Effect of decree or judgment.**—A decree obtained in an action brought under the McEnerney Act, which has become final, is binding upon all persons, even if the same were obtained wholly upon the evidence afforded by a decree of distribution in an estate which had been secured by fraud.—*Estate of Daughaday*, 168 Cal. 63, 141 Pac. 929.

242. A judgment in an action to determine conflicting claims to real estate that one of the parties has an undivided one-third interest in the property estops him

and his successors in interest from asserting title to the two-thirds awarded to other parties by reason of anything occurring anterior to the judgment.—*Klumpke v. Henley*, 24 Cal. App. 35, sub nom. *Klumpke v. Moreno*, 140 Pac. 313.

243. Effect of proof of legal title.—Proof of legal title in a party raises a presumption of the right of possession in the same party, and establishes a prima facie case in his favor.—*Flood v. Templeton*, 152 Cal. 161, 92 Pac. 78.

244. Equitable title—Evidence to establish.—In this action to quiet title the findings against the plaintiff's claim of equitable title are supported by certain circumstances, although there is no opposing evidence to the testimony of the plaintiff as to the existence of the facts upon which his claim of title is based.—*Roberts v. Roberts*, 168 Cal. 307, 142 Pac. 1080.

245. Evidence—Admissibility.—In an action to quiet title to land, where plaintiff claimed under a deed which had been delivered but which the grantor afterward obtained possession of prior to its recordation, and refused to return it, evidence was admissible that the plaintiff had testified in a former action that the deed was executed on a condition to show the consideration for the execution of the deed and to corroborate the grantor's statement relative thereto.—*Stanton v. Freeman*, 19 Cal. App. 464, 126 Pac. 377.

246. Same — Deed admissible, when.—Where, in an action to quiet title, it is admitted at the trial that the plaintiff was the owner of the land, except so far as her title may have been divested by virtue of a deed executed pursuant to proceedings had under the "Street Opening Act of 1903" it is not error to admit the deed in evidence, without pleading and independent proof of the adoption of the ordinance declaring the intention to open the street, or of the ordinance ordering the improvement to be made.—*Tilton v. Russek*, 171 Cal. 731, 154 Pac. 860.

247. Same—Of title.—Where in an action to quiet title both parties claim title from a common source, it is not error to admit in evidence a deed to the land from the owner to the plaintiffs, without proof of possession in the grantor or further proof as to title in him, notwithstanding the answer alleges a prior executory contract of sale to the defendant, where it is not further alleged that the plaintiffs had had actual or constructive notice of the contract.—*Phillips v. Menotti*, 167 Cal. 323, 139 Pac. 796.

248. Where both parties claim the title from a common source, it is sufficient to show a conveyance of title from that source without further establishing that the grantor himself had title.—*Phillips v. Menotti*, 167 Cal. 323, 139 Pac. 796.

249. The production and offer of the deed at the trial is prima facie sufficient evi-

dence of its delivery.—*Phillips v. Menotti*, 167 Cal. 323, 139 Pac. 796.

250. Where in an action to quiet title neither of the parties are able to connect themselves with the legal title, the one who proves prior possession in himself or those through whom he claims, is entitled to a decree, and is not required to prove the acquisition of a title by prescription.—*Bond v. Aickley*, 168 Cal. 161, 141 Pac. 1188.

251. Occupancy for any period confers a title sufficient against all except the state and those who have title by prescription, accession, transfer, will or succession.—*Bond v. Aickley*, 168 Cal. 161, 141 Pac. 1188.

252. Possession is prima facie evidence of ownership.—*Bond v. Aickley*, 168 Cal. 161, 141 Pac. 1188.

253. Where the defendant, in an action involving title to land, bases his claim of title on a deed from the plaintiff, the plaintiff is not required to prove title in himself prior to the date of such deed, or to obtain a stipulation or order granting further time so to do.—*Strange v. Strange*, 23 Cal. App. 281, 137 Pac. 1104.

254. Same—Of unprobated will.—The amendment of 1895 provides an exception, in suits authorized thereunder, to the rule that an unprobated will can not be given in evidence as the foundation of a right or title (dictum).—*Estate of Patterson*, 155 Cal. 636, 102 Pac. 941.

255. Same—Possession.—In an action to quiet title, the plaintiff, having no title, can not prevail against one in actual possession. Such possession is sufficient proof of title as against one out of possession, who establishes no title in himself.—*Boyer v. Gelhaus*, 19 Cal. App. 320, 125 Pac. 916.

256. Same—Prima facie evidence of tax-deeds—Applicable to state taxes only.—In an action brought under the above section to determine adverse claims to real estate, on answer to the complaint denying the facts relied upon to establish plaintiff's interest in the property and setting up an estate therein in the defendant, the plaintiff based his right to recover judgment upon certain tax-deeds and relied upon the recitals in such deeds as prima facie evidence of compliance with the requirements of the statute pursuant to which the proceedings leading up to the levy of the tax had been had, namely, the Local Improvement Act of 1910 (II Henning's General Laws, 3d ed., p. 3150), which was a municipal and not a state tax, and the court held that the provisions of section 3786 of the Political Code making tax-deed prima facie evidence of compliance with the requirements of the statute pursuant to which the proceedings leading up to the levy of the tax were had, by their own terms, limit the presumption to state taxes.—*Thill v. Moulthrop*, 181 Cal. 732, 186 Pac. 133.

257. Same—Sufficiency of.—In this action to quiet title the evidence is sufficient to establish that the plaintiff though he may

have entered upon the property in question believing it to be no man's land, subsequently recognized that the defendant's testate was the owner thereof and thereafter occupied the premises in subordination to the rights of the testate, paying him a part of the annual crop as rental, and thereby creating the relation of landlord and tenant.—*Lummer v. Unruh*, 25 Cal. App. 97, 142 Pac. 914.

As to necessity of proving facts showing validity of claim, see par. 146, this note.

258. If in such case an assessment of the property for purposes of taxation so designated the land that it would afford the owner a means of identification, and would not positively mislead him or would not be calculated to do so, the description is sufficient so that the return of the land for assessment and the payment of taxes thereon by the testate is admissible in evidence.—*Lummer v. Unruh*, 25 Cal. App. 97, 142 Pac. 914.

259. Upon the principle that when the possession and use of real property under a claim of right thereto have been long continued they create a presumption of lawful origin, the court is justified, in this case, in indulging the presumption that the tract of land in dispute was not within the exceptions specified in the deeds, and, notwithstanding the failure of the defendants to make direct proof as to the land being without the exception, such fact will be presumed.—*Lummer v. Unruh*, 25 Cal. App. 97, 142 Pac. 914.

260. **Same — Same — Presumptions indulged.**—In this action to quiet title, wherein the defendant alleges ownership by virtue of a deed of gift executed and delivered to her by plaintiff, which the latter claimed was never delivered, the question of delivery is one for the determination of the trial court.—*Kurze v. Douglas*, 26 Cal. App. 186, 146 Pac. 197.

261. **Finding.**—As to ownership in easement.—In an action to quiet title, it is competent under an allegation of ownership in fee of a right of way for railroad purposes to find an ownership of an easement.—*Gordon v. Cadwalader*, 172 Cal. 254, 156 Pac. 471.

262. **Same — Immaterial finding.**—In an action to quiet title, where the defendant sets up a right under a contract for a sale thereof and a division of the profits, without showing himself to be entitled to any equitable interest in the land, it was not error for the court to refuse to make a finding fixing the value of the property.—*Altchison v. Carruthers*, 161 Cal. 10, 118 Pac. 239.

As to findings by trial court that defendant made improvement being immaterial, see par. 199, this note.

263. **Finding immaterial, that the defendants asserted a claim adverse to plaintiff (dictum).**—*Title & Document Restoration Co. v. Kerrigan*, 150 Cal. 321, 88 Pac. 356.

264. **Same.—Reversal for want of support of.**—If in such action the court finds that a written contract providing for the transfer by the plaintiff to the defendant of one-half of the land in controversy and seventy shares of water stock, upon the defendant making certain improvements on the land, had been canceled, and then finds, without any evidence touching the matter, that by an oral contract plaintiff agreed at the same time to transfer the water stock, the judgment must be reversed because such finding is without support.—*Rockhill v. Parker*, 22 Cal. App. 367, 134 Pac. 720.

265. **Forfeiture — In opening, plaintiff need not show forfeiture by defendant.**—While it is true that in action to quiet title to land, burden rests upon plaintiff to show title in himself, failing which he is not entitled to recovery, yet this rule does not require that plaintiff shall in opening his case show that title which defendant may plead in his answer has been for some reason forfeited. Plaintiff may not, and often does not, know what adverse interest of defendant is against which plaintiff seeks to quiet title.—*Goldberg v. Bruschi*, 146 Cal. 708, 81 Pac. 23, 24.

266. **Husband — Competent witness to prove community property in action to quiet title.**—In action by husband against administrator of his wife's estate to quiet title to land acquired after marriage, and not acquired by gift, bequest, devise, or descent, and therefore community property, husband was competent as witness. Controversy was not concerning claim or demand against estate of deceased within meaning of section 1880, post, but concerning property of wife, to quiet title and claim or demand asserted by estate to said property.—*Bollinger v. Wright*, 143 Cal. 292, 296, 76 Pac. 1108.

267. **Same — In action to quiet title against administrator of estate where question was whether or not interest held by deceased under deed is property of estate or property of plaintiff, surviving husband of decedent, if it is not property of estate, action does not involve claim or demand against estate, and to hold that claim or demand in controversy was part of estate and thus render witness incompetent would be to determine in advance very question at issue.**—*Bollinger v. Wright*, 143 Cal. 292, 296, 76 Pac. 1108.

268. **Same — Not included under section 1880, post.**—Plaintiff, surviving husband of decedent in action to quiet title against administrator of his deceased wife's estate, is not included as witness under section 1880, post.—*Bollinger v. Wright*, 143 Cal. 292, 296, 76 Pac. 1108.

269. **Instructions.—Review on appeal.**—In an action to quiet title, the verdict of a jury on an issue as to the right to specific performance of a contract is merely advisory to the court, and therefore instructions to the jury will not be reviewed on appeal.—

Rockhill v. Parker, 22 Cal. App. 367, 134 Pac. 720.

As to jury trial, see Part VI, this note.

270. Judgment for defendant for costs, when.—Where a controversy over a narrow strip of land between adjoining owners involves the validity of a quitclaim deed to the strip, theretofore alleged to have been procured by mistake and misrepresentation, judgment is properly entered for the defendant for his costs, where there is no evidence from which a rational inference can be drawn, that any misrepresentations were made to the grantor, that any undue influence was exercised, or that he did not have the deed read to him or did not thoroughly understand its terms, but at most the evidence warranting the inference that the grantor was somewhat advanced in years, not very strong; physically, and that he acted without the advice of his attorney to whom he generally applied for assistance in matters of such moment.—Barry v. Sutter, 26 Cal. App. 240, 146 Pac. 527.

271. Nonsuit—Judgment of nonsuit in such an action, on the motion of defendant, decides nothing on the merits of the case, determines nothing as to plaintiff's or defendant's title, is not a bar to a subsequent action, and simply operates as a dismissal of the action for want of proof sufficient to establish plaintiff's title.—City and County v. Brown, 153 Cal. 647, 96 Pac. 281.

As to dismissal of action, see pars. 239, 240, this note.

272. Patented mining claim — Right shown by pedis possessio, or compliance with statute.—Since passage of act of congress (§2324 Rev. Stats., 6 Fed. Stats. Ann., 2d ed., p. 533), providing that "the location must be distinctly marked on the ground, so that its boundary can be readily taken," party can show right to possession of mining claim (when patent has been issued) only by showing an actual pedis possessio, as against mere wrong-doer, or by showing compliance with requisites of act of congress.—Funk v. Sterrett, 59 Cal. 613, 614.

273. Reimbursement for taxes.—Where the defendant, in a suit to quiet title, raises the defense of adverse possession, but does not claim reimbursement from the plaintiff for taxes paid, and the complaint does not disclose such right to reimbursement, the maxim, "He who seeks equity must do equity," can not be invoked so as to require the plaintiff, before having judgment, to reimburse the defendant.—Cohen v. Anderson, 22 Cal. App. 634, 135 Pac. 1096.

As to void tax-sale and reimbursement of purchaser in moneys expended in redeeming from subsequent tax-sale, see par. 277, this note.

274. Right to possession proved—Further rights to be adjudicated.—This section provides that issue (which might have been subject upon action of ejectment) may be tried in proceeding begun hereunder. That

issue determined, court, by virtue of authority conferred by this section, may in same action, proceed to determine adverse claims set up by defendant, and to decree that they be quieted. If plaintiff shall prove right to possession by virtue of his legal title, further rights of parties are to be adjudicated as if plaintiff had been in possession at commencement of action.—Hyde v. Redding, 74 Cal. 493, 497, 16 Pac. 380.

275. Theory on which cause tried—Not changed in appellate court.—In action to quiet title, counsel will not be allowed to try case upon theory that issue was properly before court below, and thus entice his adversary into a trap, to be sprung in appellate court at last moment. Supreme court does not countenance technical objections to pleadings when case is tried in court below upon theory that issues were properly made.—Casey v. Leggett, 125 Cal. 664, 672, 54 Pac. 264.

276. Same—As if plaintiff in possession, if right established.—In action under this section, if plaintiff's legal right to possession is established, defendant's adverse claim is to be tried as if plaintiff had been in actual possession at beginning of action, which was formerly prerequisite under section.—Hyde v. Redding, 74 Cal. 493, 499, 16 Pac. 380.

277. Void tax-sale—Action to quiet title—Reimbursement of purchaser in amounts expended for redemption.—In a case in which a purchaser under a void tax-sale thereafter redeemed from subsequent tax-sales and received a deed to the land, executed by the tax-collector, where the defendants not only set up title but, by answer asserted title in themselves, and prayed for affirmative relief, the court on quieting the title to the land in the defendants without requiring them to reimburse the plaintiff-purchaser at tax-sale the money expended in redeeming the property from delinquent-taxes, committed error.—Beck v. Edmison, — Cal. App. —, 193 Pac. 158.

As to requirement of reimbursement, see par. 273, this note.

VI. RIGHT TO JURY.

As to the right of party to have a jury trial, see notes 3 Ann. Cas. 248; 18 Ann. Cas. 245.

278. As to right to jury trial.—If, in action brought under this section, plaintiff avers legal title against defendant in possession, latter is perhaps entitled under constitution to trial by jury of issue at law thus presented.—Hyde v. Redding, 74 Cal. 493, 497, 16 Pac. 380.

279. Whether in an action under this section either party is entitled to a jury must depend greatly upon the facts in that particular case.—McNeil v. Morgan, 157 Cal. 373, 378, 108 Pac. 69.

280. Where an action is in substance one for the recovery of the possession of land the right of a defendant to a jury can not

be defeated by the mere device of bringing the action in an equitable form, nor is it defeated where at the commencement of the action the defendant and not the plaintiff was in the actual possession of the premises involved, nor where the defendant has been in possession for a long time and was ousted by the plaintiff, the latter can not by first bringing his action to acquire title void the defendant's right to a jury trial.—*McNeil v. Morgan*, 157 Cal. 373, 378, 108 Pac. 69.

281. Whether in action under this section an intervener is entitled to demand a trial by jury, not decided.—*McNeil v. Morgan*, 157 Cal. 373, 377, 108 Pac. 69.

282. Jury trial must be granted in action brought under this section as an equitable action to quiet title to land. If in reality it is an action for recovery of specific real estate and the issues made are purely of a legal character and as such are recognizable in a court of law, the substance must control the form and the right to the jury trial can not be defeated by any particular form which the action may take.—*Davis v. Judson*, 159 Cal. 121, 113 Pac. 147.

283. In a simple action to quiet title by a plaintiff in possession, in which the judgment for the plaintiff made no mention of possession, the defendant was not entitled to a jury trial.—*Cobe v. Crane*, 173 Cal. 116, 159 Pac. 587.

284. The refusal to grant a jury trial in an action to quiet title is not erroneous, where the complaint alleges the possession of the plaintiff and no denial thereof is made by the answer.—*Fuller v. Kelly*, 28 Cal. App. 160, 151 Pac. 749.

285. Complaint framed in particular form—Does not deprive one of jury.—Where defendant was in possession of claim adversely to plaintiff, obviously proper action to have been brought was what we call an action in ejectment—that is, an action "for recovery of specific real property"—in which case defendant would have been clearly entitled to jury. Plaintiff has endeavored to accomplish same result, that is, restitution of possession, in form of statutory action under this section. It is evident that plaintiff herein, by simply framing his complaint in particular way, could not deprive defendant of jury trial of issues raised by his answer.—*Newman v. Duane*, 89 Cal. 597, 598, 27 Pac. 66.

286. Defendant—Must allege title to have jury.—In suit to quiet title, as in other suits, denial of allegations of complaint is sufficient answer, and finding upon issues thus raised as adverse to plaintiff is sufficient finding. This, of course, implies that if possession be alleged, fact of possession, as well as that of title, must be negatived; and it may be, also, that defendant, in order to avail himself of his right to jury trial, should allege his title.—*United States L. Assoc. v. Pacific Imp. Co.*, 139 Cal. 370, 378, 69 Pac. 1064, 72 Pac. 988.

287. Same—Ousted from mining claim, right to jury.—To quiet title to certain quartz mine claim, in action under this section, where complaint was in usual form and contained averment that plaintiff was in possession of premises in contest, and, in answer, all averments of complaint were denied, except that of possession, and averred that plaintiff had wrongfully and unlawfully entered upon premises and ousted defendant therefrom, and that plaintiff wrongfully withheld same from defendant, defendant was entitled to jury on issue raised by his averments of prior possession.—*Donahue v. Meister*, 88 Cal. 121, 123, 25 Pac. 1096.

288. Either party may demand jury.—In action under this section by plaintiffs as heirs of decedent, complaint setting out that they are out of possession, and defendant is in possession, and asking for restitution of premises, defendant admitting possession of plaintiff and claiming title, either party is entitled to jury as matter of right.—*Gillespie v. Gouly*, 120 Cal. 515, 516, 517, 52 Pac. 116.

289. Equitable relief—Prayer for does not deprive party of jury.—Essential allegations necessary to action in ejectment are estate of plaintiffs', possession by defendants at commencement of action, and their wrongful withholding of same, and if action is to be regarded as action under this section, plaintiffs are still entitled to jury. Equitable relief of restraining order against waste during pendency of action does not change nature of action, but was ancillary and permissible merely under pleading.—*Haggin v. Kelly*, 136 Cal. 481, 483, 69 Pac. 140.

290. Intervener—Whether entitled to jury.—Whether an intervener in an action under this section is entitled to a jury depends upon the facts whether if he were a plaintiff or a defendant asserting the rights he sets up in his intervention he would or would not be entitled to a jury.—*McNeil v. Morgan*, 157 Cal. 373, 378, 108 Pac. 69.

291. Issues purely equitable—Do not entitle to jury.—Where defendants admitted that legal title to land described in complaint is in plaintiff, and, while alleging possession in themselves, they did not claim any right to such possession, except under and by virtue of an alleged agreement for sale of such lands made by predecessors of plaintiff, and to which agreement defendants claim they have succeeded by assignment, and aver that they are now ready and able and willing to make plaintiff herein payments required by such agreement, and, under general prayer of their answer, they in effect ask for specific performance of such agreement, it is clear that defendants were not entitled to jury for trial for equitable issues thus presented.—*Crocker v. Carpenter*, 98 Cal. 418, 420, 33 Pac. 271.

292. Jury—Must be demanded before trial.—In action under this section, where

it appeared by affidavit of late judge of tenth district court that record is erroneous in stating that parties waived jury, record can not be amended by affidavit, and it by no means follows that party can go on and try case before judge without objection, and, after he has lost it, complain that case was not tried by jury.—*Smith v. Brannan*, 13 Cal. 107, 115.

293. Same—Party desiring jury must conform to rule of court.—In an action under this section, on day of trial no jury was in attendance, nor had any been demanded or ordered for trial of said cause; after cause was called for trial and parties respectively announced they were ready, plaintiff for first time demanded said cause to be tried by jury, where complaint was not verified, and defendant's answer denied each and every allegation of complaint, and rule of court required, as prerequisite of trial by jury, deposit fees, and plaintiff had not then nor had he at any time made or offered to make such deposit, court did not err in denying plaintiff's demand.—*Adams v. Crawford*, 116 Cal. 495, 497, 48 Pac. 488.

294. Same—Pleadings, sufficiency of to entitle to jury to be made by defendant.—In action under this section it is not necessary to determine whether or not pleadings were sufficient to entitle either party to jury, as to any of issues created. If not sufficient, defendant should have made them so, if his adverse claim of interest justified such course, and, not having done so, he can not afterwards be heard to complain he was deprived of his right to jury trial.—*Landregan v. Peppin*, 94 Cal. 465, 467, 29 Pac. 771.

295. Same—Plaintiff claiming ownership and possession, defendant claiming adversely.—Complaint showing that plaintiff is owner of land, and in actual possession of it, and that defendant asserts some right or title thereto which is unfounded, followed by answer admitting plaintiff's possession, and not showing prior possession in defendant, seems to present very action contemplated by this code provision; and, under these conditions, its continued equitable character not being affected by particular kind of right which defendant sets up, court below erred in denying defendant's demand for jury.—*Angus v. Craven*, 132 Cal. 691, 697, 64 Pac. 1091.

296. Same—Right to—Depends on facts in each case.—Decision of question whether, in action under this section, either party is entitled to jury, must depend greatly upon facts in each particular case. It has never been held by supreme court of this state that action to quiet title, under code, can not be maintained as equitable action, where plaintiff was, and for considerable period of time had been, in actual possession, and defendant had never been in possession, or that in such case defendant can overthrow equitable character of action by simply answering that he has title and praying that he for first time be let into

possession.—*Angus v. Craven*, 132 Cal. 691, 696, 64 Pac. 1091.

297. Same—Same—Not avoided by calling action equitable.—It is clear that right to jury trial can not be avoided by merely calling action equitable. If that were so, legislature, by providing new remedies and new kinds of judgments and decrees in form equitable, could in all cases dispense with juries, and thus entirely defeat constitutional provisions on subject. Code confers equitable right, so far as it grants power to maintain action at all, and decree is in form equitable, but, if it has to deal with ordinary common-law rights clearly cognizable in courts of law, it is to that extent action at law.—*Donahue v. Meister*, 88 Cal. 121, 127, 25 Pac. 1096.

298. Same—Same—Section is not in violation of constitution.—This section of code must not be construed as intending to violate that provision of constitution which says that "right to trial by jury shall be secured to all, and remain inviolate," unless such construction be unavoidable. Issues about title to land, such as those presented by answer, were triable at law at time constitution was adopted, and therefore either party has right to have such issues tried by jury.—*Donahue v. Meister*, 88 Cal. 121, 124, 25 Pac. 1096.

299. Same—Where action in effect is one to recover possession.—Court, in guarding constitutional right to jury trial, have repeatedly held that where suit should have been, and in substance is, an action for recovery of possession of land, right of defendant to jury can not be defeated by mere device of bringing action in an equitable form.—*Angus v. Craven*, 132 Cal. 691, 696, 64 Pac. 1091.

300. Same—Where defendant was in possession, and in his answer not only denied that plaintiff was owner of land then in controversy, but also alleged that defendant had been in possession of such land for more than fifteen years, under issues it was held that action was in substance one for recovery of specific real property, and defendant was entitled to jury for trial of his alleged rights.—*Newman v. Duane*, 89 Cal. 597, 598, 27 Pac. 66.

301. Right to jury is not defeated where, at commencement of action, defendant and not plaintiff was in actual possession of premises involved; and action should be treated as substantially an action to recover possession.—*Angus v. Craven*, 132 Cal. 691, 696, 64 Pac. 1091.

302. Legal issues of equitable nature—Discretion of court.—Whether an action involves legal issues or issues of equitable cognizance must depend upon the facts alleged in the particular case, and where it is apparent that the facts alleged and the issues raised are strictly of an equitable nature, the question whether such issues shall be tried by a jury or not is a matter for the discretion of the trial court, and neither party has an absolute right to de-

mand a jury trial.—*Davis v. Judson*, 159 Cal. 121, 113 Pac. 147.

303. Whether an action brought under the provisions of this section is in itself correct one at law or one in equity must depend upon the facts and circumstances of the particular case.—*McNeill v. Morgan*, 157 Cal. 373, 378, 108 Pac. 69.

304. If one is the owner and in possession of property and another asserts a claim to that property which is founded neither in law or in equity the asserted claim is necessarily adverse to that of the owner or possessor of the land and it is only necessary for a complaint to allege such facts.—*McNeill v. Morgan*, 157 Cal. 373, 376, 377, 378, 108 Pac. 69.

VII. PROCEEDINGS UNDER McENERNEY ACT.

305. As to when action may be brought.—A suit under the McEnerney Act does not imply the destruction of all the records, which by any possibility may have reference to the property to which the plaintiff seeks to quiet title against all persons, but such an action lies whenever the records of the county have been lost or destroyed "in whole or in any material part," and, therefore, the existence of parts of the records does not absolve a party claiming an interest in property from the duty of availing himself of the information open to him regarding such an action, where it is conducted with all the prescribed formalities.—*Dowling v. Spring Valley Water Co.* 174 Cal. 218, 162 Pac. 894.

306. Affidavit filed with complaint.—In an action to quiet title against "all persons," under the so-called "McEnerney Act" (Stats. 1906, p. 78, II Henning's General Laws, 3d ed., p. 3367), though the affidavit filed with the complaint has reference to the property involved and might appropriately describe the same, yet it is not expressly required so to do, and any defect in the description therein may be cured by express reference to the complaint for description, which is expressly required to contain "a particular description of such real property."—*Hynes v. All Persons, etc.*, 19 Cal. App. 185, 125 Pac. 253.

307. Same—Sufficiency of affidavit.—Where the affidavit sets forth plaintiff's ownership in fee simple and peaceable possession of the property described, that it was derived from the estate of her father named, deceased, and deeds from her named mother, her named sister, and her named brother; that all of, said property is inclosed by fences and buildings, resided on by plaintiff, and "that the plaintiff and her grantors have been the owners in fee simple, and in the actual and peaceable possession thereof for more than twenty years last past," it sufficiently sets forth "the character of affiant's estate and possession," the "period during which she has enjoyed the estate" and also "the person and persons from whom obtained," and is

sufficient "to enable the defendants to verify plaintiff's claim, and prevent fraud, and safeguard their rights."—*Hynes v. All Persons, etc.*, 19 Cal. App. 185, 125 Pac. 253.

308. While the plaintiff is required to file an affidavit fully and explicitly setting forth and showing the "character of his estate, right, title, interest or claim and possession," it can not reasonably be held that the affidavit must set forth every probative fact relating to affiant's title, and every probative fact showing for what period the affiant's asserted title has existed, or should minutely set forth the history of his title and its enjoyment, in order to meet the terms of the statute.—*Hynes v. All Persons, etc.*, 19 Cal. App. 185, 125 Pac. 253.

309. Same—Waiver of objection to affidavit.—Where the defendant appeared in the action and answered and tried the case, without objection to the jurisdiction of the court over the person of the defendant or over the subject-matter, and the issue of ownership was submitted and decided, and the appeal is upon that issue by the defendant, the affidavit of the plaintiff had performed its office as to him, and where it is sufficient, prima facie, to show jurisdiction, and the evidence showed the facts which it is claimed should have been more fully stated in the affidavit, the appellant has no cause to complain of its insufficiency.—*Hynes v. All Persons, etc.*, 19 Cal. App. 185, 125 Pac. 253.

310. Complaint to set aside in part decree under—Sufficiency of.—A complaint in equity to set aside in part a decree quieting title to real property in San Francisco, pursuant to a proceeding under the statute commonly known as the "McEnerney Act," on the ground that neither the plaintiff nor his predecessor in interest had any notice or knowledge of the pendency of the quiet title action, and that the agents of the plaintiff in such action falsely swore that they knew of no adverse claimants to the property, fails to state a cause of action, where it is alleged only on information and belief that the predecessor in interest of the plaintiff was without notice or knowledge of the pendency of the action, and that the persons making the statements on behalf of the plaintiff in the action to quiet title knew the same to be false and untrue.—*Dowling v. Spring Valley Water Co.*, 174 Cal. 218, 162 Pac. 894.

311. Construction of act—Remedial in nature.—Though the act in question is remedial in its nature, and is to be liberally construed to effect its main purpose, yet a substantial compliance with its provisions is required, and the court should insist upon a fair and full compliance with such requirements, on the part of the plaintiff, as are manifestly intended for the benefit of the defendants, in enabling them by verifying plaintiff's claim to prevent fraud and to safeguard their rights.—*Hynes v. All Persons, etc.*, 19 Cal. App. 185, 125 Pac. 253.

312. Costs in.—A defendant who voluntarily appears in an action to quiet title under the McEnerney Act, and submits his own claim in relation to the property for adjudication, is estopped from contending that the trial court never acquired jurisdiction by reason of the failure of the affidavit filed with the complaint to show that the plaintiff was in the actual possession of the property as is required by section 5 of the act.—*Faxon v. All Persons, etc.*, 166 Cal. 707, 137 Pac. 919.

313. The general provisions of the Code of Civil Procedure relative to costs are applicable to proceedings under the McEnerney Act.—*Faxon v. All Persons, etc.*, 166 Cal. 707, 137 Pac. 919.

314. It is not an abuse of discretion to award the cost of publication of summons against the only defendant who appeared in an action to quiet title under the McEnerney Act.—*Faxon v. All Persons, etc.*, 166 Cal. 707, 137 Pac. 919.

315. Findings—Sufficiency of—Equitable interest claimed in cross-complaint.—Findings of title in the plaintiff, and that the defendant has no right, title, interest, or claim in or to the property described in the complaint, sufficiently negatives any equitable interest claimed in the cross-complaint of the defendant, and as the ultimate facts in issue are passed upon, no other finding was necessary as to the interest claimed in the cross-complaint. The finding of ownership includes the probative facts, and is good without a finding of particular facts upon which the title or want of title depends.—*Hynes v. All Persons, etc.*, 19 Cal. App. 185, 125 Pac. 253.

316. Interest entitling to maintain action.—The grantor of a deed of trust intended as security for a loan of money possesses such an interest as entitles him to maintain an action under the act of June, 1906, to quiet title to the property conveyed.—*C. A. Warren Co. v. All Persons*, 153 Cal. 774, 96 Pac. 807.

317. Memorandum as to adverse claimants—Absence of.—Where the affidavit showed that the city and county of San Francisco was an adverse claimant of an interest in the property, but no memorandum thereof was appended to the summons upon posting and publication, as required by section 4 of the McEnerney Act, conceding the doubtful claim that defendant could take advantage of such defect, yet where the city and county appeared by answer and disclaimed any interest, the defect was thereby cured.—*Hynes v. All Persons, etc.*, 19 Cal. App. 185, 125 Pac. 253.

318. Possession—Sufficiency of.—In an action to quiet title brought under the McEnerney Act of 1906, the fact that the property had not been occupied between April 18, 1906, and September 21, 1906, except to be visited by a watchman, who was looking after the ruins which remained on the property, does not show such a lack of pos-

session as to prevent the maintenance of the action.—*Vanderbilt v. All Persons*, 163 Cal. 507, 126 Pac. 158.

As to kind of possession required in an action under the McEnerney Act, see, post, § 749 and note.

319. Proof of possession by plaintiff—Necessity of.—In an action to quiet title, under the so-called McEnerney Act (Stats. Ex. Sess. 1906, p. 78), to certain lots in the city and county of San Francisco, the public records of which in the office of the county recorder were destroyed by the fire of April, 1906, proof of the actual possession by the plaintiff of the land in question at the time when the action was commenced and when the affidavit accompanying it was made, is necessary to the rendition of a judgment for the plaintiff.—*Vanderbilt v. All Persons, etc.*, 163 Cal. 507, 126 Pac. 158.

320. Where the plaintiff in an action to establish title under the McEnerney Act relies upon adverse possession, he has the burden to show that every element necessary to constitute such possession is made clear.—*Hart v. All Persons*, 20 Cal. App. Dec. 352, 148 Pac. 236.

321. In this action to quiet title under the McEnerney Act to two parcels of land in San Francisco, it would have been legally impossible for the court to have found in favor of the defendant's contention that it had title by prescription, as claimed by it, to a portion of one of the parcels, for the reason that evidence of certain essential elements of adverse possession was lacking, if indeed there was sufficient evidence of any of such elements.—*Hart v. All Persons*, 20 Cal. App. Dec. 352, 148 Pac. 236.

322. Such fact, however, does not deprive the defendant of the legal right to insist that the evidence is insufficient to support the judgment and findings in favor of the plaintiff, for in an action to quiet title the plaintiff can not rely altogether upon the defendant's failure to prove his title, but must show title in himself.—*Hart v. All Persons*, 20 Cal. App. Dec. 352, 148 Pac. 236.

323. The actual possession and occupation of land, under claim of ownership for any period, is sufficient to enable the party in possession to maintain an action to quiet title as against a trespasser, or one who establishes no title in himself.—*Hart v. All Persons*, 20 Cal. App. Dec. 352, 148 Pac. 236.

324. Rules of practice.—Under section 12 of the McEnerney Act, except as therein otherwise provided, "the provision and rules of law relating to evidence, pleading, practice, new trials and appeals applicable to other civil actions shall apply to the actions hereby authorized," and, under these rules, the voluntary appearance and answer of the defendant was equivalent to personal service of the summons and copy of the complaint. By such appearance he

waives any mere irregularity in the prior proceedings, nor can he avail himself of any defects in the service of summons upon other parties.—*Hynes v. All Persons*, etc., 19 Cal. App. 185, 125 Pac. 253.

VIII. PROCEEDINGS TO PUT IN POSSESSION.

As to party ejected pendente lite entitled to writ of possession, see par. 172, this note.

As to writ of possession issued when action in ejectment dismissed, see pars. 114, 172, this note.

325. As to generally.—In proceedings to put the party in possession who has recovered judgment in an action to quiet title, the court can not determine any proprietary rights of a person in possession of the property who was not a party to the action.—*Dresser v. Allen*, 25 Cal. App. 124, 142 Pac. 911.

326. If such person came into possession at any time after the commencement of the action, it is presumed that he came in un-

der the plaintiff, and upon the issue pertaining to his right to remain in possession, the burden is upon him to show affirmatively that his possession is rightful and under a title that has not been determined in the action, and that such possession was not taken by collusion with the plaintiff.—*Dresser v. Allen*, 25 Cal. App. 124, 142 Pac. 911.

327. Alias writ of possession.—The enforcement of a judgment recovered in an action to quiet title can not be resisted by a person not a party to the action, who asserts the right to retain the premises under a claim of possession adverse to the person against whom the judgment was awarded, when it appears that such claim is founded upon the mere declaration of the latter of an abandonment of the premises to the former and recognition of his claim without any actual removal from the premises.—*Dresser v. Allen*, 25 Cal. App. 124, 142 Pac. 911.

328. In such case the prevailing party is entitled to an alias writ of possession for the possession of the property.—*Dresser v. Allen*, 25 Cal. App. 124, 142 Pac. 911.

§ 739. WHEN PLAINTIFF CAN NOT RECOVER COSTS. If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff can not recover costs.

History: Enacted March 11, 1872, re-enactment of § 255 Practice Act.

PLAINTIFF CAN NOT RECOVER COSTS, WHEN.

1. Disclaimer as to part of property—Not to entitle to change of venue.
- 2, 3. Disclaimer by defendant—Gives judgment without costs.
4. Disclaimer unaffected by previous position as to interest.
5. Same—Dismissal of action.
6. Judgment—Set aside, based upon disclaimer made through mistake.
7. Same—Without costs, may be entered although disclaimer of all interests whatever.

As to answer, generally, see, ante, § 437 and note.

1. Disclaimer as to part of property—Not to entitle to change of venue.—In action to secure cancellation and annulment of certain agreements relating to certain lands described in several counties, alleged to be claimed by defendant, and to quiet title thereto, where defendant filed disclaimer to lands situated in county in which action is brought, such disclaimer did not entitle him to change of place of trial to county of his residence.—*Pennie v. Visser*, 94 Cal. 323, 325, 29 Pac. 711.

2. Disclaimer by defendant—Given judgment without costs.—For if defendant by his answer disclaims all interest whatever, judgment may, nevertheless, be entered against him, though in such case it must be without costs. Therefore, plaintiff is not required to set forth nature of defendant's claim. Pleading is very simple.—*Castro v. Barry*, 79 Cal. 443, 447, 21 Pac. 946.

3. In action under this section plaintiff is entitled to judgment, although defendant makes disclaimer, but without costs, same as in case of default. It would be strange if plaintiff were entitled to judgment on disclaimer, and not entitled to judgment, where answer shows no legal defense.—*Dranga v. Rowe*, 127 Cal. 506, 509, 59 Pac. 944.

4. Disclaimer unaffected by previous position as to interest.—When, in action to quiet title to land, defendant disclaims any interest or estate in premises, it is immaterial whether or not he had ever before claimed interest or estate therein adversely to plaintiff: in either event, plaintiff would be entitled simply to judgment quieting his title, without costs.—*Bulwer Consol. Min. Co. v. Standard Consol. Min. Co.*, 83 Cal. 589, 598, 23 Pac. 1102.

5. Same—Dismissal of action as to property of which defendant has disclaimed title is not erroneous, as in such case judgment

for plaintiff would in any event be merely formal and without costs.—*Packer v. Doray*, 4 Cal. Unrep. 297, 34 Pac. 628.

6. Judgment—Set aside, based upon disclaimer made through mistake.—Where, in action to quiet title, defendant filed amended and unverified answer disclaiming any interest in any of property described in complaint, except lot 13, and, upon trial, court found that defendant was owner of said lot, and plaintiff was owner of other lots, and defendant therein moved to set aside judgment and for permission to amend her amended answer by striking out said disclaimer upon ground that amended answer concerning disclaimer had been filed through inadvertence and mistake, and that

"said disclaimer was inadvertence and mistake of fact; that judgment was entered against defendant by reason of said mistake and that she had no notice of state of pleadings until several months later and when writ of assistance was served," court properly granted motion to set aside judgment.—*Underwood v. Underwood*, 87 Cal. 523, 524, 25 Pac. 1065.

7. Same—Without costs, may be entered, although disclaimer of all interests whatever.—If defendant by his answer, in action to quiet title to land, disclaims all interest whatever, judgment may nevertheless be entered against him, though in such case it must be without costs.—*Castro v. Barry*, 79 Cal. 443, 447, 21 Pac. 946.

§ 740. IF PLAINTIFF'S TITLE TERMINATES PENDING THE SUIT, WHAT HE MAY RECOVER, AND HOW VERDICT AND JUDGMENT TO BE. In an action for the recovery of property, where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff may recover damages for withholding the property.

History: Enacted March 11, 1872, re-enactment of § 256 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 160, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 686, *Kerr's Stats. and Amdts. 1906-7*, p. 460.

TERMINATION OF INTEREST DURING SUIT.

1. Affidavits—Right to writ of possession not determined by.
2. Allegations of facts constituting title showing adverse claim.
3. Defense that right once existed and has ceased—Is new matter, to be specially pleaded.
4. Same—Proof thereon properly rejected.
5. Same—To authorize evidence thereof.
6. Ejectment by termor—Verification of complaint by lessor.
7. Subsequent title—Must be set up by supplementary answer.
8. Tax-deed—Must be specially pleaded by defendant.
9. Under mere denials in answer—Termination of right can not be proven.

1. Affidavits—Right to writ of possession not determined by.—Where plaintiff, in action under this section, applied, after judgment, for writ based upon disputed right that defendant, as against him, had case of any character, and defendant afterwards claimed right to possession, acquired subsequent to its adjudication, which he insists was superior to right there decreed, court can not determine merits of defendant's claim upon such application upon affidavits, for no question of title can be litigated in that way.—*Landregan v. Peppin*, 94 Cal. 465, 468, 29 Pac. 771.

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2. Allegations of facts constituting title showing adverse claim.—In action to quiet title, where defendant disclaims but alleges that lands are situated within boundary of irrigation district, and further alleges in detail all steps leading up to and including sale of aforesaid land to defendant and issuance of certificate of sale thereon to him on account of assessment, levy of tax, and delinquent sale thereunder, this was an assertion of title and adverse claim of defendant, and one that could be determined in such action.—*Quint v. McMullen*, 103 Cal. 381, 382, 37 Pac. 381.

3. Defense that right once existed and has ceased—Is new matter, to be specially pleaded.—Defense permitted by this section assumes that at commencement of action plaintiff had title to right of possession, but that his right has since terminated by his own act in conveying land, and consequently right of possession. New matter must be specially pleaded, and whatever admits that cause of action as stated in complaint once existed, but at same time avoids it—that is, shows that it has ceased to exist—is new matter.—*Moss v. Shear*, 30 Cal. 468, 473.

4. Same—Proof thereon properly rejected.—Proof that as to portion of the demanded premises title had passed to one of defendants since action was commenced, was properly rejected on ground that it could not be given in evidence without pleading or by supplemental answer.—*McMinn v. O'Connor*, 27 Cal. 238, 246.

5. **Same—To authorize evidence thereof.**—To make available this section of code, facts which occur subsequent to filing answer, materially affecting rights of respective parties to disadvantage of defendant, which, if in evidence, would necessarily change result to detriment of plaintiff, should be embodied in supplemental answer to authorize evidence of them without plaintiff's consent.—*McMinn v. O'Connor*, 27 Cal. 238, 247.

6. **Ejectment by termor—Verification of complaint by lessor.**—In an action by a lessee for a term of years, where the complaint is verified by the lessor, and the action brought for her benefit as the real party in interest, this section is without proper application, since the judgment rendered must be one to determine the title of the lessor, instead of the lessee, who presumably was never in possession of the leased premises, and had never paid rent, and whose rights under an unconsummated lease were presumably nil.—*Cassin v. Nicholson*, 154 Cal. 502, 98 Pac. 190.

7. **Subsequent title—Must be set up by supplementary answer.**—Denial of allegations of complaint, in action to quiet title,

puts in issue title of plaintiff at date alleged, or, at least, his title at commencement of action. Any title acquired subsequent to issue thus joined must be set up by supplemental answer in nature of plea puis darrein continuance.—*Moss v. Shear*, 30 Cal. 468, 473.

8. **Tax-deed—Must be specially pleaded by defendant.**—Whether tax-deed would have constituted evidence of transfer of any portion of premises to grantees therein named, it was not necessary to decide. It was enough that it was objected to at threshold for reason that it was not set up in plea of defense, which objection was properly sustained.—*Moss v. Shear*, 30 Cal. 468, 474.

9. **Under mere denials in answer—Termination of right can not be proven.**—As defense that right of plaintiff has terminated during pendency of action was not made to appear by plaintiff, it was necessary for defendant to show it affirmatively. Had issue been made by answer, the burden of proof would have been upon defendant. Clearly, under our system, it is not admissible under mere denials of allegations in complaint.—*Moss v. Shear*, 30 Cal. 468, 473.

§ 741. WHEN VALUE OF IMPROVEMENTS CAN BE ALLOWED AS A SET-OFF. When damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claim of the plaintiff, in good faith, the value of such improvements must be allowed as a set-off against such damages.

History: Enacted March 11, 1872, re-enactment of § 256 Practice Act.

VALUE OF IMPROVEMENTS ALLOWED AS A SET-OFF, WHEN.

1. Compensation disallowed—Made without authority of law or consent.
2. Offset—Right to, if made bona fide before plaintiff's title and permanent.
3. Same—Only upon proof, made under color of title and in good faith.
4. Same—Statutory only, and facts to be alleged.
5. Same—Where holding adversely and before demand.
6. Same—Where value in excess of rents and profits.
7. Same—Same—Disallowed if pleading defective.
8. Valuable improvements—Are allowed only as set-off.

1. **Compensation disallowed—Made without authority of law or consent.**—Although the owner is entitled to full compensation for land taken, and for all permanent improvements thereon made by himself or by those from whom he derived title, yet he

is not entitled to damages for improvements made by the party at whose suit land is afterwards condemned without authority of law or consent of owner of land.—*Stewart v. Sefton*, 108 Cal. 197, 210, 41 Pac. 293.

2. **Offset—Right to, if made bona fide, before plaintiff's title and permanent.**—Right to offset improvements, in actions under this section, depends in particular upon whether they were made in good faith, and before title of plaintiff accrued and upon whether improvements are permanent or not.—*Carpentier v. Small*, 35 Cal. 346, 355.

3. **Same—Only upon proof, made under color of title and in good faith.**—Under the provisions of section 257 Practice Act, value of improvements can be allowed as set-off, only upon condition that they were placed upon land by defendant, or by those under whom he claims, holding under color of title adversely to claims of plaintiff, all of which must appear to have been in good faith.—*Love v. Shartzler*, 31 Cal. 487, 495; *Wise v. Burton*, 73 Cal. 174, 175, 14 Pac. 683.

4. **Same—Statutory only, and facts to be alleged.**—Right to offset the value of improvements, against claim for damages, comes from statute, and, as matter of pleading, all facts upon which party is by statute made to hinge, should be alleged.—*Carpentier v. Small*, 35 Cal. 346, 355.

5. **Same—Where holding adversely and before demand.**—Provision of this section, that improvements may be set off, as made by one holding "under color of title adversely to the claim of plaintiff in good faith," applies only where holding is adverse and before the demand.—*Hannan v. McNickle*, 82 Cal. 122, 127, 23 Pac. 271.

6. **Same—Where value in excess of rents and profits.**—Under our statute, and former decisions, allowance for improvements can be made only as offset for damages, claimed for withholding possession, where court found value of improvement placed

on land was in excess of rents and profits, and, therefore, allowed respondents no judgment for rents or damages. This was all that defendants were under any view entitled to demand.—*Huse v. Den*, 85 Cal. 390, 401, 20 Am. St. Rep. 232, 24 Pac. 790.

7. **Same—Same—Disallowed if pleading defective.**—Recoupments for improvements against the main profits, found by jury, were improperly allowed, where improvements were made before plaintiff's title accrued, and pleadings did not bring defendant within section 257 of Practice Act.—*Bay v. Pope*, 18 Cal. 694, 696.

8. **Valuable improvements—Are allowed only as set-off.**—Valuable improvements upon premises, even where defendant holding under color of title adversely to plaintiff, in good faith, could be allowed only as set-off to damages.—*Yount v. Howell*, 14 Cal. 465, 467.

§ 742. AN ORDER MAY BE MADE TO ALLOW A PARTY TO SURVEY AND MEASURE THE LAND IN DISPUTE. The court in which an action is pending for the recovery of real property, or for damages for an injury thereto, or a judge thereof may, on motion, upon notice by either party for good cause shown, grant an order allowing to such party the right to enter upon the property and make survey and measurement thereof, and of any tunnels, shafts, or drifts therein, for the purpose of the action, even though entry for such purpose has to be made through other lands belonging to parties to the action.

History: Enacted March 11, 1872, re-enactment with addition of § 258 Practice Act as amended 1860 (Stats. 1860, p. 304); amendment approved March 10, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 11.

As to notices, motions, and orders in general, see, post, §§ 1003 et seq. and notes.

As to order for survey when title to land

in two counties is in dispute, see Kerr's Cyc. Pol. Code, 2d ed., § 4270 and note.

§ 743. ORDER, WHAT TO CONTAIN, AND HOW SERVED. IF UNNECESSARY INJURY DONE, THE PARTY SURVEYING TO BE LIABLE THEREFOR. The order must describe the property, and a copy thereof must be served on the owner or occupant; and thereupon such party may enter upon the property, with necessary surveyors and assistants, and make such survey and measurement; but if any unnecessary injury be done to the property he is liable therefor.

History: Enacted March 11, 1872, re-enactment of § 259 Practice Act.

§ 744. A MORTGAGE MUST NOT BE DEEMED A CONVEYANCE, WHATEVER ITS TERMS. A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale.

History: Enacted March 11, 1872, re-enactment of § 260 Practice Act; repeal by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 160, held unconstitutional, see history, § 5 ante.

MORTGAGE NOT A CONVEYANCE.

1. Assignment absolute in form—Not made void by counter-agreement.
2. Clause distinguishing deed of trust from mortgage.
3. Construction of section—Adopted in full view of rules of law and equity.
4. Same—Creates a mere lien for security.
5. Same—Meaning of "whatever its terms."
6. Same—Mortgage passes no estate in land.
7. Same—Restricts deed to purpose of security.
8. Contracts of purchase—Mortgages not.
9. Contract to sell—May be incorporated with mortgage.
10. Deed of trust—Not invalid under this section.
11. Same—Section inapplicable to.
12. Default—Does not change character of mortgage—Payment after default discharges lien.
13. Same—Foreclosure and sale prerequisites of right of mortgagee to enter.
14. Equitable interest of grantor—Deed absolute on face—Notice.
15. Estoppel—None against innocent grantees without notice.
16. Fact that deed a mortgage—Shown in action hereunder.
17. Same—Ascertained, ordinary consequences of mortgage attaches.
18. Same—Mortgageor not prohibited from showing.
19. Innocent purchaser—Protected by estoppel of parties.
20. Mortgage under former statute—Not conveyance of conditional estate.
21. Parol evidence—Admissible to prove deed a mortgage.
22. Same—Same—At law and in equity.
23. Same—If inadmissible, this statute nugatory.
- 24, 25. Same—To connect deed and defeasance.
26. Possession—Authority to take, not derived from mortgage alone.
27. Same—By consent, rights under, distinct from rights from mortgage.
28. Same—Mortgage alone does not give title to.
29. Same—Under mortgage, ineffective.
30. Power to foreclose—Same as power to sell according to law.
31. Title—In mortgageor until foreclosure and sale.
32. Same—No title in realty passes to grantee.
33. Same—Not transferred by deed intended as mortgage.

34. Verdict that deed is mortgage—Not readily set aside.

35. Words of conveyance, in absence of defeasance, absolute.

As to distinction between trust deed and power-of-sale mortgage of realty, see note Ann. Cas. 1913a, 1045-1056.

1. Assignment absolute in form—Not made void by counter-agreement.—Where there was an assignment absolute on its face, but there was separate counter-agreement, latter did not make former void, but gave privilege to reassign upon payment of certain sum of money, parol evidence admissible to connect transactions and show object.—*Gay v. Hamilton*, 33 Cal. 686, 688; *Jackson v. Lodge*, 36 Cal. 28, 43.

2. Clause distinguishing deed of trust from mortgage.—Deed, reciting that conveyance is made to secure payment of money evidenced by promissory note referred to, and containing provision that "if default should be made in payment of said sums of principal or interest when due, in manner stipulated in said promissory note . . . then it shall be lawful for parties of second part, or survivors of them, their heirs or assigns, on application of parties of third part, or their assigns, to sell above granted premises, or such part thereof as in their discretion they shall find it necessary to sell in order to accomplish objects of these trusts," is trust-deed and not mortgage.—*Bateman v. Burr*, 57 Cal. 480, 481.

3. Construction of section—Adopted in full view of rules of law and equity.—Provisions of section 260 Practice Act were adopted in full view of fact that mortgages were in common use, and recognized by law of the land—a part of the general municipal law—whether enforced in court of law or court of equity, in various forms, some with condition of defeasance in instrument itself, others, in separate instrument, and still others without any defeasance in writing at all—and provisions cover all these cases "whatever" terms of instrument. It was intended to put them all on common form, and treat them, as parties intended, as securities for performance of things to be performed, and not as transfer either as to title or right of possession, without express agreement that possession might be taken by party secured.—*Jackson v. Lodge*, 36 Cal. 23, 51.

4. Same—Creates a mere lien for security.—Under this section mortgage creates mere lien for purposes of security, and, as in other cases of lien upon real property, can be enforced only by judicial proceedings, except on authority of owner of property. By virtue of mortgage alone, mortgagee can neither acquire possession nor dispose of premises, but existence of mortgage does not prevent owner from entering into independent contract for possession, or for authorizing sale of premises,

mortgagee consenting thereto, to pay off debt.—*Fogarty v. Sawyer*, 17 Cal. 589, 593.

5. Same—Meaning of "whatever its terms."—Language in this section—"whatever its terms"—does not prohibit separate stipulations between parties for possession or for sale of premises upon default, but was intended only to control terms of grant, bargain, and sale generally, employed in mortgages.—*Fogarty v. Sawyer*, 17 Cal. 589, 593.

As to transfer, when mortgage and when pledge, see *Kerr's Cyc. Civ. Code*, 2d ed., § 2924 and note.

As to what mortgage is lien upon, see *Kerr's Cyc. Civ. Code*, 2d ed., § 2926 and note.

6. Same—Mortgage passes no estate in land.—Formerly mortgagee could enter peaceably and bring ejectment. This section does not, in express terms, alter estate at law of mortgagee, but it does so in effect; it takes from mortgagee all right to possession, even before or after condition broken, and instrument which confers no right of either present or future possession can hardly be deemed to pass any estate in land.—*Fogarty v. Sawyer*, 17 Cal. 589, 593; *Savings & L. Soc. v. McKoon*, 120 Cal. 177, 179, 52 Pac. 305.

7. Same—Restricts deed to purpose of security.—Section 260 Practice Act takes from mortgage its common-law character and restricts it to purposes of security. At common law mortgage was regarded as conveyance of conditional estate, which became absolute upon breach of its condition. It gave to mortgagee upon its execution, except as otherwise provided by stipulations inserted in instrument, right to immediate possession.—*Fogarty v. Sawyer*, 17 Cal. 589, 592.

As to conveyance deemed a mortgage, see *Kerr's Cyc. Civ. Code*, 2d ed., §§ 2924, 2925 and notes.

As to mortgage not entitling mortgagee to possession, see *Kerr's Cyc. Civ. Code*, 2d ed., § 2927 and note.

As to transfer made subject to defeasance, see *Kerr's Cyc. Civ. Code*, 2d ed., § 2925 and note.

8. Contracts of purchase—Mortgages not.—Mortgages are no longer understood as contracts of purchase and sale between parties, but as transactions by which loan is made on one side and security given for repayment on other; and default in payment of money secured does not change their character. They create only lien on land, which is incident of secured debt and passes by similar assignment of debt.—*Savings & L. Soc. v. McKoon*, 120 Cal. 177, 179, 52 Pac. 305.

9. Contract to sell—May be incorporated with mortgage.—Right to dispose both of possession and estate follows necessarily

from ownership of property; and this being so, no valid objection can be urged against incorporating contract and power in same instrument with mortgage. They do not become, in that way, any part of mortgage, but are as much independent of it as though contained in separate instruments.—*Fogarty v. Sawyer*, 17 Cal. 589, 593.

10. Deed of trust—Not invalid under this section.—Deed of trust conveys legal title; contract is that party, in whom debtor has seen fit to vest legal title, may, in case default is made by the debtor, sell property and transfer legal title to purchaser. Such is meaning and intention of contract, and there is nothing in such contract to make it invalid, nor is there any reason under this section why its provisions should not be carried out.—*Bateman v. Burr*, 57 Cal. 480, 483.

11. Same—Section inapplicable to.—While it is doubtless law that parol evidence may be introduced for purpose of showing that deed absolute upon its face was intended as mortgage, and for purpose of protecting written instrument, not to establish equity superior to its terms, but where instrument executed to secure repayment of money borrowed was not mortgage, but was in fact deed in trust, between which instruments distinction has been long recognized and pointed out, section 260 Practice Act and above section have no application.—*Bateman v. Burr*, 57 Cal. 480, 482.

12. Default—Does not change character of mortgage—Payment after default discharges lien.—Mortgage is regarded as mere security for debt, and default in payment does not change its character; payment after default operates to discharge the lien, equally with payment at maturity of debt.—*Jackson v. Lodge*, 36 Cal. 28, 42.

13. Same—Foreclosure and sale of prerequisites of right of mortgagee to enter.—Where defendant's mortgage has not been foreclosed, and has no special provision therein authorizing possession to be taken, but is in usual form, it conveys property, but provides that if certain payments are made, then instrument is to be void; but if default be made in their payment, then property may be sold. Until default and consequent foreclosure and sale, mortgagees thereunder had no right to enter upon or take possession of premises, and, having done so, they are liable to be ejected same as any other intruder.—*Kidd v. Teeple*, 22 Cal. 256, 262.

14. Equitable interest of grantor—Deed absolute on face—Notice.—The interest of a grantor, being equitable in its character, legal title, based on deed, remains in grantee and his assigns, until court declares deed to have been intended as mortgage, and grantor redeems according to terms of decree. Notice of equitable title of first grantor does not impair effect of

second deed as conveyance of legal title. It would be absurd to hold that notice kept on foot equitable interest, while party entitled to possession held legal title (dis. op. Rhodes, J.).—*Jackson v. Lodge*, 36 Cal. 28, 62.

15. Estoppel—None against innocent grantees without notice.—Where deed is made by Schultz to his wife, with the request to pay off a mortgage held by defendant Stoerling and wife, thereafter conveys to defendant Davis, subject to Stoerling's mortgage, but so far as appears without notice of any vendor's lien on part of plaintiff, defendant Davis was not estopped from saying that plaintiff never had title to land; her predecessor in interest, Schultz, was not estopped from showing that deed to plaintiff was in fact a mortgage, and neither was she estopped from making same claim.—*Wenzel v. Schultz*, 100 Cal. 250, 254, 34 Pac. 696.

16. Fact that deed a mortgage—Shown in action hereunder.—Provision of this section prohibiting recovery, has reference to action at law, and it necessarily assumes that fact, which shall defeat recovery, may be shown in very action in which recovery is sought. If it can not be thus shown, then, as in large number of cases embraced within provisions of statute, purpose of legislature is defeated. But courts of equity exercise no arbitrary powers; they simply administer, in forms peculiarly their own, one branch of municipal law. There must be right recognized by municipal law before even court of equity can enforce it. Their mode of proceeding was different; but now, under our system, there is no difference in forms of such proceeding.—*Jackson v. Lodge*, 36 Cal. 28, 52.

17. Same—Ascertained, ordinary consequences of mortgage attaches.—When it is once ascertained that deed is mortgage, ordinary consequences of mortgage attaches, whatever form may be,—so far, at least, as parties and those under them with notice are concerned; mortgagee no more takes title, except in form, even when deed is absolute on its face, than when instrument is mortgage in its usual terms.—*Jackson v. Lodge*, 36 Cal. 28, 40.

18. Same—Mortgageor not prohibited from showing.—Section 260 Practice Act is not nugatory, and when mortgage is, in its terms, in form absolute conveyance, mortgageor is not prohibited from showing the real character of the transaction.—*Jackson v. Lodge*, 36 Cal. 28, 48.

19. Innocent purchaser—Protected by estoppel of parties.—That innocent purchaser for valuable consideration from apparent grantee of conveyance, absolute on its face, in due form upon records, although intended as mortgage, without notice of its real character, would be protected there can be no doubt. Parties who executed and placed upon record such deed would be es-

topped, as to such innocent purchaser, from averring that instrument is not such as it appears to be—such as their act represented it to be. In such case, parol evidence is admissible to show that deed absolute on its face was given as security, and is therefore mortgage.—*Jackson v. Lodge*, 36 Cal. 28, 43.

20. Mortgage under former statute—Not conveyance of conditional estate.—Mortgage made prior to act of 1861 (par. 2 § 260 ante), is not to be regarded as conveyance of conditional estate to become absolute on breach of condition, as at common law.—*Skinner v. Buck*, 29 Cal. 253, 255.

21. Parol evidence—Admissible to prove a deed mortgage.—If plaintiff, having introduced in evidence instrument in writing executed by one Bartlett, purporting to transfer all his right, title, and interest in claim in dispute, and also promissory note given by said Bartlett, bearing same date, it was error to refuse offer to prove by Bartlett that said instrument transferring said claim was intended by party to be, and was, to secure payment of said note. Testimony was relevant and it is settled in this state that parol evidence is admissible to show that deed absolute on its face was intended to be mortgage.—*Cunningham v. Hawkins*, 27 Cal. 603, 606.

22. Same—Same—At law and in equity.—Upon principle and authority, parol evidence is admissible in this state, at law as in equity, to show that deed, absolute on its face, was given as security for money, and that it is, in fact, a mortgage.—*Jackson v. Lodge*, 36 Cal. 28, 56.

23. Same—If inadmissible, this statute nugatory.—If parol evidence was inadmissible, this provision of statute would be nugatory, for the reason that when mortgage is in its terms absolute conveyance, mortgageor would be prohibited from showing real character of transactions, and would resolve question into one of pleading, rather than question as to pertinence of evidence.—*Cunningham v. Hawkins*, 27 Cal. 603, 606.

24. Same—To connect deed and defence.—Where there was instrument in form of deed absolute, and written agreement to reassign upon payment of certain sum by separate instrument, parol testimony was admissible to connect two, and show object.—*Jackson v. Lodge*, 36 Cal. 28, 49.

25. It is now conceded that rule in favor of admissibility of parol evidence in equity is universally established here and elsewhere, and this being so, under our system of practice and statutory provisions, same rules prevail in proceedings which would formerly have been at law.—*Jackson v. Lodge*, 36 Cal. 28, 50.

26. Possession—Authority to take, not derived from mortgage alone.—Common form of mortgage in use in this state is that of absolute conveyance, with condi-

tion underwritten, that it is executed as security, and shall become inoperative and void upon payment of the debt; and this statute is directed to language of alienation and transfer, declaring that instrument, whatever terms it may use, shall not be treated as conveyance, so as to enable owner to recover possession without foreclosure and sale. As result flowing herefrom, no authority can be derived from mortgage alone to take possession, even though terms are used which in other instruments would convey both title and possession.—*Fogarty v. Sawyer*, 17 Cal. 589, 594.

27. Same—By consent, rights under, distinct from rights from mortgage.—Possession taken by consent of owner, or by contract with him under mortgage, may confer rights as against third parties, but they are independent and distinct from any rights springing from mortgage, from which they derive no support. This conclusion only carries doctrine that mortgage is mere security for debt to its legitimate and logical result.—*Jackson v. Lodge*, 36 Cal. 28, 42.

28. Same—Mortgage alone does not give title to.—By operation of section 260 Practice Act, and it may be said also of other sections of that act, and of certain sections of the act concerning conveyances, and of several decisions of the supreme court, a mortgage of real estate does not, in this state, confer title to the possession of mortgaged property, except as result of foreclosure sale.—*Kidd v. Teeple*, 22 Cal. 255, 262.

29. Same—Under mortgage, ineffective.—Possession under mortgage can not affect nature of mortgagee's interest; it does not abridge nor enlarge his interest, nor convert what was previously security into seizin of freehold, nor change relation of creditor or debtor, nor impair estate of mortgageor, but leaves rights and interest of parties exactly as they existed previously.—*Jackson v. Lodge*, 36 Cal. 28, 42.

30. Power to foreclose—Same as power to sell according to law.—It would be difficult to detect any difference between stipulation empowering mortgagee to proceed to foreclose upon default, and one giving authority on like default "to proceed to sell," "in manner prescribed by law." Power given by mortgage, by clause quoted, is to

proceed to sell in manner prescribed by law, which, in our judgment, is in substance same as power to proceed to sell by means of action to foreclose.—*Brickell v. Batchelder*, 62 Cal. 623, 630.

31. Title—In mortgageor until foreclosure and sale.—In this state mortgagee is not regarded as ever having title of mortgageor until judicial foreclosure and sale. Title remains with mortgageor, whether possession be taken, or otherwise.—*Johnson v. Sherman*, 15 Cal. 287, 289; *Jackson v. Lodge*, 36 Cal. 28, 43.

32. Same—No title in realty passes to grantee, even by conveyance absolute in form and without any defeasance, when purpose is security; or, in other words, all mortgages, whether in usual form or absolute conveyances on their faces, stand upon same footing in this respect—that neither conveys title in fact.—*Jackson v. Lodge*, 36 Cal. 28, 43.

33. Same—Not transferred by deed intended as mortgage.—Deed absolute, if intended as mortgage, does not transfer title between parties to it.—*Cunningham v. Hawkins*, 27 Cal. 603, 606; *Taylor v. McLain*, 64 Cal. 513, 514, 2 Pac. 399; *Healy v. O'Brien*, 66 Cal. 517, 519, 6 Pac. 386; *Turner v. McDonald*, 76 Cal. 177, 180, 9 Am. St. Rep. 189, 18 Pac. 262.

34. Verdict that deed is mortgage—Not readily set aside.—When evidence was conflicting, upon question whether deed absolute upon its face was intended to be mortgage to secure money due from defendant to plaintiff, and question was fairly submitted to jury and determined against defendant, appellate court can not disturb verdict, and clear case ought to be made to justify jury or court in finding, upon parol testimony, deed, absolute upon its face, to be mortgage.—*Hopper v. Jones*, 29 Cal. 19, 20.

35. Words of conveyance, in absence of defeasance, absolute.—In absence of defeasance, words of conveyance, being without qualification or restriction, must have their usual signification, and conveyance of legal title is necessary result of their operation. Whatever may be effect of parol defeasance in equity, it is clear that it can not, at law, operate as defeasance of deed of conveyance (dis. op. *Rhodes, J.*).—*Jackson v. Lodge*, 36 Cal. 28, 60.

§ 745. WHEN COURT MAY GRANT INJUNCTION; DURING FORECLOSURE; AFTER SALE ON EXECUTION, BEFORE CONVEYANCE. The court may, by injunction, on good cause shown, restrain the party in possession from doing any act to the injury of real property during the foreclosure of a mortgage thereon; or, after a sale on execution, before a conveyance.

History: Enacted March 11, 1872, re-enactment of § 261 Practice Act; repeal by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 160, held unconstitutional, see history, § 5 ante.

As to executions and sales thereunder, see, ante, §§ 694 et seq. and notes.

As to foreclosure of mortgage, see, ante, § 726 and note.

As to injunctions and general practice concerning same, see, ante, §§ 525-533 and notes.

As to receivers, and appointment thereof, see, ante, § 564, subd. 2 and note.

As to waste, generally, see Kerr's Cyc. Civ. Code, 2d ed., § 2929 and note.

§ 746. DAMAGES MAY BE RECOVERED FOR INJURY TO THE POSSESSION AFTER SALE AND BEFORE DELIVERY OF POSSESSION.

When real property has been sold on execution, the purchaser thereof, or any person who may have succeeded to his interest, may, after his estate becomes absolute, recover damages for injury to the property by the tenant in possession after sale, and before possession is delivered under the conveyance.

History: Enacted March 11, 1872, re-enactment of § 262 Practice Act.

1. Action in ejectment—Damages for detention—Right of successor in interest.—In case of recovery by the successor in interest of plaintiff, substituted for such plaintiff after commencement of the action and before judgment, resultant damages for use and occupation during the period of unlawful detention, were properly

awarded to him.—Cassin v. Nicholson, 154 Cal. 503, 98 Pac. 190.

See, also, ante, § 738, note pars. 222-227.

As to *lis pendens*, see, ante, § 409 and note.

As to waste by person whose interest is subject to lien of mortgage, see Kerr's Cyc. Civ. Code, 2d ed., § 2929 and note.

§ 747. ACTION NOT TO BE PREJUDICED BY ALIENATION, PENDING SUIT. An action for the recovery of real property against a person in possession can not be prejudiced by any alienation made by such person, either before or after the commencement of the action.

History: Enacted March 11, 1872, re-enactment of § 263 Practice Act.

As to *lis pendens*, see, ante, § 409 and note.

§ 748. MINING CLAIMS, ACTIONS CONCERNING TO BE GOVERNED BY LOCAL RULES. In actions respecting mining claims, proof must be admitted of the customs, usages, or regulations established and in force at the bar or diggings embracing such claim; and such customs, usages, or regulations, when not in conflict with the laws of this state, must govern the decision of the action.

History: Enacted March 11, 1872, re-enactment of § 621 Practice Act.

MINING CLAIMS.

1. Action to quiet title to placer-mining claim—Necessity of proof of discovery of mineral prior to location.
2. Same—Same—Effect of stipulation as to mineral character of ground.
- 3, 4. Agricultural rights—Subject to mining rights on mining lands.
5. All legislation favors right of miners to mining land.
6. Conveyance of part of claim—Description by surface lines.
7. "Forfeiture"—In mining customs and codes means only loss of right from non-compliance therewith.

8. Same—Not same as "abandonment."
- 9-11. General customs—Not proved by testimony of particular customs.
12. Gypsum—Is a mineral.
13. Intruders—Miners not, entering upon mining land occupied as agricultural.
14. Maxim "qui prior est tempore," etc.—Gives no protection to farmer on mining lands.
15. Mining claims—Possession proven by evidence of acts and by prevailing customs.
16. Same—Possession and abandonment of mineral location.

17. Same—Right to, aided by presumption of grant.
18. Mining customs and usages—Adequate to judicial determination of mining controversies.
- 19, 20. Same—Admissible in evidence.
21. Same—Control rights of all parties entering thereunder.
22. Same—Local regulations are binding only as to claims of particular district.
23. Same—Sanctioned by state legislation.
24. Permission to miner to seek where he chooses for precious metals—Implied by this section.
25. Records of mining district admissible to establish claim.
26. Right from prior entry on mining claim—Not divested by rules of miners, but rules may be considered.

See, also, Kerr's Cyc. Civ. Code, 2d ed., §§ 1426-1426s and notes.

As to mines, minerals and mining, see, ante, § 586 and note.

1. Action to quiet title to placer-mining claim.—Necessity for proof of discovery of mineral prior to location.—Discovery of mineral is the source of the miner's title to the land, and is essential to a valid location, which it must precede, and while no arbitrary rule as to what will constitute a sufficient discovery, such discovery is essential to both placer and lode locations.—Garibaldi v. Grillo, 17 Cal. App. 543, 120 Pac. 425.

2. Same—Same—Effect of stipulation as to mineral character of ground.—A stipulation between the parties that the land was unpatented mineral land of the United States, was competent to determine their contending and conflicting rights, but could not dispense with the necessity of proof as to the actual discovery of gold in paying quantities prior to location by either party.—Garibaldi v. Grillo, 17 Cal. App. 542, 120 Pac. 425.

3. Agricultural rights—Subject to mining rights on mining lands.—Person who has settled, for agricultural purposes, upon any of mining lands of this state has settled upon such lands subject to rights of miners, who may proceed in good faith to extract any valuable metals there may be found in lands so occupied by settler in most practicable manner in which they can be extracted and to least injury to occupying claimant, according to express statutes of this state.—McClintock v. Bryden, 5 Cal. 97, 102, 63 Am. Dec. 87.

4. If it were the prevailing doctrine in this state that persons, without any right but that of possession, could, under pretense of agriculture, invade mineral district of state, and swallow up entire mineral wealth, by settlement upon 160-acre tract of land, it would be using law to very bad purpose if court should allow per-

son who has no evidence of title but his improvements, and no right but that of naked possession he has usurped, to destroy, for his own benefit, business of neighborhood and put as well government as mining public at defiance.—McClintock v. Bryden, 5 Cal. 97, 102, 63 Am. Dec. 87.

5. All legislation favors the right of miners to mining land.—All of legislation of both federal and state governments, bearing upon question as to what right plaintiff may have, in maintaining possession of farm which he claims situate upon mining lands, to exclusion of miner whilst he is in good faith searching for gold, denies claim of settler for agricultural purposes upon mineral lands; but, instead of denying to miner privilege of extracting gold wherever found, one, by its tacit permission, and other, by uniform tendency and implication of its laws, have given him that privilege, and allowed him to define and regulate his location in mines by local customs and laws prevailing at place where he is following his mining vocation.—McClintock v. Bryden, 5 Cal. 97, 100, 63 Am. Dec. 87.

6. Conveyance of part of claim—Description by surface lines.—A conveyance by the patentee of an entire mining claim, without reservation, of a part thereof, described by surface lines, together with all mining right, property, possession, claim, and demand whatsoever, conveys all the land below the surface within vertical planes conforming to the side lines, including the extralateral dip of all veins having their apexes within the unconveyed portion (Beatty, C. J., dis.).—Riley v. North Star Min. Co., 152 Cal. 550, 93 Pac. 194.

7. "Forfeiture"—In mining customs and codes, means only loss of right from non-compliance therewith.—Term "forfeiture," as used in our mining customs and codes, means loss of right to mine particular piece of ground previously acquired, by neglect or failure to comply with rules and regulations of bar or diggings in which ground is situated, prescribing acts which must be done in order to continue and keep alive that right after it has been once acquired.—St. John v. Kidd, 26 Cal. 263, 270.

8. Same—Not same as "abandonment."—"Forfeiture," as used in customs and rules of miners, is entirely separate and distinct from that of "abandonment." It involves no question of intent, but rests entirely upon mining rules and regulations, and involves only question whether in point of fact those rules and regulations have been observed by party seeking to maintain or perpetuate right, regardless of what his intention may have been.—St. John v. Kidd, 26 Cal. 263, 270.

9. General customs—Not proved by testimony of particular customs.—Testimony of witness, as to customs prevailing in mining camps, with which they were acquainted, in several counties other than one in which is situated claim in contro-

versy, all of which differed from each other as to extent of claim, such witnesses not testifying to any general custom or usage regulating extent of claims, was not competent evidence of general custom, but, so far as it amounted to anything on that point, tended strictly to negative its existence, and not admissible to show such general custom.—*Table Mt. Tunnel Co. v. Stranahan*, 81 Cal. 387, 391.

10. While general custom, whether existing anterior to location of mining claim or not, may be given in evidence upon question of extent, mere local regulation stands on different footing, and is inadmissible to limit extent of claim previously located.—*Table Mt. Tunnel Co. v. Stranahan*, 81 Cal. 387, 391.

11. Proof of general custom, for local customs, is irrelevant under provisions of section 621 Practice Act, which provides that "proof shall be admitted of customs, usages, or regulations established at bar or diggings embracing such claims," when not in conflict with constitution and laws of this state.—*Table Mt. Tunnel Co. v. Stranahan*, 81 Cal. 387, 393.

12. Gypsum—Is a mineral, and lands containing it are mineral lands, within the meaning of the statutes of the United States providing for the location of mineral lands.—*Madison v. Octave Oil Co.*, 154 Cal. 771, 99 Pac. 176.

13. Intruders—Miners not, entering upon mining land occupied as agricultural.—To sustain action of ejectment in favor of party relying upon mere prior possession, defendant in action is treated as intruder and wrong-doer who invades without right to premises, but where, in mining district, defendants were in exercise of peaceable and lawful calling, and in their search for gold, in progress of their work, they discovered that plaintiff had inclosed ground, which they believed to be valuable for mining purposes, and upon which they entered for purpose of carrying on their business of extracting gold, it was not act of intruders or wrong-doers, but act of persons following lawful and honorable pursuit, upon ground reserved to such purposes by both policy and laws of this state.—*McClintock v. Bryden*, 5 Cal. 97, 102, 63 Am. Dec. 87.

14. Maxim, "*qui prior est tempore, potior est jure*"—Gives no protection to farmer on mining lands.—Plaintiff can not settle upon and claim mineral lands for purposes of agriculture to exclusion of miners, without right, and claim protection in his possession merely because he was first upon ground; that he had fenced a farm, and was occupied in business of raising crops. Maxim of the law "*qui prior est tempore, potior est jure*," can not be applied in protection of person who settles upon lands reserved from settlement by policy of law, as against one entering for purpose encouraged wherever minerals may be found.

—*McClintock v. Bryden*, 5 Cal. 97, 101, 63 Am. Dec. 87.

15. Mining claims—Possession proven by evidence of acts and by prevailing customs.—In ascertaining limits of mining possession, courts have said same common-law principles are to be relied upon as those which regulate rights to possession of agricultural lands, although indicia of possession are not necessarily same. Possession in such case may be proved by satisfactory evidence of notorious acts of occupation, reference being had to nature of lands, uses to which they can be put, and to general practices or customs of region, with respect to occupation of lands of particular character. But possession, however proved, being established, presumption of grant arises.—*Lux v. Haggin*, 69 Cal. 255, 383, 10 Pac. 674.

16. Same—Possession and abandonment of mineral location.—One in the actual possession of public land, on which he has attempted to make a mineral location, is entitled to hold such possession as against every one but the United States, the holder of the paramount title, but this right is lost by abandonment, as against another who peaceably enters into possession after such abandonment.—*New England & Coalina Oil Co. v. Congdon*, 152 Cal. 211, 213, 92 Pac. 180.

17. Same—Right to, aided by presumption of grant.—Priority, extent, boundaries, and continuance of possession of mining claim, having been determined by consideration of rules of mining district, courts have proceeded to apply presumption of grant from paramount source,—a presumption, sustainable on common-law principles.—*Lux v. Haggin*, 69 Cal. 255, 383, 10 Pac. 674.

18. Mining customs and usages—Adequate to judicial determination of mining controversies.—At the time section 621 Practice Act became part of law of land, there had sprung up, throughout the mining regions of the state, local customs and usages by which persons, engaged in mining pursuits, were governed in acquisition, use, forfeiture, or loss of mining ground (forfeiture being used here as used and understood by miners in their mining codes). These customs differing in various localities, and prescribing acts by which right to mine particular piece of ground could be secured, and its use and enjoyment preserved, were few, plain, and simple, and well understood by those with whom they originated, and well adapted to secure end designed to be accomplished, and were adequate to judicial determination of all controversies touching mining rights.—*Morton v. Solambo Copper Min. Co.*, 26 Cal. 527, 533.

19. Same—Admissible in evidence.—That miners may make rules and regulations, to govern acquisition and tenure of mining rights, has been expressly and wisely de-

clared by legislature, with further declaration that such rules and regulations shall be admitted in evidence, and shall control decision of mining controversies according to language of section 621 Practice Act.—*St. John v. Kidd*, 26 Cal. 263, 270.

20. The customs and usages of mining districts have, in the progress of time, become more general and uniform, and their leading features are now same throughout mining regions of state, and however it may have been heretofore, there is no reason why judges or lawyers should wander back to time when Abraham dug his well, or explore with them law of agency, or statute of frauds, in order to solve simple question affecting mining right; for more convenient and equally legal solution can be found nearer home, in "customs and usages of bar or diggings embracing claim" to which such right is asserted or denied, as prescribed by section 621 Practice Act.—*Morton v. Solambo Copper Min. Co.*, 26 Cal. 527, 533.

21. Same—Control rights of all parties entering thereunder.—Proof being that defendants entered upon mining ground, claiming by virtue of location under local mining laws, which allowed claim of three hundred feet front for each man, and that plaintiff's claim did not exceed that ratio, defendants were not in position to allege that plaintiff's claim was unreasonable in extent, for, by locating their claims under and in accordance with these laws, they affirm that limit therein provided is not unreasonable. If that land was not unreasonable for defendants to locate under local laws, same amount was not unreasonable for plaintiff to continue to hold after adoption of laws.—*Table Mt. Tunnel Co. v. Stranahan*, 31 Cal. 387, 392.

22. Same—Local regulations are binding only as to claims of particular district.—Customs, usages, and regulations of bar or diggings were, by express statute, declared to be admissible as evidence "in actions respecting mining claims." It has always been held that local regulations, etc., accepted by the miners of particular district, are binding only as to possessory rights within district, and that they must be proved as a fact.—*Lux v. Haggin*, 69 Cal. 255, 383, 10 Pac. 674.

23. Same—Sanctioned by state legislation.—It was wise policy, on part of legislature, not only not to supplant mining rules by legislative enactments, but on contrary to give them additional weight of legislative sanction as in section 621 Prac-

tice Act. These usages and customs were fruit of times, and demanded by necessities of communities, which, though living under common law, could find therein no clear and well-defined rules for their guidance, applicable to new conditions by which they were surrounded, but were forced to depend upon remote analogies of doubtful application, and unsatisfactory results. Having received sanction of legislature, they have become as much part of law of land as common law itself, which was not adopted in more solemn form.—*Morton v. Solambo Copper Min. Co.*, 26 Cal. 528, 533.

24. Permission to miner to seek where he chooses for precious metals—Implied by this section.—The act of 1851 regulating proceedings in civil cases (§ 621) defining "that in actions respecting mining claims, proof shall be admitted of customs, usages, or regulations established or in force at bar or diggings embracing such claim," would seem to imply permission, upon part of state, to miner to seek wherever he chose in the gold-bearing districts for precious metals, and it would seem to extend to him whatever right it might have to mineral when found.—*McClintock v. Bryden*, 5 Cal. 97, 100, 63 Am. Rep. 87.

25. Records of mining district admissible to establish claim.—Where defendants, in contest of title over mining land, relied upon alleged forfeiture or loss of right to mine ground on part of plaintiffs by failure to work the ground, and keep right alive, as required by mining rules and regulations in force in district, and that, by such neglect and failure, ground was open to reoccupation, book, purporting to be book for record and transfer of mining claims, containing rules and regulations of district, was properly offered in evidence by defendants accompanied with testimony tending to show fact of forfeiture alleged by them.—*St. John v. Kidd*, 26 Cal. 263, 270.

26. Right from prior entry on mining claim—Not divested by rules of miners, but rules may be considered.—In contest over mining claims, court properly instructed jury in effect, that if they found from evidence that plaintiffs had acquired right to mine ground in controversy prior to entry of defendants, that right could not be divested by non-compliance on their part with any rules and regulations adopted by miners, and that such rules and regulations might be considered by them in connection with other evidence for purpose of determining whether or not plaintiffs had abandoned their claim.—*St. John v. Kidd*, 26 Cal. 263, 270.

§ 749. HOW SERVICE MAY BE MADE IN ACTION RELATING TO REAL PROPERTY. [Repealed.]

History: Enactment approved March 31, 1891, Stats. and Amdts. 1891, p. 278. Repeal approved March 19, 1907, Stats. and Amdts. 1907, p. 686.

§ 749[a]. DETERMINATION OF ADVERSE CLAIM TO REAL PROPERTY; UNKNOWN OWNER. An action may be brought to determine the adverse claims to and clouds upon title to real property by a person who, by himself or by himself and his predecessors in interest, has been in the actual, exclusive and adverse possession of such property continuously for twenty years prior to the filing of the complaint, claiming to own the same in fee against the whole world, and who has paid all taxes of every kind levied or assessed against the property during the period of five years continuously next preceding the filing of the complaint.

[Commencement of action—Verified complaint, contents.] Said action shall be commenced by the filing of a verified complaint averring the matters above enumerated. The said complaint may include as defendants in such action, in addition to such persons as appear of record to have, all other persons who are known to the plaintiff to have, some claim or cloud on the lands described in the complaint adverse to plaintiff's ownership, or other persons unknown claiming any right, interest or lien in such lands, or cloud upon the title of plaintiff thereto, and the plaintiff may describe such unknown defendants in the complaint as follows: "also all other persons unknown, claiming any right, title, estate, lien or interest in the real property described in the complaint adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto."

[Notice of pendency of action—When to be filed and contents.] Within ten days after the filing of the complaint, plaintiff shall file, or cause to be filed, in the office of the county recorder of the county where the property is situated, a notice of the pendency of the action, containing the matters required by section four hundred and nine of this code.

History: Enactment approved March 23, 1901, Stats. and Amdts. 1900-1, p. 579; amendment approved March 9, 1903, Stats. and Amdts. 1903, p. 104.

ADVERSE CLAIM TO REAL PROPERTY —UNKNOWN OWNERS.

1. Amendment of 1903.
2. Defendants—As to who are necessary.
- 3, 4. Same—Failure to file *lis pendens*.
5. Determining adverse claims—Conditions precedent.
6. Same—Action under McEnerney Act—Kind of possession required.
7. Filing of the notice of pendency of the action.
8. Judgment quieting title—Proper, when.

As to when it is not necessary to prove payment of taxes under the provisions of section 325, ante, in an action brought under the above section for the purpose of determining claims to real property, see, ante, § 325.

1. Amendment of 1903.—The action having been commenced subsequent to the amendment of this and succeeding sections, the question whether or not it is a proceeding under these sections is to be determined by the terms of the sections as amended.—*Los Angeles v. Los Angeles F. & M. Co.*, 150 Cal. 647, 649, 89 Pac. 615.

2. Defendants—As to who are necessary.

—It is not necessary in order to institute action under this section to examine the public records and name as defense all persons having an interest in the land in controversy in derogation of the plaintiff's title.—*Blackburn v. Bucksport & Elk River R. Co.*, 7 Cal. App. 649, 654, 95 Pac. 668.

3. Same—Failure to file *lis pendens*.—A defendant who appears and answers is not prejudiced by a failure to file a *lis pendens*, for the only effect of such omission would be to relieve innocent third parties from the operation of a judgment affecting the "title or right of possession" of the land in dispute.—*Blackburn v. Bucksport & Elk River Co.*, 7 Cal. App. 649, 652, 95 Pac. 668.

See par. 7, this note.

4. It is immaterial to one who voluntarily appears whether the summons was regularly issued or is defective in omitting therefrom certain matters required to be embraced therein or was not for any reason properly served and returned, as his voluntary appearance is equivalent to personal service and obviated the necessity of a summons.—*Blackburn v. Bucksport & Elk River R. Co.*, 7 Cal. App. 649, 651, 95 Pac. 668.

5. Determining adverse claims—Conditions precedent.—Even though the lien of a mortgage may have become extinguished the mortgageor can not quiet his title to the mortgaged premises under this and sections 750 and 751, post, as against the mortgagee without paying the mortgage-debt.—*Bulson v. Moffatt*, 173 Cal. 685, 161 Pac. 259.

6. Same—Action under McEnerney Act—Kind of possession required.—Must be actual, such as is described in sections 322 and 323, ante, as contradistinguished from constructive possession.—*Lofstad v. Murasky*, 152 Cal. 69, 91 Pac. 1008.

See, also, ante, § 738, note Part VII.

7. Filing of the notice of pendency of the action with the county recorder is not

an essential prerequisite to invest the court with jurisdiction of the subject-matter of a suit in which the recordation of such a notice is required.—*Blackburn v. Bucksport & Elk River R. Co.*, 7 Cal. App. 649, 653, 95 Pac. 668.

See pars. 3, 4, this note.

8. Judgment quieting title—Proper, when.—Although an action is brought under the provisions of the above section for the purpose of determining conflicting claims, an order quieting title to the land is properly entered in those cases in which the issue of title is properly raised by the pleadings of the parties.—*Ernst v. Hall*, — Cal. App. —, 197 Pac. 807.

See, also, ante, § 738 and note.

§ 750. NOTICE TO UNKNOWN OWNERS, HOW SERVED. Within one year after the filing of the complaint, as required by the preceding section, a summons must be issued, which shall contain the matters required by section four hundred and seven of this code, and in addition a description of the property and a statement of the object of the action. In said summons the said unknown defendants shall be designated as in the complaint. Within thirty days after the issuance of the summons, the plaintiff shall post or cause to be posted a copy thereof in a conspicuous place on the property.

[Resident defendants, to be served, when.] All defendants residing in the state of California, whose place of residence is known to the plaintiff, shall be served personally.

[Affidavit of service—Contents.] After service on all such defendants has been made, the plaintiff, or his agent, or attorney, shall make and file an affidavit wherein there shall be stated the names of the defendants who have been served personally, the names of the defendants who reside out of the state and their places of residence, if known to the plaintiff, and the names of the defendants residing in or out of the state whose place of residence is unknown to the plaintiff,

[Service on nonresident defendants—Order.] And thereupon the court or a judge thereof shall make an order directing the said summons to be served upon the defendants residing out of the state, whose place of residence is known to the plaintiff and upon the defendants residing in or out of the state, whose place of residence is unknown to the plaintiff, and upon all the unknown defendants as stated in the complaint and summons, by publication in some newspaper of general circulation printed and published in the county where the property is situated, and if there be no such paper in such county, then in some adjoining county; to be designated by the court or judge thereof, which publication shall be for once a week for two successive months.

[Mailing copy of summons, etc., to nonresident defendants.] A copy of the summons and complaint, within ten days after the making of said order, properly addressed and with the postage thereon fully prepaid, shall be mailed to each of the defendants who reside out of the state, at their place of residence, if known, and also to the defendants residing in or out of the state whose place

of residence is unknown to plaintiff, addressed to them at the county seat of the county where the action is commenced.

All such unknown persons so served shall have the same rights as are provided by law in cases of all other defendants named, upon whom service is made by publication, or personally, and the action shall proceed against such unknown persons in the same manner as against the defendants who are named upon whom service is made by publication or personally and with like effect; and

Any such unknown person who has or claims to have any right, title, estate, lien or interest in the said property, or cloud on the title thereto, adverse to plaintiff, at the time of the commencement of the action, who has been duly served as aforesaid, and any one claiming under him, shall be concluded by the judgment in such action as effectually as if the action was brought against the said person by his or her name and personal service of process was obtained, notwithstanding any such unknown person may be under legal disability. Service shall be deemed complete upon the completion of the publication.

History: Enactment approved March 23, 1901, Stats. and Amdts. 1900-1, p. 579; amendment approved March 9, 1903, Stats. and Amdts. 1903, p. 105.

§ 751. JUDGMENT TO BE IN ACCORDANCE WITH EVIDENCE. When the summons has been served as provided in the preceding section and the time for answering has expired, the court shall proceed to hear the case as in other cases and shall have jurisdiction to examine into and determine the legality of plaintiff's title and of the title and claim of all the defendants and of all unknown persons, and to that end must not enter any judgment by default, but must in all cases require evidence of plaintiff's title and possession and hear such evidence as may be offered respecting the claims and title of any of the defendants and must thereafter direct judgment to be entered in accordance with the evidence and the law.

[Proof of service before hearing—Judgment.] The court before proceeding to hear the case must require proof to be made that the summons has been served and posted as hereinbefore directed and that the required notice of pendency of action has been filed. The judgment after it has become final is conclusive against all the persons named in the summons and complaint who have been served and against all unknown persons as stated in the complaint and summons who have been served by publication, but shall not be conclusive against the state of California or the United States.

Said judgment shall have the effect of a judgment in rem except as against the state of California and the United States; and provided [,] further, that the said judgment shall not bind or be conclusive against any person claiming any estate, title, right, possession or lien to the property under the plaintiff or his predecessors in interest, which claim, lien, estate or right of possession has arisen or been created by the plaintiff or his predecessors in interest within twenty years prior to the filing of the complaint.

[Remedy cumulative.] The remedy provided in this and the two preceding sections shall be construed as cumulative and not exclusive of any other remedy, form or right of action or proceeding now allowed by law.

History: Enactment approved March 23, 1901, Stats. and Amdts. 1900-1, p. 579; amendment approved March 9, 1903, Stats. and Amdts. 1903, p. 106.

QUIETING TITLE—JUDGMENT.

- I. LIENS, 1-11.
 - II. MINERAL LANDS, 12-15.
 - III. MINING CLAIMS, 16-36.
 - IV. TRIAL, 37-70.
- I. LIENS.
1. Docketed judgment not necessarily a lien.
 2. Same—Findings.
 3. Street-assessment—Defeated by lack of authority to let contract.
 4. Tax—Assessment valid on face—Defeated only by extraneous evidence.
 5. Same—Defeated when right of action for collection lost.
 6. Same—Same—By statute of limitations and invalidity of assessment.
 - 7, 8. Same—Map—When authentic admissible in evidence.
 9. Same—Upheld, if description sufficient to give notice.
 10. Same—Same—If land can be identified.
 11. Same—Same—Parol evidence inadmissible to supply defects of description.
- II. MINERAL LANDS.
12. Discovery of oil—After location perfects title, save against intervening rights.
 13. Same—Location without, gives no title.
 14. Same—Must have been upon the specific land located.
 15. Same—Seepage of oil alone not sufficient; oil must be found after sinking.
- III. MINING CLAIMS.
16. Abandonment—By locator, nullifies claim.
 17. Same—A matter of intent.
 18. Citizenship of defendant's locators does not concern plaintiff.
 19. Clandestine entry upon land located by others, invalid.
 20. Defeated by proof of non-performance of statutory acts or prior location.
 21. Description enabling one to ascertain land claimed—Supplements previous failure of locator.
 22. Discovery alone, without location, gives no title.
 23. Finding of lower court as to location—Should not be disturbed.
 24. Forfeiture—Established only on convincing proof.
 25. Same—From failure to do statutory work before location by plaintiff.
 26. Grantor may acquire a prescriptive title against his grantee.
 27. Location—May be on unoccupied land on which statutory work not done.
 28. Same—Proved by plaintiff, burden on defendant to prove his prior.
 29. Same—On surveyed land of the United States, to conform to lines of survey as nearly as practicable.
 30. Prior location defeats subsequent.
 31. Requirements of statute complied with, gives title.
 32. Unoccupied land of the United States—All public land presumed to be.
 33. Same—Work on, as required by statute, necessary to complete right.
 34. Work—Required by law to hold, greater than mere watchman, if only naked claim.
 35. Same—Failure to do—Burden of proof on party asserting.
 36. Same—Same—Gives right to third party to locate.
- IV. TRIAL.
37. Adverse claim—Not, where lines of land not claimed to be true.
 38. Adverse possession proved by payment of taxes—Continuous possession.
 39. Same—Or that no valid assessment made for preceding five years.
 40. Burden of proof upon plaintiff.
 41. Costs—Allowed plaintiff even if all of land not recovered.
 42. Same—On appeal, depends on terms of statute relating to costs.
 43. Same—Order, after judgment, striking out, appealable.
 44. Decree must reserve timber, title to which is held by defendant.
 45. Deed intended as mortgage—Gives no title and no right against purchasers with notice.
 46. Defendant—Entitled to be heard upon allegations and denials.
 47. Same—Valid interest in, does not warrant denial of relief to plaintiff.
 48. Denial—Of ownership, with affirmative allegations of ownership, raises issues.
 49. Same—Of right in plaintiff and allegation of right in defendant sets up valid defense.
 50. Finding of plaintiff in possession, unnecessary.
 51. Judgment—For plaintiff, out of possession, entitles to possession.

52. Same—Valid after verdict upon issues raised by defendant.
53. Jury — Execution-sale in suit, where party mentally unsound, and cause involving legal questions.
54. Same—One who ousts can not, by suit, deprive defendant of right to.
55. Same—Verdict of, conclusive in equitable action upon issue of ownership.
56. Same—Where issues cognizable in courts of law, may be tried by.
57. Nonsuit—Improper if plaintiff shows interest.
58. Same—Order of, declares plaintiff has no interest.
59. Same—Proper, if plaintiff fails to show legal interest.
60. Ownership, claim of, not affected by issue of moneys due.
61. Plaintiff—Entitled to decree—Defining his interest.
62. Same—Same—Reserving defendant's rights.
63. Same—Not to be denied all relief, even if defendant has some interest.
64. Possession, finding as to—Defendant failing to make proof, not disturbed.
65. Records show, not ouster, but transfer of title.
66. Right of defendant—Immaterial plaintiff failing to prove title.
67. Rightfulness of defendants' possession—Immaterial to plaintiff claiming ownership.
68. Stipulation—Not admitted at first trial may be admitted at second.
69. Verification of answer—Not required of each defendant.
70. Writ of possession—Issued on supplemental order.

I. LIENS.

1. **Docketed judgment not necessarily a lien.**—It does not follow that, because defendant had a docketed judgment, that such judgment was necessarily a lien. Where land was a homestead, and therefore exempt from execution, it was not necessary for the court to state that fact as a reason for finding defendant had no lien.—*Dam v. Zink*, 112 Cal. 91, 93, 44 Pac. 331.

2. **Same—Findings.**—Where issue made by pleadings as to alleged judgment-lien is whether or not the judgment constitutes a lien, finding that it is not a lien is responsive to the averments and denials of the pleadings, and is sufficient.—*Dam v. Zink*, 112 Cal. 91, 93, 44 Pac. 331.

3. **Street-assessment—Defeated by lack of authority to let contract.**—Action may be maintained to quiet title of plaintiff to premises and to have claim of defendant declared to be unjust, and certificate of sale made in foreclosure of street-assessment declared void, where it appears that authority to let contract for grading and improving

public streets is vested in city council which can not shift responsibility so given by delegating its power to any officer or committee of corporation, to determine mode, manner, or plan of improvement, where contract was void because city council did so delegate its power.—*Chase v. Scheerer*, 136 Cal. 248, 249, 68 Pac. 768.

4. **Tax—Assessment valid on face—Defeated only by extraneous evidence.**—Where statute makes assessment a lien upon property of plaintiff, and so also bond issued upon non-payment, and there is nothing upon face of assessment, or bond, to show that lien is not in all respects valid, it is obvious, to defeat such assessment, or such deed, plaintiff must resort to evidence extraneous of any recitals to be found in it.—*Chase v. City Treasurer of Los Angeles*, 122 Cal. 540, 543, 55 Pac. 414.

5. **Same—Defeated when right of action for collection lost.**—Plea of defendant, in action to quiet title of liens for delinquent taxes, is defeated by fact that right of action for collection of taxes is lost, the lien therefore lost, and plaintiff's title quieted accordingly.—*Clark v. San Diego*, 144 Cal. 361, 77 Pac. 973.

6. **Same—Same—By statute of limitations and invalidity of assessment.**—In action to quiet title to certain lots in city of San Diego, defense that lots were assessed and taxes levied more than three years prior to beginning of action is bar of statute of limitations, and where record in case shows that assessment and levy were not made as directed by law, they were therefore invalid and void.—*Dranga v. Rowe*, 127 Cal. 506, 508, 29 Pac. 944.

7. **Same—Map—When authentic admissible in evidence.**—Where, in action to quiet title, in order to sustain assessment for taxes, no reference is made to any particular map, if it can be shown that there is only one map of tract, which includes the lot in controversy upon which the lot is delineated or designated, and that map is well known and generally accepted as authentic, it may be received in evidence as tending to identify land before court.—*Best v. Wohlford*, 144 Cal. 733, 737, 78 Pac. 293.

8. **To sustain lien of tax assessment designation of tract of land as portion of larger tract by number and block, without any reference to map, may be sufficient to identify it, and, if so, motion to refer to map is not fatal to description; but if such reference is made, map thereby becomes part of description, and may be read in evidence to identify land.**—*Best v. Wohlford*, 144 Cal. 733, 737, 78 Pac. 293.

9. **Same—Upheld, if description sufficient to give notice.**—Obligation of citizens to contribute to expense of government is recognized, and instead of regarding proceedings for levying and collection of taxes as hostile to property owner, he is considered to be interested equally with all other citizens in prompt collection of taxes, and tax properly imposed upon his property will be

upheld if description of the property is sufficient to give him notice that it is burdened with tax.—*Best v. Wohlford*, 144 Cal. 733, 736, 78 Pac. 293.

10. Same—Same—If land can be identified.—In action to quiet title against lien of assessment tax, description must be such that land claimed by virtue of deed can be identified or located upon ground by means thereof.—*Best v. Wohlford*, 144 Cal. 733, 737, 78 Pac. 293.

11. Same—Same—Parol evidence inadmissible to supply defects of description.—In action to quiet title against lien of assessment for taxes where description of land is defective, parol evidence will not be admitted to help it out, nor to show intention with which it was made, nor to resolve ambiguity in its terms; but rule that description must be certain and definite, and sufficient in itself to identify land, does not exclude evidence for purpose of applying description to surface of earth and thus identify it with tract in controversy.—*Best v. Wohlford*, 144 Cal. 733, 737, 78 Pac. 293.

II. MINERAL LANDS.

12. Discovery of oil—After location perfects title, save against intervening rights.—It is not necessary that discovery should precede or coexist with posting of notice and marking of claims to mineral lands, but discovery subsequently made perfects title, except so far as rights of others may have intervened. In action to quiet title to mineral lands, location, and subsequent discovery of oil by defendants, perfected their title, if plaintiffs had no intervening right.—*Weed v. Snook*, 144 Cal. 439, 443, 77 Pac. 1023.

13. Same—Location without, gives no title.—Where plaintiffs were citizens of United States, and entitled to locate mineral lands, and they properly marked location of claim so as to indicate its boundaries, and posted notice upon same, but at time of so attempting to locate entire one hundred and sixty acres had made no discovery of oil or mineral in south half of northeast quarter, nor had they attempted to do so, and claim to north half of southeast quarter had been perfected by discovery of oil upon ten acres conveyed to Lion Company, plaintiffs had no title.—*Weed v. Snook*, 144 Cal. 439, 441, 77 Pac. 1023.

14. Same—Must have been upon the specific land located.—Where plaintiffs have not expended money nor entered upon development of land in contest, have made no discovery of oil thereon, have merely posted notices and marked boundaries on land in connection with land which they had already located, though a discovery of oil had been made upon land last mentioned, but plaintiffs can not claim such discovery as being discovery upon the land in contest, and their claim that prior discovery on south eighty acres of said land, upon part of said land, can be availed of for purpose of making consolidated filing upon whole one hundred and sixty acres, can not be

upheld.—*Weed v. Snook*, 144 Cal. 439, 442, 77 Pac. 1023.

15. Same—Seepage of oil alone not sufficient; oil must be found after sinking.—In action to quiet title against parties claiming mineral lands, questions material to decision of case did not involve marking of locations nor posting of notice, but validity of locations of respective parties, their respective dates, and discovery of oil in land, where oil was not discovered under either location until found by sinking or driving well down to the sand. Mere finding of surface indication, such as seepage of oil, is not ordinarily sufficient to sustain claim of title thereto. Oil must have been discovered within limits of claims.—*Weed v. Snook*, 144 Cal. 439, 440, 77 Pac. 1023.

III. MINING CLAIMS.

16. Abandonment—By locator, nullifies claim.—In action to quiet title to mining claim, plaintiff by her pleading called upon defendant to declare nature of his claim, which he did by asserting rights under location earlier than that of plaintiff, which location, if still valid, necessarily avoided her own, and she had right to defeat claim of valid prior subsisting location by evidence of its abandonment, although abandonment was not pleaded, but evidence thereof might be given without special plea under denial of title.—*Trevaskis v. Peard*, 111 Cal. 599, 603, 44 Pac. 246.

17. Same—A matter of intent.—In setting up claim of abandonment to defeat adverse claim, abandonment is matter of intent, but that intent may be proved by actions and conduct of parties, even against their express declaration to contray; and if intent has been formed and once acted upon, abandonment is as absolute if it exists for minute or second as though it continued for years.—*Trevaskis v. Peard*, 111 Cal. 599, 605, 44 Pac. 246.

18. Citizenship of defendant's locators does not concern plaintiffs.—In action to determine title to mining lands, where it is claimed that defendant failed to prove that original locators of claims were citizens or had declared their intention to become citizens of United States, and hence it was not shown that they were qualified locators, and it was also urged that there was no evidence that locators of defendant's claims marked boundaries thereof by monuments; these are matters which did not concern plaintiffs. When it has been determined that they have no interest in land in controversy, case is ended.—*Schroder v. Aden Gold Min. Co.*, 144 Cal. 628, 629, 78 Pac. 20.

19. Clandestine entry upon land located by others, invalid.—Statutes and mining laws of United States do not contemplate forcible or clandestine entry and location of land in peaceable possession of other parties who have located same in good faith, and in endeavor to secure their claims, and in action to quiet title thereto,

claim of parties under such entry can not be sustained.—Weed v. Snook, 144 Cal. 439, 443, 77 Pac. 1023.

20. Defeated by proof of non-performance of statutory acts or prior location.—Claim to mining ground may be defeated by showing that claimant never performed any of acts necessary to location of mining claim, or, by showing, if such acts were performed, that prior location existed which precluded possibility of valid location having been made by plaintiff; such proof could properly be made under general denial of plaintiff's title and right of possession.—Adams v. Crawford, 116 Cal. 495, 501, 48 Pac. 488.

21. Description enabling one to ascertain land claimed—Supplements previous failure of locator.—Whatever might be effect of entire failure to comply with act of April 3, 1876, only regulation then in force relative to recording of location notices, subsequent compliance with requirements of act would certainly be sufficient, and if description contained any notice, or was complete enough to enable one examining it to ascertain therefrom that land actually claimed was included therein, there was such substantial compliance as to satisfy statute, for such description would give full notice that such land had been in fact appropriated by others.—Mitchell v. Hutchinson, 142 Cal. 404, 411, 76 Pac. 55.

22. Discovery alone, without location, gives no title.—In action to quiet title to certain mining claim, discovery of ore by plaintiff was but one step in acquiring title to mining claim and vested in him no right or title to property. It must be followed by location, which consists of marking of claim by monuments so that its boundaries can be readily traced, posting of notice thereon, and, where state or district law requires it, recording of such.—Adams v. Crawford, 116 Cal. 495, 498, 48 Pac. 488.

23. Finding of lower court as to location—Should not be disturbed.—Action to determine right to about seven acres of mining ground, where burden rested upon plaintiffs to satisfy court that their contention as to location of monument was correct, finding of court should not be disturbed. Appellate court is warranted in interfering with findings only where it can be seen that they are contrary to all evidence, and that there is no substantial evidence in support of them.—Schroder v. Aden Gold Min. Co., 144 Cal. 628, 629, 78 Pac. 20.

24. Forfeiture—Established only on convincing proof.—Treating provision of revised statutes of United States (§ 2324, 6 Fed Stats. Ann. 2d ed., p. 533), that "upon failure to comply with conditions (among them to do the required annual work), claim or mine upon which such failure occurs shall be open to relocation in same manner as if no location of same land had ever been made," as in effect working forfeiture, such forfeiture can not be estab-

lished except upon clear and convincing proof of former owner to have had work performed or improvements made to amount required by law.—Goldberg v. Bruschi, 146 Cal. 708, 712, 81 Pac. 23, 24.

25. Same—From failure to do statutory work before location by plaintiff.—Defendant whose claim was located in 1897 could not assert valid claim thereto after close of year 1898 unless he had in year 1899, before plaintiff made location, within time limited, begun development work and prosecuted it diligently; but as he did no work at any time, his location ceased to have any validity as against valid relocation, and his possession was not enough to remove land from category of unoccupied lands of United States, nor sufficient to prevent third party from making valid location.—Goldberg v. Bruschi, 146 Cal. 708, 713, 81 Pac. 23, 25.

26. Grantor may acquire a prescriptive title against his grantee.—In action to quiet title against defendant, who disclaims any interest, but alleges that plaintiff conveyed to him premises in controversy, and he (defendant) conveyed same to other defendants, where evidence at trial disclosed circumstances that deed was made to defendant, plaintiff offering to give him right to prospect ground and give him quitclaim deed for that purpose to be used and occupied by party of second part for purpose of working and occupying mining claim, such deed did not preclude grantor from afterwards acquiring title to land by prescription as against grantee of mining right and those claiming under it.—Baker v. Clark, 128 Cal. 181, 183, 60 Pac. 677.

27. Location—May be on unoccupied land on which statutory work not done.—Possession of mining claim on which defendant has not done work required by statutes of United States, nor begun nor made any attempt to perform such work, is not enough to remove land from category of unoccupied land, so as to prevent another party from making valid location thereon.—Goldberg v. Bruschi, 146 Cal. 708, 713, 81 Pac. 23, 25.

28. Same—Proved by plaintiff, burden on defendant to prove his prior.—Where plaintiff's mining claims were located in December, 1899, and he had all of year 1900 in which to do assessment work, and he brought an action in January, 1900, to quiet title to his claim, burden was then put upon defendant to show that location under which he claimed title was prior in time and superior in right.—Goldberg v. Bruschi, 146 Cal. 708, 712, 81 Pac. 23, 24.

29. Same—On surveyed land of United States, to conform to lines of survey as nearly as practicable.—Action to quiet title to mining claims is not to be defeated because location was made upon surveyed government land, and description thereof by metes and bounds consisted of nine courses, of which only five conformed to United States system of land surveys; such conformity, under statutes of United States, seems to be that claims are required to

conform to lines of public survey only where such conformity is reasonably practicable, and where not reasonably practicable it is sufficient that conformity to such lines is as near as reasonably practicable.—*Mitchell v. Hutchinson*, 142 Cal. 404, 407, 76 Pac. 55.

30. Prior location defeats subsequent.—If defendant's location is valid, plaintiff could not acquire any right to claim so located by his subsequent location, made two weeks after location made by defendant.—*Adams v. Crawford*, 116 Cal. 495, 498, 48 Pac. 488.

31. Requirements of statute complied with, gives title.—At date of location of mining claim, land located was vacant public land of United States, open to location and exploration, and plaintiffs located premises as placer mining claim in pursuance of revised statutes of United States and performed various acts necessary to effect effectual location, such as posting notice of location, etc., and such locators were entitled to judgment in action to quiet title.—*Mitchell v. Hutchinson*, 142 Cal. 404, 408, 76 Pac. 55.

32. Unoccupied land of United States.—All public land presumed to be.—Where plaintiff made his proof of citizenship and that he had made a discovery of gold-bearing quartz in land, and had shown location according to requirements of law, he established his case prima facie, and was not called upon to make further proof that land was unoccupied mineral land of United States. It was shown to be public land, and presumption is that all public land is unoccupied.—*Goldberg v. Bruschi*, 146 Cal. 708, 712, 81 Pac. 23, 24.

33. Same—Work on, as required by statute, necessary to complete right.—To constitute possession of one occupying without having complied with requisites of statute as enough to remove land of United States from category of unoccupied land, would permit locator of mineral land to hold it against all world for indefinite time without doing any development work whatever.—*Goldberg v. Bruschi*, 146 Cal. 708, 713, 81 Pac. 23, 25.

34. Work—Required by laws to hold, greater than mere watchman, if only naked claim.—Work required upon mine in order to hold same under laws of United States, if mine be idle, may consist of services of watchman or custodian in looking after property and taking care of same, provided it were necessary to preserve tunnels, buildings, or any structures erected to work mine, and which would be necessary in case work were resumed. But, if there were only naked claim to be looked after, and watchman were placed there merely to warn prospectors and thus prevent location, it would not be labor upon the mine, in sense of statute.—*Altoona Q. M. Co. v. Integral Q. M. Co.*, 114 Cal. 100, 106, 45 Pac. 1047.

35. Same—Failure to do—Burden of proof on party asserting.—In action to quiet

title to mining claim, burden of proof of failure to comply with statutory conditions is upon one who asserts it, and when, therefore, defendant proved his location, it was plaintiff's right to assume burden of showing defendant's failure to do required work.—*Goldberg v. Bruschi*, 146 Cal. 708, 711, 81 Pac. 23, 25.

36. Same—Same—Gives right to third party to locate.—Where defendant's claim to mining land was located in 1897, and he remained in possession thence afterwards, and was in possession at time of plaintiff's location in 1899, but had done no assessment work and was not at that time engaged in doing any work thereon, and plaintiff thereupon made locations including portion of defendant's claim, and that was, so far as it appears, accomplished peaceably and without disturbing defendant's possession, such as it was, defendant's location clearly could not be source of valid claim after close of year 1898, unless he had done required assessment work by that time, or unless he had, in year 1899, before plaintiff made his location, begun development work and prosecuted it diligently.—*Goldberg v. Bruschi*, 146 Cal. 708, 713, 81 Pac. 23.

IV. TRIAL.

37. Adverse claim—Not, where lines of land not claimed to be true.—Where party had made inclosure, not claiming that his fences were upon line, but expecting to remove them to true line when it should be determined, he would not be claiming adversely, and statute of limitations did not run in his favor. If one of two coterminous owners takes possession and claims title to extent of his possession, he holds adversely, although he was induced to locate his possession through mistake as to boundary.—*Woodward v. Faris*, 109 Cal. 12, 17, 41 Pac. 781.

38. Adverse possession proved by payment of taxes—Continuous possession.—In action to quiet title, in order to prove adverse possession, it must be shown that successive claimants have paid all taxes levied and assessed on land, that possession was continuous and uninterrupted, and either that such possession was protected by substantial inclosure or that land was usually cultivated or improved.—*Nathan v. Dierssen*, 146 Cal. 62, 67, 79 Pac. 739.

39. Same—Or that no valid assessment made for preceding five years.—In order to prove adverse possession in action to quiet title, defendant must show either that he had paid all taxes levied and assessed on land during the preceding five years, or that no valid assessment had been made.—*Nathan v. Dierssen*, 146 Cal. 62, 67, 79 Pac. 739.

40. Burden of proof upon plaintiff.—In action to quiet title, burden rests upon plaintiff to show title in himself, and if he fails to make out a case, he is not entitled to recover. Possession was also formerly necessary to enable party to maintain action to quiet title, but under this section it is not

now required.—*Heney v. Pesoli*, 109 Cal. 53, 58, 41 Pac. 819.

41. Costs—Allowed plaintiff even if all of land not recovered.—Code directs that costs are allowed of course to plaintiff upon judgment in his favor in action which involves title of possession of real estate, and that plaintiffs did not recover judgment as to all land in controversy, does not change fact that they had judgment in their favor any more than if they had sued for five thousand dollars damages and recovered but one thousand dollars.—*Sierra U. W. & M. Co. v. Wolff*, 144 Cal. 430, 433, 77 Pac. 1038.

42. Same—On appeal, depends on terms of statute relating to costs.—In appeal in action under this section, question of appeal from order for payment of costs made in action under this section does not turn on form or entry of action, but depends rather on fact whether case comes within terms of statute relating to costs.—*Sierra U. W. & M. Co. v. Wolff*, 144 Cal. 430, 433, 77 Pac. 1038.

43. Same—Order, after judgment, striking out, appealable.—In action to quiet title, where plaintiffs' title was quieted as to lands found to belong to them, and defendants' title likewise quieted to lands found to belong to them, supreme court had appellate jurisdiction of matter, brought from order striking out cost-bill of less than three hundred dollars—order being made after final judgment, and not controlled or affected by amount involved.—*Sierra U. W. & M. Co. v. Wolff*, 144 Cal. 430, 432, 77 Pac. 1038.

44. Decree must reserve timber, title to which is held by defendant.—Title to standing timber can be transferred to and held by any one who is not owner of land, and so long as it remains actually affixed to land, decree quieting plaintiff's title to real property, without reserving or excepting from its operation timber, title to which is held by absolute conveyance, is invalid.—*Peterson v. Gibbs*, 147 Cal. 1, 7, 81 Pac. 121, 123.

45. Deed intended as mortgage—Gives no title and no right against purchasers with notice.—Where deed was intended as, and was in fact, mortgage made to party formerly agent of grantor, but who did not continue after execution of deed as such agent, nor continue to receive and disburse moneys and render services prior to that time, legal title did not pass by deed, and subsequent purchasers or encumbrancers with notice would require no right as against plaintiff.—*De Leonis v. Hammel*, 1 Cal. App. 390, 394, 1 Cal. App. Dec. (Whiting) 287, 289, 82 Pac. 349.

46. Defendant—Entitled to be heard upon allegations and denials.—That part of answers of defendants, in action under this section, stating that defendants hold legal title "under certain trusts," and it does not appear what trusts are, as they are not set forth, may be regarded as surplusage, because legal title being in certain defendants,

it can not be in plaintiffs at same time, and, if answers are true (and we must here so presume), the defendants were entitled to be heard, even upon denial of material allegations of complaint.—*Butterfield v. Graves*, 138 Cal. 155, 158, 71 Pac. 510.

47. Same—Valid interest in, does not warrant denial of relief to plaintiff.—Mere fact that defendant in action brought under provisions of this section is shown to have some valid interest or estate in property in controversy, does not warrant denial of all relief to plaintiff, who has also shown valid interest therein.—*Peterson v. Gibbs*, 147 Cal. 1, 7, 81 Pac. 121, 122.

48. Denial—Of ownership, with affirmative allegations of ownership, raises issues.—Where in action under this title, answers did not deny possession of plaintiff, but did deny his ownership, and further denied that they "had no estate, right, title, or interest in the land," and alleged affirmatively that at time of commencement of action defendants Woods and Winans "owned, and still own, legal title in fee to said premises, and all thereof," this certainly raised issues upon which defendants were entitled to be heard.—*Butterfield v. Graves*, 138 Cal. 155, 157, 71 Pac. 510.

49. Same—Of right in plaintiff and allegation of right in defendant sets up valid defense.—In action to quiet title, answer of defendant denying plaintiff's ownership and denying that he himself claims any interest in land, except right to maintain in creek which flows over land dam at certain point, and to maintain pipes connecting with said creek at said dam for purpose of conducting waters of said creek to lands below for purposes of irrigation and domestic use, sets up valid defense against such claim.—*San Jose L. & W. Co. v. San Jose R. Co.*, 129 Cal. 673, 674, 62 Pac. 269; affirmed 189 U. S. 177, 47 L. ed. 765, 23 Sup. Ct. Rep. 487.

50. Finding of plaintiff in possession, unnecessary.—Owner of land does not have to be in possession in order to enable him to maintain an action to quiet title, and finding that plaintiff was in possession of lands at time of commencement of action is wholly immaterial.—*Casey v. Leggett*, 125 Cal. 664, 672, 54 Pac. 264.

51. Judgment—For plaintiff, out of possession, entitles to possession.—When it has been adjudicated that defendant has no adverse claim or interest of any kind or nature whatever in realty, subject of litigation is exhausted, and if plaintiff is out of possession, necessary effect of judgment is that it entitles him to that possession.—*Landregan v. Peppin*, 94 Cal. 465, 468, 29 Pac. 771.

52. Same—Valid after verdict upon issues raised by defendant.—Where, in his complaint in an action to quiet title to mining lands, plaintiff distinctly claimed ownership and right of possession, but did not allege that defendant claimed some interest in land, nor did he call upon defendant to set forth his title, but defendant met com-

plaint by denial of plaintiff's ownership, and assertion of title in himself, and issue thus formed was tried, and by general verdict was decided in plaintiff's favor, the court properly entered judgment for plaintiff therein.—*Reiner v. Schroeder*, 146 Cal. 411, 416, 80 Pac. 517.

53. Jury—Execution-sale in suit, where party mentally unsound, and cause involving legal question.—In action to quiet title, it appearing that litigation inaugurated against decedent was inaugurated and carried on at time when she was mentally unsound and incapable of acting for herself and was not represented by guardian, the result of litigation amounted to nothing, and deeds, therefore, following execution-sale, should be set aside at instance of heirs of deceased, and in view of fact that cause possessed elements of an action at law, it should have been submitted to jury upon evidence offered.—*Gillespie v. Gouly*, 120 Cal. 515, 516, 52 Pac. 116.

54. Same—One who ousts can not, by suit, deprive defendant of right to.—Where defendant was in possession under title and was ousted by plaintiff, plaintiff by first bringing suit could not deprive defendant of his right to jury trial. If it were not for this provision of code, plaintiff would have been compelled to wait until defendant commenced his action, and then there would have been no question about right to jury; but while legislature has power to grant plaintiff privilege of himself commencing suit, it had not power to give him, and we think did not intend to give him, privilege of thus depriving defendant of his constitutional right.—*Donahue v. Meister*, 88 Cal. 121, 128, 25 Pac. 1096.

55. Same—Verdict of, conclusive in equitable action upon issue of ownership.—Action to determine adverse claims to mining ground is equitable in its nature, whether considered as action for trespass coupled with injunction, or action to quiet title coupled with injunction to prevent further claims; and where plaintiff was clearly entitled to jury to try the issue of ownership, their general verdict is conclusive on court: save only power to set it aside and grant new trial, no finding of court could add to or take from its force, the question of ownership being principal issue in case.—*Reiner v. Schroeder*, 146 Cal. 411, 420, 80 Pac. 517.

56. Same—Where issues cognizable in courts of law, may be tried by.—Main effect of this chapter is to give parties right to compel others by suit to litigate and determine controversies in cases where such right did not before exist; but if in such suit issues arise which are clearly legal and cognizable in court of law, code does not take away right to have such issues tried by jury.—*Donahue v. Meister*, 88 Cal. 121, 124, 25 Pac. 1096.

57. Nonsuit—Improper if plaintiff shows interest.—As case made by plaintiff, in action to quiet title to land, showed him to be

owner of land in controversy, subject only to such interest in timber thereon and such rights of entry and rights of way as defendants may be determined to have under contract, motion for nonsuit should have been denied.—*Peterson v. Gibbs*, 147 Cal. 1, 7, 81 Pac. 121, 123.

58. Same—Order of, declares plaintiff has no interest.—By order granting nonsuit in action under section 738, ante, plaintiff is in effect declared to have no legal interest whatever in property in controversy.—*Peterson v. Gibbs*, 147 Cal. 1, 7, 81 Pac. 121, 123.

59. Same—Proper, if plaintiff fails to show legal interest.—If plaintiff fails to show any legal interest in property in controversy, in action under this section, and as to which he asserts title, he must fail altogether, and could not complain of judgment of nonsuit; but where he shows any legal interest, he is entitled to have that interest declared by court.—*Peterson v. Gibbs*, 147 Cal. 1, 6, 81 Pac. 121, 123.

60. Ownership, claim of, not affected by issue of moneys due.—Fact that claim for moneys is included in complaint to quiet title can not affect usual result of issue of ownership, especially where such claim was ignored by jury and no damages awarded.—*Reiner v. Schroeder*, 146 Cal. 411, 416, 80 Pac. 517.

61. Plaintiff—Entitled to decree—Defining his interest.—Where plaintiff simply failed to establish that his land was free of all valid claim on part of defendant, but showed that he was owner in fee of land, subject only to interest held by defendant in timber "standing, lying, or being" on such land, with such rights of entry, rights of way, etc., as are given by contract, and although he had not come to full measure of allegations of his complaint as to invalidity of claim asserted by defendant, had shown legal title in himself sufficient to enable him to maintain action to quiet his title to land, mere fact that defendant in action is shown to have some valid interest or estate in property in controversy does not warrant denial of all relief to plaintiff who has shown valid interest therein.—*Peterson v. Gibbs*, 147 Cal. 1, 7, 81 Pac. 121, 123.

62. Same—Same—Reserving defendant's rights.—In action where plaintiff has title to certain land, although he had simply failed to establish that his land was free of all valid claim on part of defendant, and he had clearly shown that he was owner in fee of land, subject only to interest held by defendant in timber "standing, lying, or being" on said land at certain date, and although he had not come up to full measure of allegations of his complaint as to invalidity of claim asserted by defendant, he having shown legal title in himself, that was sufficient to enable him to maintain action to quiet his title and to have adverse claim of defendant in regard thereto fully defined and determined.—*Peterson v. Gibbs*, 147 Cal. 1, 6, 81 Pac. 121, 122.

63. Same—Not to be denied all relief, even if defendant has some interest.—Mere fact that defendant in action under section 738, ante, is shown to have some valid interest or estate in property in controversy does not warrant denial of all relief to plaintiff, who has also shown a valid interest therein.—*Peterson v. Gibbs*, 147 Cal. 1, 5, 81 Pac. 121, 123.

64. Possession, finding as to—Defendant failing to make proof, not disturbed.—Where defendant was only witness as to possession prior to certain date, and his testimony shows that he was not possessed of sufficient knowledge to state whether or not possession of one of claimants of any part of land was continuous or uninterrupted between certain dates, burden being on defendant to show such adverse possession; upon this condition of evidence, court was not bound to find that action was barred, and his finding that it was not barred is therefore sustained by evidence.—*Nathan v. Dierssen*, 146 Cal. 63, 67, 79 Pac. 739.

65. Records show, not ouster, but transfer of title.—Record of foreclosure, deed of commissioner to plaintiff, and writ of assistance thereafter issued by court, and return of sheriff thereon, were part of record of plaintiff's title showing that he had obtained not only title, but possession, so far as it could be obtained from judgment-debtor; it was not evidence to show that he had ousted defendant, and was competent to show complete divestiture and transfer of title and legal possession of judgment-debtor.—*Nathan v. Dierssen*, 146 Cal. 62, 68, 79 Pac. 739.

66. Right of defendant — Immaterial, plaintiff failing to prove title.—If plaintiff has shown, in action to quiet title, no title nor right of possession, and defendant is in possession, it is immaterial by what right defendant holds possession, and plaintiff can not recover.—*Goldberg v. Bruschi*, 146 Cal. 708, 712, 81 Pac. 23, 24.

67. Rightfulness of defendants' possession — Immaterial to plaintiff claiming ownership.—Where complaint alleged that defendants were in possession, and alleged title and ownership in plaintiff, it is not

material to plaintiff whether defendants were rightfully in possession or not, unless he (plaintiff) were owner and entitled to possession; and, as his right to possession was based solely on his alleged ownership, only question material to be determined was as to validity of his claim of ownership.—*Adams v. Crawford*, 116 Cal. 495, 501, 48 Pac. 488.

68. Stipulation — Not admitted at first trial may be admitted at second.—Where, in action to quiet title, parties stipulating before trial that "plaintiff and defendant, George E. Dierssen, hereby admit and will admit upon trial of above-entitled action" that property was vested in way mentioned, and at first trial court refused to admit in evidence such stipulation, and after trial of several weeks stipulation was again offered and court then changed its ruling and allowed stipulation to be admitted in evidence, there was no error to this ruling, there being nothing in stipulation or in circumstances under which it was made to show that its operation was intended to be limited to first trial.—*Nathan v. Dierssen*, 146 Cal. 62, 65, 79 Pac. 739.

69. Verification of answer—Not required of each defendant.—If answers in action under this title were not properly verified, that was not reason for sustaining demurrer to them. In such case court could entertain motion to strike out; but answers, whether properly verified or not, are pleadings in case. As defendants are sued jointly, and it is alleged that they "claim estate or interest therein adverse to said plaintiff," law does not require each of them to verify answer.—*Butterfield v. Graves*, 138 Cal. 155, 158, 71 Pac. 510.

70. Writ of possession—Issued on supplemental order.—It is not essential that judgment itself in action under this section should direct issuance of writ of possession. Law is fully satisfied by a supplemental order to that effect. Section of code provides that, if the judgment upon main question, to wit, adverse claim, be for plaintiffs, they may have writ for possession of premises.—*Landregan v. Peppin*, 94 Cal. 465, 468, 29 Pac. 771.

[The procedure in chancery in actions of partition has been substantially embodied in the provisions of this chapter. In some circumstances it differs: e. g., in chancery, partition proceedings were suspended until the issues raised by the adverse claimants to any portion of the land were tried and determined by actions of ejectment in the courts of law. The same legal effect follows the raising of such issues in a partition proceeding under this code; only, instead of sending the parties to a court of law to litigate the question of title between them, the court in which the proceeding is pending has jurisdiction to try and determine all issues, whether of law or in equity, and must determine them as part of the proceeding itself; and until those issues are disposed of, and the tenants in common of the property are ascertained and enumerated, and their respective interests and rights have been ascertained and determined, the case can not be considered as tried.—Concurring opinion of McKee, J., in *Emerie v. Alvarado*, 64 Cal. 529, 629, 2 Pac. 418. See, also, *Gates v. Salmon*, 35 Cal. 576, 593, 95 Am. Dec. 139; *Emerie v. Alvarado*, 90 Cal. 444, 457, 27 Pac. 356.]

CHAPTER IV.

ACTIONS FOR THE PARTITION OF REAL PROPERTY.

- § 752. Who may bring actions for partition.
- § 752a. Action for partition of personal property.
- § 753. Interests of all parties must be set forth in the complaint.
- § 754. Lien-holders not of record need not be made parties.
- § 755. Plaintiff must file notice of lis pendens.
- § 756. Summons must be directed to all persons interested in the property.
- § 757. Unknown parties may be served by publication.
- § 758. Answer of defendants, what to contain.
- § 759. The rights of all parties may be ascertained in the action.
- § 760. Partial partition.
- § 761. Lien-holders must be made parties, or a referee be appointed to ascertain their rights.
- § 762. Lien-holders must be notified to appear before the referee appointed.
- § 763. The court may order a sale or partition, and appoint referees therefor.
- § 764. Partition must be made according to the rights of the parties, as determined by the court.
- § 765. Referees must make a report of their proceedings.
- § 766. The court may set aside or affirm report, and enter judgment thereon. Upon whom judgment to be conclusive.
- § 767. Judgment not to affect tenants for years to the whole property.
- § 768. Expenses of partition must be apportioned among the parties.
- § 769. A lien on an undivided interest of any party is a charge only on the share assigned to such party.
- § 770. Estate for life or years may be set off in a part of the property not sold, when not all sold.
- § 771. Application of proceeds of sale of encumbered property.
- § 772. Party holding other securities may be required first to exhaust them.
- § 773. Proceeds of sale, disposition of.
- § 774. When paid into court, the cause may be continued for the determination of the claims of the parties.
- § 775. Sales by referees must be at public auction. [At private sale when.]
- § 776. The court must direct the terms of sale or credit.
- § 777. Referees may take securities for purchase-money.
- § 778. Tenants whose estate has been sold shall receive compensation.
- § 779. The court may fix such compensation.
- § 780. The court must protect tenants unknown.
- § 781. The court must ascertain and secure the value of future contingent or vested interests.
- § 782. Terms of sale must be made known at the time. Lots must be sold separately.
- § 783. Who may not be purchasers.
- § 784. Referee must make a report of the sale to the court.
- § 785. If confirmed, conveyances may be executed.
- § 786. Proceeding if a lien-holder become a purchaser.
- § 787. Conveyance must be recorded, and will be a bar against parties.
- § 788. Proceeds of sale belonging to parties unknown must be invested for their benefit.
- § 789. Investment must be made in the name of the clerk of the county.
- § 790. When the interests of the parties are ascertained, securities must be taken in their names.
- § 791. Duties of the clerk making investments.
- § 792. When unequal partition is ordered, compensation may be adjudged in certain cases.
- § 793. The share of an infant may be paid to his guardian.
- § 794. The guardian of an insane person may receive the proceeds of such party's interest.

- § 795. A guardian may consent to partition without action, and execute releases. [Repealed.]
- § 796. Costs of partition a lien upon shares of parceners.
- § 797. The court, by consent, may appoint a single referee. [Repealed.]
- § 798. Apportionment of counsel fees and expenses.
- § 799. Abstract of title in action for partition. Cost of allowed, when.
- § 800. Same. How made and verified.
- § 801. Interest allowed on disbursements, when.

§ 752. WHO MAY BRING ACTIONS FOR PARTITION. When several co-tenants own real property as joint tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property, or a part thereof, if it appears that a partition can not be made without great prejudice to the owners.

History: Enacted March 11, 1872, substantial re-enactment of § 264 Practice Act as amended 1854 (Stats. 1854, p. 84); amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 160, held unconstitutional, see history, § 5 ante; enactment approved May 6, 1919, Stats. and Amdts. 1919, p. 319. In effect July 22, 1919.

PARTITION—IN GENERAL.

1. Action in partition—As to proceeding when action can not be maintained.
2. Same—May be brought against defendant out of possession.
3. Same—May be brought by one tenant in common.
4. Same—May be brought by co-tenant not in possession.
5. Same—Must be in name of the real party in interest.
6. Same—Partakes more fully of principles and rules of equity, than of those of law.
7. Same—Rules in this section applicable to all actions for partition; no suit in equity therefor.
- 8, 9. Administrator—Can not bring an action under this section.
10. Same—Entitled to possession for purposes of administration.
11. Same—Is not co-tenant.
12. Administrator's possession—Does not divest heir.
13. Same—Is same as possession of heirs or devisees.
14. Appointment of but one referee—Instead of three.
15. Attorney's fees—Allowance of estoppel.
16. Same—Allowance to parties, not direct to attorneys.
17. Barred—Action not, without adverse possession, or repudiation of trust.
18. Complaint—Must show primary facts.
19. Same—Need not ask for particular mode of partition.
20. Same—Need state only facts enumerated in this section.
21. Same—Need state only that partition can not be made by meets and bounds.
22. Same—Should contain description of premises.
23. Same—Should state only facts indicated in this and next succeeding section.
24. Construction of section—In general.
25. Same—Action divides land and settles title.
26. Same—For partition or sale.
27. Same—Not to be construed as repetition of other provisions.
28. Same—Sections to be construed together.
- 29-34. Contribution and subrogation.
35. Co-tenancy and copartnership—Differentiated.
36. Decree of sale for partition of proceeds—Stipulation of joint owners.
37. Discretion of court.
38. Ditches in mining district—Proprietors tenants in common.
- 39, 40. Enforcement of delivery of deed—Pursuant to agreement.
41. Equitable estate in land—Is real property.
42. Same—Owner of, may sue, and, if co-tenant, have partition.
43. Estate only in land—Without possession as co-tenant, does not sustain action.
44. Same—Several may own without being co-tenants.
45. Fact that plaintiff is entitled to exclusive possession.
46. Former adjudication.
47. Homestead—Assigned to widow, properly reserved—Partion of residue.

48. Same—Nature of homestead-right—Incapable of compulsory partition or sale.
49. Same—Partition of not authorized.
- 50-54. Improvements, and allowance therefor.
- 55-58. May be had in one action, of two or more tracts.
59. "Mining right" — Is incorporeal hereditament, and incapable of partition.
60. Object of partition—Possession of co-tenants in severalty — Possession must be enforceable—Injustice not allowed.
61. Objection to referees' reports.
62. Operation of action enlarged.
63. Oral agreement between parties.
64. Particular portions of general tract—Can not be appropriated by one co-tenant.
65. Partition among co-tenants.
66. Party necessary — All persons having legal or equitable claims.
- 67-69. Same—Grantee of special location.
70. Same—Not, when one has no lien of record.
- 71, 72. Property subject to mortgage and contract of sale.
73. Same—Receiver.
74. Provisions of section 1104 of Civil Code.
75. "Real property," defined.
76. Referee after sale — Custodian of funds.
77. Same—Funds not custodia legis.
- 78, 79. Remainderman out of possession—Right to maintain action.
80. Right to partition—Postponement.
81. Several tracts—As to partition of in one suit.
82. Same—All parties must be co-tenants of each tract.
83. Same—Misjoinder of causes of action.
84. Share set off to certain parties—Costs.
85. Special tract, conveyance of — Leaves general tract subject to partition among co-tenants.
86. Title—Means whereby one holds.
87. Same—Not mere asserted right to compel conveyance, necessary.
88. Same—Of the respective parties conclusively determined.
89. Same—Same—As to all questions.
90. Tracts situated in different counties.
91. Under will and decree of distribution.
92. Waiver of right—By contract—Breach of contract by joint tenant—Revival of right.
93. Same—Same — Tenant may, by contract.
94. Same—Release from.
95. Who may compel.

96. Whole of Mexican grant need not be included in suit—Only described tract.

97. Words "persons having an interest"—Includes holders of particular portions.

See, also, post, § 759 and note.

As to apportionment of dominant tenement, see Kerr's Cyc. Civ. Code, 2d ed., §§ 807 et seq. and notes.

As to arbitration in case of partition, see, post, § 1281 and note.

As to certain disabilities excluded from time to commence action, see, ante, § 328 and note.

As to effect of death of party on judgment, see, post, §§ 763, 766 and notes.

As to partition of contingent interest, see, post, § 781 and note.

As to partition of personal property, see Kerr's Cyc. Civ. Code, 2d ed., § 964, note par. 4.

As to partition of probate homestead and of homestead after death of one spouse, see, post, §§ 1465, 1468, 1474 and notes.

As to partition of remainders and reversions, see note 113 Am. St. Rep. 55.

As to service of notice to appear on non-residents claiming lien, see, post, § 764 and note.

As to title by occupancy, see Kerr's Cyc. Civ. Code, 2d ed., § 1007 and note.

As to venue of action, see, ante, § 392 and note.

As to whether partition must include all the lands of the co-tenancy, see note 114 Am. St. Rep. 880.

1. Action in partition—As to proceeding when action can not be maintained.—Where proceeding can not be maintained or relief prayed for granted because of the disseizin of the partitioner, or because of a dispute in a title, the court may retain the action pending proceedings for the settlement of the legal title.—*Buhrmeister v. Buhrmeister*, 10 Cal. App. 392, 396, 102 Pac. 221.

2. Same—May be brought against defendant out of possession for he can not be prejudiced thereby, and if it must appear that both parties are at least entitled to possession at the time of the bringing of the action it should be held that by instituting the proceeding the plaintiff admits the rights of the defendant.—*Buhrmeister v. Buhrmeister*, 10 Cal. App. 392, 396, 102 Pac. 221.

3. Same—May be brought by one tenant in common having an equitable title to an estate of inheritance in the property.—*Varni v. Devoto*, 10 Cal. App. 304, 306, 101 Pac. 934.

4. Same—May be brought by co-tenant not in possession.—A co-tenant not in possession of the land may bring a petition suit against his co-tenant whose possession is adverse and hostile and the proceeding

in partition is one in which the rights of all the parties may be fully inquired into and determined.—*Varni v. Devoto*, 10 Cal. App. 304, 307, 101 Pac. 934.

5. Same—Must be in name of the real party in interest.—Action in partition must be brought in name of real party in interest, and none of provisions relating to partition change that rule.—*Gates v. Salmon*, 35 Cal. 576, 596, 95 Am. Dec. 139.

6. Same—Partakes more fully of principles and rules of equity, than of those of law.—To action in partition, holder of special location is necessary party; action, though regulated to great extent by state, partakes more fully, both in respect to remedies provided and mode of procedure, of principles and rules of equity than of those of law.—*Gates v. Salmon*, 35 Cal. 576, 590, 95 Am. Dec. 139.

That partition must be according to rights of parties as determined by court, see, post, § 764 and note.

7. Same—Rules in this section applicable to all actions for partition; no suit in equity therefor.—There is no such thing, under our system of pleading and practice, as suit in equity for partition, distinct from proceeding provided for in this act. Rules there laid down are applicable alike to all actions for partition, and there is nothing in those rules, if section 264 Practice Act should be liberally construed, so as to advance remedy which will preclude parties from having complete partition of rancho among all persons interested therein. Nor is there anything in nature or extent of interest of several persons interested that will prevent partition.—*Gates v. Salmon*, 35 Cal. 576, 597, 95 Am. Dec. 139.

8. Administrator—Can not bring an action under this section.—An administrator performs his trust when he carefully preserves property and delivers it over to heir or devisee, with such title as deceased had at his death, whether it be estate in fee for life or for years; whether it be entire fee or undivided interest as tenant in common, it should follow same rule, and after administration go to its rightful owner.—*Ryer v. Fletcher Ryer Co.*, 126 Cal. 482, 484, 58 Pac. 908.

As to partition of estates of decedents, see, post, §§ 1675-1686 and notes.

As to possession of administrators or executors for purpose of partition, see, post, § 1581 and note.

9. The language in the case of Bath v. Valdez, 70 Cal. 350, 11 Pac. 724: "Actions may be maintained by the executor and administrator of the estate . . . for partition thereof," was clearly obiter dictum.—*Ryer v. Fletcher Ryer Co.*, 126 Cal. 482, 485, 58 Pac. 908.

10. Same—Entitled to possession for purposes of administration.—Estate of deceased vests immediately upon his death in his heirs or devisees, subject, of course, to payment of his debts, but administrator is en-

titled to possession of estate for purposes of administration, to preserve it and distribute it for certain purposes named in statute, and to sell it by order of court. He can not represent either side in contest between heirs, devisees, or legatees and can not bring action in partition.—*Ryer v. Fletcher Ryer Co.*, 126 Cal. 482, 483, 58 Pac. 908.

11. Same—Is not co-tenant.—Administratrix of estate is not one of the parties to action of partition named in statute, and she is not co-tenant either as parcener, joint tenant, or tenant in common.—*Ryer v. Fletcher Ryer Co.*, 126 Cal. 482, 483, 58 Pac. 908.

12. Administrator's possession—Does not divest heir.—Possession of administrator does not divest heir or devisee of fee; his possession is for heirs or devisees who are owners and seized in fee subject to temporary right of administrator to possession, and subject to defined statutory authority and powers of sale given to the administrator.—*Ryer v. Fletcher Ryer Co.*, 126 Cal. 482, 484, 58 Pac. 908.

13. Same—Is same as possession of heirs or devisees.—Section 1582, post, refers to and contemplates actions by heirs or devisees for quieting title to and partitioning property of estate, intent being to give heirs or devisees all rights which actual possession would give them, and to make possession of administrator same as if heirs or devisees were actually in possession, preserving, however, all rights of executor or administrator for purposes of administration only.—*Ryer v. Fletcher Ryer Co.*, 126 Cal. 482, 484, 58 Pac. 908.

14. Appointment of but one referee—Instead of three, even if irregular, would not avoid the judgment being an error that could not be taken advantage of or inquired into collaterally.—*Baldwin v. Foster*, 157 Cal. 643, 648, 108 Pac. 714.

15. Attorney's fees—Allowance of estoppel.—Where the court makes an allowance of attorney's fees in favor of the plaintiff and also in favor of two of the defendants, a defendant consenting to the allowance to the other defendant and requesting that one be made to him also, is estopped from objecting thereto on appeal.—*Seale v. Carr*, 155 Cal. 577, 578, 102 Pac. 262.

16. Same—Allowance to parties, not direct to attorneys.—The allowance contemplates that the allowance for attorneys' fees in a suit for partition should be made to the parties and not direct to the attorneys.—*Bennett v. Potter*, 180 Cal. 736, 183 Pac. 156.

17. Barred—Action not, without adverse possession, or repudiation or trust.—Where there has been no adverse possession by any one of tenants in common, and where plaintiff was as much in possession as any of co-tenant, or, if possession was held by trustee, it was as much possession of plaintiff as of other co-tenants, and there was no

possession such as to put plaintiff on inquiry, and no open repudiation of any trust by trustee, and certainly none ever known to plaintiff, plaintiff is not barred from bringing his action in partition.—*Watson v. Sutro*, 86 Cal. 500, 529, 24 Pac. 172, 25 Pac. 64.

18. Complaint—Must show primary facts.—Complaint brought for partition of real estate, must show primary facts upon which right to partition is founded, under this section (Practice Act § 264).—*Bradley v. Harkness*, 26 Cal. 69, 78.

19. Same—Need not ask for particular mode of partition.—Manner in which partition is to be made constitutes no part of cause of action, but is merely a part of relief. While it is proper and perhaps advisable to ask for particular mode of partition—there being two provided by statute—and to that end allege facts upon which plaintiff relies for particular mode which he seeks, yet this is not indispensable, and complaint which is silent upon subject is good.—*De Uprey v. De Uprey*, 27 Cal. 330, 332, 87 Am. Dec. 81.

20. Same—Need state only facts enumerated in this section.—No facts need be stated in complaint in partition except such as are found enumerated in section 264 Practice Act, and specification of interest of each party interested in land, so far as known to plaintiff, as provided in section 265 of that act.—*De Uprey v. De Uprey*, 27 Cal. 330, 331, 87 Am. Dec. 81.

21. Same—Need state only that partition can not be made by metes and bounds.—Whether partition can or can not be made by metes and bounds is purely question of fact, and is ultimate fact to be found, and, therefore, only fact necessary to be averred under system of pleading in this state. Constituent facts, or those which lie behind, are merely probative and need not be averred.—*De Uprey v. De Uprey*, 27 Cal. 330, 332, 87 Am. Dec. 81.

22. Same—Should contain description of premises.—Whether partition can or can not be made by metes and bounds is purely question of fact, and is legitimate fact to be found, and, therefore, only fact necessary to be averred under any system of pleading with which the court is acquainted. Constituent facts or those which lie behind, are merely probative, and need not be averred, but it may be safely affirmed that bare description of premises contained in complaint may sufficiently show that a partition by metes and bounds can be made, without prejudice.—*De Uprey v. De Uprey*, 27 Cal. 330, 332, 87 Am. Dec. 81.

23. Same—Should state only facts indicated in this and next succeeding section.—No facts need be stated in complaint except such as are found enumerated in section 264 Practice Act, which provides for the cause of action in partition and defines facts upon which it rests; and specification of interest of each party interested in land,

so far as known to the plaintiff, as provided in section 265 of that act (§ 753, post).—*De Uprey v. De Uprey*, 27 Cal. 330, 332, 87 Am. Dec. 81.

24. Construction of section—In general.—Partition may be had of real property held and occupied by several persons as coparceners, joint tenants, or tenants in common, according to their respective rights and interest in it, whether estate which they owned therein be estate of inheritance or for life or lives or for years.—*Smith v. Cooley*, 65 Cal. 46, 47, 2 Pac. 880.

25. Same—Action divides land and settles title.—Proceeding in partition answers the double purpose of dividing land and settling title, and mere fact of adverse holding by defendant constitutes no objection to proceedings.—*Martin v. Walker*, 58 Cal. 590, 596.

26. Same—For partition or sale.—Proceedings may be instituted by any of cotenants of real property, as provided in this section, for partition thereof according to their respective rights, or for sale thereof, if it appear that partition can not be made without great prejudice to owners.—*Lorenz v. Jacobs*, 53 Cal. 24, 25.

27. Same—Not to be construed as repetition of other provisions.—Statute must be so construed as to give effect, if possible, to every portion of it, and without rejecting any part as surplusage or treating it as repetition of provision already made. Provision is made in first clause of section 264 Practice Act for joint tenants and tenants in common of general tract, and to hold that those mentioned as having an interest in property must be restricted to such as are joint tenants or tenants in common of whole would make provision useless repetition.—*Gates v. Salmon*, 35 Cal. 576, 587, 95 Am. Dec. 139.

28. Same—Sections to be construed together.—The corresponding provision of Practice Act was not limited to those who were joint tenants or tenants in common of whole tract of which partition was sought, and the section had to be construed with regard to section 268 of that act (which now is § 756, post), which had material bearing upon point.—*Gates v. Salmon*, 35 Cal. 576, 586, 95 Am. Dec. 139.

29. Contribution and subrogation.—In an action for partition the plaintiff can not have an accounting and contribution from his co-tenant for the latter's proportionate part of expenditures made by the plaintiff for the benefit of the common property, if the expenditures were made more than two years prior to the commencement of the action and after the plaintiff had repudiated the existence of the co-tenancy.—*Willmon v. Koyer*, 168 Cal. 369, L. R. A. 1915B, 961, 143 Pac. 694.

30. The plaintiff in an action for partition, although he has repudiated the co-tenancy, is entitled to contribution for expenditures made within two years of the

commencement of the action, for taxes, street assessments, and attorney's fees in defending actions brought by a third person affecting the common property.—*Willmon v. Koyer*, 168 Cal. 369, L. R. A. 1915B, 961, 143 Pac. 694.

31. But such plaintiff is not entitled to interest on the expenditures, prior to the entry of judgment determining the liability of the defendant for contribution.—*Willmon v. Koyer*, 168 Cal. 369, L. R. A. 1915B, 961, 143 Pac. 694.

32. In an action for partition and for an accounting for expenditures made by the plaintiff for the benefit of the common property, it is proper to charge the portion of the property assigned to the defendant with a lien for the payment of the amount found to be due from him to the plaintiff on account of such expenditures.—*Willmon v. Koyer*, 168 Cal. 369, L. R. A. 1915B, 961, 143 Pac. 694.

33. In the event that foreclosure proceedings become necessary by reason of the failure of the owners in severalty of the mortgaged property to contribute equally to the payment of the mortgage-debt, the particular owner who may be compelled to pay the entire debt will be rightfully and readily subrogated, to the extent of the excess payment, to the interests of the mortgagee in a proper proceeding instituted for that purpose.—*Rich v. Smith*, 20 Cal. App. Dec. 461, 148 Pac. 545.

34. When one tenant in common has paid a debt or obligation for the benefit of the joint property, or has discharged a lien or assessment imposed upon it as a common burden, he is entitled as matter of right to have his co-tenant, who has received the benefit of it, refund to him his proportionate share of the amount paid, and it is proper to provide in the decree of partition that the share of the latter be charged with a lien therefor.—*Rich v. Smith*, 20 Cal. App. Dec. 461, 148 Pac. 545.

35. **Co-tenancy and copartnership—Differentiated.**—Tenancy in common results from rule of law by which it is also controlled and governed; and partnership, on contrary, is result of agreement between parties, which also supplies rules for its government. Former relation is undisturbed by change of tenants, but latter admits of no change as to its members; and where change takes place by consent and agreement of all parties concerned, old firm is thereby dissolved and new one created. Thus incidents annexed to each have different origin and are diverse.—*Bradley v. Harkness*, 26 Cal. 69, 78.

36. **Decree of sale for partition of proceeds—Stipulation of joint owners.**—Where it appeared that partition could not be made without great prejudice to the owners, the court may decree a sale, even though by agreement of the owners it was provided that no sale should be made except by a

joint transfer.—*Vollmer v. Wheeler*, 42 Cal. App. 1, 183 Pac. 264.

37. **Discretion of court.**—Courts favor partition in kind when possible; but it is, in most cases, a matter of discretion in the trial court whether to order the one or the other. In the present case, held, no abuse of discretion shown.—*Muller v. Muller*, 14 Cal. App. 349, 112 Pac. 200.

38. **Ditches in mining districts—Proprietors tenants in common.**—In absence of any special facts constituting them something else, proprietors of ditches, in mining districts, are tenants in common of real estate, and their rights in ditch and in profits arising from sales of water, although in latter respect analogous to those of copartners, are governed by law of tenancy in common.—*Bradley v. Harkness*, 26 Cal. 69, 76.

39. **Enforcement of delivery of deed—Pursuant to agreement.**—In an action between tenants in common to compel the delivery of a deed executed by the defendant to the plaintiff in pursuance of their agreement for the partition of the land held by them in common, the evidence is sufficient to sustain the finding that there was no mistake in the description of the property referred to in the deed.—*Ellsworth v. Palmtag*, 168 Cal. 360, 143 Pac. 602.

40. Such action is not one for the specific performance of a contract of sale and purchase, and the adequacy of the consideration paid by the plaintiff for the land is not involved.—*Ellsworth v. Palmtag*, 168 Cal. 360, 143 Pac. 602.

41. **Equitable estate in land—Is real property, and must descend in case of intestacy as legal estates.** In most cases, in this state, difference between equitable and legal estates is of no practical importance. They are both estates originating by law and held under law, and in that sense are legal estates, and object of the code being to permit but one form of action, in which either or both legal or equitable remedies may be sought, it would be unwarrantable to hold that this did not apply to actions of partition.—*Watson v. Sutro*, 86 Cal. 500, 527, 24 Pac. 172, 25 Pac. 64.

42. **Same—Owner of, may sue, and, if co-tenant, have partition.**—Where legal and equitable remedies relate to same subject-matter, there is no reason why owner of equitable title may not sue to establish his right, and, when so established, if he is tenant in common, ask for and have partition of common estate.—*Watson v. Sutro*, 86 Cal. 500, 527, 24 Pac. 172, 25 Pac. 64.

43. **Estate only in land—Without possession as co-tenant, does not sustain action.**—Supreme court has gone to great length in upholding right of tenant in common to maintain action, where he had right to present possession, although not in actual possession; but it does not go to the extent of holding that any person, having estate in land, but not holding as coparcener, joint

tenant, or tenant in common, can maintain action for partition.—*Jameson v. Hayward*, 106 Cal. 682, 686, 46 Am. St. Rep. 268, 39 Pac. 1078.

44. Same—Several may own without being co-tenants.—Under this section it is only the co-tenants mentioned who hold and are in possession of real estate who can bring action for partition, and it is only that real property which is thus held by them that can be partitioned. It is the co-tenancy which gives right to partition. Several persons may own thing without being co-tenants thereof, and, in such case, under statute like our own, no partition can be had.—*Jameson v. Hayward*, 106 Cal. 682, 686, 46 Am. St. Rep. 268, 39 Pac. 1078.

45. Fact that plaintiff is entitled to exclusive possession until the expiration of a lease held by him would seem to be no different in the way of a partition subject to said temporary possession.—*Buhrmeister v. Buhrmeister*, 10 Cal. App. 392, 396, 102 Pac. 221.

46. Former adjudication.—In this action in partition it is held that the question of the title to both pieces of property involved was adjudicated in the case of *Lauricella v. Lauricella*, 161 Cal. 61, which was a suit for the establishment and enforcement of a constructive trust, that is, for a decree declaring that the property was held in trust by the plaintiff in this action in partition for the benefit of her husband during his life, and, upon his death, one-half thereof to be conveyed in equal shares to the father and mother of the husband (the defendants in the action in partition) and the other one-half to be retained by the wife, and that the judgment in the former action operates as an estoppel to the maintenance of the present action wherein the plaintiff seeks to obtain a greater interest in the property than was awarded her by such judgment.—*Gluffre v. Lauricella*, 25 Cal. App. 422, 143 Pac. 1061.

47. Homestead—Assigned to widow, properly reserved—Partition of residue.—Where, in the administration of a deceased husband's estate comprising three hundred twenty acres of land, a homestead was assigned to the widow of twenty-five acres across the northerly boundary of the tract, including the improvements, and the estate was distributed to the heirs as tenants in common, subject to such homestead, it is held that in a subsequent action for partition by the widow, between herself and the remaining heirs, of the remaining two hundred ninety-five acres, reserving the homestead right, the court properly confined its interlocutory decree of partition to such two hundred ninety-five acres, and reserved and refused to partition or sell the homestead right.—*Mills v. Stump*, 20 Cal. App. 84, 128 Pac. 349.

48. Same—Nature of homestead-right—Incapable of compulsory partition or sale.—The homestead interest in land is the offspring of statute, created for the benev-

olent purpose of furnishing a home to such person or persons to whom the law awards it, as a sanctuary against any hostile attack. The homestead-right assigned to the widow, having been carved out of the husband's separate estate for the term of her natural life, she does not hold her interest during such term, either as parcenary, joint tenant, or tenant in common. Her homestead is of such a nature as to be incapable of compulsory partition or sale. The above section was not intended to authorize the partition of the homestead interest during the term of its enjoyment.—*Mills v. Stump*, 20 Cal. App. 84, 128 Pac. 349.

49. Same—Partition of not authorized.—Section 752 of the Code of Civil Procedure was not intended to authorize the partition of the homestead interest during its enjoyment.—*Mills v. Stump*, 20 Cal. App. 84, 128 Pac. 349, 352.

50. Improvements, and allowance therefor.—In this action for partition of a tract of land wherein the defendant, by way of cross-complaint, sought judgment against the plaintiff for money expended in improving and preserving the common property by leveling and bulkheading it, the findings fixing the cost of such improvements and refusing to allow the defendant anything therefor are contrary to the evidence, which is not conflicting either as to the necessity for the improvements or their cost.—*Ventre v. Tiscornia*, 23 Cal. App. 598, 138 Pac. 954.

51. If in such case the improvements were necessary and the plaintiff shared in the benefits thereof, he is chargeable with his proportion of their cost, though they were made without his consent, express or implied.—*Ventre v. Tiscornia*, 23 Cal. App. 598, 138 Pac. 954.

52. A co-tenant, seeking partition of the common property at the hands of a court of equity, will be granted relief only upon the condition that the equitable rights of his co-owner will be respected and protected. Therefore, where one tenant in common has, in good faith, with or without the consent of his co-tenant, expended money in making permanent improvements which were necessary to the preservation of the common property, partition should not be decreed without first counting the cost of such improvements and making a suitable allowance for them.—*Ventre v. Tiscornia*, 23 Cal. App. 598, 138 Pac. 954.

53. If, as appears to be true, the evidence in the present case shows without conflict that the improvements to the common property were necessary to its preservation and enhance its rental value, then the plaintiff should have been put to his election either to contribute equally to the undisputed cost of the improvements, or else relinquish all claim to a share of the increased rentals resulting therefrom.—*Ventre v. Tiscornia*, 23 Cal. App. 598, 138 Pac. 954.

54. The finding of the lower court in this case, relating to the necessity and cost of the improvements in question, can not be justified upon the theory that the improvements were made by the defendant in the character of an ordinary tenant at will of the plaintiff. The case was not tried, either in whole or in part, upon the theory that the relation of landlord and tenant existed between the parties to the partition; but was heard and determined solely upon the issue of the relative rights of the parties as tenants in common—*Ventre v. Discornia*, 23 Cal. App. 598, 138, Pac. 954.

55. May be had in one action, of two or more tracts or parcels of land and the fact that such tracts are situated in different counties can not affect this right, the action being maintainable in such a case in any county in which a part of the property is situated.—*Middlecoff v. Cronise*, 155 Cal. 185, 188, 100 Pac. 232.

See pars. 81-83, this note.

As to tracts situated in different counties, see par. 90, this note.

56. Where the requisite unity of title as to the co-tenants exists the claims of any and all persons adverse to the co-tenants in regard to the property may be determined in the action in order to settle all controversies to the title in one action, and equitably apportion the property of the defendant. Such a determination of adverse claims is merely incidental to the main purpose of the action—the partition of the property held in co-tenancy.—*Middlecoff v. Cronise*, 155 Cal. 185, 191, 100 Pac. 232.

57. With the exception hereafter noted (par. 58, this note), while two or more parcels of land may be the subject-matter of a single proceeding for partition even though the interest of each co-tenant is not the same in each parcel, in order to justify such union in one suit, each parcel of land must be owned by the same person.—*Middlecoff v. Cronise*, 155 Cal. 185, 188, 100 Pac. 232.

58. The exception to the rule last stated is one based on the universally accepted doctrine that one co-tenant can not by a conveyance of his interest in a portion of the property held in common, etc., prejudice the rights of his co-tenants. The grantee or successor of such co-tenant simply steps into the shoes of his grantor, subject to all the rights of the other co-tenants and their successors as to partition, and in such a case a necessary party defendant may be a co-tenant only as to one of the parcels involved, and the fact that he is not interested in the other parcels is no ground of objection to the joinder in one action of the various parcels of land.—*Middlecoff v. Cronise*, 155 Cal. 185, 189, 100 Pac. 232.

59. "Mining right"—Is an incorporeal hereditament, and incapable of partition.—

"Mining right" upon specific piece of ground is right to enter upon and occupy ground for purpose of working it, either by underground excavations or open workings, to obtain from it minerals or ores which may be deposited therein; and as incorporeal hereditament it is subject to general rules which govern enjoyment of real property, and is not in its nature capable of partition, because division of the right would enlarge original grant beyond intention of grantor, and likewise prove greater charge than was originally intended by owner of the soil, and because, so long as minerals and ores, which are subject of servitude, are in place, unworked, and unsevered from soil, they are incapable of allotment according to quality and quantity relatively considered.—*Smith v. Cooley*, 65 Cal. 46, 47, 2 Pac. 880.

As to partition of mines, see note 9 Am. St. Rep. 884.

60. Object of partition—Possession of co-tenants in severalty—Possession must be enforceable—Injustice not allowed.—The object of partition is to enable the co-tenants to enjoy the possession in severalty, and not to be compelled to submit to joint possession. It is not intended to try the title to land, and where possession can not be effected as the result of the partition, there is no necessity for making it. It can not be allowed where injustice and wrong would result from it, on account of part of the land being subject to a homestead.—*Mills v. Stump*, 20 Cal. App. 84, 128 Pac. 349.

61. Objection to referees' report.—Where referees in partition proceedings do not comply with the interlocutory decree, and hence do not preserve the rights of all parties in interest, objection to their report will afford ample remedy to the party claiming to be aggrieved thereby.—*Rich v. Smith*, 20 Cal. App. Dec. 461, 148 Pac. 545.

62. Operation of action enlarged.—Operation on the action of partition as known at the law has been greatly enlarged. It is more comprehensive here than in many other jurisdictions.—*Buhrmeister v. Buhrmeister*, 10 Cal. App. 392, 395, 102 Pac. 221.

63. Oral agreement between parties to a suit in partition that the party to whom a certain piece was awarded should give to the others a right of way across it, confers an estate in real property and, not being carried into the decree in partition, is within the statute of frauds and void.—*Oliver v. Burnett*, 10 Cal. App. 403, 408, 102 Pac. 223.

64. Particular portions of general tract—Can not be appropriated by one co-tenant.—One tenant can not appropriate to himself any particular portion of general tract mentioned in action for partition; as, upon partition, which may be claimed by co-tenants at any time, parcel may be entirely set apart in severalty to co-tenant. He can not defeat this possible result whilst re-

taining his interest, nor can he be defeated by transfer of his interest. He can not, of course, invest his grantee with rights greater than he possesses. Grantee must take, therefore, subject to contingency of loss of premises, if on partition of general tract they should be allotted to grantor.—*Stark v. Barrett*, 15 Cal. 362, 368; *Gates v. Salmon*, 35 Cal. 576, 588, 95 Am. Dec. 139.

As to when contingent or future estates are subject to partition, see note 32 Am. St. Rep. 778.

65. Partition among cotenants.—A suit in partition under our code is, in its nature and essence, equitable, just and proper, and will not only allot to a co-tenant that part of the common land upon which he has valuable improvements, but will also set apart a specific tract to the share of a co-tenant who has undertaken to convey the title in fee to such tract in severalty, so that the grantee may have that which is justly his, when such disposition of the land can be made without material injury to the rights and interest of the other cotenants.—*East Shore Co. v. Richmond Belt R.*, 172 Cal. 174, 155 Pac. 999.

66. Party necessary.—All persons having legal or equitable claims.—Where owner of undivided estate rightfully commences action for partition, all persons, claiming liens or equitable rights on or in estates of their co-tenants, are properly made defendants from necessity. Otherwise, one tenant in common, by keeping his share covered by liens and trusts, could deprive his co-tenants of their right of partition (dis. op. *McFarland, J.*).—*Watson v. Sutro*, 86 Cal. 500, 529, 24 Pac. 172, 25 Pac. 65.

That purchasers not of record need not be made parties, see, post, § 754 and note.

67. Same.—Grantee of special location.—Grantee of special location occupies, as to it, identical position that his grantor held, immediately before he executed conveyance, and holder of special location is necessary party to action for partition of general tract.—*Gates v. Salmon*, 35 Cal. 576, 597, 95 Am. Dec. 139.

68. Respondents, in order to maintain action in partition, must adopt view that holders of special locations are necessary parties, if it is true that grantor, upon execution of his conveyance of special location, parts with all interest therein, and must also support a liberal construction of section 264 Practice Act.—*Gates v. Salmon*, 35 Cal. 576, 596, 95 Am. Dec. 139.

69. If holder of special location is regarded as unnecessary and improper party, while he holds conveyance from any one of co-tenants, he will not be rendered competent to participate as party to action by receiving further conveyances from remaining co-tenants, nor can his possession be strengthened, in consequence of his grantor's subsequent conveyance to other tenants in common, or to strangers by specific locations, or otherwise, sufficient to

cover all general tract remaining after his conveyance of first special location.—*Gates v. Salmon*, 35 Cal. 576, 589, 95 Am. Dec. 139.

70. Same.—Not, when one has no lien of record.—Plaintiff in partition is not called upon to make person who has no lien of record when suit is commenced, party defendant.—*Towle Bros. Co. v. Quinn*, 141 Cal. 382, 385, 74 Pac. 1046.

As to who may compel partition, see note 67 Am. Dec. 703.

71. Property subject to mortgage and contract of sale.—In an action for partition of several tracts of land subject to subsisting mortgages and executory contracts of sale, the mortgagees and parties to the contracts can not be deprived of the right granted to them by the contracts to look and resort wholly and solely to the particular pieces of property originally mortgaged or contracted for in satisfaction of their mortgages or in execution of their contracts, and if the decree of partition in any manner alters or impairs the scope and effect of either, it is subject to reversal upon the appeal of any or all of the aggrieved parties.—*Rich v. Smith*, 20 Cal. App. Dec. 461, 148 Pac. 545.

72. In this action for the partition of several tracts of land subject to mortgage liens and executory contracts of sale, the interlocutory decree directing physical partition of the land does not contemplate that the referees will and must treat all of the lands as a single tract, and then proceed to divide the same into two equal parts, quantity and quality considered, without regard to the existence of the outstanding mortgages and contracts, but contemplates that in making partition the referee shall consider the existence as well as the scope and effect of the outstanding mortgages and contracts of sale, and may, when making partition, treat the particular parts and parcels of the common property covered by the mortgages and the contracts of sale as so many distinct estates, and separately partition them as such, and then allot them in severalty to one or other of the cotenants, subject, however, to the existence and satisfaction of such liens.—*Rich v. Smith*, 20 Cal. App. Dec. 461, 148 Pac. 545.

73. Same.—Receiver.—In the event that the interested parties can not agree as to whom payments made from time to time under the contracts of sale shall be made, the court may, in aid of the final judgment in partition, appoint a receiver for that purpose under the provisions of section 564, ante.—*Rich v. Smith*, 20 Cal. App. Dec. 461, 148 Pac. 545.

74. Provisions of section 1104 of Civil Code under which a transfer of real property passes all easements attached thereto, etc., applies to a transfer made by decree in partition and the latter has the same effect in this regard as the deed between the parties.—*Oliver v. Burnett*, 10 Cal. App. 403, 406, 102 Pac. 223.

75. "Real property," defined.—The "real property" herein referred to is that to which such unity of title exists as authorizes a single action, and the fact that the rights of adverse occupants of the land sought to be partitioned may be put in issue, tried, and determined, does not prevent the joinder of different tracts of land. —*Middlecoff v. Cronise*, 155 Cal. 191, 100 Pac. 232.

76. Referee after sale—Custodian of funds.—Where property has been partitioned, the sale made, and the money in the hands of the referee, such referee was not the mere bailee of a specific fund or the custodian of ear-marked money belonging to the claimant of the fund as assignee thereof. He was the custodian of funds held by him for the use of such assignee, to be paid him when the precise amounts due should be determined. The only appropriate action which the assignee, or his agents, could maintain against the referee, or his successor, for the recovery of the money due would be an action of debt for money had and received. The claim assigned was a pure chose in action, nor could an action thereon be in the nature of an action of replevin. —*Widenmann v. Weniger*, 164 Cal. 667, 130 Pac. 421, 423.

77. Same—Funds not custodia legis.—Where the court, in a partition suit, confirmed the sale and directed the distribution of the proceeds by the referees, but no money had been paid into court, nor had the action been continued thereafter for the disposition of any such money, the order had become fixed in that court. The money was not even in custodia legis so as to be exempt from execution, hence a proceeding by the purchaser under execution is in the nature of a proceeding independent from the partition suit, and the assignee of an interest in the money distributed was entitled to notice thereof. —*Widenmann v. Weniger*, 164 Cal. 667, 130 Pac. 421, 424.

78. Remainderman out of possession—Right to maintain action.—Under the above section as amended in 1919 striking from the provisions that in order for a co-tenant to maintain an action in partition he must hold and be in possession of real property, a remainderman out of possession may maintain an action in partition, although he could not do so under the statute as it stood before the amendment. —*Geary v. De Espinosa*, — Cal. App. —, 196 Pac. 90.

79. In adopting the amendment and elimination of 1919 the legislature had before it the bar of the common law and of the section as it then stood. It was then, as now, the law in a number of states that a remainderman, although not in possession, might bring a partition suit; and there are a number of decisions apparently based upon statutory reading so like the above statute in its amended form as to be practically of the same effect. —*Geary v. De Espinosa*, — Cal. App. —, 196 Pac. 90. See *Deadman v. Yantis*, 230 Ill. 243, 250, 120 Am. St. Rep. 291, 82 N. E. 592; *Hanson* mon with co-tenants of his grantor, but his

v. Ingwaldson, 77 Minn. 533, 77 Am. St. Rep. 692, 80 N. W. 702; *Doerner v. Doerner*, 161 Mo. 407, 61 S. W. 802; *Crowley v. Sutton*, — Mo. —, 209 S. W. 292, 293; *Stahl v. Buffalo R. & P. R.*, 262 Pa. St. 493, 106 Atl. 65, 67.

80. Right to partition—Postponement.—Partition of land held in common will not be denied until such time as the same will result in the fullest profit to both parties, since ordinarily, if the party seeking partition is shown to be a tenant in common, and as such entitled to the possession of the land sought to be partitioned, his right to partition is absolute. —*Rich v. Smith*, 20 Cal. App. Dec. 461, 148 Pac. 545.

81. Several tracts—As to partition of in one suit.—Where one co-tenant has parted with his interest in one, but not all tracts, his grantee or successor steps into the shoes of his grantor, and may be joined as a co-tenant as to that tract. Otherwise, where several tracts are joined in the same action, the parties must be co-tenants in all tracts, to escape a misjoinder of cause of action. —*Middlecoff v. Cronise*, 155 Cal. 189, 100 Pac. 232.

See pars. 55-58, this note.

As to tracts situated in different counties, see par. 90, this note.

82. Same—All parties must be co-tenants of each tract.—Subject to the exception that where one co-tenant has made a conveyance of his interest in a portion of the property held in common, and therefore can not be permitted to prejudice the rights of his co-tenants, where two or more tracts of land are subject to partition, even though the interest of each co-tenant is not the same in each parcel, in order to justify union in the same suit, each parcel must be owned by the same persons, otherwise there would be a misjoinder of causes of action. —*Middlecoff v. Cronise*, 155 Cal. 189, 100 Pac. 232.

83. Same—Misjoinder of causes of action.—Where a demurrer for misjoinder of causes of action is sustained, on the ground that all co-tenants are not co-tenants in each tract, the right of the plaintiff to maintain another action against such defendants as were co-tenants in each tract united in the action, is not prejudiced. —*Middlecoff v. Cronise*, 155 Cal. 193, 100 Pac. 232.

84. Share set off to certain parties—Costs.—Where a certain share is set off to certain of the parties as co-tenants it would seem proper that the proportion of the costs should be made a lien upon that share without admitted segregation as to the portion of the costs which each of the co-tenants within that share should be called upon to bear. —*Baldwin v. Foster*, 157 Cal. 643, 648, 108 Pac. 714.

85. Special tract, conveyance of—Leaves general tract subject to partition among co-tenants.—Grantee acquires all interest of his grantor in special tract, and that interest is tenancy in special tract in common with co-tenants of his grantor, but his

conveyance does not sever special tract from general tract, so far as co-tenants are concerned, and general tract is therefore liable to partition, as it would be had conveyance of special tract not been made. Aside from directions of statute in that respect, interest of grantee of special location shows that he is proper defendant in action.—*Gates v. Salmon*, 35 Cal. 576, 588, 95 Am. Dec. 139.

86. Title—Means whereby one holds.—Title, within meaning of this section, is "means whereby one holds that which he hath," not right to get that which he hath not, and it has never been held by this court that such action can be maintained (dis. op. *McFarland, J.*).—*Watson v. Sutro*, 86 Cal. 500, 529, 24 Pac. 172, 25 Pac. 64.

87. Same—Not mere asserted right to compel conveyance, necessary.—Under this section, action for the partition of land can not be maintained by one who has not title, but has mere asserted right to compel some one who has title to convey it to plaintiff. He should establish his claim against owner, whom he asserts to be his trustee, and settle accounts with him, before bringing other co-tenants into litigation; at least, he should be able to aver that he has title to estate of inheritance, for life or for years, in the land (dis. op. *McFarland, J.*).—*Watson v. Sutro*, 86 Cal. 500, 529, 24 Pac. 172, 25 Pac. 64.

88. Same—Of the respective parties conclusively determined.—Under this section, title of respective parties of any portion of land may be determined in action of partition, and there is no reason why determination should not be as conclusive as it would be if made in action brought for sole purpose of its determination.—*Martin v. Walker*, 58 Cal. 590, 595.

89. Same—Same—As to all questions.—This provision of code gives court, in which partition suit is brought, full power and authority to try and determine, in that proceeding, all questions relating to title, as fully and as completely as such questions could be adjudicated in action of ejectment, and decisions of supreme court of this state are to that effect.—*Martin v. Walker*, 58 Cal. 590, 593.

As to partition of water-rights, see note 26 L. R. A. 284.

90. Tracts situated in different counties.—The right to have partition of two or more tracts of land in the same action is not affected by the fact that such tracts are situated in different counties, the action being maintainable in any county in which part of the property is situated.—*Middlecoff v. Cronise*, 155 Cal. 188, 100 Pac. 232.

See pars. 55-58, 81-83, this note.

91. Under will and decree of distribution vesting nephew of the testatrix with the absolute title to certain land provided another party did not commence residence thereon within a certain time, or should

cease to reside thereon, creates a conditional limitation, and upon the cessation of such party to live upon the land, the absolute title immediately vests in the nephew by act of the law.—*Taylor v. McCowen*, 154 Cal. 798, 803, 99 Pac. 351.

92. Waiver of right—By contract—Breach of contract by joint tenant—Revival of right.—The right to partition conferred by the above section may be waived by agreement, yet a joint tenant who enters into such an agreement, in consideration of a covenant and agreement on the part of the other joint tenant to farm the land and keep an accurate and intelligible account accessible to the former of all receipts and expenditures, upon the failure of such other joint tenant to keep his agreement in this regard such other joint tenant is released from any legal or moral obligation to carry out his promise or covenant in order to require partition.—*Asels v. Asels*, 43 Cal. App. 574, 185 Pac. 419.

93. Same—Same—Tenant may, by contract, under the provisions of section 3513 of Civil Code.—*Asels v. Asels*, 43 Cal. App. 574, 185 Pac. 419.

94. Same—Release from where the consideration for the agreement of waiver was that the tenant in possession should keep books showing his expenditures in farming the land, and to render them accessible and intelligible to tenant consenting, and to account for all grain raised upon said premises, the covenants being mutual and concurrent, upon the breach of covenant by the tenant in possession.—*Asels v. Asels*, 43 Cal. App. 574, 185 Pac. 419.

95. Who may compel.—A widow to whom has been left an undivided one-third interest in an estate of three hundred twenty acres, and for whom a homestead of twenty-five acres has been set apart during her lifetime, can compel partition of the two hundred ninety-five acres, outside of the homestead, but the homestead can not be partitioned without her consent.—*Mills v. Stump*, 20 Cal. App. 84, 128 Pac. 349.

96. Whole of Mexican grant need not be included in suit—Only described tract.—There is nothing in law that requires whole of Mexican grant to be included in partition suit. All that is required is, that land sought to be partitioned come within description given in this section.—*Adams v. Hopkins*, 144 Cal. 19, 29, 69 Pac. 228, 77 Pac. 712.

97. Words "persons having an interest"—Include holders of particular portions.—If words "persons having an interest" comprise only joint tenants and tenants in common, they can not be limited to those who, holding such interests coextensive with whole property, for section includes those also who have such interests in any particular portion of property.—*Gates v. Salmon*, 35 Cal. 576, 587, 95 Am. Dec. 139.

As to partial partition, see, post, § 760 and note.

§ 752a. ACTION FOR PARTITION OF PERSONAL PROPERTY. When several persons are co-owners of any personal property, an action may be brought by any one or more such co-owners for a partition thereof; or in case partition can not be had without great prejudice to the owners, for the sale thereof, and partition of the proceeds according to the respective interests of the parties. In all such actions the provisions of this chapter shall govern wherever applicable. Real and personal property may be partitioned in the same action.

History: Enactment approved April 15, 1919, Stats. and Amdts. 1919, p. 73. In effect July 22, 1919.

§ 753. INTEREST OF ALL PARTIES MUST BE SET FORTH IN THE COMPLAINT. The interests of all persons in the property, whether such persons are known or unknown, must be set forth in the complaint, as far as known to the plaintiff; and if one or more of the parties, or the share or quantity of interest of any of the parties, is unknown to the plaintiff, or is uncertain or contingent, or the ownership of the inheritance depends upon an executory devise, or the remainder is a contingent remainder, so that such parties can not be named, that fact must be set forth in the complaint.

History: Enacted March 11, 1872, re-enactment of § 265 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 160, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 603, Kerr's Stats. and Amdts. 1906-7, p. 460.

COMPLAINT—WHAT TO SET FORTH.

1. Any question as to rights of all parties—Determined in action.
2. Complaint—Must show interests of all parties.
3. Same—Bringing in of new party matter of substance.
4. Same—To set forth interest of all parties specifically only when known.
5. Facts of interests known to plaintiff—Can not be proved without allegations.
6. Intervention—By party whose interest accrues after suit commenced.
7. Parties—All set forth origin, nature, and extent of respective interests.
8. Same—Necessary parties—Woman claiming land as homestead and all persons interested.
9. Same—Same—Parties specified.

1. Any question as to rights of all parties—Determined in action.—Under this section and section 753, post, any question affecting right of plaintiff to partition, or to rights of each and all parties in land, may be put in issue, tried and determined in such action; and if disputes exist as to their rights or interest in any respect, such disputes may be litigated and determined in such action.—*De Uprey v. De Uprey*, 27 Cal. 335, 87 Am. Dec. 81; *Morenhout v. Higuera*, 32 Cal. 289, 294; *Gates v. Salmon*, 35 Cal. 576, 95 Am. Dec. 139; *Hancock v. Lopez*, 53 Cal. 362, 371; *Martin v. Walker*, 58 Cal. 590, 592.

As to rights of all parties known or unknown to be ascertained in this action, see, post, § 759 and note.

2. Complaint—Must show interests of all parties.—In an action under this section, plaintiff is required to set forth interests of all parties, known or unknown, as far as they are known to him, and each defendant is required to set forth in his answer, fully and particularly, nature and extent of his interest.—*De Uprey v. De Uprey*, 27 Cal. 330, 336, 87 Am. Dec. 81.

3. Same—Bringing in of new party matter of substance.—In partition, all interests of all persons in property must be set forth as far as known to plaintiff, under provisions of this section. Nature of action makes bringing in of new party matter of substance.—*San Diego Sav. Bank v. Goodsell*, 137 Cal. 420, 426, 70 Pac. 299.

4. Same—To set forth interests of all parties specifically only when known.—Plaintiff, in action for partition, is required to set forth in complaint specifically and particularly respective interests of all parties, whether such parties be known or unknown to him, so far as such interests are known to him, but it would be idle to require him to set forth specifically interests as to character and extent of which he is ignorant.—*Morenhout v. Higuera*, 32 Cal. 289, 294.

As to abstract of title procured before action, see, post, § 759 and note.

As to complaint, generally, see, ante, § 426 and note; post, § 754.

As to notice of lis pendens, generally, see, ante, § 409 and note.

5. Facts of interests known to plaintiff—Can not be proved without allegations.—Where second deed delivered by plaintiff was intended as substitute for former deed, for same interest, which was supposed to have been lost, and two-thirds interest of defendant was really derived only through deed first delivered by plaintiff, he should have set forth these facts in complaint; in absence of proper allegations in complaint with reference thereto, they can not be proved upon trial.—*Miller v. Sharp*, 48 Cal. 394.

6. Intervention—By party whose interest accrues after suit commenced.—When an action in partition was commenced, plaintiff had no mortgage and one which was afterwards executed was not recorded until after an interlocutory decree, plaintiff undoubtedly had right, and it was his duty, to intervene in that suit and set up his mortgage lien and have it adjusted in partition decree as provided by code; at least it could not afterwards, in its separate action to foreclose mortgage, rightfully ask court to cross over and take charge of partition suit.—*Towle Bros. Co. v. Quinn*, 141 Cal. 382, 385, 74 Pac. 1046.

7. Parties—All set forth origin, nature, and extent of respective interests.—Action for partition under our statute is, to some extent, *sui generis*. Parties named in complaint, whether as plaintiffs or defendants, are all actors, each representing his own interest. Whether plaintiffs or defendants, they are required to set forth fully and particularly origin, nature, and extent of their

respective interests in property.—*Morenhout v. Higuera*, 32 Cal. 289, 295.

8. Same—Necessary parties—Woman claiming land as homestead, and all persons interested.—Where woman, in her answer, not only claimed homestead right to premises in partition case, but claimed that entire legal estate was in her, and court found that legal title to an undivided half was in her, she was not only proper but necessary party to complete determination of case. All persons having, or claiming, any interest in land, are not only proper but necessary parties to suit for partition; and it was not only proper for court to grant motion to bring in wife and defendant by supplemental complaint, but it would have been error not to have done so.—*De Uprey v. De Uprey*, 27 Cal. 330, 333, 87 Am. Dec. 81.

9. Same—Same—Parties specified.—Provision is made in this act for bringing in, not only original tenants or tenants in common in whole or any part of property, but those having future rights and estates; those entitled in remainder or reversion; those having estates for life or for years, and those holding liens by mortgage, judgment, or otherwise; and power is given to court to try and determine rights of all parties to action, and to order compensation to be made by one tenant to another, so as to equalize shares allotted to each.—*Gates v. Salmon*, 35 Cal. 576, 590, 95 Am. Dec. 139.

As to parties defendant whose names are unknown, see, ante, § 474 and note.

As to parties plaintiff, see, ante, §§ 384-387 and notes.

§ 754. LIEN-HOLDERS NOT OF RECORD NEED NOT BE MADE PARTIES. No person having a conveyance of or claiming a lien on the property, or some part of it, need be made a party to the action, unless such conveyance or lien appear of record.

History: Enacted March 11, 1872, re-enactment of § 266 Practice Act.

§ 755. PLAINTIFF MUST FILE NOTICE OF LIS PENDENS. Immediately after filing the complaint in the superior court, the plaintiff must record in the office of the recorder of the county or of the several counties in which the property is situated, a notice of the pendency of the action, containing the names of the parties so far as known, the object of the action, and a description of the property to be affected thereby. From the time of filing such notice for record all persons shall be deemed to have notice of the pendency of the action.

History: Enacted March 11, 1872, re-enactment of § 267 Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 325; March 10, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 11.

1. Sale of reversion.—Reversion of which one of co-tenants is sole owner will not be ordered sold in action of partition be-

tween co-tenants of estate for years.—*Jameson v. Hayward*, 106 Cal. 682, 686, 46 Am. St. Rep. 268, 39 Pac. 1078.

§ 756. SUMMONS MUST BE DIRECTED TO ALL PERSONS INTERESTED IN THE PROPERTY. The summons must contain a description of the property sought to be partitioned, and must be directed to all of the persons named as defendants in the complaint, and when it shows that some person has or claims an interest in or lien upon the property whose name is unknown to the plaintiff, the summons must also be directed to all persons unknown who have or claim any interest in or lien upon the property.

History: Enacted March 11, 1872, re-enactment of § 268 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 160, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 604, Kerr's Stats. and Amdts. 1906-7, p. 460.

As to contents of summons, see, ante, § 407 and note.

As to filing in pendens, see, ante, § 409 and note.

§ 757. UNKNOWN PARTIES MAY BE SERVED BY PUBLICATION. If a party having a share or interest is unknown, or any one of the known parties reside out of the state, or can not be found therein, and such fact is made to appear by affidavit, the summons may be served on such absent or unknown party by publication, as in other cases. When publication is made, the summons, as published, must be accompanied by a brief description of the property which is the subject of the action.

History: Enacted March 11, 1872, re-enactment of § 269 Practice Act.

As to publication of summons, see, ante, §§ 412, 413 and notes.

As to service on nonresident, see, ante, §§ 413, 749 and notes.

As to service of summons generally, see, ante, §§ 405 et seq. and notes.

§ 758. ANSWER OF DEFENDANTS, WHAT TO CONTAIN. If the defendant fails to answer within the time allowed by law, he is deemed to admit and adopt the allegations of the complaint. Otherwise, he must controvert such of the allegations of the complaint as he does not wish to be taken as admitted, and must set forth his estate or interest in the property, and if he claims a lien thereon must state the date and character of the lien and the amount remaining due, and whether he has any additional security therefor, and if so, its nature and extent, and if he fails to disclose such additional security, he must be deemed to have waived his lien on the property to be partitioned.

History: Enacted March 11, 1872; re-enactment of § 270 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 161, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 604, Kerr's Stats. and Amdts. 1906-7, p. 460.

ANSWER—WHAT TO CONTAIN.

1. Answer—Must show extent of defendant's interest.
2. Disclaimer — Insufficient unless absolute and unconditional.
3. Issue—Any question affecting right to partition, put in.

4. Statute of limitations—Cuts no figure in partition, save when party has lost all right in land.
5. Same—Operates consistently and not unfairly.
6. Same—Resorted to so far as it establishes interest.

1. **Answer—Must show extent of defendant's interest.**—Defendants, in action for partition, must each set forth in his answer fully and particularly, nature and extent of his interest.—*De Uprey v. De Uprey*, 27 Cal. 330, 336, 87 Am. Dec. 81.

2. **Disclaimer—Insufficient unless absolute and unconditional.**—In action for partition, where defendant disclaims all interest, except such as he may have under homestead laws by virtue of dedication of land to homestead uses by himself and his wife,—in view of fact that such interest did not amount to anything in law, he could not claim dismissal of action upon ground of disclaimer, unless he made that disclaimer in absolute and unconditional terms. Instead of doing that, he denied all allegations of complaint as to plaintiff's title, pleaded statute of limitations, averred title in his wife, and claimed for himself right of homestead in premises, but disclaimed any further interest. It is misnomer to call such answer disclaimer.—*De Uprey v. De Uprey*, 27 Cal. 330, 334, 87 Am. Dec. 81.

3. **Issue—Any question affecting right to partition, put in.**—Any question affecting right of plaintiff to partition, or rights of each and all of parties in land, may be put in issue, tried and determined in such action. Such is one of fruits of new system of practice adopted here, and when contrasted with practice in such cases at common law, serves to illustrate its superiority.—*De Uprey v. De Uprey*, 27 Cal. 330, 334, 87 Am. Dec. 81.

4. **Statute of limitations—Cuts no figure in partition, save when party has lost all**

right in land.—Statute of limitations never bars relief between tenants in common in action in partition. It is only where party has, by operation of statute of limitations, lost all right in land, and such right has by prescription become vested in another, that statute of limitations cuts any figure in partition suit.—*Adams v. Hopkins*, 144 Cal. 19, 27, 69 Pac. 228, 77 Pac. 712.

5. **Same—Operates consistently and not unfairly.**—Lands of defendants, whose titles by adverse possession were upheld, were expressly excluded from original complaint in action in partition, and were brought in subsequently after five years, statute of limitations had run in their favor. Statute of limitations is positive rule of law, and courts must, when it is pleaded, be governed by it where it applies, and where it does not apply it must be so held. Had these plaintiffs, instead of waiting for statute to run in their own favor, commenced suit for partition against all parties interested within time allowed by law, they would not now be complaining of unfair and inequitable operation of statute.—*Adams v. Hopkins*, 144 Cal. 19, 28, 69 Pac. 228, 77 Pac. 712.

6. **Same—Resorted to so far as it establishes interests.**—Statute of limitations may be resorted to, in action of partition, so far as it establishes interests in property; and this is in no way inconsistent with general rule that right of action, for partition of property between tenants in common, is not barred by lapse of time.—*Adams v. Hopkins*, 144 Cal. 19, 28, 69 Pac. 228, 77 Pac. 712.

As to answer generally, see, ante, § 437 and note.

§ 759. THE RIGHTS OF ALL PARTIES MAY BE ASCERTAINED IN THE ACTION. The rights of the several parties, plaintiff as well as defendant, may be put in issue, tried, and determined in such action; and when a sale of the premises is necessary, the title must be ascertained by proof to the satisfaction of the court before the sale can be ordered; except that where there are several unknown persons having an interest in the property, their rights may be considered together in the action, and not as between themselves.

History: Enacted March 11, 1872, re-enactment of § 271 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 161, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 604, Kerr's Stats. and Amdts. 1906-7, p. 460.

RIGHTS OF ALL PARTIES.

1. Adverse occupants, rights of—Determined in action.
2. All questions affecting right of plaintiff—Determined in this action.
3. Construction of section.
4. Decrees touching matters within its jurisdiction—Leaving to probate court matters contested there.

5. Estate of deceased—Can not be partitioned hereunder during administration.
6. Judgment—Concludes all parties summoned.
7. Same—Estoppel, lien on interest not an, of plaintiff.
8. Same—Settles all intricate questions between holders of special locations and of undivided interests.
9. Same—Same—And is not to be in piecemeal.

10. Judgment is conclusive.
11. Lien on interest of plaintiff—Does not deprive of right.
12. Mortgage claim and accounting of water-rights determined.
13. Ouster need not be found—Where implied from running of statute.
14. Possession obtained contrary to law—Not aided by court of equity.
15. Relative rights of grantees and grantors.
16. Tenants in common—Entitled to same relief after conveyance of special parcels of general tract as before.
17. Same—Once in possession, may sue co-tenant.
18. Same—"The court" is court into which parties have been brought.
19. Trustee's deed—Not necessary if land not affected or trust terminated.

As to parties defendant in general, see, ante, §§ 381-384 and notes; post, § 761.

As to power of court to affirm or set aside report and judgment, see, post, § 766.

As to requisites of report of sale, see, post, § 784 and note.

That lienholders must be made parties, or referee appointed to determine their rights, see, post, § 761 and note.

1. Adverse occupants, rights of.—Determined in action.—It is settled in this state that rights of adverse occupants of land sought to be partitioned "may be put in issue, tried and determined in such action." In partition of large tracts of land, it would otherwise be impracticable proceeding.—*Adams v. Hopkins*, 144 Cal. 19, 29, 69 Pac. 228, 77 Pac. 712.

2. All questions affecting right of plaintiff.—Determined in this action.—Any question affecting right of plaintiff to partition, or rights of each and all of parties in land, may be put in issue, tried, and determined in action in partition. Such is one of proofs of new system of practice which we have adopted, and, when contrasted with the practices in such cases at common law, serves to reinstate its superiority.—*De Uprey v. De Uprey*, 27 Cal. 329, 335, 87 Am. Dec. 81.

3. Construction of section.—This section gives the court in which the partition suit is brought full power and authority to try and determine in that proceeding all questions relating to the title as fully and completely as such questions could be adjudicated in an action of ejectment.—*Buhrmeister v. Buhrmeister*, 10 Cal. App. 392, 395, 102 Pac. 221.

4. Decrees touching matters within its jurisdiction—Leaving to probate court matters contested there.—Where court has determined all matters over which it has jurisdiction and has definitely ascertained all interests of all co-tenants,—except only issues between contesting claimants in probate court of interests of deceased co-

tenant, over which issues it has no jurisdiction,—and premises must be sold in order to effect just division, decree of sale, leaving rights of such contesting claimants to be determined in court having jurisdiction thereof is proper, is warranted by general law of partition, and is not violative of any provision of code.—*Grant v. Murphy*, 116 Cal. 427, 434, 58 Am. St. Rep. 188, 48 Pac. 481.

5. Estate of deceased—Can not be partitioned hereunder during administration.—Where estate of deceased co-tenant is unsettled, and administration thereof is pending in proper probate court, and there is also pending there contest between heirs and devisees, as to who are rightful owners of such deceased co-tenant, there is no jurisdiction in court in which partition suit is pending to hear and determine issues between hostile claimants in interest of deceased co-tenant; such jurisdiction is for probate court.—*Grant v. Murphy*, 116 Cal. 427, 434, 58 Am. St. Rep. 188, 48 Pac. 481.

6. Judgment—Concludes all parties summoned.—Judgment in action for partition is binding and conclusive as to title upon all parties who are served with summons or appear, and is bar to new action.—*De Uprey v. De Uprey*, 27 Cal. 329, 335, 87 Am. Dec. 81; *Martin v. Walker*, 58 Cal. 590, 594.

7. Same—Estoppel, lien on interest not an, of plaintiff.—This section gives, to any one or more of several co-tenants of real property, right of action for its partition, according to respective rights of persons interested therein, and for sale of such property, if partition can not be had; and in succeeding section provision is made for ascertaining respective rights of parties to action, and for satisfaction, or other disposition, of any lien thereon; and although party may, by some act or agreement on his part, estop himself from enforcing his right to partition, mere fact that his interest in land is subject to lien or encumbrance will not of itself operate as such estoppel.—*Gardiner v. Cord*, 145 Cal. 157, 164, 78 Pac. 544.

8. Same—Settles all intricate questions between holders of special locations and of undivided interests.—There may be many and intricate questions to be settled between the holders of special locations and those claiming undivided interests in whole rancho, but they will have to be determined before whole partition is complete. Complete partition should be made in one action, if practicable, and parties desire it, and rights of all parties, when put in issue, should be tried and determined instead of being tried in many new actions.—*Gates v. Salmon*, 35 Cal. 576, 597, 95 Am. Dec. 139.

9. Same—Same—And is not to be in piecemeal.—Whole scope and tenor of provisions of act relating to partition show that intention was to make one judgment

partition final and conclusive on all persons interested in property, or any part of it, of whom court could have acquired jurisdiction, and not to permit matter to be taken up in piecemeal.—*Gates v. Salmon*, 35 Cal. 576, 590, 95 Am. Dec. 139.

10. **Judgment is conclusive** as between parties, and when it adjudges ownership of property to be in one of parties, is admissible in evidence in subsequent action of ejectment between same parties.—*Hancock v. Lopez*, 53 Cal. 362, 366.

11. **Lien on interest of plaintiff—Does not deprive of right.**—Fact that interest of plaintiff in land in question, in action for partition, is subject to lien for certain indebtedness which can be at any time discharged by payment of such debt, and for payment of which court is authorized to provide in its judgment of partition or sale, does not deprive him of right to maintain action.—*Gardiner v. Cord*, 145 Cal. 157, 165, 78 Pac. 544.

12. **Mortgage claim and accounting of water-rights determined.**—In action for partition of real estate, in mining districts, mortgage claim of parties plaintiff can be settled and adjusted, and, as collateral to main question, account of water-rights can be taken, and rights of parties therein respectively ascertained.—*Bradley v. Harkness*, 26 Cal. 69, 78.

13. **Ouster need not be found—Where implied from running of statute.**—In action in partition it is not necessary to find, subsequently, whether there has been an ouster of their co-tenants, on part of parties who successfully plead statute of limitations. Finding of ultimate fact that statute had run in their favor was all that was necessary, and if an ouster were necessary to set statute in motion, ouster would be implied from finding of ultimate fact of running of statute.—*Adams v. Hopkins*, 144 Cal. 19, 28, 69 Pac. 228, 77 Pac. 712.

14. **Possession obtained contrary to law.—Not aided by court of equity.**—Where plaintiffs, under agreements and understandings, contrary to express provision of revised statute, and to policy of express laws of United States regulating occupation, possession, and sale of public lands, have succeeded in thus obtaining land, a court of equity will not stoop to investigate and enforce those parts of agreements and understandings relating to division of land among conspirators, and will not interfere in behalf of others in obtaining them their share, but will leave parties in position where they have placed themselves.—*Mitchell v. Cline*, 84 Cal. 409, 415, 24 Pac. 164.

15. **Relative rights of grantees and grantors.**—In an action for partition, where,

during the progress of the suit and before the decision, some of the common owners made deeds purporting to convey to third persons, in severalty, the whole title to specific parcels of the common land, it is not error, so far as such an appealing tenant is concerned, to open the case after the evidence had been closed and the cause submitted, and allow proof to be made of such conveyances, as they involved only the relative rights of the grantees and grantors in the share set apart by the partition to the grantors.—*East Shore Co. v. Richmond Belt R.*, 172 Cal. 174, 155 Pac. 999.

16. **Tenants in common—Entitled to same relief after conveyance of special parcels of general tract as before.**—Tenant in common, after conveyance of specific parcel of general tract, is often mentioned as tenant in common of general tract, but this is not true in any sense, nor for any purpose. Remaining tenants in common, in applying for partition, are entitled to same relief, in every respect, that they could demand were special locations remaining in hands of tenant in common who conveyed them, and same would be case if, instead of special locations, tenant in common had conveyed portions of his undivided interest.—*Gates v. Salmon*, 35 Cal. 576, 590, 95 Am. Dec. 139.

17. **Same—Once in possession, may sue co-tenant.**—Tenant in common who has never been in occupancy of land may, under this section, maintain suit in partition against co-tenant whose possession is adverse and hostile.—*Martin v. Walker*, 58 Cal. 590, 592.

18. **Same—"The court" is court into which parties have been brought.**—This section, with section 774, post, clearly applies only to issues over which court in which partition suit is pending has jurisdiction. "The court" mentioned in either section is court into which parties have been brought by action for partition; and both sections are based upon assumption that matters therein mentioned are matters over which that court has jurisdiction.—*Grant v. Murphy*, 116 Cal. 427, 434, 58 Am. St. Rep. 188, 48 Pac. 481.

19. **Trustee's deed—Not necessary, if land not affected or trust terminated.**—Where, if trust was invalid from beginning, title and estate of owners of land were not affected thereby, and, if it was valid it was terminated, and estate of trustee had ceased, rights of owners of land could be adjudicated in court of equity in proceeding for partition under this section without necessity of actual reconveyance thereof from trustee.—*Gardiner v. Cord*, 145 Cal. 157, 163, 78 Pac. 544.

§ 760. PARTIAL PARTITION. Whenever from any cause it is, in the opinion of the court, impracticable or highly inconvenient to make a complete partition, in the first instance, among all the parties in interest, the court may

first ascertain and determine the shares or interest respectively held by the original co-tenants, and thereupon adjudge and cause a partition to be made, as if such original co-tenants were the parties, and sole parties, in interest, and the only parties to the action, and thereafter may proceed in like manner to adjudge and make partition separately of each share or portion so ascertained and allotted as between those claiming under the original tenant to whom the same shall have been so set apart, or may allow them to remain tenants in common thereof, as they may desire.

History: Enacted March 11, 1872, takes place of § 272 Practice Act, which provided for production at hearing of certificate of recorder as to outstanding liens.

PARTIAL PARTITION.

- 1, 2. Construction of section.
3. Interlocutory decree—Interests of each party to be determined before.
4. Same—Enables referees to make partition.
5. Same—Moieties as specified in, before partition.
6. Same—Must first define rights and interests.
7. Same—Must precede partition.
8. Same—Only one, embraces all rights clearly set out.
- 9, 10. Same—Rights of parties must be ascertained before.
11. Issues, at law and in equity—Determined, or case not tried.
12. Original co-tenants—Rights of, may be first specified.
13. Same—And then partition between them as if only parties.
14. Same—Partition among, must include possession and improvements.
15. Rights of all parties to be determined before partition.

1. Construction of section.—This section is intended to allow, and does allow, two partitions, one as between original co-tenants, and then another between all parties to action. After this first partition is made, which is allowed as aid to accomplish second one, court is authorized to proceed "in like manner to adjudge and make partition separately of each share or portion so ascertained and settled as between those claiming under original tenant, to whom same shall have been set apart."—*Emeric v. Alvarado*, 64 Cal. 529, 611, 2 Pac. 418.

2. Provision is made in this section for cases where by reason of the impracticability or inconvenience of doing otherwise the court may set apart portions or parcels to co-tenants subsequently segregating the interests of such co-tenants and while such co-tenants have the unquestioned right upon demand to the trial court or upon direct appeal to insist upon further proceedings whereby their several interests should be delimited and set over to them, the judgment is not void because it assigns

to them a distinct tract as tenant in common.—*Baldwin v. Foster*, 157 Cal. 643, 108 Pac. 714.

3. Interlocutory decree—Interests of each party to be determined before.—Statute allows but one interlocutory decree. Therefore interests of each party to action must be ascertained and determined before any interlocutory decree is made. If this is not so, there must be two interlocutory decrees, and there is no warrant for this in statute.—*Emeric v. Alvarado*, 64 Cal. 529, 610, 2 Pac. 418.

4. Same—Enables referees to make partition, court must ascertain right and title of each party, showing under which of co-tenants each party claims. Interlocutory decree must be made before there can be any partition ordered, that is, rights of parties determined by court, and specified in such decree.—*Emeric v. Alvarado*, 64 Cal. 529, 610, 2 Pac. 418.

5. Same—Moieties as specified in, before partition.—Under this section and sections 763, 764, post, in action in partition, before any partition is ordered or can be made, interest and shares of parties are to be determined and adjudicated by court, and moieties in which land is to be partitioned; and such moieties must be specified in interlocutory judgment so that referees may have no question of title to determine, and that they may intelligently discharge duties as to making allotment involved on them by decree.—*Emeric v. Alvarado*, 64 Cal. 529, 610, 2 Pac. 418.

6. Same—Must first define rights and interests.—Whether partition is to be ordered in action hereunder, or sale directed. It is indispensable that decree, interlocutory in its character, be first entered, definitely ascertaining rights and interests of respective parties in subject-matter. In case sale is to be directed it is impossible for any party, in absence of such interlocutory decree, to know whether he is interested in maintaining, or in resisting, proceedings.—*Lorenz v. Jacobs*, 53 Cal. 24, 25.

7. Same—Must precede partition.—Proper construction of this section is under conditions mentioned in it, to first ascertain and determine shares and interests re-

spectively held by official co-tenant, as well as shares or interest respectively held by each one of parties to action, and, upon such ascertainment being made, and judgment rendered in accordance therewith, thereupon to adjudge and cause partition to be made as if such official co-tenants were sole parties in interest. Provision forbids any partition until interlocutory decree is made.—*Emeric v. Alvarado*, 64 Cal. 529, 610, 2 Pac. 418.

8. **Same—Only one, embraces all rights clearly set out.**—Language of section is "to adjudge and make partition," and "to adjudge and cause partition to be made," thus two partitions only are allowed—one preliminary and ancillary to other, partial in its character; other embracing all parties to action. Though there are two partitions, there is but one interlocutory decree, which should embrace all rights to be ascertained and determined—that of original co-tenants and also of all parties to action. These rights so ascertained should be set out clearly in decree, and interlocutory decree, or judgment, is not concluded until this is done.—*Emeric v. Alvarado*, 64 Cal. 529, 611, 2 Pac. 418.

9. **Same—Rights of parties must be ascertained before.**—Under this section, before any interlocutory decree in partition is made, rights of parties must be ascertained by court.—*Emeric v. Alvarado*, 64 Cal. 529, 609, 2 Pac. 418.

10. **Construction of this section, that under no circumstances can any interlocutory decree in partition be made until interest of each and every owner is first ascertained and determined, seems, in effect, to nullify whole provision thereof (dis. op. Ross, J.).**—*Emeric v. Alvarado*, 64 Cal. 529, 631, 2 Pac. 418.

11. **Issues, at law and in equity—Determined, or case not tried.**—Procedure in chancery in action of partition has been substantially embodied in provisions of chapter IV of this code. Same legal effect follows raising of such issues in partition proceedings in this state under code; only, instead of sending parties to court of law to litigate question of title between them, court in which proceeding is pending has jurisdiction to try and determine issues,

whether at law or in equity, and must determine them as part of proceeding itself, and until these issues are disposed of, and tenants in common of property are ascertained and enumerated, and their restricted interests and rights have been ascertained and determined, case can not be considered as tried and decided, and this section is not in conflict with such views.—*Emeric v. Alvarado*, 64 Cal. 529, 629, 2 Pac. 418.

12. **Original co-tenants—Rights of, may be first specified.**—Court can, in action in partition, in addition to ascertaining rights and title of each party, just mentioned, and specifying them in decree, ascertain rights and interests of original co-tenants, and specify them also in decree; indeed, this last-mentioned may be done first, and then, after ascertaining title of original co-tenants and all parties and declaring them in decree, court may thereupon adjudge and cause partition to be made as of original co-tenants.—*Emeric v. Alvarado*, 64 Cal. 529, 610, 2 Pac. 418.

13. **Same—And then partition between them as if only parties.**—This section does not dispense with ascertaining rights of all parties, but allows further additional ascertainment of shares or interest, respectively, of each of original co-tenants, and then adjudging partition in first instance of land between original co-tenants as if they were only parties.—*Emeric v. Alvarado*, 64 Cal. 529, 610, 2 Pac. 418.

14. **Same—Partition among, must include possession and improvements.**—To make partition of land between original co-tenants as if they were only parties, so that it may be of any aid in making further partition between all parties to action, it must be made to include, in land allotted to each co-tenant, possession and improvements of each one under him.—*Emeric v. Alvarado*, 64 Cal. 529, 610, 2 Pac. 418.

15. **Rights of all parties to be determined before partition.**—Construing section 759, ante, and sections 763, 764, post, together, it is evident that rights of all parties to action must be ascertained and determined by court before any partition can be made, and there is no different rule laid down for this section.—*Emeric v. Alvarado*, 64 Cal. 529, 609, 2 Pac. 418.

§ 761. LIEN-HOLDERS MUST BE MADE PARTIES, OR A REFEREE BE APPOINTED TO ASCERTAIN THEIR RIGHTS. If it appears to the court that there are outstanding liens or encumbrances of record upon such real property, or any part thereof, which existed and were of record at the time of the commencement of the action, and the persons holding such liens are not made parties to the action, the court must [1] either order such persons to be made parties to the action, by an amended or supplemental complaint, or [2] appoint a referee to ascertain whether or not [a] such liens or encumbrances have been paid, and if not paid, [b] what amount remains due thereon, and [c] their order among the liens or encumbrances severally held by such per-

sons and the parties to the action, and [d] whether the amount remaining due thereon has been secured in any manner, and if secured, [e] the nature and extent of the security.

History: Enacted March 11, 1872, founded on § 273 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 161, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 604, Kerr's Stats. and Amdts. 1906-7, p. 461.

As to acts of referees, see, post, § 1053 and note.

As to effect of referee's findings, see, ante, § 644 and note.

As to lien on undivided share subject to costs, see, post, § 769.

As to lienholder holding other security to first exhaust it, see, post, § 772.

That lienholders not of record need not be made parties, see, ante, § 754.

As to references and trials by referees, in general, see, ante, §§ 638-645 and notes.

As to report of referees, see, ante, § 643 and note.

§ 762. LIEN-HOLDERS MUST BE NOTIFIED TO APPEAR BEFORE THE REFEREE APPOINTED.

The plaintiff must cause a notice to be served, a reasonable time previous to the day for appearance before the referee appointed as provided in the last section, on each person having outstanding liens of record, who is not a party to the action, to appear before the referee at a specified time and place, to make proof, by his own affidavit or otherwise, of the amount due, or to become due, contingently or absolutely thereon. In case such person be absent, or his residence be unknown, service may be made, by publication or notice to his agents, under the direction of the court, in such manner as may be proper. The report of the referee thereon must be made to the court, and must be confirmed, modified, or set aside, and a new reference ordered, as the justice of the case may require.

History: Enacted March 11, 1872, re-enactment of § 274 Practice Act.

As to lienholders holding other security to first exhaust same, see, post, § 772.

§ 763. THE COURT MAY ORDER A SALE OR PARTITION, AND APPOINT REFEREES THEREFOR.

If it appears by the evidence, whether alleged in the complaint or not, that the property or any part of it is so situated that partition can not be made without great prejudice to the owners, the court may order the sale thereof; otherwise, upon the requisite proofs being made, it must order a partition according to the respective rights of the parties as ascertained by the court, and appoint three referees therefor, and must designate the portion to remain undivided for the owners whose interests remain unknown, or are not ascertained; or the court, with the consent of the parties, may appoint one referee instead of three, and he when appointed, has all the powers and may perform all the duties required of three referees; and the court must appoint as referee any person or persons to whose appointment all the parties have consented, and no person shall be appointed as referee who is disqualified from acting as an appraiser under the provisions of section four-hundred forty-four of the Code of Civil Procedure.

[In incorporated city.] When the site of an incorporated city or town is included with the exterior boundaries of the property to be partitioned, the

court must direct the referees to survey and appraise the entire property to be partitioned by actual lots and subdivisions then existing in the actual possession of the several tenants in common, exclusive of the value of improvements thereon, first setting apart necessary portions of the property for ways, roads and streets, as in section seven hundred sixty-four provided, and to report such survey and separate appraisement on each lot and subdivision to the court.

[Action of court.] The court may confirm, change, modify, or set aside the report in whole or in part, and if necessary appoint new referees.

[Sale. Deed.] When, after the final confirmation of the report of such survey and appraisement, it appears by evidence to the satisfaction of the court that an equitable partition of the whole property is impracticable, and a sale of the site of such city or town, or any portion thereof, will be for the best interests of the owners of the whole property, it must order a sale thereof; provided, that within sixty days thereafter any tenant in common, or tenants in common, having improvements erected on any town or city lot or subdivision included in such order of sale, shall have the prior right to purchase the same at such appraised valuation, and may pay into court the amount so appraised as the value thereof, and upon such payment the title shall vest in such purchaser or purchasers, and the court shall cause to be executed by such referees a deed for such lot or subdivision in fee and in severalty to such purchaser or purchasers; such further proceedings shall then be had as to the remainder of the property, and the money so paid to the court, as by this chapter provided.

[In case of death of party.] If, during the pendency of the action, any of the parties die, or become insane, or otherwise incompetent, the proceedings shall not for that cause be delayed or suspended, but the attorney who has appeared for such party may continue to represent such interest; and in case any such party has not appeared by an attorney, the court must appoint an attorney to represent the interest which was held by such party, until his heirs or legal representatives, or successors in interest, shall have appeared in the action;

[Attorney's fees.] and an attorney so appointed must be allowed by the court a reasonable compensation for his services, which may be taxed as costs against the share or interest represented by such attorney, and may be adjudged a lien thereon in the discretion of the court.

History: Enacted March 11, 1872, re-enactment of § 275 Practice Act; amendment approved April 12, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 60; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 161, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 605. Kerr's Stats. and Amdts. 1906-7, p. 461; May 30, 1913, Stats. and Amdts. 1913, p. 235. In effect August 10, 1913.

SALE OR PARTITION—COURT MAY ORDER.

1. Appeal—Is premature, when.
2. Construction of section—Removes all doubt of facts to be stated in complaint.
3. Death of party—Service of notice of appeal.
4. Jeopardy to one interest, with lack of benefit to any one, will control.
5. Merger of reversion and estate for years—Prevented by court of equity.
6. Partition—Can not be made until respective interests of all ascertained.
7. Same—If required, not aided by judicial notice of fact not proved.
8. Referee—Sole duty of, to apportion and make report.
9. Reversion, share in — Not awarded where partition to parties as tenants for years.

10. Reversionary interest—Not sold at request of parties having no interest in it.
- 11, 12. Sale—If appears, partition can not be made.
13. Same — If required, determined by court, though not alleged.
14. Same—Made only on proof, partition impracticable.
15. Value, dispute as to—Not before referee but before court.

As to abstract of title in action for partition, see, post, § 799.

As to allowance for improvements in partition, see note 7 L. R. A. 731.

As to attorney's fees, see, post, § 796 and note.

As to expenses of previous litigation for common benefit allowed, see, post, § 798.

As to partition of dominant tenement, see Kerr's Cyc. Civ. Code § 807.

1. Appeal—Is premature when taken from decree while proceedings for its modification are pending. The modified decree is only appealable judgment.—Bixby v. Bent, 59 Cal. 522, 532.

2. Construction of section—Removes all doubt of facts to be stated in complaint.—If sections 264, 265 of Practice Act leave question concerning what facts shall be stated in complaint in partition in doubt, such doubt is entirely removed by two hundred and seventy-fifth section, which provides that: "If it be alleged in complaint, and be established by evidence, or if it appear by evidence, without such allegation in complaint, to satisfaction of court, that property, or any part of it, is so situated that partition can not be made without great prejudice to owners, court may order sale thereof."—De Uprey v. De Uprey, 27 Cal. 330, 332, 87 Am. Dec. 81.

3. Death of party—Service of notice of appeal upon attorney who has regularly appeared for party, where no substitution of attorneys has taken place, although that party at time of service was dead, is valid.—Lacoste v. Eastland, 117 Cal. 673, 680, 49 Pac. 1046.

4. Jeopardy to one interest, with lack of benefit to any one, will control.—In absence of expression of intention, if interest of person in whom several estates have united would be best subserved by keeping them separate, intent so to do will ordinarily be implied; and where it appears that interests of defendant would be jeopardized by sale of interest in land vested in him, but can not be enjoyed by purchaser for forty-five years, and no corresponding benefit being discernible to any one of the parties, court below did not err in refusing to order sale of reversionary interest of defendant, or in rejecting mere opinions of witnesses in proffered testimony.—Jameson v. Hayward, 106 Cal. 682, 688, 46 Am. St. Rep. 268, 39 Pac. 1078.

5. Merger of reversion and estate for years — Prevented by court of equity.—Where it is contended in action in partition that when estate for years and reversion vested in defendant there was merger, and that as to him estate for years had ceased to exist, equity will prevent or permit merger, as will best subserve purposes of justice and actual and just intent of parties, and where interests of such defendant would be jeopardized by sale of reversionary interest in land which had nearly fifty years to run, and no corresponding effect was discernible to any of parties, court will not order sale of such reversionary interest.—Jameson v. Hayward, 106 Cal. 682, 688, 46 Am. St. Rep. 268, 39 Pac. 1078.

6. Partition—Can not be made until respective interests of all ascertained.—Where plaintiffs have set forth origin, nature, and extent of their interests, interests of each or all may be put in issue by others; and, if so, such issues are to be first tried and determined, and no partition can be made until respective interests of parties have been ascertained and settled by trial.—Morenhout v. Higuera, 32 Cal. 289, 295.

7. Same—If required, not aided by judicial notice of fact not proved.—Whether or not partition can be made without great prejudice to owners is question of fact decision of which is not to be aided by judicial notice of any fact or circumstance not proved.—Mitchell v. Cline, 84 Cal. 409, 418, 24 Pac. 164.

8. Referee—Sole duty of, to apportion and make report.—Sole duty of referee, under this section and section 797, post, was to apportion and allot land, lots, and blocks between original co-tenants according to their respective interests as found and determined by court, quality and quantity relatively considered, and make report of his proceedings, specifying manner in which he had executed his trust, and describing property divided and shares allotted to each party.—Richardson v. Loupe, 80 Cal. 490, 501, 22 Pac. 227.

As to appointment of single referee by consent, see, post, § 797.

As to apportionment of fees of referee, see, post, § 768.

As to compensation of parties when unequal partition ordered, see, post, § 792.

As to number of referees, qualifications, etc., see, ante, § 640 and note.

As to power of court to affirm, modify, or set aside report of referee, see, post, § 766 and note.

As to referee, appointment of, see, ante, § 761 and, post, § 797.

As to single referee, power of, see, post, § 797.

As to tenants for years to whole property, judgment not to affect, see, post, § 767.

As to unequal partition, possession may be adjudged in certain cases, see, post, § 792.

9. Reversion, share in—Not awarded where partition to parties as tenants for years.—Power of court in case sale becomes necessary is not greater, nor its discretion to be exercised different, than in cases where partition is made, and if court has ordered partition of rights of parties to property as tenants for years, it would not be incumbent on it, or even proper, to have awarded to either plaintiff or to defendant any share or interest with another party defendant in a reversion.—*Jameson v. Hayward*, 106 Cal. 682, 688, 46 Am. St. Rep. 268, 39 Pac. 1078.

10. Reversionary interest—Not sold at request of parties having no interest in it.—Where in partition there was estate for years in which all parties had interest, but which had nearly half century to run, but plaintiff and one of defendants had no interest, legal or equitable, in reversion, court of equity will not enforce at their request sale of reversionary interest which does not concern them.—*Jameson v. Hayward*, 106 Cal. 682, 688, 46 Am. St. Rep. 268, 39 Pac. 1078.

As to estate for life or years, set off, see, post, § 770.

11. Sale—If appears, partition can not be made.—By this section it is provided that if it be alleged in complaint and established by evidence, or if it appears by evidence without such allegation in complaint, to satisfaction of court, that property or any part of it is so situated that partition can not be made without great prejudice to owners, court may order sale thereof. Otherwise, upon requisite proofs being made, it must order partition according to respective rights of parties and appoint three referees therefor, and must designate portion to remain undivided for owners whose interests remain unknown or not ascertained.—*Emeric v. Alvarado*, 64 Cal. 529, 614, 2 Pac. 418.

12. There is a presumption that land held in common tenancy can be equitably divided. It is only where the contrary "appears by the evidence" that a sale may be ordered. Therefore one who, upon appeal, contends for a sale, instead of a partition as ordered, must show that it appears by the evidence that a partition would prejudice the owners. The burden of proof to show such prejudice rests on him.—*East Shore Co. v. Richmond Belt R.*, 172 Cal. 174, 155 Pac. 999.

13. Same—If required, determined by court, though not alleged.—This statute seems to contemplate that court may investigate questions as to whether sale is requisite to avoid great prejudice to owners, even in absence of any allegation in complaint to that effect.—*Bartlett v. Mackey*, 130 Cal. 181, 182, 62 Pac. 482.

As to encumbered property, application of proceeds of sale of, see, post, § 771.

As to sale to be at auction, see, post, § 775.

As to sale or credit, court must direct terms of, see, post, § 776.

As to sales in partition, see, post, §§ 771-795 and notes.

14. Same—Made only on proof, partition impracticable.—Under code rule party asking for sale instead of partition has burden of proving that partition can not be made without great prejudice to owners.—*Mitchell v. Cline*, 84 Cal. 409, 418, 24 Pac. 164.

15. Value, dispute as to—Not before referee, but before court.—This statute does not require that referee should report valuation of whole or any allotment, or for any hearing of parties before him. If any contest arises as to relative value of several allotments, or as to justice of his report in any other respect, settlement of such dispute is to be had before court, which has full power to confirm, change, modify, or set aside his report.—*Richardson v. Loupe*, 80 Cal. 490, 500, 22 Pac. 227.

§ 764. PARTITION MUST BE MADE ACCORDING TO THE RIGHTS OF THE PARTIES, AS DETERMINED BY THE COURT. In making partition, the referees must divide the property, and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, pursuant to the provisions of this chapter, designating the several portions by proper landmarks, and may employ a surveyor with the necessary assistants to aid them.

[Setting aside for road or street, when.] Before making partition or sale, the referees may, whenever it will be for the advantage of those interested, set apart a portion of the property for a way, road, or street, and the portion so set apart must not be assigned to any of the parties or sold, but must remain an open and public way, road, or street, unless the referees shall set the same apart as a private way for the use of the parties interested, or some of them, their heirs and assigns, in which case it shall remain such private way. When-

ever the referees have laid out on any tract of land roads sufficient in the judgment of said referees to accommodate the public and private wants, they must report that fact to the court, and upon the confirmation of their report all other roads on said tract cease to be public highways.

[Allotting land to purchaser from tenant in common, when.] Whenever it appears, in an action for partition of lands, that one or more of the tenants in common, being the owner of an undivided interest in the tract of land sought to be partitioned, has sold to another person a specific tract by metes and bounds out of the common land, and executed to the purchaser a deed of conveyance, purporting to convey the whole title to such specific tract to the purchaser in fee and in severalty, the land described in such deed shall be allotted and set apart in partition to such purchaser, his heirs or assigns, or in such other manner as shall make such deed effectual as a conveyance of the whole title to such segregated parcel, if such tract or tracts of land can be so allotted or set apart without material injury of the rights and interests of the other co-tenants who may not have joined in such conveyance.

[Duty of referees in making partition.] In all cases it is the duty of the referees, in making partition of land, to allot the share of each of the parties owning an interest in the whole or in any part of the premises sought to be partitioned, and to locate the share of each co-tenant, so as to embrace as far as practicable the improvements made by such co-tenant upon the property, and

The value of the improvements made by the tenants in common must be excluded from the valuation in making the allotments, and the land must be valued without regard to such improvements, in case the same can be done without material injury to the rights and interests of the other tenants in common owning such land.

History: Enacted March 11, 1872, re-enactment of § 276 Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 325; April 3, 1876, Code Amdts. 1875-6, pp. 96, 97; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 162, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 606, Kerr's Stats. and Amdts. 1906-7, p. 462.

PARTITION ACCORDING TO RIGHTS AS DETERMINED BY COURT.

1. As to method of partition.
2. Agreement for partition upheld if ratified.
- 3, 4. Contribution and subrogation.
5. Shares not to be determined by sheriff or commissioner—If moieties specified in first judgment.
6. Specific bounds, sale by—Of land in common—Not binding on co-tenant.

1. As to method of partition.—The grantee of each parcel is entitled to have the same set off to him out of the share of his grantor, if it can be done without injury to the other tenants in common; but, the fact that he owns contiguous land which will make his ownership of the specific parcel more advantageous to him, can not justify the allotment thereof to him, if to do so would in fact materially injure another tenant in common.—*East Shore Co. v. Richmond Belt R.*, 172 Cal. 174, 155 Pac. 999.

2. Agreement for partition upheld if ratified.—Partial agreement for partition of land is void under statute of fraud, and can not be enforced; but, where consummated and ratified by parties, it will be upheld.—*Gordon v. San Diego*, 101 Cal. 522, 531, 40 Am. St. Rep. 73, 36 Pac. 18.

3. Contribution and subrogation.—In the event that foreclosure proceedings become necessary by reason of the failure of the owners in severalty of the mortgaged property to contribute equally to the payment of the mortgage-debt, the particular owner who may be compelled to pay the entire debt will be rightfully and readily subrogated, to the extent of the excess payment, to the interests of the mortgagee in a proper proceeding instituted for that purpose.—*Rich v. Smith*, 26 Cal. App. 775, 148 Pac. 545.

4. When one tenant in common has paid a debt or obligation for the benefit of the joint property, or has discharged a lien or assessment imposed upon it as a common

burden, he is entitled as matter of right to have his co-tenant, who has received the benefit of it, refund to him his proportionate share of the amount paid, and it is proper to provide in the decree of partition that the share of the latter be charged with a lien therefor.—*Rich v. Smith*, 26 Cal. App. 775, 148 Pac. 545.

5. Shares not to be determined by sheriff or commissioner.—If moieties specified in first judgment.—Where moieties, in which partition is to be made, are specified in first judgment, and writ de partitione facienda issued thereon, in action at law and in first judgment, and commission issued thereon in suit in chancery, in neither case are shares or interest of parties, nor any mat-

ter of title, to be determined by sheriff in one case, or commissioners in other.—*Emeric v. Alvarado*, 64 Cal. 529, 618, 2 Pac. 418.

6. Specific bounds, sale by.—Of land in common.—Not binding on co-tenant.—All authorities are to effect that sale by tenant in common, by specific bounds, of portion of land in common, is not binding upon his co-tenant unless ratified by him.—*Gordon v. San Diego* 101 Cal. 522, 531, 40 Am. St. Rep. 73, 36 Pac. 18.

As to partition between tenants by entireties, see note 30 L. R. A. 335.

As to partition of partnership real estate, see note 28 L. R. A. 103.

§ 765. REFEREES MUST MAKE A REPORT OF THEIR PROCEEDINGS.

The referees must make a report of their proceedings, specifying therein the manner in which they executed their trust, and describing the property divided, and the shares allotted to each party, with a particular description of each share. Any party to the action, after giving at least ten days' notice in writing to the other parties who have appeared therein of his intention to do so, may move the court to confirm, change, modify, or set aside such report.

History: Enacted March 11, 1872, re-enactment of § 277 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 163, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 607, Kerr's Stats. and Amdts. 1906-7, p. 463.

REFEREE'S REPORT.

1. Referee's report—Final judgment upon—Necessary to segregation of particular interests.

2. Same—Objection to referee's report.

1. Referees' report—Final judgment upon—Necessary to segregation of particular interests.—Until final judgment upon referee's report in partition is entered, it can not be known to which of parties any particular parcel of land will fall, and until such segregation has been made, there can be no adverse holding of any portion of land by either party to action against any

other parties thereto.—*Christy v. Spring Valley W. W.*, 97 Cal. 21, 27, 31 Pac. 1110.

As to affirming or setting aside report of referee, see, post, § 766 and note.

As to contents of referee's report, see, post, § 784 and note.

2. Same—Objection to referee's report.—Where referees in partition proceedings do not comply with the interlocutory decree, and hence do not preserve the rights of all parties in interest, objection to their report will afford ample remedy to the party claiming to be aggrieved thereby.—*Rich v. Smith*, 26 Cal. App. 775, 148 Pac. 545.

§ 766. COURT MAY SET ASIDE OR CONFIRM REPORT, AND ENTER JUDGMENT THEREON. UPON WHOM JUDGMENT TO BE CONCLUSIVE.

The court may confirm, change, modify, or set aside the report, and if necessary, appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive.

1. [Judgment binding on.] On all persons named as parties to the action, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee or as tenants for life or for years, or as entitled to the reversion, remainder, or the inheritance of such property, or any part thereof, after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof, as tenants for years or for life;

2. **On all persons not in being** at the time said judgment is entered, who have any interest in the property divided, or any part thereof, as entitled to the reversion, remainder or the inheritance of such property, or any part thereof, after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property; provided, that in case sale has been made under the provisions of this chapter the judgment shall provide for keeping intact the share of the proceeds of said sale, to which said party or parties not in being at the time are or may be entitled until such time as such party or parties may take possession thereof;

3. **On all persons interested** in the property, who may be unknown, to whom notice has been given of the action for partition by publication;

4. **On all other persons claiming** from such parties or persons, or either of them.

And no judgment is invalidated by reason of the death of any party before final judgment or decree; but such judgment or decree is as conclusive against the heirs, legal representatives, or assigns of such decedent, as if it had been entered before his death. If during the pendency of the action, and before final judgment therein, any of the co-tenants has conveyed to another person his interest, or any part of his interest, such conveyance, whatever its form, shall be deemed to have passed to the grantee any lands which, after its execution, may have been set aside to the grantor in severalty, or such proportionate interest in such lands as the interest so conveyed bears to the whole interest of the grantor.

History: Enacted March 11, 1872; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 163, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 607, Kerr's Stats. and Amdts. 1906-7, p. 463; March 15, 1911, Stats. and Amdts. 1911, p. 366.

CONFIRMING OR SETTING ASIDE REFEREES' REPORT.

1. "Any part thereof"—Means any part of whole and not of undivided interest.
2. Decree—Effect of.
3. Default of parties served—Confession of no interest.
4. Effect of interlocutory decree.
5. Judgment, final—Conclusive upon parties served in partition.
6. Same—Court acquired jurisdiction to determine interest of all.
7. Same—Right of way concluded by decree.
8. Referees' report, confirmation of—Subject to sound judicial discretion.
9. Same—Appeal, does not lie from order rejecting report.
10. Specific parcel, title of purchaser of—Good, save contingently, as to other tenants in common.

As to estate for years, when may be set off and property not sold, see, post, § 770.

As to expenses of partition, how apportioned, see, post, §§ 768, 769.

As to future, contingent, and vested interest to be ascertained and protected, see, post, § 781.

As to guardian, assent of, to partition, see, post, § 1772 and note.

As to improvements, appraisal and apportionment of, see, ante, §§ 763, 764.

As to unknown tenant of estate for life or years, protection of, see, post, § 780.

1. "Any part thereof"—Means any part of whole and not of undivided interest.—Words, "any part thereof," in subdivision 1 of this section, necessarily mean, in connection in which they are used, any part of property, and not any portion of undivided interest in property. It would be very inconsistent, if not absurd, that judgment should be conclusive on those who were not proper parties in action.—*Gates v. Salmon*, 35 Cal. 576, 592, 95 Am. Dec. 139.

2. **Decree—Effect of.**—A decree in partition has no other effect than to sever the unity of possession, and does not vest in either of the co-tenants any new or additional title.—*Potrero Nuevo Land Co. v. All Persons*, 29 Cal. App. 743, 156 Pac. 876.

3. **Default of parties served—Confession of no interest.**—Where, in action in partition, parties were served with summons and made no appearance, their default was confession that they had no interest in land, and court had jurisdiction to so adjudge ex-

pressly; but, had it not done so and passed them in silence, result would have been the same, for judgment that land belonged to parties between whom it was divided, would be equally as conclusive as against their title, they having been made parties and served with process.—*Morenhout v. Higuera*, 32 Cal. 289, 296.

4. **Effect of interlocutory decree** is merely to determine relative rights of respective parties in entire tract of land, but does not accomplish any severance of possession. It is thereafter necessary that partition according to these respective rights be made, and particular share of each party be allotted to him, and until this be done by final judgment it can not be known to which of parties any particular parcel of land will fall, and, therefore, prior to such segregation, there can be no adverse holding of any portion of land by either party to action against any of other parties thereto.—*Christy v. Spring Valley W. W.*, 97 Cal. 21, 27, 31 Pac. 1110.

5. **Judgment, final—Conclusive upon parties served in partition.**—Force and effect of final judgment in action for partition are clearly and explicitly stated in this section. Such judgment is declared to be binding and conclusive forever upon all persons who are named in complaint as parties to action, and have been served with summons, and their legal representatives.—*Morenhout v. Higuera*, 32 Cal. 289, 295.

6. **Same—Court acquired jurisdiction to determine interests of all.**—Plaintiffs herein having been named in complaint as parties to an action in partition, and having been served with summons, court acquired jurisdiction to first ascertain and determine what interest they held, if any, in land, and then to divide it accordingly. To say that judgment is not conclusive upon them because they neglected to appear and exhibit their interest, is preposterous. Such doctrine would place it in power of an obstinate tenant to defeat and prevent partition in all cases by merely staying out of court.—*Morenhout v. Higuera*, 32 Cal. 289, 295.

7. **Same—Right of way concluded by decree.**—Partition having been adjudged between tenants in common of ranch, and their respective shares set apart to them in severalty, although before partition appellant had been accustomed to pass over respondent's land, but there never was right of way appurtenant to parcel of land allotted to appellant, decree in partition entered upon report of referee, which laid out several new roads and made changes in old ones, no appeal having been taken, is conclusive against appellant's claim of right of way.—*Carey v. Rae*, 58 Cal. 159, 161.

8. **Referees' report, confirmation of—Subject to sound judicial discretion.**—Under this section, court doubtless has power to confirm or refuse to confirm, but this is not arbitrary power; it is neither more nor less than sound judicial discretion, and it must be exercised, with just regard to rights of all concerned, "subject to review of appellate tribunal, and propriety of its exercise depends upon circumstance of each case, and can only be rightfully exercised when it can be done with due regard to rights and interest of all concerned—the purchaser, as well as others."—*Dunn v. Dunn*, 137 Cal. 51, 59, 69 Pac. 847.

9. **Same—Appeal, does not lie from order rejecting report of referees and appointing new referees, or from order appointing new referees in place of those who have resigned, died, or been removed.** Such action can only be reviewed upon appeal from final judgment.—*Fallon v. Brittan*, 84 Cal. 511, 514.

As to appeal lying from order confirming sale, see, post, § 773, note par. 1.

10. **Specific parcel, title of purchaser of—Good, save contingently, as to other tenants in common.**—Title of purchaser of specified parcel, from one of tenants in common, is good against all world, except other tenants in common, and as to them it is subject to contingency of being taken by them, if it should be found necessary to do so, in order to make general partition of general tract.—*Gates v. Salmon*, 35 Cal. 576, 595, 95 Am. Dec. 139.

§ 767. JUDGMENT NOT TO AFFECT TENANTS FOR YEARS TO THE WHOLE PROPERTY. The judgment does not affect tenants for years less than ten to the whole of the property which is the subject of the partition.

History: Enacted March 11, 1872, re-enactment of § 279 Practice Act.

1. **Interlocutory order reviewable, and order striking out answer.**—This section requires court to review interlocutory order in an action in partition, when it involves merits and necessarily affects

judgment, and order striking out answer, regularly put on file, and rendering judgment without trial, falls within this class.—*Stevens v. Ross*, 1 Cal. 94, 97.

§ 768. EXPENSES OF PARTITION MUST BE APPORTIONED AMONG THE PARTIES. The expenses of the referees, including those of a surveyor
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and his assistants, when employed, must be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by the court, in its discretion, to the referees, must be apportioned among the different parties to the action, equitably.

History: Enacted March 11, 1872, re-enactment of § 280 Practice Act; but this section of Practice Act was amended in 1872, and the above provision of code superseded by this amendment (see note to this section, par. 4).

EXPENSES OF PARTITION APPORTIONED.

1. Referee's allowance—In discretion of court.
2. Superseding code section — Amendment of 1872.

As to allowance of attorney's fees, see, post, §§ 796, 798.

As to appointment of referee to inquire into lien, see, ante, § 761.

As to fees of referees, see, post, §§ 1028, 1508 and notes.

1. Referee's allowance—In discretion of court.—An allowance to referee is not to be confined to five dollars a day for his services, and court, allowing him much larger sum, under this section, which grants discretion to court to fix fees of ref-

erees, followed law which governed matter.—*Mesnager v. De Leonis*, 140 Cal. 402, 404, 73 Pac. 1052.

2. Superseding code section—Amendment of 1872.—Section 280 of Practice Act, which was re-enacted in above section, was amended by the legislature of 1871-72, and this amendment superseded the above code section. This amendment reads as follows: "The expenses of the referees, including those of a surveyor and his assistant when employed, shall be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by law to the referees, and such attorney's fees expended for the common benefit, both for plaintiff and defendants, as the court shall deem just and proper, shall be apportioned among the different parties to the action."—Stats. 1871-72, p. 230.

§ 769. A LIEN ON AN UNDIVIDED INTEREST OF ANY PARTY IS A CHARGE ONLY ON THE SHARE ASSIGNED TO SUCH PARTY. When a lien is on an undivided interest or estate of any of the parties, such lien, if a partition be made, shall thenceforth be a charge only on the share assigned to such party; but such share must first be charged with its just proportion of the costs of the partition, in preference to such lien.

History: Enacted March 11, 1872, re-enactment of § 281 Practice Act.

As to liens in general, see Kerr's Cyc. Civ. Code, 2d ed., §§ 2872 et seq. and notes.

§ 770. ESTATE FOR LIFE OR YEARS MAY BE SET OFF IN A PART OF THE PROPERTY NOT SOLD, WHEN NOT ALL SOLD. When a part of the property only is ordered to be sold, if there be an estate for life or years, in an undivided share of the whole property, such estate may be set off in any part of the property not ordered to be sold.

History: Enacted March 11, 1872, re-enactment of § 282 Practice Act.

§ 771. APPLICATION OF PROCEEDS OF SALE OF ENCUMBERED PROPERTY. The proceeds of the sale of encumbered property must be applied under the direction of the court, as follows:

1. To pay its just proportion of the general costs of the action;
2. To pay the costs of the reference;
3. To satisfy and cancel of record the several liens in their order of priority, by payment of the sums due and to become due; the amount due to be verified by affidavit at the time of payment;

4. The residue among the owners of the property sold, according to their respective shares therein.

History: Enacted March 11, 1872, re-enactment of § 273 Practice Act.

As to apportionment of costs of proceeding, see, ante, § 768.

As to attorney's fees, costs include, see, post, §§ 796, 798 and notes.

As to costs, judgment for, how enforced, see, post, § 796 and note.

As to cost, lien of undivided share, subject to, see, post, § 796 and note.

As to costs of partition and liens on shares of parceners, see, post, § 1196 and note.

As to costs, when restricted to certain parties, see, post, § 796.

As to cost of previous litigation incurred by one tenant, see, post, § 798.

§ 772. PARTY HOLDING OTHER SECURITIES MAY BE REQUIRED FIRST TO EXHAUST THEM. Whenever any party to an action, who holds a lien upon the property, or any part thereof, has other securities for the payment of the amount of such lien, the court may, in its discretion, order such securities to be exhausted before a distribution of the proceeds of sale, or may order a just deduction to be made from the amount of the lien on the property, on account thereof.

History: Enacted March 11, 1872, re-enactment of § 284 Practice Act.

As to service on lienholder of notice to appear, see, ante, § 762.

§ 773. PROCEEDS OF SALE, DISPOSITION OF. The proceeds of sale and the securities taken by the referees, or any part thereof, must be distributed by them to the persons entitled thereto, whenever the court so directs. But in case no direction be given, all of such proceeds and securities must be paid into court, or deposited therein, or as directed by the court.

History: Enacted March 11, 1872, re-enactment of § 285 Practice Act.

1. Appeal from order confirming sale may be taken by purchaser, as he thereby becomes quasi party to suit.—*Hammond v. Cailleaud*, 111 Cal. 206, 214, 52 Am. St. Rep. 167, 43 Pac. 607.

As to no appeal lying from order setting aside referees' report, see, ante, § 776, note par. 9.

As to conveyances on confirmation of sale, see, post, § 785 and note.

As to deposit in court, see, ante, §§ 572-574 and notes; post, § 2104.

§ 774. WHEN PAID INTO COURT, THE CAUSE MAY BE CONTINUED FOR THE DETERMINATION OF THE CLAIMS OF THE PARTIES. When the proceeds of the sale of any share or parcel belonging to persons who are parties to the action, whether known or unknown, are paid into courts, the action may be continued as between such parties, for the determination of their respective claims thereto, which must be ascertained and adjudged by the court. Further testimony may be taken in court, or by a referee, at the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in controversy, by pleadings, as in an original action.

History: Enacted March 11, 1872, re-enactment of § 286 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 164, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 607, Kerr's Stats. and Amdts. 1906-7, p. 464.

As to ascertaining the shares of the several parties, see, ante, § 759.

As to directions to referees concerning proceeds of sale, see, post, § 785 and note.

§ 775. SALES BY REFEREES MUST BE BY PUBLIC AUCTION. [AT PRIVATE SALE WHEN.] All sales of real property made by referees under this chapter must be made at public auction to the highest bidder, upon notice given in the manner required for the sale of real property on execution unless in the opinion of the court it would be more beneficial to the parties interested to sell the whole or some part thereof at private sale; the court may order or direct such real property, or any part thereof, to be sold at either public auction or private sale as the referee shall judge to be the most beneficial to all parties interested. If sold at public auction the notice must state the terms of sale and if the property or any part thereof is to be sold subject to a prior estate, charge or lien, that must be stated in the notice. If the sale is ordered made at either public auction or private sale, the sale at private sale shall be conducted in the manner required in private sales of real property of estates of deceased persons.

History: Enacted March 11, 1872, re-enactment of § 587 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 164, held unconstitutional, see history, § 5 ante; amendment approved April 19, 1909, Stats. and Amdts. 1909, p. 1001.

As to conduct of sale, see, ante, §§ 694 et seq.

As to notice of execution sales, see, ante, §§ 692, 693.

As to refusal of purchaser to pay purchase-money, see, ante, § 695.

As to sale of farms or lots separately, see, post, § 782.

As to terms of sale to be made known at time thereof, see, post, § 782.

§ 776. THE COURT MUST DIRECT THE TERMS OF SALE OR CREDIT. The court must, in the order for sale, direct the terms of credit which may be allowed for the purchase-money of any portion of the premises of which it may direct a sale on credit, and for that portion of which the purchase-money is required, by the provisions hereinafter contained, to be invested for the benefit of unknown owners, infants, or parties out of the state.

History: Enacted March 11, 1872, re-enactment of § 288 Practice Act.

1. **Imperfect title—Need not be taken, regardless of conditions of sale.**—Conceding that the rule of caveat emptor applied to judicial sales generally, and that an order of sale was silent as to any conditions relating to the validity or invalidity of the title to be acquired by the purchase thereunder; and, further conceding, that the ref-

eree derived no power from the statute, or the order of sale, to stipulate with the purchaser that the title should be good and free from imperfections or the sale be void, it does not follow that the purchaser was bound to accept an imperfect title.—*Hammond v. Calileaud*, 111 Cal. 206, 217, 52 Am. St. Rep. 167, 43 Pac. 607.

§ 777. REFEREES MAY TAKE SECURITIES FOR PURCHASE-MONEY. The referees may take separate mortgages and other securities for the whole, or convenient portions of the purchase-money, of such parts of the property as are directed by the court to be sold on credit, for the shares of any known owner of full age, in the name of such owner; and for the shares of an infant, in the name of the guardian of such infant; and for other shares, in the name of the clerk of the county and his successors in office.

History: Enacted March 11, 1872, re-enactment of § 289 Practice Act as amended 1854 (Stats. 1854, p. 84).

As to how securities for purchase-money shall be taken at sale, see, post, § 789.

§ 778. TENANTS WHOSE ESTATE HAS BEEN SOLD SHALL RECEIVE COMPENSATION. The person entitled to a tenancy for life, or years, whose estate has been sold, is entitled to receive such sum as may be deemed a reasonable satisfaction for such estate, and which the person so entitled may consent to accept instead thereof, by an instrument in writing, filed with the clerk of the court. Upon the filing of such consent, the clerk must enter the same in the minutes of the court.

History: Enacted March 11, 1872, re-enactment of § 290 Practice Act.

§ 779. THE COURT MAY FIX SUCH COMPENSATION. If such consent be not given, filed, and entered as provided in the last section, at or before a judgment of sale is rendered, the court must ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be allowed on account of such estate, and must order the same to be paid to such party, or deposited in court for him, as the case may require.

History: Enacted March 11, 1872, re-enactment of § 291 Practice Act.

§ 780. THE COURT MUST PROTECT TENANTS UNKNOWN. If the persons entitled to such estate for life or years be unknown, the court must provide for the protection of their rights in the same manner, as far as may be, as if they were known and had appeared.

History: Enacted March 11, 1872, re-enactment of § 292 Practice Act.

§ 781. THE COURT MUST ASCERTAIN AND SECURE THE VALUE OF FUTURE CONTINGENT OR VESTED INTERESTS. In all cases of sales, when it appears that any person has a vested or contingent future right or estate in any of the property sold, the court must ascertain and settle the proportional value of such contingent or vested right or estate, and must direct such proportion of the proceeds of the sale to be invested, secured, or paid over, in such manner as to protect the rights and interests of the parties.

History: Enacted March 11, 1872, re-enactment of § 293 Practice Act.

§ 782. TERMS OF SALE MUST BE MADE KNOWN AT THE TIME. LOTS MUST BE SOLD SEPARATELY. In all cases of sales of property the terms must be made known at the time; and if the premises consist of distinct farms or lots, they must be sold separately.

History: Enacted March 11, 1872, re-enactment of § 294 Practice Act.

As to requisites of notice of sale, see, ante, § 775.

§ 783. WHO MAY NOT BE PURCHASERS. Neither of the referees, nor any person for the benefit of either of them, can be interested in any pur-

chase; nor can a guardian of an infant party be interested in the purchase of any real property, being the subject of the action, except for the benefit of the infant. All sales contrary to the provisions of this section are void.

History: Enacted March 11, 1872, re-enactment of § 295 Practice Act.

WHO MAY BE PURCHASER.

1. Liability of defaulting purchaser—Fixed by resale on same terms.
2. Trustee may purchase at own sale.

1. Liability of defaulting purchaser—Fixed by resale on same terms.—Where purchaser, without cause or excuse, refused to take property after sale in partition, and deliberately intended to suffer all legal consequences of such refusal, resale could not be either just or legal mode of ascertaining his liability, unless made upon same terms and conditions as those under which

he purchased the property.—*Hammond v. Caillaud*, 111 Cal. 206, 216, 52 Am. St. Rep. 167, 43 Pac. 607.

2. Trustee may purchase at own sale.—The rule forbidding a trustee to purchase at his own sale does not apply to a purchase at a partition sale, made pursuant to a decree in equity of a court of foreign jurisdiction, which has acquired jurisdiction of the parties, notwithstanding the property was distributed "in trust" in a probate proceeding by a court of this state.—*Plant v. Plant*, 171 Cal. 765, 154 Pac. 1058.

§ 784. REFEREES MUST MAKE A REPORT OF THE SALE TO THE COURT. After completing a sale of property, or an part thereof ordered to be sold, the referees must report the same to the court, with a description of the different parcels of land sold to each purchaser; the name of the purchaser; the price paid or secured; the terms and conditions of the sale, and the securities, if any, taken. The report must be filed in the office of the clerk of the county in which the action is brought. Thereafter any purchaser, or any party to the action, may, upon ten days' notice to the other parties who have appeared therein, and also to the purchaser if he be not the moving party, move the court to confirm or set aside any sale or sales so reported. Upon the hearing, the court must examine the return and report and witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appears that a sum exceeding such bid at least ten per cent, exclusive of a new sale may be obtained, the court may vacate the sale and direct another to be had, of which notice must be given, and the sale conducted in all respects as if no previous sale had taken place. If an offer of ten per cent more in amount than that named in the return be made to the court, in writing, by a responsible person, it is in the discretion of the court to accept such offer and confirm the sale to such person, or to order a new sale.

History: Enacted March 11, 1872, re-enactment of § 296 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 164, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 608, Kerr's Stats. and Amdts. 1906-7, p. 465; April 19, 1909, Stats. and Amdts. 1909, p. 1002.

REPORT OF SALE—CONFIRMATION, ETC.

1. Objections to report—Time for.
2. Order confirming sale—Fixes liability of purchaser.
3. Purchaser at sale, not appealing—Bound to complete purchase.

4. Price, inadequacy of—Shown from selling price and market value.
5. Same—Such as to justify inference of fraud.
6. Purchaser refusing to pay and take deed—Must pay difference between prices at first and second sales.

7. Referee—Can not disclaim obligation on contract to prosecute action.
8. Referees' report—Power to confirm or refuse, not arbitrary, but rests on sound judicial discretion.
9. Resale—Not just test of damage if purchaser, at first, not informed as at second sale.
10. Sale by referee—Conclusive, if owners with knowledge obtained confirmation.
11. Same—Not conclusively deemed valid, purchaser affected by representation by officer.
12. Same—Not confirmed if error of officer would make it unconscionable.
13. Value at time of sale—Not at hearing on confirmation, considered.

1. **Objections to report—Time for.**—The time for a co-tenant to make objections to findings in partition is when the report of the referees is made to the court.—*East Shore Co. v. Richmond Belt R.*, 172 Cal. 174, 155 Pac. 999.

2. **Order confirming sale—Fixes liability of purchaser.**—If, without resale, referee, under decree of partition, has brought suit against defendant, purchaser, to recover unpaid purchase-money, action can properly be sustained, because order confirming sale, not having been appealed from, absolutely fixes defendant's liability as purchaser; but he is not concluded, by his failure to appeal, from showing the terms of his purchase to have been different from those of second sale.—*Hammond v. Cailleaud*, 111 Cal. 206, 220, 52 Am. St. Rep. 167, 43 Pac. 607.

3. **Purchaser at sale, not appealing—Bound to complete purchase.**—Where, in action for partition, referee made sale and decree became final after confirmation of sale, purchaser, being then party having right of appeal, who did not appeal, was concluded by order of confirmation, and became legally bound to complete his purchase.—*Hammond v. Cailleaud*, 111 Cal. 206, 215, 52 Am. St. Rep. 167, 43 Pac. 607.

4. **Price, inadequacy of—Shown from selling price and market value.**—In those cases, where inadequacy of price has been held to be sufficient to justify order of resale, difference between selling price and actual market value was shown to amount to considerable sum, and that sum was given, and court had tangible evidence upon which to base his discretion.—*Dunn v. Dunn*, 137 Cal. 51, 60, 69 Pac. 847.

5. **Same—Such as to justify inference of fraud.**—There is not entire agreement by appellate tribunals as to when mere inadequacy of price will justify order of resale, although weight of authority seems to hold to rule that there must be something more than mere inadequacy—i. e., that inadequacy must be such as to justify inference of fraud, or inadequacy must be so gross as to shock conscience.—*Dunn v. Dunn*, 137 Cal. 51, 59, 69 Pac. 847.

6. **Purchaser refusing to pay and take deed—Must pay difference between prices at first and second sales.**—Code provisions recognize accepted bid as sale, and successful bidder as purchaser. Under this and next succeeding section, if purchaser refuses to pay price bid, and to take deed, and resale is made at less price, first purchaser is liable for difference.—*Dunn v. Dunn*, 137 Cal. 51, 59, 69 Pac. 847.

7. **Referee—Can not disclaim obligation on contract to prosecute action.**—The right of referee, making sale under decree in partition, to prosecute action based upon contract made with purchaser for purpose, means that he should not be permitted to disclaim obligation upon contract, because he had no power to make it, and, therefore, it would not constitute any part of terms and conditions of sale, and purchaser may use it for purpose of showing that terms of second sale were different.—*Hammond v. Cailleaud*, 111 Cal. 206, 220, 52 Am. St. Rep. 167, 43 Pac. 607.

8. **Referees' report—Power to confirm or refuse, not arbitrary, but rests on sound judicial discretion.**—Court doubtless has power to confirm or refuse to confirm, but this is not arbitrary power; it is neither more nor less than sound judicial discretion, and must be exercised with just regard to rights of all concerned.—*Dunn v. Dunn*, 137 Cal. 51, 59, 69 Pac. 847.

9. **Resale—Not just test of damage if purchaser, at first, not informed, as at second sale.**—If, by latest terms and conditions of sale, party was led to bid more for property, to any material extent, at least,—than he would if he had been informed as purchaser was at second sale, that he must take title as it was, whether defective or not, it is obvious that resale would not furnish any just measure of damages in an action to recover deficiency.—*Hammond v. Cailleaud*, 111 Cal. 206, 219, 52 Am. St. Rep. 167, 43 Pac. 607.

10. **Sale by referee—Conclusive, if owners with knowledge obtained confirmation.**—If referee, making sale in action of partition, has entirely omitted to publish notice of sale, and has made private contract for sale of property, and owners (creditors not being affected) have been satisfied with terms of sale and price obtained, and with knowledge of facts, have obtained its confirmation, sale so confirmed will be valid, and they can not thereafter object that they are not bound by acts of referee, though made without authority.—*Hammond v. Cailleaud*, 111 Cal. 206, 219, 52 Am. St. Rep. 167, 43 Pac. 607.

11. **Same—Not conclusively deemed valid, purchaser affected by representation by officer.**—It is not true that purchasers are conclusively bound to know limits of power of officer making sale in partition, but they are affected by representation made by officer, and by any terms and conditions given and imposed by him, and, therefore,

sale is not, for purpose of confirmation, as well as for all other purposes, to be conclusively deemed to have been regular and valid.—Hammond v. Cailleaud, 111 Cal. 206, 217, 52 Am. St. Rep. 167, 43 Pac. 607.

12. **Same—Not confirmed if error of officer would make it unconscionable.**—For any error, irregularity, or misrepresentation of an officer making sale in action of partition, whether intentional or otherwise, whereby purchaser has been misled to his prejudice to such extent as to make it unconscionable that his contract of purchase

should be enforced against him, sale will not be confirmed.—Hammond v. Cailleaud, 111 Cal. 206, 219, 52 Am. St. Rep. 167, 43 Pac. 607.

13. **Value at time of sale—Not at hearing on confirmation, considered.**—Court must look to value of property at time of sale, and not at time when question of confirmation is before court, unless these periods so nearly coincide as to justify presumption that no change in values has taken place.—Dunn v. Dunn, 137 Cal. 51, 60, 69 Pac. 847.

§ 785. IF CONFIRMED, CONVEYANCES MAY BE EXECUTED. If the sale is confirmed by the court, an order must be entered, directing the referees to execute conveyances and take securities pursuant to such sale, which they are hereby authorized to do. Such order may also give directions to them respecting the disposition of the proceeds of the sale.

[**Refusal of purchaser to pay amount of bid—Procedure.**] If the purchaser, after the confirmation of the sale, refuses to pay the amount of his bid, the referees may again sell the property at any time to the highest bidder, and if any loss is occasioned thereby the referees may recover the amount of such loss and the cost from the bidder so refusing, or the referees, without making a resale, may maintain an action against the purchaser for the amount of his bid.

History: Enacted March 11, 1872, re-enactment of § 297 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 165, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 608, Kerr's Stats. and Amdts. 1906-7, p. 465.

CONVEYANCE EXECUTED, WHEN.

1. Mistake—Correction in equity.
- 2, 3. Title of purchaser—In general.

As to agreement as to shares of proceeds of sale, filing of, see, post, § 790.

As to disposition of proceeds to protect future interests, see, ante, § 781.

As to distribution of proceeds, see, ante, § 773.

As to encumbered property, application of proceeds of sale of, see, ante, § 771.

As to guardian, may receive proceeds of sale, see, post, §§ 793, 794.

That infant's share may be paid to guardian, see, post, § 793.

As to liens, proceeds of sale to be applied to discharge of, see, ante, § 771.

As to proceeds, taking testimony to determine rights to, see, ante, § 774.

As to sale, securities, and receipt for to be filed, see, post, § 790.

As to unknown or absent parties, proceeds belonging to, see, post, § 791.

1. **Mistake—Correction in equity.**—Where by reason of mistake of referee in using

wrong map in making partition, land not included in complaint, or in interlocutory decree, and which is adversely possessed by one not party to action, is set off and confirmed to one of parties, final decree may be set aside as to such property by suit in equity.—Sullivan v. Lumsden, 118 Cal. 664, 668, 50 Pac. 777.

2. **Title of purchaser—In general.**—The sale under a partition decree is a judicial sale, and the rule in execution sales is applicable that the purchaser "takes the precise interest of the defendant, and after-acquired title by the seller does not pass to the purchaser."—Potrero Nuevo Land Co. v. All Persons, 29 Cal. App. 743, 156 Pac. 876.

3. Under a partition sale made by the holders of ninety-nine year terms in beach and water lots of the city and county of San Francisco, the purchasers acquire the interests of the partitioners at the time and nothing more, and the purchase by one of them subsequent to the partition sale of the reversionary interests of the state therein, does not inure to the benefit of his copurchasers.—Potrero Nuevo Land Co. v. All Persons, 29 Cal. App. 743, 156 Pac. 876.

§ 786. PROCEEDING IF A LIEN-HOLDER BECOME A PURCHASER. When a party entitled to a share of the property, or an encumbrancer entitled

to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belongs to him.

History: Enacted March 11, 1872, re-enactment of § 298 Practice Act.

§ 787. CONVEYANCES MUST BE RECORDED, AND WILL BE A BAR AGAINST PARTIES. The conveyances must be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way who shall have been named as parties in the action, and against all such parties and persons as were unknown, if the summons was served by publication, and against all persons claiming under them, or either of them, and against all persons having unrecorded deeds or liens at the commencement of the action.

History: Enacted March 11, 1872, re-enactment of § 299 Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 326.

As to recording of instruments generally, see Kerr's Cyc. Civ. Code, 2d. ed., §§ 1158 et seq. and notes.

§ 788. PROCEEDS OF SALE BELONGING TO PARTIES UNKNOWN MUST BE INVESTED FOR THEIR BENEFIT. When there are proceeds of a sale belonging to an unknown owner, or to a person without the state, who has no legal representative within it, the same must be invested in bonds of this state or of the United States, for the benefit of the persons entitled thereto.

History: Enacted March 11, 1872, re-enactment of § 300 Practice Act.

As to proceeds of sale belonging to unknown or absent parties, see, post, § 791.

§ 789. INVESTMENT MUST BE MADE IN THE NAME OF THE CLERK OF THE COUNTY. When the security of the proceeds of sale is taken, or when an investment of any such proceeds is made, it must be done, except as herein otherwise provided, in the name of the clerk of the county where the papers are filed, and his successors in office, who must hold the same for the use and benefit of the parties interested, subject to the order of the court.

History: Enacted March 11, 1872, re-enactment of § 301 Practice Act.

As to mortgages and securities for purchase-money, see, ante, § 777.

§ 790. WHEN THE INTERESTS OF THE PARTIES ARE ASCERTAINED, SECURITIES MUST BE TAKEN IN THEIR NAMES. When the security is taken by the referees on a sale, and the parties interested in such security, by an instrument in writing, under their hands, delivered to the referees, agree upon the shares and proportions to which they are respectively entitled, or when shares and proportions have been previously adjudged by the court, such securities must be taken in the names of and payable to the parties respectively entitled thereto, and must be delivered to such parties upon their receipt therefor. Such agreement and receipt must be returned and filed with the clerk.

History: Enacted March 11, 1872, re-enactment of § 302 Practice Act.

As to interest on disbursements, see, post, § 801.

As to setting off estate for life or years from property not sold, see, ante, § 770.

§ 791. DUTIES OF THE CLERK MAKING INVESTMENTS. The clerk in whose name a security is taken, or by whom an investment is made, and his successors in office, must receive the interest and principal as it becomes due, and apply and invest the same as the court may direct; and must deposit with the county treasurer all securities taken, and keep an account in a book provided and kept for that purpose, in the clerk's office, free for inspection by all persons, of investments and moneys received by him thereon, and the disposition thereof.

History: Enacted March 11, 1872, re-enactment of § 303 Practice Act.

§ 792. WHEN UNEQUAL PARTITION IS ORDERED, COMPENSATION MAY BE ADJUDGED IN CERTAIN CASES. When it appears that partition can not be made equal between the parties, according to their respective rights, without prejudice to the rights and interests of some of them, and a partition be ordered, the court may adjudge compensation to be made by one party to another, on account of the inequality; but such compensation shall not be required to be made to others by owners unknown, nor by an infant, unless it appears that such infant has personal property sufficient for that purpose, and that his interest will be promoted thereby. And in all cases the court has power to make compensatory adjustment between the respective parties, according to the ordinary principles of equity.

History: Enacted March 11, 1872, founded on § 304 Practice Act.

§ 793. THE SHARE OF AN INFANT MAY BE PAID TO HIS GUARDIAN. When the share of an infant is sold, the proceeds of the sale may be paid by the referee making the sale to his general guardian, or the special guardian appointed for him in the action, upon giving the security required by law or directed by order of the court.

History: Enacted March 11, 1872, re-enactment of § 305 Practice Act.

§ 794. THE GUARDIAN OF AN INSANE PERSON MAY RECEIVE THE PROCEEDS OF SUCH PARTY'S INTEREST. The guardian who may be entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, whose interest in real property has been sold, may receive in behalf of such person his share of the proceeds of such real property from the referees, on executing with sufficient sureties an undertaking, approved by a judge of the court, that he will faithfully discharge the trust reposed in him, and will render a true and just account to the person entitled or to his legal representative.

History: Enacted March 11, 1872, re-enactment of § 306 Practice Act; amendment approved March 10, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 11.

1. Construction of section—As to contemplation.—It is contemplated by this section that costs may or may not become lien upon several shares of parties as parties to whom they are due may elect, and solution of question as to whether they become lien depends upon whether they are speci-

fied and included in judgment of partition. Statute does not say that costs shall in all cases become lien, but that "in that case"—that is, when they are "included and specified in judgment"—they become lien.—*Lacoste v. Eastland*, 117 Cal. 673, 677, 49 Pac. 1046.

§ 795. A GUARDIAN MAY CONSENT TO PARTITION WITHOUT ACTION, AND EXECUTE RELEASE. [Repealed.]

History: Enacted March 11, 1872, re-enactment of § 307 Practice Act; repeal by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 165, held unconstitutional, see history, § 5 ante; repeal approved March 19, 1907, Stats. and Amdts. 1907, p. 608, Kerr's Stats. and Amdts. 1906-7, p. 465.

1. **Guardian—May consent to procedure authorized by statute.**—Under this section, general guardian, having authority to appear for minor in action for partition, it would seem that, in action, guardian may

consent to mere course of procedure authorized by statute and coming within purview of action itself.—*Richardson v. Loupe*, 80 Cal. 490, 500, 22 Pac. 227.

§ 796. COSTS OF PARTITION A LIEN UPON SHARES OF PARCENERS.

The costs of partition, including reasonable counsel fees, expended by the plaintiff or either of the defendants, for the common benefit, fees or [of] referees, and other disbursements, must be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment. In that case they shall be a lien on the several shares, and the judgment may be enforced by execution against such shares, and against other property held by the respective parties. When, however, litigation arises between some of the parties only, the court may require the expense of such litigation to be paid by the parties thereto, or any of them.

History: Enacted March 11, 1872, re-enactment of § 308 Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 326.

COSTS OF PARTITION—LIEN UPON SHARES.

1. Amount of attorney's fee.
2. Same—Evidence of witnesses or experts not required.
3. Costs—Lien, if specified and included in judgment.
4. Defendants liable to share of costs of partition.
5. Lien referred to—One that takes effect without docketing judgment.
6. Proceeds of sale—Rights of plaintiffs to, limited by extent of interest less their share of costs, etc.

As to allowance of costs at law and in equity, see note 16 Am. Dec. 406.

As to costs in general, see, post, §§ 1021 et seq. and notes.

As to costs in partition generally, see note 10 L. R. A. 55.

As to fees of referees, see, ante, § 768 and post, § 1028 and note.

1. **Amount of attorney's fee** is question of fact essentially within province of trial court to determine, and finding in that regard will not be disturbed where evidence is conflicting.—*Watson v. Sutro*, 103 Cal. 169, 171, 37 Pac. 201.

2. **Same—Evidence of witnesses or experts** is not required in fixing amount of attorney's fee. It may be fixed by court

upon evidence of amount and character of labor performed for common benefit.—*Watson v. Sutro*, 103 Cal. 169, 171, 37 Pac. 201.

3. **Costs—Lien, if specified and included in judgment.**—It is contemplated by this section that costs may or may not become lien upon several shares of parties, as parties to whom they are due may elect, and solution of question as to whether they may become lien depends upon whether they are specified and included in judgment of partition.—*Lacoste v. Eastland*, 117 Cal. 673, 677, 49 Pac. 1046.

4. **Defendants liable to share of costs of partition.**—As only parties "entitled to share in lands divided," defendants are under law liable for just proportion of costs of the partition, charged upon interest which belongs to them, although interest was nominally altered and set apart in severalty to grantor.—*Wickersham v. Denman*, 68 Cal. 382, 388, 9 Pac. 723.

5. **Lien referred to—One that takes effect without docketing judgment.**—Lien referred to in this section is one that takes effect at time of filing of notice of lis pendens, and without docketing judgment; and express provision, that such lien may be acquired in particular mode, negatives right to acquire it in any other mode.—*Lacoste v. Eastland*, 117 Cal. 673, 677, 49 Pac. 1046.

6. **Proceeds of sale—Rights of plaintiffs to, limited by extent of interest, less their share of costs, etc.**—Right of plaintiffs in

action of partition to proceeds arising from sale, must be limited by extent of interest they acquire in premises under their conveyances; from this, their proportionate

share of costs and expenses of action, and subsequent proceedings must be deducted. —Goodenow v. Ewer, 16 Cal. 461, 472, 76 Am. Dec. 540.

§ 797. THE COURT, BY CONSENT, MAY APPOINT SINGLE REFEREE.
[Repealed.]

History: Enacted March 11, 1872, re-enactment of § 309 Practice Act; repeal by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 165, held unconstitutional, see history, § 5 ante; repeal approved March 19, 1907, Stats. and Amdts. 1907, p. 608, Kerr's Stats. and Amdts. 1906-7, p. 465.

The provisions of this repealed section are incorporated in the 1907 amendment to § 763, ante.

§ 798. APPORTIONMENT OF COUNSEL FEES AND EXPENSES. If it appear that other actions or proceedings have been necessarily prosecuted or defended by any one of the tenants in common, for the protection, confirmation, or perfecting of the title, or setting the boundaries, or making a survey or surveys of the estate partitioned, the court shall allow to the parties to the action, who have paid the expense of such litigation or other proceedings, all the expenses necessarily incurred therein, except counsel fees, which shall have accrued to the common benefit of the other tenants in common, with interest thereon from the date of making the said expenditures, and in the same kind of money expended or paid, and the same must be pleaded and allowed by the court, and included in the final judgment, and shall be a lien upon the share of each tenant respectively, in proportion to his interest, and shall be enforced in the same manner as taxable costs of partition are taxed and collected.

History: Original section, added by Act April 1, 1872, repeal approved March 24, 1874, Code Amdts. 1873-4, p. 326; enactment of present section approved February 14, 1876, Code Amdts. 1875-6, p. 98.

§ 799. ABSTRACT OF TITLE IN ACTION FOR PARTITION. COST OF ALLOWED, WHEN. If it is necessary to have an abstract of title of the property to be partitioned, the plaintiff may procure one before commencing the action, and may, in his complaint, state that he has done so, and that the abstract is subject to the inspection and use of all the parties to the action, designating a place where it will be kept for such inspection. Otherwise the court may, upon application of any one of the parties, authorize him to procure an abstract, which, when made, shall be kept at some place designated by the court for the inspection and use of all parties, any of whom is entitled to make a copy thereof. The expense reasonably incurred in procuring such abstract must be allowed to the party incurring it, with interest thereon from the commencement of the action, if it had been procured before that time, otherwise from the time of payment.

History: Section added by Act April 1, 1872, Stats. 1871-2; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 165, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 608, Kerr's Stats. and Amdts. 1906-7, p. 465.

§ 800. SAME. HOW MADE AND VERIFIED. The abstract mentioned in the last preceding section may be made by any competent searcher of records, and need not be certified by the recorder or other officer, but instead thereof it must be verified by the affidavit of the person making it, to the effect that he believes it to be correct; but the same may be corrected from time to time if found incorrect, under the direction of the court.

History: Section added by Act April 1, 1872, Stats. 1871-2.

§ 801. INTEREST ALLOWED ON DISBURSEMENTS, WHEN. Whenever, during the progress of the action for partition, any disbursements shall have been made, under the direction of the court or the judge thereof, by a party thereto, interest must be allowed thereon from the time of making such disbursements.

History: Section added by Act April 1, 1872, Stats. 1871-2.

CHAPTER V.

ACTIONS FOR THE USURPATION OF AN OFFICE OR FRANCHISE.

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| <p>§ 802. Certain writs abolished.</p> <p>§ 803. Action may be brought against any party usurping, etc., any office or franchise.</p> <p>§ 804. Name of person entitled to office may be set forth in the complaint. If fees have been received by the usurper, he may be arrested.</p> <p>§ 805. Judgment may determine the rights of both incumbent and claimant.</p> | <p>§ 806. When rendered in favor of applicant.</p> <p>§ 807. Damages may be recovered by successful applicant.</p> <p>§ 808. When several persons claim the same office, their rights may be determined by a single action.</p> <p>§ 809. If defendant found guilty, what judgment to be rendered against him.</p> <p>§ 810. Undertaking when action brought upon information of private party.</p> |
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§ 802. CERTAIN WRITS ABOLISHED. The writ of scire facias is abolished.

History: Enacted March 11, 1872; amendment approved March 10, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 11.

CERTAIN WRITS ABOLISHED.

1. Former reading of section.
2. Informations in the nature of quo warranto.
3. Same—Office of writ.
4. Same—Whether civil or criminal proceeding.
- 5-7. Quo warranto—At common law.
- 8, 9. Same—Discretion of court.
10. Same—Jurisdiction.
11. Same—Nature of proceeding—Case at law.
12. Same—Same—Mixed civil and criminal action.
- 13, 14. Same—Parties—Appeal.
- 15-17. Scire facias—As known to common law.
18. Same—As to nature of.
19. Same—Judgment on—In effect a new judgment.

1. Former reading of section was: "The writ of scire facias, of quo warranto, and

proceedings in nature of quo warranto, are abolished. Remedies obtainable in these forms may hereafter be obtained by civil action, under provisions of this chapter."

2. Informations in nature of quo warranto existed at common law. In England they were filed by attorney-general, or by king's coroner, of his own authority; afterward by king's coroner under direction of court of king's bench,—last under statutes 4 and 5 William and Mary, chapter 13,—and still later, in certain cases, by leave of court, in pursuance of statute of Anne, chapter 20. The statute of Anne introduced more convenient mode of proceedings to inquire into usurpation of or intrusion into certain enumerated offices and franchises.—People ex rel. Attorney-General v. Stanford, 77 Cal. 360, 375, 376, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

3. Same—Office of writ issued upon information in nature of quo warranto is to prevent usurpation of any office, franchise or liberty, as also to afford remedy against corporations for violation of their charters tending to forfeiture thereof.—People

ex rel. Attorney-General, Ex parte, 1 Cal. 8b, 87.

As to information in the nature of quo warranto being the proper remedy to test the right to exercise particular franchises not within terms of charter, and to oust corporation therefrom, see brief 63 L. R. A. 765.

4. Same.—Whether civil or criminal proceeding.—Information in nature of quo warranto, which has succeeded writ of that name, was originally, in form, criminal proceeding to punish usurpation of franchise by fine, as well as to seize franchise. This information has, in process of time, become, in substance, civil proceeding to try mere right to franchise or office.—People ex rel. Attorney-General v. Dashaway Assoc. 84 Cal. 114, 118, 12 L. R. A. 117, 24 Pac. 277.

See, post, § 803 and note pars. 93-98.

As to information in the nature of quo warranto being a civil suit of legal, not equitable, cognizance, see brief 63 L. R. A. 765.

As to information in the nature of quo warranto being ordinarily a criminal proceeding, see brief 63 L. R. A. 764.

5. Quo warranto.—At common law was writ which issued to bring defendant before court to show by what authority he claimed office or franchise, and was applicable alike to cases where defendant never had right, or where, having right or franchise, he had forfeited it by neglect or abuse.—People ex rel. Attorney-General v. Dashaway Assoc. 84 Cal. 114, 118, 12 L. R. A. 117, 24 Pac. 277.

6. Definition of process of quo warranto is that it is in nature of writ of right of public against him who usurps any office, franchise or liberty; to inquire by what authority he supports his claim, in order to determine right.—People ex rel. Palmer v. Woodbury, 14 Cal. 43, 46.

7. Quo warranto lies to prevent usurpation of office.—Buckner v. Veuve, 63 Cal. 304.

As to exercise of visitatorial power over corporations by means of quo warranto, see Kerr's Cyc. Civ. Code, 2d ed., § 382 and note par. 4.

8. Same.—Discretion of court.—Proceedings by quo warranto, like writs of mandamus and other prerogative writs, rest in discretion of court. The exercise of power is had only in cases where public convenience and welfare requires. Writ is state's right and is only to be issued for state's benefit.—Searcy v. Grow, 15 Cal. 117, 122.

See, post, § 803 and note par. 192.

9. Proceedings in quo warranto will not be countenanced or receive sanction of court, as general rule, where act complained of is of trivial character, or where abuse may be said to be doubtful one, or

there exists any other adequate or available remedy therefor.—State ex rel. Snyder v. Portland N. G. & O. Co., 153 Ind. 483, 74 Am. St. Rep. 318, 53 L. R. A. 413, 53 N. E. 1089.

As to judicial discretion in proceedings in the nature of quo warranto, see note 3 L. R. A. 511.

10. Same.—Jurisdiction.—Constitution of 1849, in force when Code of Civil Procedure was adopted, did not give district courts express power to issue writs of quo warranto. Section 802 of Code of Civil Procedure, as same read originally, provided: "The writ of scire facias, the writ of quo warranto, and informations in the nature of quo warranto, are abolished," etc. Section 5 of article IV of constitution of 1879 declares that superior courts shall have power to issue writs of quo warranto, and that constitution does not prohibit legislature from providing for actions or informations or proceedings in nature of quo warranto.—People ex rel. Attorney-General v. Stanford, 77 Cal. 360, 375, 376, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

See, post, § 803 and note pars. 77-89.

11. Same.—Nature of proceeding.—Case at law.—Quo warranto was case at law. It afforded legal remedy for usurpation of office.—People ex rel. Davidson v. Perry, 79 Cal. 105, 108, 21 Cal. 423; People ex rel. Swift v. Bingham, 82 Cal. 238, 242, 22 Pac. 1039; Wheeler v. Donnell, 110 Cal. 655, 658, 43 Pac. 1.

See, post, § 803 and note pars. 90-105.

12. Same.—Mixed civil and criminal action.—Proceeding by quo warranto is in form criminal proceeding though in substance civil one in most cases. It would seem to be and generally is mixed action for double purpose of vindicating public policy and enforcing private remedy.—People ex rel. Hughes v. Gillespie, 1 Cal. 342, 344.

As to ancient writ of quo warranto being civil writ at suit of crown, see brief 63 L. R. A. 763, 768.

13. Same.—Parties.—Appeal.—An action of quo warranto may be brought and maintained only by the attorney-general in the name of the people of the state, and the relators are not "parties" to the action.—People ex rel. Hershey v. Reclamation District No. 108, 169 Cal. 786, 147 Pac. 1176.

14. An appeal from a judgment in quo warranto can not be taken by the relators alone on the ground that they are parties in interest and the attorney-general declines to appeal in the name of the state.—People ex rel. Hershey v. Reclamation District No. 108, 169 Cal. 786, 147 Pac. 1176.

As to distinction between the ancient writ of quo warranto and information in the nature thereof, see note 3 L. R. A. 510.

As to extent of inquiry which court will make in action of quo warranto to recover an office, see brief 64 L. R. A. 945.

As to nature of quo warranto, see note 30 Am. Dec. 44-52; briefs 1 L. R. A. 771, 27 L. R. A. 211.

As to quo warranto being proper remedy to forfeit exclusive feature of franchise, see brief 63 L. R. A. 765.

As to quo warranto being proper remedy to restrain usurpation of power in condemning land for railroad tracks without complying with the law and paying incorporation fees required from railroad companies, see brief 63 L. R. A. 307.

As to quo warranto being proper remedy to try title to office, see notes 76 Am. Dec. 708, 94 Am. Dec. 83; 3 Am. St. Rep. 184; brief 64 L. R. A. 945.

As to quo warranto for usurpation of office or franchise, see brief 57 L. R. A. 244.

As to quo warranto to inquire into validity of drainage assessment, see note 60 L. R. A. 243.

As to quo warranto to test constitutionality of statute under which office is held, see brief 57 L. R. A. 244.

As to remedy by ancient writ of quo warranto, see note 3 L. R. A. 510.

As to what acts quo warranto will generally reach, see brief 63 L. R. A. 762.

As to writ of quo warranto, see, ante, § 76 subd. 5 and note; post, § 803 and note pars. 102-104.

15. *Scire facias*—As known to common law, was writ founded on same matter of record as recognizance, judgment, or letters patent. There were two forms and purposes of such writs: (1) A writ which was used to remedy defects, or as continuation of former suit, as, to prevent abatement of suits, remedy defects arising by change of parties, or to obtain an execution of dormant judgment; and (2) a writ in nature of an original writ, used to commence some proceeding, such as to repeal letters patent. This writ has been abolished, and remedies formerly obtained thereby must now be sought by ordinary

civil action, or by motion.—*Humiston v. Smith*, 21 Cal. 130, 134. *Ark. Hicks v. State*, 3 Ark. 313. *Ill. Chestnut v. Chestnut*, 77 Ill. 346. *Md. Regents of Univ. of Maryland v. Williams*, 9 Gill. & J. 365; *President, etc., of W. & B. T. R. v. State*, 19 Md. 239. *N. Y. Thurston v. King*, 1 Abb. Pr. 126; *Alden v. Clark*, 11 How. Pr. 209. *N. C. McDowell v. Asbury*, 66 N. C. 444. *Oreg. State ex rel. Wilson v. Shively*, 10 Oreg. 267. *Pa. President, etc., Centre & K. T. R. Co. v. McConaby*, 16 Serg. & R. 140.

As to *scire facias*, see note 8 Am. St. Rep. 198.

16. Writ of *scire facias* was formerly used by government as mode to ascertain and enforce forfeiture of corporate charters, in cases where there was legal existing body capable of acting, but who had abused their power. It would not lie in cases of mere de facto corporations. It was necessary that government be party to suit, for judgment was that parties be ousted and franchise seized into hands of government.—*People ex rel. Attorney-General v. Dashaway Assoc.*, 84 Cal. 114, 118, 12 L. R. A. 117, 24 Pac. 277.

17. *Scire facias* was remedy by means of which government patent for land might be attacked by subsequent patentee of same land, no collateral attack upon such patent being permissible.—*O'Connor v. Frasher*, 56 Cal. 499, 501.

18. *Same*—As to nature of.—While it is true that *scire facias* for the purpose of obtaining execution is ordinarily a judicial writ to continue the effect of the former judgment, yet it is in the nature of an action because the defendant may plead to it, and in many cases it has been classified as, in substance, a new action.—*Thomas v. Lally*, 28 Cal. App. 308, 152 Pac. 53.

19. *Same*—Judgment on.—In effect a new judgment.—A judgment upon a *scire facias* is in legal effect a new judgment, and the statute of limitations begins to run from its date anew.—*Thomas v. Lally*, 28 Cal. App. 308, 152 Pac. 53.

§ 803. ACTION MAY BE BROUGHT AGAINST ANY PARTY USURPING, ETC., ANY OFFICE OR FRANCHISE. An action may be brought by the attorney-general, in the name of the people of this state, [1] upon his own information, or [2] upon a complaint of a private party, against [a] any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise, or [b] against any corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state. And the

Attorney-general must bring the action, [1] whenever he has reason to believe that any such office or franchise has been usurped, intruded into, or

unlawfully held or exercised by any person, or [2] when he is directed to do so by the governor.

History: Enacted March 11, 1872, re-enactment of § 310 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 165, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 600, Kerr's Stats. and Amdts. 1906-7, p. 465.

USURPATION OF OFFICE OR FRANCHISE—QUO WARRANTO.

1. Abatement of action.
2. Application to attorney-general—For leave to commence action.
3. Bar to action—In general.
- 4, 5. Same—Decree confirming organization of irrigation district.
6. Same—Facts not amounting to bar—Acts of informant.
7. Same—Same—Collateral action by state against defendant.
8. Same—Same—Contest of election.
9. Same—Statute of limitations.
- 10-12. Burden of proof.
- 13-17. Collateral inquiry—Corporate capacity of plaintiff in civil action.
18. Same—Proceedings to confirm irrigation district bonds.
- 19-22. Same—Right to franchise.
- 23-26. Same—Right to hold office.
27. Same—Same—De facto incumbent.
28. Same—Same—Denial of existence of office.
29. Constitutionality of statute.
30. Corporations—Authority of directors de facto—Collateral attack.
- 31-34. Definitions—Franchise.
35. Same—Same—Distinguished from mere powers.
- 36, 37. Same—Same—Grant proceeds from legislature.
38. Same—Same—Particular franchises—Banking.
39. Same—Same—Same—Office.
40. Same—Same—Same—Right and power to govern tax.
41. Same—Same—Same—Right of laying down and maintaining pipes in streets of city.
- 42, 43. Same—Same—Same—Right to be a corporation.
44. Same—Same—Same—Right to collect tolls.
- 45, 46. Same—Same—Same—Right to lay and maintain street-railway tracks.
- 47, 48. Same—Office.
49. Same—Same—Creation of.
50. Same—Same—Director of private corporation.
51. Same—Same—Employee distinguished.
52. Same—Same—Member of board of health.
53. Same—Same—Pilot of port of San Francisco.
54. Same—Same—Position of "practicing physician of Yuba County Hospital."
55. Same—Usurper.
56. Same—Same—Appointee, vacancy not having been judicially determined.
57. Same—Same—Certificate of election wrongfully obtained.
- 58-61. Same—Same—Incumbent holding over.
62. Discretion of attorney-general—Judicial control.
63. Effect of pending proceeding—As defense in other actions.
- 64, 65. Same—On property rights of defendant corporation.
66. Intrusion into office.
- 67, 68. Same—Contest of election.
- 69-73. Same—Same—Evidence of election.
74. Same—Contest of right of actual incumbent in possession under color of right.
75. Same—Forfeiture of right to office by failure of appointee to qualify.
- 76, 77. Same—Removal from office.
78. Same—Right to military office may be inquired into.
- 79-82. Jurisdiction—City council's right to determine its membership.
- 83, 84. Same—Effect of other remedies.
- 85-88. Same—Superior court.
89. Same—Same—To review annexation proceedings of city council.
90. Same—Same—To dissolve corporation.
91. Same—Supreme court has no original jurisdiction.
- 92-94. Nature and office of proceedings.
- 95-100. Same—Civil action in form and procedure.
101. Same—Direct, rather than collateral, proceeding.
102. Same—Distinguished from criminal proceedings.
103. Same—Distinguished from election contest.
- 104-106. Same—Equivalent to quo warranto.
107. Same—Public, rather than private actions.
108. Other remedies—Certiorari.
109. Same—Habeas corpus.
- 110, 111. Same—Injunction.

- 112-116. Same—Mandamus.
- 117-119. Same—Same—Mandamus proper, when.
- 120-123. Same—Prohibition.
124. Parties—In general.
- 125-127. Same—Defendants—In action against corporation acting under defective articles.
- 128, 129. Same—Same—In actions against corporations for abuse or usurpation of powers.
130. Same—Same—In action against individual for usurpation of city office, where proceeding attacks existence of municipal corporation.
- 131-133. Same—Same—In action against municipality for usurpation of corporate capacity.
- 134-139. Same—Same—In action where existence of corporation is questioned.
140. Same—Same—Joinder of defendants claiming one office.
141. Same—Same—Stockholders of corporation.
142. Same—Intervention of interested persons.
143. Same—Municipal corporation is a "person."
144. Same—Plaintiff.
- 145, 146. Same—Relator.
147. Pleading—In general.
- 148, 149. Same—Answer.
- 150-153. Same—Same—Affirmative showing of right required, when.
154. Same—Same—Denial sufficient, when.
- 155-157. Same—Same—Estoppel of defendant.
158. Same—Same—Plea of not guilty is insufficient.
159. Same—Same—Relevant facts not denied are deemed admitted.
- 160-167. Same—Complaint—Allegations may be either general or specific.
168. Same—Same—Allegations necessary in particular cases—Defective in corporation.
169. Same—Same—Same—Existence of corporate franchise sought to be forfeited.
170. Same—Same—Same—Forfeiture of street-railway franchise, for non-user.
171. Same—Same—Same—Illegality of election.
- 172, 173. Same—Same—Same—Intrusion into office.
174. Same—Same—Same—Perversion of purpose of corporation.
175. Same—Same—Same—Termination of corporate franchise.
176. Same—Same—Same—Usurpation of franchise of being corporation.
- 177-183. Same—Same—Miscellaneous rulings as to complaint.
- 184-186. Same—Demurrer.
- 187, 188. Same—Joinder of causes.
- 189, 190. Practice—In general.
- 191-193. Same—Attorney-general has control of action.
194. Same—City has no power to institute action.
195. Same—Dismissal.
196. Same—Leave of court.
197. Same—New trial.
198. Receiver for defendant corporation.
199. Same—Estoppel to object to receivership.
200. Same—Illegal monopoly not ground for receivership.
201. Same—Prohibition against receivership.
202. Quo warranto—As to nature of remedy.
203. Same—Against drainage district.
- 204, 204a. Same—Laches, effect of.
205. Same—Protection districts—Quo warranto does not lie against.
206. Same—Usurpation and unlawful holding and exercising toll-road franchise.
207. Right of certain parties to act as trustees of a town.
208. State as creditor—After judgment for fine.
209. Usurpation of franchises—In general.
210. Same—Causes of action on continuously renewed usurpations.
211. Same—City or county asserting authority beyond lawful boundary.
- 212, 213. Same—Defective in corporation.
214. Same—Evasive compliance with law.
215. Same—Exercise of corporate powers without charter.
216. Same—Foreign corporations.
- 217, 218. Same—Forfeiture and usurpation distinguished.
- 219-224. Same—Forfeiture of corporate franchise—Abuse, non-user, etc.
225. Same—Same—Corporation responsible for acts of its officers.
226. Same—Same—Dissolution dates from judgment.
227. Same—Same—Entering into trust combination.
- 228, 229. Same—Same—Extent of forfeiture.
230. Same—Same—Fraudulent use of power of eminent domain.
- 231, 232. Same—Same—Principle of forfeiture.
233. Same—Same—Use of abbreviated name.
234. Same—Same—Waiver of forfeiture.

235. Same—Injunction to protect usurped privileges.

236. Same—Presumption of right to franchise.

237. Usurpation of office.

1. **Abatement of action.**—Where proceeding of this nature is instituted during term in which usurpation is alleged to exist, action does not abate merely by reason of failure to bring it to judgment before expiration of such term. Neither will it abate by reason of fact that office involved has ceased to exist by reason of an amendment to charter of city under which office existed.—*People ex rel. Drew v. Rodgers*, 118 Cal. 393, 397, 400, 46 Pac. 740, 50 Pac. 668.

2. **Application to attorney-general.**—For leave to commence action should be based upon affidavits, by persons having knowledge of the facts, so full and positive as to make out a clear case of right in such a way that prosecution for perjury may be maintained if any material allegation is false; and an application supported only by allegations upon information and belief is wholly insufficient.—*Lamb v. Webb*, 151 Cal. 455, 91 Pac. 102.

3. **Bar to action.—In general.**—Decision against city in action brought by it to enjoin street-railway company from using certain streets, on ground that consent of city given to former street-railway company to use such streets had not been given in such manner as to be available to present company and binding upon city, is bar to proceedings against company by quo warranto in name of attorney-general respecting same subject-matter.—*City of Detroit v. Ellis*, 103 Mich. 612, 27 L. R. A. 211, 61 N. W. 886.

4. **Same.—Decree confirming organization of irrigation district.**—Decree in proceedings taken under provisions of act of March 16, 1889 (Stats. 1889, p. 212), for examination and approval of proceedings for organization of irrigation district, wherein it is adjudged that district has been duly organized, is conclusive upon state, as well as others, and is bar to subsequent proceeding in quo warranto where state seeks to assail validity or regularity of proceedings for organization of district. Such decree can not be collaterally attacked in quo warranto proceedings as irregular because of want of proper notice of hearing of petition for confirmation, or because fraudulently obtained.—*People ex rel. Fogg v. Perris Irr. Dist.*, 132 Cal. 289, 292, 64 Pac. 399, 773.

5. **Decree of superior court in proceedings taken under Confirmatory Act of 1889,** to effect that irrigation district was regularly organized under Wright Act, and that bonds issued thereby composed valid issue, is bar to subsequent proceeding in nature of quo warranto by state for purpose of securing judgment declaring that irrigation district was never organized according to law and excluding it from all corporate

rights, powers, and franchises. Such decree is not simply certificate obtained in ex parte proceedings for purpose of obtaining evidence of validity or invalidity of organization, but is proceeding in rem in which notice is given of time and place fixed for hearing of petition that any person interested in organization of said district or in proceedings for issue or sale of said bonds may appear and become party thereto, and within time limited present and submit to judicial investigation any and all objections he may have to regularity of organization of district and all other matters affecting validity of bonds, so that it may be finally and conclusively determined by judgment, which neither he nor his successors in interest can thereafter question. Such judgment is binding on whole world, and state comes within that territory. Legislature may make fact of incorporation or no incorporation to depend upon action and determination of some official or tribunal whose determination courts will have no power to revise, and, if this be done, in proceeding by quo warranto against persons who assume to exercise powers given by act of incorporation no inquiry can be made into legality of corporation.—*People v. Linda Vista Irr. Dist.*, 128 Cal. 477, 485, 61 Pac. 86.

As to quo warranto to determine existence of corporation where such existence or authority depends upon some existing jurisdictional fact which has been determined to exist by some court or other tribunal possessing authority to determine it, see note 23 Am. St. Rep. 111.

6. **Same.—Facts not amounting to bar.—Acts of informant.**—Action commenced by state to restrain wrong of usurping franchise is not barred by any prior acts of informant.—*People v. Lowden*, 2 Cal. Unrep. 537, 8 Pac. 66, 69.

7. **Same.—Same.—Collateral action by state against defendant.**—State is not estopped from prosecuting an action against corporation for usurpation of franchise of being corporation and of franchises for right of way and privilege to collect tolls on street railway by mere fact that state had succeeded, in another action brought against said company as corporation, in obtaining judgment that company had placed obstacles in navigable stream which constituted public nuisance, existence of such corporation not having been put in issue in said action.—*People ex rel. Attorney-General v. Stanford*, 77 Cal. 360, 381, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

8. **Same.—Same.—Contest of election.**—State is not estopped by judgment in former action between an elector and defendant, brought under section 1111, post, to contest election of defendant. Nor would such judgment estop state, even though such elector were relator in action prosecuted by state.—*People ex rel. Drew v. Rodgers*, 118 Cal. 393, 397, 46 Pac. 740, 50 Pac. 668.

As to existence of other remedies not being a bar to a proceeding in quo warranto by state, see brief 63 L. R. A. 762.

9. Same—Statute of limitations.—If proceeding be simply one in which forfeiture is sought by reason of misuse or non-use of its powers by corporation, statute of limitations may be pleaded in bar (§ 345, ante).—*People ex rel. Attorney-General v. Stanford*, 77 Cal. 360, 377, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

10. Burden of proof is on defendant to show that corporation was duly formed; and to show that its existence has been legally extended, where it is alleged that its charter has expired.—*People v. Lowden*, 2 Cal. Unrep. 537, 8 Pac. 66, 68.

11. Burden is on defendant to show his right to office, when it is challenged by people.—*People ex rel. Dickson v. Clayton*, 4 Utah 421, 11 Pac. 206.

12. Where fact that defendant claimed and was exercising disputed franchise is admitted, burden is upon him to show by what warrant or authority he claims and exercises franchise.—*People v. Volcano C. T. R. Co.*, 100 Cal. 87, 89, 34 Pac. 522.

See pars. 158, 160, this note.

As to burden of proof in quo warranto, see note 100 Am. Dec. 268-274; briefs 61 L. R. A. 735; 63 L. R. A. 768.

13. Collateral inquiry—Corporate capacity of plaintiff in civil action.—In action by corporation it is only necessary for it, in order to establish, if controverted, its capacity to sue, to prove that it is corporation de facto claiming in good faith to be corporation and to do business as such under laws of this state. Defendant is in no position to question due incorporation of such company, nor its right to exercise corporate powers, and such inquiry can not be made collaterally in any private suit to which it is party, but must be had at suit of state.—*Pacific Bank v. De Ro*, 37 Cal. 538, 541.

14. Rule that right to franchise is not subject to attack in collateral proceeding will not prevent defendant in action prosecuted against him by turnpike road company to enforce payment of tolls from denying right of plaintiff to franchise to collect such tolls, if it affirmatively appears on plaintiff's own showing that no toll-gate had been legally established or located upon road, and if under law board of supervisors was without jurisdiction to grant franchise to collect such tolls until after it had established such toll-gates.—*Waterloo T. R. Co. v. Cole*, 51 Cal. 381, 385, 386.

15. General rule is that existence of corporation may be proved by producing its charter, and showing acts of user under it; but this rule has no application to corporation formed under provision of general statute, requiring certain acts to be performed before corporation can be consid-

ered in esse or its transactions possess any validity. Existence of corporation thus formed must be proved by showing at least substantial compliance with requirements of statute. But there is broad and obvious distinction between such acts which are declared to be necessary steps in process of incorporation, and such as are required of individuals seeking to become incorporated, but which are not made prerequisites to assumption of corporate powers. In respect to former, any material omission will be fatal to existence of corporation and may be taken advantage of collaterally in any form in which fact of incorporation can properly be called in question. In respect to latter, corporation is responsible only to government, and in direct proceeding to forfeit its charter. Right of plaintiff to be considered corporation, and to exercise corporate powers, depends upon fact of performance of particular acts named in statute as essential to its corporate existence.—*Mokelumne Hill C. & M. Co. v. Woodbury*, 14 Cal. 424, 426, 427; *Harris v. McGregor*, 29 Cal. 124, 127.

16. Provisions of statute that due incorporation of company claiming in good faith to be corporation under laws of this state and doing business as such corporation shall not be inquired into collaterally, does not go to extent of precluding private person from denying existence de jure or de facto of an alleged corporation. To say that "due incorporation" can not be inquired into collaterally does not mean that no inquiry can be made as to whether it is corporation. Many of acts required to be performed in order to make complete organization of corporation may have been irregularly performed, or some of them may have been entirely omitted, and rule of statute is that such irregular or defective performance shall not defeat incorporation when drawn into question collaterally. A substantial compliance with requirements of statute will be sufficient to show corporation de jure in an action between the corporation and private person.—*Spring Valley W. W. v. San Francisco*, 22 Cal. 434, 441; *Dannebrog, G. Q. M. Co. v. Allment*, 26 Cal. 286, 288; *People v. Frank*, 28 Cal. 507, 519; *Oroville & V. R. Co. v. Supervisors*, 37 Cal. 354, 360, 361; *Dean v. Davis*, 51 Cal. 406, 411, 412; *Bakersfield T. H. Assoc. v. Chester*, 55 Cal. 98, 101; *Fresno C. & I. Co. v. Warner*, 72 Cal. 379, 382, 383, 14 Pac. 37; *Lakeside D. Co. v. Crane*, 80 Cal. 181, 186, 22 Pac. 76; *Golden Gate M. & M. Co. v. Joshua Hendy M. W.*, 82 Cal. 184, 186, 23 Pac. 45; *First Baptist Church of San Jose v. Branham*, 90 Cal. 22, 23, 24, 27 Pac. 60.

17. Where defendants in action to recover damages for breaking and entering plaintiff's close defend upon ground that locus in quo was property of corporation, and that they, defendants, performed acts complained of as agents and servants of said company, and opening testimony of

plaintiff tends to prove that company was corporation de facto, that evidence not only dispenses with necessity of strict proof of corporate character but precludes plaintiff from inquiring into or disputing it. Such inquiry can be had only at suit of state, upon information by attorney-general.—*Rondell v. Fay*, 32 Cal. 354, 360, 361.

As to answer alleging non-compliance with statute, in action by foreign corporation, see *Kerr's Cyc. Civ. Code*, 2d ed., § 406 and note.

As to collateral inquiry into due incorporation of company, see *Kerr's Cyc. Civ. Code*, 2d ed., § 358 and note.

As to collateral inquiry into right of foreign corporation to do business within state, see *Kerr's Cyc. Civ. Code*, 2d ed., § 536 and note par 20.

As to estoppel to attack corporate capacity, see *Kerr's Cyc. Civ. Code*, 2d ed., § 633 and note par 6.

As to rule that corporate franchises can only be attacked at instance of state, see note 38 *Am. St. Rep.* 162.

18. Same—Proceedings to confirm irrigation district bonds.—A proceeding in pursuance of act of March 6, 1889 (*Stats.* 1889, p. 212), to procure confirmation by court of proceedings for issue and sale of certain bonds of irrigation district, is not one in which question of due incorporation of corporation arises collaterally. Corporation itself comes into court and challenges an examination into regularity of its organization and asks court to examine each and all of proceedings for organization of said district. Upon such proceedings it becomes as necessary for it to establish such regularity, and to give evidence of each step therein as fully as if its acts were under investigation upon writ of review, or as if state were by quo warranto questioning its right to exercise franchise of corporation. In such case it is incumbent upon it to make proof of every step required by statute for assuming corporate powers.—*In Matter of Madera I. Dist.*, 92 Cal. 296, 334, 335, 14 L. R. A. 755, 28 Pac. 272, 675; *People ex rel. Fogg v. Perris Irr. Dist.*, 132 Cal. 289, 292, 64 Pac. 399, 773.

19. Same—Right to franchise.—In an action by turnpike road company against individual, prosecuted for collection of toll claimed to be due for passing along its road, defendant can not collaterally attack right of plaintiff to franchise to collect such tolls by raising questions as to facts which were within jurisdiction of board of supervisors to determine in proceeding which resulted in order of board granting to plaintiff franchise. Determination of board in respect to those questions of fact is conclusive as against such defendant, and he will not be permitted to allege or show that board erred in its determination. The rule in all cases, irrespective of whether franchise was granted directly by legislature,

or by subordinate body by authority of legislature, is that grant is not liable to be attacked by private person in collateral proceeding for mere error in exercise of authority to make grant.—*Truckee & T. T. R. Co. v. Campbell*, 44 Cal. 89, 92.

20. Franchise of turnpike road company to maintain toll-road, and its title and right to possess such road, can not be inquired into by mere intruder or trespasser in action brought by such turnpike road company against said trespasser to recover possession of portion of such road. Until ousted by some direct proceeding instituted for that purpose, its rightful possession can not be disturbed.—*Stockton & L. G. R. Co. v. Stockton & C. R. Co.*, 45 Cal. 680, 685.

21. Ownership of toll-road and right to collect tolls by corporation which has had possession of such road and collected tolls thereon for number of years can not be inquired into except in an action or proceeding in which some person who claims better title is party; and then it can not be tried by board of supervisors upon application to fix rate of tolls, nor in proceeding to determine whether mandate should issue to compel performance by said board of duty of fixing such tolls.—*Weaverville & M. W. R. Co. v. Board of Supervisors*, 64 Cal. 69, 72, 28 Pac. 496.

22. Question whether toll-road company was lawfully incorporated, and as to whether it had ever been or was owner and entitled to possession of toll-road of which it had had actual possession for more than fifteen years are matters which can not be inquired into by board of supervisors on application to fix its rates of toll, or in proceeding by mandamus to compel board to fix rates.—*Stony Hill T. R. Co. v. Board of Supervisors*, 88 Cal. 632, 633, 26 Pac. 513. See *People v. Volcano C. T. R. Co.*, 100 Cal. 87, 89, 34 Pac. 522.

23. Same—Right to hold office.—Validity of election, or right to take and hold office, can not be inquired into in collateral action or proceeding.—*Shores v. Scott River Water Co.*, 17 Cal. 626, 628; *Satterlee v. San Francisco*, 23 Cal. 314, 320; *People v. Sassovich*, 29 Cal. 480, 485; *Town of Susanville v. Long*, 144 Cal. 362, 365, 77 Pac. 987.

24. Right of de facto justice of peace to exercise functions of office can not be questioned in any collateral proceeding.—*People ex rel. Attorney-General v. Provines*, 34 Cal. 520, 523; *People v. Sehorn*, 116 Cal. 503, 508, 48 Pac. 495. See *People v. Mellon*, 40 Cal. 648, 655, 656.

25. Rightful authority of judge, in full exercise of his judicial function, can not be questioned by any merely private suitor, nor by any other, excepting in form especially provided by law. A judge de facto assumes exercise of part of prerogative of sovereignty, and legality of that assumption is open to attack of sovereign power alone. Judge de facto is judge de jure as to all parties except commonwealth.—

Walcott v. Wells, 21 Nev. 47, 55, 37 Am. St. Rep. 478, 24 Pac. 367.

As to inquiry in habeas corpus, see par. 107, this note.

26. Right of sheriff who participated in drawing of jury in criminal case to hold such office will not be inquired into in such criminal action where it appears that he was de facto sheriff of county.—*People v. Roberts*, 6 Cal. 214, 215.

27. **Same—Same—De facto incumbent.**—One who assumes office under color of election is officer de facto, and holds vested right to act as such until his right is questioned by some one in proper proceeding for that purpose.—*People v. Hammond*, 109 Cal. 384, 390, 42 Pac. 36.

28. **Same—Same—Denial of existence of office.**—Right of de facto officer to office, or his power or jurisdiction,—his claim being that he is police judge,—can not be questioned collaterally, but must be raised by direct action for that purpose. But when question raised is not as to right of particular individual to hold an existing office, but is as to existence of the office, this rule does not apply.—*People v. Toal*, 85 Cal. 333, 338-340, 24 Pac. 603.

29. **Constitutionality of statute.**—Statute is constitutional. In first place it may be considered as mode of procedure for exercise of jurisdiction in quo warranto conferred by constitution. In next place, it is an action, and legislature is not prohibited by constitution from providing for such an action.—*People ex rel. Attorney-General v. Stanford*, 77 Cal. 360, 375, 376, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693. See *People ex rel. Attorney-General v. Dashaway Assoc.*, 84 Cal. 114, 120, 12 L. R. A. 117, 24 Pac. 277.

30. **Corporations—Authority of directors de facto—Collateral attack.**—Where certain persons are elected and exercise the functions of a board of directors, and there is no other set of men claiming to be directors, they are, if not de jure, certainly de facto, the board of directors of the corporation and as such their authority can not be questioned collaterally, and their right to the offices claimed and exercised by them can be tested in a quo warranto proceeding, or by the method provided by the above section.—*Guaranty Loan Co. v. Fontenel*, 183 Cal. 1, 190 Pac. 177, applying the doctrine in *Potomac Oil Co. v. Dye*, 10 Cal. App. 534, 539, 102 Pac. 677.

31. **Definitions—Franchise** is said to be particular privilege conferred by grant from government and invested in individuals.—*Ex parte Henshaw*, 73 Cal. 486, 493, 15 Pac. 110; *People ex rel. Attorney-General v. Stanford*, 77 Cal. 360, 372, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

32. Blackstone says, in relation to franchises: "Franchise and liberty are used as synonymous terms; and their definition is royal privilege or branch of king's prerogative, subsisting in the hands of subject. Being therefore derived from crown, they

must arise from king's grant; or in some cases may be held by prescription, which, as has been frequently said, presupposes grant. The kinds of them are various, and almost infinite"; and adds that "they may be vested in either natural persons or bodies politic; in one man or in many." And again on this subject, he says: "To be a county palatine is a franchise, vested in number of persons. It is likewise franchise for number of persons to be incorporated, and subsisting as body politic, with power to maintain in perpetual succession, and do other corporate acts; each individual member of such corporation is also said to have franchise or freedom" (2 Bl. Com. 37). Kent defines franchises as "privileges conferred by grant from government, and vested in individuals" (3 Kent's Com., 458) (Id. 459). He also says: "Corporations or bodies politic are most usual franchises known in our law." In *Pierce v. Emery*, 32 N. H. 484, 507, Perley, C. J., speaking for court, remarks: "A corporation is itself franchise belonging to members of corporation; and corporation being itself franchise, may hold other franchises as rights and franchises of corporation." And further: "The corporation, being itself franchise, consists and is made up of its rights and franchises." In *City of Bridgeport v. New York & N. H. R. Co.*, 36 Conn. 255, 266, Butler, J., speaking for court, uses this language in regard to railroad corporation: "The term franchise has several significations, and there is some confusion in its use. The better opinion, deduced from authorities, seems to be that it consists of entire privileges embraced in and constituting grant.—*Spring Valley W. W. v. Schottler*, 62 Cal. 69, 106.

33. Franchise is special privilege granted by state which does not belong to citizens of country generally by common right. This is distinguishing feature of franchise. A right which belongs to government, when conferred upon citizens, is franchise. Such rights as inhere in sovereign power can only be exercised by individual or corporation by virtue of grant from such sovereign power, and when state grants such right, it is franchise.—*Lasher v. People*, 183 Ill. 226, 75 Am. St. Rep. 103, 47 L. R. A. 802, 55 N. E. 663.

As to distinction between franchise and mere monopoly, see note 4 L. R. A. 614.

As to execution sale of franchise, see *Kerr's Cyc. Civ. Code*, 2d ed., § 388 and note.

As to franchise being a contract, see brief 47 L. R. A. 90, 104.

As to franchise not being contract, see *Kerr's Cyc. Civ. Code*, 2d ed., § 503 and note pars. 1, 2.

As to the nature of a franchise, see briefs 36 L. R. A. 144; 59 L. R. A. 582.

As to whether franchise is subject to sale and transfer, see brief 32 L. R. A. 315; note 47 L. R. A. 87, 89; brief 47 L. R. A. 215, note L. R. A. 1917D, 707.

34. In commenting on definition of franchises as "special privileges conferred by government upon individuals and which do not belong to citizens of country generally of common right," supreme court of this state said that common right refers to right of citizens generally at common law, investiture of which is not to be looked for in any special law, whether established by constitution or by an act of legislature; that although right, such as to lay water-pipes and collect rates for water furnished, might be granted by constitution to every person, it would not follow that such right is not franchise. They are vested by grant of sovereign power, and not by common law; and generality of grant does not deprive them of character of franchises.—*Spring Valley W. W. v. Schottler*, 62 Cal. 69, 102, 108.

35. **Same—Same—Distinguished from mere powers.**—Definition of franchise given by Finch, adopted by Blackstone, and accepted by every authority since, is "a royal privilege or branch of king's prerogative subsisting in hands of subject." To be franchise, right possessed must be such as can not be exercised without express permission of sovereign power—privilege or immunity of public nature which can not be legally exercised without legislative grant. It follows that right, whether existing in natural or artificial person, to carry on any particular business, is not necessarily or usually franchise. Kinds of business which corporations organized under title to, chapter thirty-four, or under act of 1873, are authorized to carry on, are powers but not franchises, because they are rights possessed by all citizens who choose to engage in them without any legislative grant. Only franchise which such corporations possess is general franchise to be or exist as corporate entity; hence, if they engage in any business not authorized by statute it is *ultra vires* or in excess of their powers, but not usurpation of franchises not granted. Acts in excess of power may undoubtedly be carried so far as to amount to misuser of franchise to be corporation and ground for its forfeiture. How far it must go to amount to this courts have wisely never attempted to define except in very general terms, preferring safe course of adopting gradual process of judicial inclusion and exclusion as cases arise. But we think it may be safely stated as general consensus of authorities that to constitute misuser of corporate franchise, such as to warrant its forfeiture, *ultra vires* acts must be so substantial and continued as to amount to clear violation of condition upon which franchise was granted and so derange or destroy business of corporation that it no longer fulfills end for which it was created. But in case of excess of powers it is only where some public mischief is done or threatened that state, by attorney-general, should interfere.—*State ex rel. Clapp v.*

Minnesota T. M. Co., 40 Minn. 213, 3 L. R. A. 510, 41 N. W. 1020.

As to corporate powers, see *Kerr's Cyc. Civ. Code*, 2d ed., §§ 354, 355 and notes.

As to *ultra vires* acts, see *Kerr's Cyc. Civ. Code*, 2d ed., § 354 and note pars. 177-184.

36. **Same—Same—Grant proceeds from legislature.**—Franchises must be granted by authority of legislature, but such authority may reside in subordinate bodies holding delegated power.—*Bartram v. Central T. Co.*, 25 Cal. 284, 290, 291; *Truckee & T. T. R. Co. v. Campbell*, 44 Cal. 89, 92; *Volcano C. R. Co. v. Board of Supervisors*, 88 Cal. 634, 635, 26 Pac. 513; *State ex rel. Attorney-General v. Madison St. R. Co.*, 72 Wis. 612, 1 L. R. A. 771, 40 N. W. 487.

37. Franchise must be granted by legislature; municipal body can not confer franchise.—*Lasher v. People*, 183 Ill. 226, 75 Am. St. Rep. 103, 47 L. R. A. 802, 55 N. E. 663; *State v. Scougal*, 3 S. D. 55, 44 Am. St. Rep. 756, 15 L. R. A. 477, 51 N. W. 858.

As to point that no franchise can be held which is not derived from the law of the state, see briefs 1 L. R. A. 772; 38 L. R. A. 218.

38. **Same—Same—Particular franchises—Banking.**—At common law banking in all its branches was free to all and belonged to citizens of country generally. It was, therefore, not franchise. By our national constitution, power to regulate currency was conferred upon national government; and it follows that if bank is given privilege of issuing demand notes to circulate as money, such right is franchise.—*State v. Scougal*, 3 S. D. 55, 44 Am. St. Rep. 756, 15 L. R. A. 477, 51 N. W. 858. See *Bank of Augusta v. Earle*, 38 U. S. (13 Pet.) 575, 10 L. ed. 274.

As to banking, see *Kerr's Cyc. Civ. Code*, 2d ed., § 356 and note.

39. **Same—Same—Same—Office is of nature of franchise in that it can only be derived from sovereign.**—*Ex parte Henshaw*, 73 Cal. 486, 493, 15 Pac. 110.

See pars. 46, 47, this note.

40. **Same—Same—Same—Right and power to govern and tax inhabitants of certain territory is franchise, in addition to and distinct from that of being corporation; and exercise of such power by municipal corporation over inhabitants of territory outside of its charter limits is usurpation of franchise, for which attorney-general is authorized to bring an action in name of people.**—*People ex rel. Adams v. Oakland*, 92 Cal. 611, 614, 28 Pac. 807.

41. **Same—Same—Same—Right of laying down and maintaining pipes in streets of city by which gas or water is to be conveyed, and to collect rates for gas or water, is franchise.**—*San Jose G. Co. v. January*, 57 Cal. 614, 616; *Spring Valley W. W. v. Schottler*, 62 Cal. 69, 107, 108.

As to whether the right to manufacture gas and distribute it by means of pipes laid

in the streets is a franchise or easement, see note 8 L. R. A. 487, 488.

42. Same—Same—Same—Right to be corporation is in itself franchise; and to acquire franchises under general law, prescribed statutory conditions must be complied with. Still substantial rather than literal compliance will suffice. Because substantial compliance will do, it does not follow that any positive statutory requirements can be omitted on ground that it is unimportant. There are conditions precedent to acquiring a statutory right and none can be dispensed with by court.—*People ex rel. Fraser v. Selfridge*, 52 Cal. 331, 333; *People v. Montecito W. Co.*, 97 Cal. 276, 278, 32 Pac. 236.

43. Very existence of corporation as such is franchise, and it exercises its franchise in every act which it performs as corporation. But corporation whose existence is franchise may possess powers and franchises which in themselves are not franchises (such as right to bank, discussed in *Bank of Augusta v. Earle*, 38 U. S. (13 Pet.) 575, 10 L. ed. 274, or right to buy and sell property, real and personal), but it usually owns, along with such privilege, some that are franchises; but whether powers be entirely of kind which are franchises or not its existence and right to employ its corporate powers is franchise. Franchise of corporation is and can be well defined to be right of corporation to exist and exercise powers and privileges vested in it by its charter. The franchise is faculty of corporation. As said by Redfield in his work on railways: "The faculty of corporation is its organic life; its corporate existence by which it is enabled to carry on business; that which it derives from its charter or incorporation, its corporate franchise."—*Spring Valley W. W. v. Schottler*, 62 Cal. 69, 108, 109.

As to corporate franchises, see notes 40 Am. St. Rep. 157; 3 L. R. A. 510; brief 64 L. R. A. 367.

44. Same—Same—Same—Right to collect tolls on bridges, roads, etc., is franchise. Franchise of this character may be defined as certain privilege of public nature conferred by grant from government and vested in individuals. It is sovereign prerogative and vests in an individual only by legislative grant. It makes no difference whether grant be made directly by legislature or by subordinate body to whom power is delegated; it is still grant emanating from sovereign authority of state. A grant of such franchise by board of supervisors has same standing in respect to its validity, presumptions in its favor, and mode in which it may be attacked, as grant of any other right, privilege, or thing made by any department of government under authority of law.—*Bartram v. Central T. Co.*, 25 Cal. 284, 290, 291; *Truckee & T. T. R. Co. v. Campbell*, 44 Cal. 89, 92; *Volcano C. R. Co.*

v. Board of Supervisors, 88 Cal. 634, 635, 26 Pac. 513.

As to ferry privilege being a franchise, see briefs 32 L. R. A. 315; 33 L. R. A. 536.

As to franchise to take tolls, see, ante, § 528 and note.

As to necessity of franchise for taking tolls, see note 37 L. R. A. 711, 719.

As to right to collect toll; to operate ferries; to build dams; to use streets and highways, being a franchise, see brief 63 L. R. A. 767.

As to right to collect wharfage being a franchise, see note 1 L. R. A. 133, 134.

45. Same—Same—Same—Right to lay and maintain street-railway tracks.—Ordinance of common council of city granting authority and permission to corporation to lay and maintain within certain streets of said city, upon certain conditions, street railway is more than mere contract between company and city for breach of which city has usual remedy by action. Immunities and privileges granted to company by ordinance are as much franchises of corporation as if they had been directly granted by statute under which it was organized. The common council of city of Madison is authorized, by statute, to grant them, and such power is delegated one. What common council does within that power is done by legislature through its agency. Public has interest in these franchises; power to grant them therefore must be derived from legislature.—*State ex rel. Attorney-General v. Madison St. R. Co.*, 72 Wis. 612, 1 L. R. A. 771, 40 N. W. 487.

As to franchise for constructing road for use of automobiles, bicycles, etc., see *Kerr's Cyc. Civ. Code*, 2d ed., § 524 and note.

46. Compare: There has always been well defined distinction between "ways" and "franchises." A way may be granted by private person; franchise can be granted only by government, and is sovereign prerogative existing in hands of subject. A way belongs to same species whether granted by government or by private person. Ownership of way granted by public authority is no more franchise than is ownership of land conveyed from government to individual by patent. Right to maintain tracks and switches of street-railway upon certain streets is not franchise; it is mere right of way (*McFarland, J.*, dis. op.).—*People ex rel. Warfield v. Sutter St. R. Co.*, 117 Cal. 604, 615, 616, 49 Pac. 736.

As to appurtenances, easements, and servitudes, see *Kerr's Cyc. Civ. Code*, 2d ed., §§ 801-811 and notes.

As to right granted by the city council to a street-railway company to use certain streets being a franchise, see brief 48 L. R. A. 823.

47. Same—Office is right to exercise public function or employment, and to take fees and emoluments belonging to it.—*Peo-*

ple ex rel. Flint v. Harrington, 63 Cal. 257, 260; Hamlin v. Kassafer, 15 Ore. 456, 460, 3 Am. St. Rep. 180, 15 Pac. 778.

48. In abstract "office" signifies place of trust. In legal idea, an office is an entity, and may exist in fact, though it be without incumbent. In this sense word "office" is used in number of instances in constitution and also in statutes. An office is also defined to be right to exercise public function or employment, and to take fees and emoluments belonging to it.—People ex rel. Madden v. Stratton, 28 Cal. 382, 388; Miller v. Board of Supervisors, 25 Cal. 93, 98.

As to definition of office, see note 63 Am. St. Rep. 180-193.

As to office being of nature of franchise, see par. 38, this note.

49. Same—Same—Creation of.—Office can only be created by constitution, or some valid statute passed by legislature. Existence or non-existence of office is question of law, not of fact. Its existence depends on law, either constitutional or statutory. If no law can be found showing its creation, it can not exist (dis. op. of Thornton, J.).—Ex parte Henshaw, 73 Cal. 486, 499, 15 Pac. 110.

See pars. 35, 36, this note.

50. Same—Same—Director of private corporation can not be said to hold public office.—Foster v. Superior Court, 115 Cal. 279, 283, 47 Pac. 58.

51. Same—Same—Employee distinguished.—Position occupied by physician appointed by board of supervisors, under subdivision 5 of section 25 of County Government Act of 1897, to attend indigent sick and dependent poor of county and patients in county hospital, is not an office, and suit in nature of quo warranto to oust him from such employment will not lie.—Law providing for employment of such hospital physicians does not designate title of officers or physicians employed, or give them distinctive name, or fix their terms of office, or prescribe their duties or compensation. It does not provide that there shall be one physician only, but board may employ as many as in its discretion it may deem necessary. Physicians employed must be regarded as merely servants or employees of board.—People ex rel. Attorney-General v. Wheeler, 136 Cal. 652, 653, 69 Pac. 435.

As to definition of employment, see Kerr's Cyc. Civ. Code, 2d ed., § 1965 and note.

As to what distinguishes an office from a mere employment or contract, see notes 72 Am. Dec. 179; 17 L. R. A. 243, 250; brief 52 L. R. A. 408; 36 L. R. A. (N. S.) 882.

52. Same—Same—Member of board of health of city and county of San Francisco is an officer.—People ex rel. Davidson v. Perry, 79 Cal. 105, 113, 21 Pac. 423.

53. Same—Same—Pilot of port of San Francisco, appointed by board of pilot commissioners under act of May 11, 1854, and amendatory act of 1858, is public officer.

Such pilots are appointed by virtue of act of legislature; have fixed term to their employment, have definite duties prescribed, have fixed rates of compensation; are required to give bond, and are entitled to do all business of pilots for harbor of San Francisco. They are subject to penalties for misfeasance and malfeasance, and are protected by law in enjoyment of their offices and emoluments.—People ex rel. Palmer v. Woodbury, 14 Cal. 43, 45.

54. Same—Same—Position of "practicing physician of Yuba county hospital" is an office. Law which authorizes appointment of practicing physician for said Yuba county hospital fixes term for which he shall be appointed, provides for his salary, and prescribes his duties. That is sufficient to create office.—People ex rel. Flint v. Harrington, 63 Cal. 257, 260. See Wall v. Board of Directors, 145 Cal. 468, 472, 78 Pac. 951.

As to juror not being an officer within meaning of statute, see par. 91, this note.

As to whether the position of teacher in public schools of city is an office, see par. 117, this note.

55. Same—Usurper is one who acts without color of title and whose acts are utterly void. Distinction between officers de jure, and officers de facto, and mere usurpers are set forth in Hamlin v. Kassafer, 15 Ore. 456, 460, 3 Am. St. Rep. 180, 15 Pac. 778.

As to difference between usurper and officer de facto, see note 3 Am. St. Rep. 183.

As to usurpation of franchise, see pars. 209-236, this note.

As to usurpation of office, see pars. 55-61, 66-78, 237, this note.

56. Same—Same—Appointee, vacancy not having been judicially determined.—One who is appointed to fill vacancy in board of supervisors caused by reason of incumbent ceasing to be inhabitant of district for which he was chosen, is not usurper because of fact that vacancy of office was not judicially determined prior to his appointment. In such case office becomes vacant ipso facto, and issue of vacancy or not can be determined in action of quo warranto brought upon relation by former incumbent against appointee.—People ex rel. Tracy v. Brite, 55 Cal. 79, 80.

57. Same—Same—Certificate of election wrongfully obtained.—One who obtains certificate of election to which he is not entitled and by virtue of which he enters into office does not thereby enter lawfully, and he is an "intruder" or "usurper" or one who "unlawfully holds and exercises" office, and is liable to be proceeded against by virtue of this section. Certificate of election is only prima facie evidence of his right to office and affords him at most but color of title if office was in fact given by voters to another.—People ex rel. Wicks v. Jones, 20 Cal. 51, 53.

58. Same—Same—Incumbent holding over.—Incumbent of office is bound to know upon

expiration of his term of office who is his successor and to yield office to that one of candidates who has been legally elected, upon his qualification and demand. He is bound to act at his peril, and if he holds over and thereafter it should appear that party so qualifying and demanding office had at time title thereto he becomes, upon such determination, a usurper ab initio.—*People ex rel. Dorsey v. Smyth*, 28 Cal. 21, 25.

59. Former incumbent who, upon apparent election of defendant, gave up possession of office to defendant and ceased to perform duties of office, is not thereafter entitled to resume office by reason of judgment, in action brought by an elector to contest defendant's election, determining defendant ineligible to office. Under such circumstances office becomes vacant.—*People ex rel. Drew v. Rodgers*, 118 Cal. 393, 396, 46 Pac. 740, 50 Pac. 668.

60. There is no provision authorizing judge of superior court to hold his office until his successor is elected and qualified. It is no defense to action in nature of quo warranto against such officer that at expiration of his term his successor had not qualified.—*People ex rel. Bledsoe v. Campbell*, 138 Cal. 11, 14, 17, 70 Pac. 918.

61. One who holds over after expiration of his term of office, and who is entitled to retain office until appointment of his successor, can not be ousted by new appointee who does not possess qualifications prescribed by law. In such case there is not ground for judgment that he "wrongfully usurps, holds, occupies," etc., said office.—*People ex rel. Moore v. King*, 127 Cal. 570, 573, 574, 60 Pac. 35.

62. Discretion of attorney-general—Judicial control.—Assuming that the discretion of the attorney-general is not entirely beyond the control of the court, it is clear that the power to order him to grant leave to commence a suit against his own conviction and conscientious belief, should be exercised only where the abuse of discretion is extreme and clearly indefensible. In the absence of such an extreme case a decree of the court compelling him to act against his judgment is erroneous and is itself an abuse of discretion.—*Lamb v. Webb*, 151 Cal. 454, 91 Pac. 102.

63. Effect of pending proceeding—As defense in other action.—Pendency of proceeding in quo warranto against persons named as claiming to compose corporation is no defense to proceeding by mandamus by such corporation to compel board of supervisors of county to subscribe to capital stock of such corporation and to issue to said corporation bonds of county in payment of subscription, in pursuance of requirements of an act of legislature.—*Oroville & V. R. Co. v. Supervisors*, 37 Cal. 354, 360, 363.

64. Same.—On property rights of defendant corporation.—State acquires no lien on property of corporation by action against it for forfeiture of its charter, and can not attack sale thereof made pendente lite. Up to date of dissolution corporation has same power of disposing of its property honestly and in good faith that any corporation has.—*Havemeyer v. Superior Court*, 84 Cal. 327, 385, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

65. Legislature has given no indication of intention to forfeit or take away from stockholders property of corporation except to extent of fine of five thousand dollars which court is authorized in its discretion to impose. What is forfeited to state, and all that is forfeited, is charter,—right to be corporation, and this is presumed solely upon ground that condition upon which it was granted has been violated. When corporation is dissolved its property vests in its stockholders, subject only to claims of creditors, and is thereafter held upon same tenure and subject to same conditions as similar property owned by other natural persons.—*Havemeyer v. Superior Court*, 84 Cal. 327, 362, 378, 379, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

As to effect of judgment of ouster upon property rights of corporation, see notes 30 Am. Dec. 52; 58 Am. St. Rep. 781; 3 L. R. A. 510.

As to effect of proceeding to forfeit charter of a corporation upon rights of corporation to dispose of its property, see note 56 Am. St. Rep. 864.

As to receivership, see pars. 198-201, this note.

66. Intrusion into office.—One assuming, without grant, to exercise powers which are prerogatives of government and such as can be exercised by private person only when granted by government, may be adjudged to be unlawfully exercising such powers.—*Ex parte Henshaw*, 73 Cal. 466, 493, 15 Pac. 110. See *People ex rel. Smith v. Olds*, 3 Cal. 167, 175, 177, 58 Am. Dec. 398.

As to definition of "intruder" and "usurper," see pars. 54-60, this note.

As to definition of "office," see pars. 46-53, this note.

As to usurpation of office, see par. 237, this note.

67. Same.—Contest of election.—There are two separate and distinct methods provided in this code to contest title to office. First is by proceedings in nature of quo warranto against any person who usurps or intrudes into public office. The second is by contesting election as provided in this code (§§ 1111-1127, post).—*Powers v. Hitchcock*, 129 Cal. 325, 326, 327, 61 Pac. 1076. See *Satterlee v. San Francisco*, 23 Cal. 314, 320.

68. Result of election may be contested by proceeding upon information in nature

of quo warranto.—*Stone v. Elkins*, 24 Cal. 125, 127.

As to proceedings to inquire into elections of private corporations, see *Kerr's Cyc. Civ. Code*, 2d ed., § 315 and note.

69. Same—Same—Evidence of election.—Possession of certificate of election is not necessary to enable contestant to pursue remedy by quo warranto. Certificate of election is merely prima facie evidence of title to office; but it is not conclusive; nor is it only evidence by which title may be established. It is fact of election which gives title to office, and this fact may be established not only without, but against, evidence of this certificate.—*Magee v. Board of Supervisors*, 10 Cal. 376, 377.

70. Loss or destruction of certificate of election may be shown, and fact of election established by parol evidence. To lay foundation for admission of such testimony, in action relating to county office, it is not necessary to ask county clerk, as witness, if he has made diligent search for certificate in his office, where he testifies that there is not in his office, or so far as he knows, in county, any record or written evidence of persons elected to different county offices. His positive testimony that documents or records are not in office would raise legal presumption that witness had searched for them, unless it should be made to appear from his testimony that such was not fact.—*People ex rel. Attorney-General v. Clingan*, 5 Cal. 389, 390.

71. Proof of fact that claimant had been acting as sheriff, taken in connection with proof of loss of certificate of election issued to him, would raise presumption that he had executed bond and taken oath of office.—*People ex rel. Attorney-General v. Clingan*, 5 Cal. 389, 391; *Hull v. Superior Court*, 63 Cal. 174, 176.

72. Ballots returned with poll-list and tally-paper to county clerk to be kept by him for at least six months, under law of 1863 (*Stats.* 1863, p. 354, § 35), are better evidence of number of votes cast, and for whom, than is the tally-list made from them by officers of election, notwithstanding that name of candidate has been torn from certain of the ballots. In absence of evidence to contrary, it will be presumed that such ballots were torn by electors voting them, before being deposited in the ballot-box.—*People ex rel. Budd v. Holden*, 28 Cal. 123, 131-134.

73. Plaintiff, claiming right to unexpired term as officer-elect to fill alleged vacancy, must, in action against incumbent to recover possession of books and papers of office, not only show that he has a prima facie title to office, but must show prima facie that vacancy existed, and that he was elected to fill it.—*Doane v. Scannell*, 7 Cal. 393, 394, 395; *People ex rel. Attorney-General v. Scannell*, 7 Cal. 432, 442, 443.

74. Same—Contest of right of actual incumbent in possession under color of right

can be originated only by proceeding by information in nature of quo warranto against him as incumbent.—*People ex rel. Smith v. Olds*, 3 Cal. 167, 175, 176, 58 Am. Dec. 398; *Hull v. Superior Court*, 63 Cal. 174, 177.

75. Same—Forfeiture of right to office by failure of appointee to qualify under commission of appointment within time provided by law may be determined in action under this chapter.—*People ex rel. Finigan v. Perkins*, 85 Cal. 509, 511, 26 Pac. 245.

76. Same—Removal from office.—Officer can not be removed from office for failure to comply with any law prescribing test other than that prescribed by section 3 article XX of constitution of 1879. For act of 1901, to execute and carry into effect this constitutional provision, see *II Henning's General Laws*, 3d ed., p. 2210.

77. Act of March 30, 1874 (*Stats.* 1873-4, p. 911), providing for removal of certain officers for wilful violation of laws defining their duty, was repealed by constitution of 1879, and its place supplied by sections 55 and 184 of County Government Act enacted March 14, 1883.—*Fraser v. Alexander*, 75 Cal. 147, 150, 154, 16 Pac. 757.

As to criminal punishment for usurpation of office, see *Kerr's Cyc. Pen. Code*, 2d ed., § 75.

As to forfeiture of office by conviction of crime, see *Kerr's Cyc. Pen. Code*, 2d ed., §§ 88, 98.

As to forfeiture of office by inhumanity to prisoner, see *Kerr's Cyc. Pen. Code*, 2d ed., § 147 and note.

As to forfeiture of office for taking reward for deputation, see *Kerr's Cyc. Pen. Code*, 2d ed., § 74.

As to removal from office for neglect of duty, see *Kerr's Cyc. Pen. Code*, 2d ed., § 661.

As to removal of civil officers by impeachment, see *Kerr's Cyc. Pen. Code*, 2d ed., §§ 739-753 and notes.

As to removal of civil officers upon accusation presented by grand jury, see *Kerr's Cyc. Pen. Code*, 2d ed., §§ 758-771 and notes.

As to removal of officers by summary proceedings before superior court, for charging illegal fees, or refusing, or neglecting to perform official duties, see *Kerr's Cyc. Pen. Code*, 2d ed., § 772 and note.

78. Same—Right to military office may be inquired into under this proceeding.—*People ex rel. Palmer v. Woodbury*, 14 Cal. 43, 46.

As to what offices are public, in sense that would warrant issuance of an information for usurping or intruding into them, see note 30 Am. Dec. 47-52.

79. Jurisdiction—City council's right to determine its membership.—Jurisdiction of usurpation of office having been conferred on superior court by constitution, such jurisdiction can not be taken away or abridged by legislature. Section 677 Con-

solidation Act of city and county of San Francisco, providing that board of supervisors shall be judge of election and qualifications of its own members, therefore does not deprive court of jurisdiction to inquire into election of such officers by proceedings under this chapter. That act creates an accumulative jurisdiction; it enables board to pass speedily and by simple proceeding upon right of membership in it, so that it may not be hampered in performance of its function; and when it has done so, board, as composed thereby, is for time legal board, and its doing authoritative. Courts of competent jurisdiction are not shut out, however, from inquiring on behalf of people origin of all authority, into right of any person who, by action of board, in fact holds place in it, and claims thereby to exercise public office.—*People ex rel. Swift v. Bingham*, 82 Cal. 238, 239-242, 22 Pac. 1039. See *People ex rel. Davidson v. Perry*, 79 Cal. 105, 107-109, 21 Pac. 423.

80. Statute giving city council right to determine qualifications of its members and of all election returns, and to determine contested elections of all city officers, does not deprive superior court of jurisdiction in quo warranto to determine who is entitled to office. Jurisdiction given to city council is merely cumulative.—*State ex rel. Blake v. Morris*, 14 Wash. 262, 263, 44 Pac. 266.

81. Legislature may confer upon common council of city right to determine election of city officers and may make such jurisdiction exclusive, ousting superior court of its jurisdiction in cases of contested elections concerning such officers. But unless it appears definitely from language of the statute that it is intended to exclude superior court from jurisdiction of such contests, such jurisdiction will be regarded as cumulative. Where statute declares that decision of board in election contests between city officers shall be "final and conclusive," such jurisdiction is regarded as exclusive. But whether jurisdiction of such council in contest cases is exclusive of jurisdiction given superior court by quo warranto, or whether determination in former case would be bar to proceedings by quo warranto was not involved in case and therefore not determined.—*Carter v. Superior Court*, 138 Cal. 150, 155, 70 Pac. 1067.

82. Compare: Tenth section of act of March 11, 1850, to provide for incorporation of cities (Stats. 1850, p. 88) provides that common council "shall judge of the qualifications, elections, and returns of its own members." These words being identical with the eighth section of article IV of constitution, relating to legislative department of state government, should receive same construction. It is settled beyond controversy that those words of constitution confer upon each house exclusive power to judge of and determine qualifications, elections, and returns of its own members; and

it follows that common council of city to which that section of act is applicable possesses like exclusive authority to judge of and determine qualifications, elections, and returns of its own members. The courts therefore have no jurisdiction of an action in nature of quo warranto to determine right as between relator and defendants to office of member of such common council.—*People ex rel. Vejar v. Metzker*, 47 Cal. 524, 525, 526.

83. Same—Effect of other remedies.—Right granted to elector to contest election in no way impairs right of people in their sovereign capacity to inquire into authority by which any person assumes to exercise functions of public office or franchise and to remove him therefrom, if it be made to appear that he is usurper having no legal title thereto. The two remedies are distinct, one belonging to elector in his individual capacity as power granted, and other to people in right of their sovereignty.—*People ex rel. Budd v. Holden*, 28 Cal. 123, 129.

84. Jurisdiction of superior court to issue writs of quo warranto, given by constitution of 1879, is not exclusive of jurisdiction to entertain regular action to declare forfeiture of franchise.—*People ex rel. Warfield v. Sutter St. R. Co.*, 117 Cal. 604, 611, 612, 49 Pac. 736.

As to proceedings relating to irrigation districts under Confirmation Act of 1889, barring proceedings by quo warranto or action for usurpation, see pars. 4, 5, this note.

85. Same—Superior court has jurisdiction of this class of proceedings. Jurisdiction of quo warranto is given to that court by section 5 of article IV of state constitution. Also, authority of court, under section 809, post, to impose penalty of five thousand dollars upon defendant adjudged guilty, satisfies jurisdictional test as to amount of demand involved.—*People ex rel. Swift v. Bingham*, 82 Cal. 238, 239-242, 22 Pac. 1039.

86. Jurisdiction of superior court to try question of usurpation of an office, and incidentally existence of office, is not derived from any act relating to particular office, but from its constitutional grant of general jurisdiction in civil cases, exercise of which, so far as respects actions of this character, is regulated by chapter of Code of Civil Procedure treating of "actions for usurpation of office or franchise."—*Ex parte Henshaw*, 73 Cal. 486, 489, 491, 15 Pac. 110.

87. Former district court had jurisdiction of action to determine result of election to office.—*People ex rel. Budd v. Holden*, 28 Cal. 123, 129.

88. Information in nature of quo warranto to determine right to office can only be entertained in district courts of this state, being courts of highest original jurisdiction. Inferior courts, such as superior court of city of San Francisco, under con-

stitution of 1849, have no jurisdiction of such proceedings.—*People ex rel. Hughes v. Gillespie*, 1 Cal. 342, 344.

88. Same—Same—To review annexation proceedings of city council.—Whether or not petition for annexation of territory to city was signed by requisite number of electors can not be inquired into by court in action of quo warranto where determination whether it was so signed was question submitted by statute to decision of council.—*People ex rel. Skelton v. Los Angeles*, 133 Cal. 338, 342, 65 Pac. 749.

90. Same—Same—To dissolve corporation.—Jurisdiction of superior court to decree dissolution of any corporation exists only by virtue of statutory authority. It does not possess this authority by virtue of its inherent general jurisdiction in equity, either at suit of individual or at suit of state, and as its jurisdiction is derived from statute, it is limited by provisions of statute, both as to conditions under which it may be invoked and extent of judgment which it may make in exercise of its jurisdiction.—*State Inv. & Ins. Co. v. Superior Court*, 101 Cal. 135, 146, 35 Pac. 549.

91. Same—Supreme court has no original jurisdiction.—Supreme court has power to issue such writs and processes known to law as may be necessary to exercise of their jurisdiction, but jurisdiction of supreme court is strictly appellate. That court will not take original jurisdiction of an information in nature of quo warranto to determine right to office or existence of office.—*People ex rel. Attorney-General ex parte*, 1 Cal. 85, 86, 90. See *Caulfield v. Hudson*, 3 Cal. 389; *Milliken v. Huber*, 21 Cal. 166, 169; *People ex rel. Danielwitz v. Harvey*, 62 Cal. 508.

92. Nature and office of proceeding.—This section provides for action against one who unlawfully exercises any public office or any franchise.—*Ex parte Henshaw*, 73 Cal. 486, 493, 15 Pac. 110.

See, ante, § 802 and note.

93. Quo warranto does not lie against mere temporary employment, like that of jury; but lies only against holder of public office, having fixed and permanent tenure.—*Bruner v. Superior Court*, 92 Cal. 239, 248, 28 Pac. 341.

94. Proceedings under this chapter were maintained in following cases to question validity of election, appointment, or right to hold office, or exercise franchise, but no ruling as to character of action was made.—*People ex rel. Harris v. Brenham*, 3 Cal. 477, 501; *People v. Hoge*, 55 Cal. 612-627; *People v. Pfister*, 57 Cal. 532-534; *People ex rel. Wilshire v. Newman*, 96 Cal. 605-608, 31 Pac. 564; *People ex rel. Hoffman v. Hecht*, 105 Cal. 621, 631, 27 L. R. A. 203, 38 Pac. 941; *People ex rel. Spencer v. Knight*, 116 Cal. 108-110, 47 Pac. 925; *People ex rel. Barker v. Shaver*, 127 Cal. 347, 349, 59 Pac. 784; *People ex rel. Lawlor v. Williamson*, 135 Cal. 415, 421, 67 Pac. 504; *People ex rel. Weath-*

erly v. Golden Gate Lodge, 128 Cal. 257, 259, 60 Pac. 865.

As to actions for intrusion and usurpation, see pars. 65-76, 199-231, this note.

95. Same—Civil action, in form and procedure.—Action itself takes form of civil action, and, as to procedure therein, it follows rules prescribed for civil cases, and yet it is plain that judgment adjudging defendant to have usurped or unlawfully exercised franchise, and fining it five thousand dollars therefor, is clearly penal in its nature.—*People ex rel. Warfield v. Sutter St. R. Co.*, 129 Cal. 545, 547, 79 Am. St. Rep. 137, 62 Pac. 104.

See, ante, § 802 and note pars. 4, 11, 12.

96. An action against person for usurping or unlawfully holding office or franchise is civil rather than criminal action, whether it be regarded as authorized by this chapter of code or as proceeding instituted under provision in constitution giving to superior court jurisdiction to issue writs of quo warranto, although still retaining its criminal form and some of incidents of criminal proceeding (dis. op. Harrison, J.).—*People ex rel. Gesford v. Superior Court*, 114 Cal. 466, 475, 46 Pac. 383.

97. Former reading of section 802, ante, characterized the proceeding provided for by this section as an ordinary action. The reading was: "The writs of scire facias, of quo warranto, and proceedings in nature of quo warranto, are abolished. The remedies obtainable in these forms may hereafter be obtained by civil action, under provisions of this chapter."

As to proceedings of this nature being regarded as civil remedy, see brief 63 L. R. A. 769.

98. Under constitution of state of Minnesota, information in nature of quo warranto is not included within phrase "cases at law," but is considered as special proceeding, or what is termed "remedial case."—*State ex rel. Clapp v. Minnesota F. M. Co.*, 40 Minn. 213, 3 L. R. A. 310, 41 N. W. 1020.

99. In some jurisdictions civil action is only remedy for usurpation of office or franchise.—*State ex rel. Clapp v. Minnesota F. M. Co.*, 40 Minn. 213, 3 L. R. A. 310, 41 N. W. 1020.

As to civil actions to attain remedies formerly reached by the writ of quo warranto, and informations in the nature of quo warranto, see note 3 L. R. A. 513.

100. Compare: Proceeding under section 803 and succeeding sections is in its nature criminal prosecution (*McFarland, J.*, dis. op.).—*People ex rel. Warfield v. Sutter St. R. Co.*, 117 Cal. 604, 615, 616, 49 Pac. 736.

101. Same—Direct, rather than collateral, proceeding.—Information in nature of quo warranto is not collateral, but is direct proceeding to try title of office, and to inquire into all facts upon which title rests. The action of board of examiners in relation to sufficiency of officer's bond, or of board of

supervisors in declaring office vacant, may be reviewed. Rule that exercise of given discretion by particular board or person will not generally be reviewed, does not apply with same force as in other cases. Rights not only of contesting parties, but of people, are deeply involved in these questions, and to permit rule to apply to them with same strictness at it does in other cases would be inconsistent with ends of justice. Exercise of discretion in such cases is too important to be final; and if subject is to be reviewed at all, proceeding by information is direct and appropriate remedy.—*People ex rel. Attorney-General v. Scannell*, 7 Cal. 432, 443.

As to collateral inquiry, see pars. 13-28, this note.

102. Same—Distinguished from criminal proceedings.—Proceeding under section 772 of Penal Code for misdemeanor in office is in no sense proceeding in nature of quo warranto. Title to office is not in dispute.—*Wheeler v. Donnell*, 110 Cal. 655, 658, 43 Pac. 1.

103. Same—Distinguished from election contest.—Action to contest election under section 1111, post, is an entirely distinct proceeding from one authorized by this section. In former proceeding it is designed as speedily as may be to determine question (1) whether a given election was legally held; and (2) to decide which of two or more opposing candidates has been legally chosen to office. No question of usurpation, or unlawfully intruding, or of illegally holding enters into this consideration. Judgment which may be entered is one of three—judgment of dismissal, judgment setting aside and annulling election, or judgment declaring that contestee or some other person has received highest number of legal votes, and is therefore elected.—*Day v. Gunning*, 125 Cal. 527, 529, 530, 58 Pac. 172.

104. Same—Equivalent to quo warranto.—Proceeding under this chapter is substantially equivalent to that by quo warranto. It is same as quo warranto with something added.—*People ex rel. Davidson v. Perry*, 79 Cal. 105, 108, 21 Pac. 423; *People ex rel. Gesford v. Superior Court*, 114 Cal. 466, 475, 46 Pac. 383.

105. This chapter of Code of Civil Procedure, relating to actions for usurpation of offices or franchises, provides in effect for an information in nature of quo warranto, remedy or proceeding being extended to usurpations of or intrusions into any office or franchise.—*People ex rel. Attorney-General v. Stanford*, 77 Cal. 360, 376, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

106. Whether section 5 of article IV in constitution of 1879, and act of 1880, amending section 76, ante, reviving writ of quo warranto had effect to repeal by implication this chapter, providing for an action against persons who usurped office or franchise, makes little difference, as power under writ

of quo warranto is quite as broad as under statute.—*People ex rel. Attorney-General v. Dashaway Assoc.*, 84 Cal. 114, 120, 12 L. R. A. 117, 24 Pac. 277.

As to quo warranto, see pars. 202-206, this note; also, ante, § 802 and note.

107. Same—Public, rather than private, actions.—Fact that action is brought in interest of relator, private party does not convert proceeding into private action.—*People ex rel. Warfield v. Sutter St. R. Co.*, 117 Cal. 604, 612, 49 Pac. 738.

108. Other remedies—Certiorari is not proper remedy to contest right to office. Right of incumbent can not be questioned on review by certiorari, of judgment of superior court awarding possession of books and papers of office.—*Hull v. Superior Court*, 63 Cal. 174, 177. See *Lamb v. Schottler*, 54 Cal. 319, 321.

109. Same—Habeas corpus.—Existence of office of police judge of city may be determined upon habeas corpus proceeding instituted by prisoner.—*Ex parte Ah You*, 82 Cal. 339, 343, 22 Pac. 929.

See pars. 13-28, this note.

As to collateral attack on authority of court by habeas corpus, see *Kerr's Cyc. Pen. Code*, 2d ed., § 1484 and note par. 28.

As to extent of inquiry on habeas corpus, see *Kerr's Cyc. Pen. Code*, 2d ed., § 1484 and note pars. 5-13.

110. Same—Injunction is not available as means of determining disputed title to office.—*People ex rel. Attorney-General v. Dashaway Assoc.*, 84 Cal. 114, 117, 12 L. R. A. 117, 24 Pac. 277; *Guillotte v. Polney*, 41 La. Ann. 333, 5 L. R. A. 403, 6 So. 507.

111. Whether injunction can be issued to restrain person to whom certificate of election has been issued from exercising duties and functions of office, because of irregularities in his election by reason of non-compliance with requirements of primary election law, where matters complained of are not ground of contesting an election under sections 1111-1127, post, and where he has not actually intruded into office, was raised but not decided, as complaint failed to state facts sufficient to constitute cause of action, in *Powers v. Hitchcock*, 129 Cal. 325, 327, 328, 61 Pac. 1076.

As to injunction against usurpation of franchise, see brief 36 L. R. A. 846.

As to injunction not being proper remedy to try title to office, see notes 42 Am. St. Rep. 236; 47 L. R. A. 394.

As to injunction to enforce forfeiture, see *Kerr's Cyc. Civ. Code*, 2d ed., § 3369 and note.

As to injunction to prevent unlawful exercise of corporate privilege, see note 35 Am. St. Rep. 674, 675.

As to injunction to restrain exercise of public office, see *Kerr's Cyc. Civ. Code*, 2d ed., § 3423, subd. 6 and note.

112. *Same*—Mandamus is not proper remedy to try eligibility or title of office.—*Turner v. Malony*, 13 Cal. 621, 623; *Kelly v. Edwards*, 69 Cal. 460, 463, 11 Pac. 1, Nev. *Denver v. Hobart*, 10 Nev. 28. N. C. *Brown v. Turner*, 70 N. C. 93. Okla. *Ewing v. Turner*, 2 Okla. 94, 104, 35 Pac. 951. Ore. *Biggs v. McBride*, 17 Ore. 640, 652, 21 Pac. 878.

113. Statute has provided an action against any person who usurps an office, which is ample and furnishes not only specific but adequate and speedy remedy. Mandamus is therefore not proper.—*People ex rel. Smith v. Olds*, 3 Cal. 167, 177, 58 Am. Dec. 398.

114. It is well-settled rule of common law that title to office can not be tried by mandamus. Mandamus can give no right, not even right of possession, although it may enforce one. It may be resorted to for purpose of putting claimant in position to assert his right, when without that he could not do so. It may be used to compel an officer of election to give claimant certificate of his election, but this, if he obtains it, will not necessarily oust incumbent or give claimant possession of office. So, too, it will lie upon application of person showing *prima facie* right to office who seeks to have proper oath of office administered to him, to end that it may place him in condition to assert his legal rights, but he would still have to resort to *quo warranto* to oust incumbent and get possession of office.—*People ex rel. Smith v. Olds*, 3 Cal. 167, 175, 58 Am. Dec. 398.

115. Mandamus does not lie to try title to office which is filled de facto.—*Meredith v. Board of Supervisors*, 50 Cal. 433, 435.

116. Mandamus is not proper remedy for claimant of office to compel board of supervisors to issue certificate of election to him. Discretion of board in canvassing votes and determining election in favor of opponent can not be reviewed by mandamus.—*Magee v. Board of Supervisors*, 10 Cal. 376, 377.

As to mandamus not being proper remedy to try title to office, see notes 12 Am. Dec. 28-31; 12 Am. Dec. 59; 89 Am. Dec. 732; 13 Am. St. Rep. 273; 31 L. R. A. 342, 368.

As to mandamus to compel admission to office, see, post, § 1085 and note.

117. *Same*—*Same*—Mandamus proper, when.—It is undoubted rule that mandamus does not lie to try title to office. But this is founded upon just and expedient principle that writ will never issue when remedy at law is plain, speedy, and adequate. An application for writ of mandate to try title to office would be answered at once by suggestion that law affords adequate process and procedure by an action of *quo warranto* for usurpation of office. But when right is invoked to enforce specific duty, and remedies at law are not adequate, aid will not be refused merely because occupancy or incumbency or title is incidentally involved. Court will act under such circumstances as

does equity, and inquire into and determine rights so far as, but no farther than, may be necessary to granting of relief sought. Where there are two bodies claiming to constitute board of supervisors, and it is not admitted or established that one or another of boards is de facto body and auditor refuses to recognize, compute, and enter tax-levy in accordance with rate fixed by either one of such bodies claiming to be board of supervisors, court will determine on mandamus directed to auditor which body of men claiming to constitute board if legally entitled to such office, and will compel auditor to enter tax-levy in accordance with rate fixed by it. Cases in which doctrine is invoked that mandamus will not lie to try title to office are those like *People ex rel. Smith v. Olds*, 3 Cal. 167, 58 Am. Dec. 398, and *Kelly v. Edwards*, 69 Cal. 460, 11 Pac. 1, where respondent being admitted or proved to be at least de facto officer, express purpose of the action upon the part of the petitioner is to establish in himself superior legal right to office. And this courts uniformly hold may not be done in mandamus.—*Morton v. Broderick*, 118 Cal. 474, 481, 50 Pac. 644.

118. If title is not involved, except incidentally, and aid of writ of mandamus is sought merely to obtain possession of effects, moneys, and official belongings of office, writ will lie. While it is true that *quo warranto* is only method of determining disputed questions of title to public offices, yet mere groundless assumption of election on part of respondent and pretended exercise of functions of office de facto will not deter court from granting mandamus. As regards evidence of his title, which relator must show who seeks aid of mandamus to recover possession of official records and insignia, it is held that, having received certificate of election, and qualified in manner provided by law, he is *prima facie* entitled to their possession, and may enforce his rights by aid of writ; and upon application for mandamus, court will not go behind certificate of election to try relator's actual title.—*Ewing v. Turner*, 2 Okla. 104, 35 Pac. 951.

119. The position of teacher in public school of city is not an office nor does such teacher occupy merely position of employee under contract. Under sections 1617 and 1793 of Political Code he has right to retain such position, when once elected, until removed for good cause. Mandamus is proper remedy to restore teacher to such position when unlawfully deprived of it. As his term of service is uncertain and depends upon action of board of education, based upon causes named in statute, his damages could not be ascertained with certainty, and action for such damages could not be adequate remedy.—*Kennedy v. Board of Education*, 82 Cal. 483, 488, 493.

120. *Same*—Prohibition is not available as remedy to prevent usurpation of office — *Buckner v. Veuve*, 63 Cal. 304.

121. Prohibition is not available to prevent acts of de facto ministerial officer or to try right to office.—*Havemeyer v. Superior Court*, 84 Cal. 327, 392, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

122. Right of one claiming to act as sheriff of county can only be questioned in proper proceeding by information in nature of quo warranto. Prohibition is not available to prevent court from recognizing and taking judicial notice of acts of one claiming to act as sheriff and tax-collector.—*Hull v. Superior Court*, 63 Cal. 179.

123. For usurpation or abuse of power, writ of prohibition should not be granted, unless other remedies provided by law are inadequate to afford full relief.—*Walcott v. Wells*, 21 Nev. 47, 55, 37 Am. St. Rep. 478, 9 L. R. A. 59, 24 Pac. 367.

As to contesting election to office, see, post, §§ 1111-1127 and notes.

124. Parties—In general.—As to parties to proceedings of this nature, see note 30 Am. Dec. 44-52.

125. Same—Defendants—In action against corporation acting under defective articles.—Corporation is necessary party defendant in action brought for usurping franchise to be corporation where complaint sets forth facts showing existence of de facto corporation acting under articles of incorporation which are alleged to be defective. In such case action can not be maintained against trustees of corporation alone.—*People ex rel. Schindler v. Flint*, 64 Cal. 49, 52, 28 Pac. 495; *People ex rel. Attorney-General v. Stanford*, 77 Cal. 360, 370, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

126. It was said in *People ex rel. Attorney-General v. Stanford*, 77 Cal. 360, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693, that corporation should not be treated as person which could be sued simply to obtain judgment that it was not and never had been such person. There is no such inconsistency where it is averred that corporate defendant is corporation de facto, but it is claimed that it did not become corporation de jure because persons who attempted incorporation did not comply with conditions which statute makes conditions precedent to its rightful incorporation. Under such circumstances, although association is legal entity which may be sued, its rights to corporate existence may be questioned by state in proceedings in nature of quo warranto in which corporation is made party defendant. Under such circumstances it seems clear that corporation is not only proper but necessary party.—*People v. Montecito W. Co.*, 97 Cal. 276, 277, 32 Pac. 236.

127. An information was filed against individuals for usurping franchise of corporation. Complaint showed that articles of incorporation of California Farmers' Mutual Fire Insurance Association had been filed, but that they were defective in that they failed to state amount of stock subscribed

in manner required by statute. Corporation was not joined as defendant. Demurrer for defect of parties in this regard was overruled. The decree enjoined defendants from doing or transacting any business, issuing any policies of insurance, directly or indirectly prosecuting or maintaining any action, process, or writs whatever as corporation for, in name of, or for benefit of California Farmers' Mutual Fire Insurance Association, or for or on account of any claims, demands, or business of said association whatever. Supreme court held this to be error, saying: "The alleged corporation is not party, and has not been heard; therefore its right of existence, or its right to transact business, can not be adjudged or determined in this proceeding. It may be that individuals, perhaps relator, have had such transaction with alleged corporation as not to be in condition to dispute its existence. People are interested to extent that no further insurance business shall be transacted by defendants (that is, no policy issued); and to that extent defendants might perhaps be enjoined; but to prevent corporation from collecting its dues, or maintaining any action, without being heard as to its right so to do, is beyond scope of present proceeding. . . . It certainly should be heard before any decree should be made affecting its rights; and possibly very right of defendants as individuals to transact business or do any act might involve right of corporation to have business done. Rights of corporation may be, and probably are, involved in very acts sought to be enjoined. It has right to take an issue on allegation that individuals enjoined are its trustees or directors."—*People ex rel. Schindler v. Flint*, 64 Cal. 49, 52, 28 Pac. 495.

128. Same—Same—In actions against corporations for abuse or usurpation of powers.—If it is claimed that corporation is usurping privileges and powers not belonging to it, corporation is proper and only party.—*People ex rel. Attorney-General v. Stanford*, 77 Cal. 360, 363, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693; *People ex rel. Van Loben Sels v. Reclamation Dist.*, 117 Cal. 114, 117, 48 Pac. 1016.

129. Where action is for forfeiture of franchise or corporation for abuse and misuse of its powers, corporation is proper party defendant.—*People ex rel. Attorney-General v. Dashaway Assoc.*, 84 Cal. 114, 121, 12 L. R. A. 117, 24 Pac. 277.

130. Same—Same—In action against individual for usurpation of city office, where proceeding attacks existence of municipal corporation.—The authorities are by no means uniform upon point whether municipal corporation should be made party defendant to proceeding by quo warranto to determine title of an individual to office of mayor of such city, when proceeding attacks right of city to exercise franchise of municipal corporation. There are cases where proceedings in effect to determine

legal existence of municipal corporation have been sustained without making municipality party, and that where question was directly raised. Weight of authority and better reasoning is that whenever proceeding is such as must test and determine validity of municipal charter, as such the municipality, real or pretended, must be made party. It may be otherwise where only effect of proceeding will be to determine right of some particular person to exercise certain powers under charter.—*People v. Gunn*, 85 Cal. 238, 243, 244, 24 Pac. 718.

As to whether it is necessary that a municipal corporation should be made a party defendant in a proceeding instituted against the incumbent of an office of such municipal corporation on the ground that the pretended municipal corporation has never been legally created, see brief 61 L. R. A. 734, 735.

131. Same—Same—In action against municipality for usurpation of corporate capacity.—Maintenance of action against municipal corporation for usurpation of franchise will not be defeated by objection that such action can be maintained only against person or corporation, and that as complaint shows that corporation was never legally organized, there is no person or corporation defendant against whom to maintain action. It is true that under common law an information for usurping franchise to be a corporation should be against particular persons guilty of usurpation, but no substantial right of any one can be prejudiced by upholding such action, and object of code will be thereby effected and justice promoted.—*People ex rel. Beltner v. Riverside*, 66 Cal. 288, 289, 290, 5 Pac. 350.

132. In action against municipal corporation for usurpation of franchise on ground that it has never been legally incorporated, it is not necessary to join trustees of defendant with it.—*People ex rel. Beltner v. Riverside*, 66 Cal. 288, 290, 5 Pac. 350.

133. In proceeding against municipal corporation for usurping franchise to be corporation, trustees of city can not be sued, as there could be no trustees if there were no city, and no individuals could be made parties as claiming to be corporation. In case of private corporation, rule must be entirely different. If no corporation exists, parties who are claiming to be such can be proceeded against. That such is only proper course where it is claimed that certain persons are unlawfully claiming to be and are exercising function of private corporation which never had existence, authorities are agreed.—*People ex rel. Attorney-General v. Stanford*, 77 Cal. 360, 370, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

134. Same—Same—In action where existence of corporation is questioned.—It is well settled that corporation can not be sued as such and brought into court in an action maintained against it on ground that it is

not corporation. If it is intended to draw in question franchise of corporation, proceeding must be against individuals who usurped franchise.—*People ex rel. Attorney-General v. Stanford*, 77 Cal. 360, 363, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693; *People ex rel. Van Loben Sels v. Reclamation Dist.*, 117 Cal. 114, 117, 48 Pac. 1016.

135. If quo warranto be brought for usurping right to be corporation, it should be brought against particular persons, because it is in disaffirmance of incorporation, and then judgment of ouster will be given; but if liberty is claimed by corporation, it must be brought against corporation itself.—*State ex rel. Crow v. Fleming*, 147 Mo. 1, 12, 44 S. W. 758.

136. In an action against individuals for usurping franchise to be corporation, all those claiming to be stockholders need not be joined as defendants, since where parties are very numerous, or there are very many in same interest who can not be easily ascertained, or where question is one of common interest, and one or more may sue or defend for whole, or where parties form involuntary association, and those made defendants may be fairly presumed to represent interest of all, it is not necessary that all be made parties. Where defendants are chosen officers and directors of alleged corporation, its governing body, they fairly represent other stockholders.—*State ex rel. Sanche v. Webb*, 97 Ala. 111, 38 Am. St. Rep. 151, 12 So. 377.

137. Existence of corporation, at least as de facto entity, is admitted by making it party defendant. If complaint alleges and action is maintained on theory that assumed corporation never had been corporation, it should not be made defendant.—*People ex rel. Attorney-General v. Stanford*, 77 Cal. 360, 364, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

138. Weight of authority may be regarded as sustaining proposition that effect of filing an information against corporation by its corporate name to procure forfeiture of its charter, or to compel its disclosure by what authority it exercises its corporate franchise, is to admit existence of corporation. Franchise to be corporation is one in question, and proceedings under statute should be against individuals who usurp such franchise, or who assume to act as such corporation.—*State ex rel. Sanche v. Webb*, 97 Ala. 111, 38 Am. St. Rep. 151, 12 So. 377.

139. People can not bring both corporation and individuals who compose it before court by information in nature of quo warranto and claim non-existence of corporation thus brought before court, and that other defendants, generally with it, are claiming to be and exercising rights and privileges of such corporation. To permit such course would be subversive of all rules of pleading. The impropriety of attempting to join corporation and individuals alleged to be acting as such in same action is made

manifest by fact that it is impossible that both could be doing acts alleged. That individuals are in wrong can only be established by showing that there is no such corporation; and if corporation itself exists and is itself exercising franchises complained of, individuals charged may truthfully and with perfect propriety deny that they are exercising such franchise. Such denial is complete defense to action as to them.—People ex rel. Attorney-General v. Stanford, 77 Cal. 360, 364, 366, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

As to corporate character being admitted by making the corporation a party defendant, see note 3 L. R. A. 512; brief 61 L. R. A. 735.

140. Same—Same—Joinder of defendants claiming one office.—An information against three persons who claim to constitute board of trustees of school district is not objectionable as uniting three causes of action. In such case office or franchise is same. Three trustees constitute board or entity charged with performance of same public duty; and where right of each member of board depends upon same facts, question is whether board, composed of three persons, has legal existence and right to exercise powers conferred upon it as such. And it is provided by section 808, post, that if several persons claim to be entitled to same office or franchise, one action may be brought against all such persons in order to try their respective rights to such office or franchise.—People ex rel. Lee v. Prewett, 124 Cal. 7, 13, 56 Pac. 619.

As to trying rights of several claimants to one office or franchise in one action, see, post, § 808.

141. Same—Same—Stockholders of corporation are in certain sense parties to an action to forfeit its franchise, but they are not parties in any other sense than that they are bound by consequence of such judgment as court in that action has power to give. If court goes outside of issues in action and renders judgment or makes an order embracing matters entirely foreign to such issues, stockholders are not bound by such judgment or order.—Havemeyer v. Superior Court, 84 Cal. 327, 385, 386, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

142. Same—Intervention of interested persons.—Persons interested in result of litigation, as holders of bonds of irrigation district which is charged with usurping franchise of being corporation, may intervene and join in defending action, and may avail themselves of all procedure and remedies to which defendants would be entitled for purpose of defeating action or resisting claim of plaintiff.—People ex rel. Fogg v. Perris Irr. Dist., 132 Cal. 289, 290, 64 Pac. 399, 773.

143. Same—Municipal corporation in "person" in same sense in which word is used in this section.—People ex rel. Adams v. Oakland, 92 Cal. 611, 614, 28 Pac. 807. See People v. Town of Nevada, 6 Cal. 143, 144. C. C. P.—125

144. Same—Plaintiff.—As to state being proper party to institute such proceedings, see note 3 L. R. A. 511.

145. Same—Relator.—Party not entitled to an office may be relator at whose instance proceeding is maintained.—People ex rel. Swift v. Bingham, 82 Cal. 238, 243, 22 Pac. 1039; People ex rel. Gesford v. Superior Court, 114 Cal. 466, 478, 46 Pac. 383.

146. If proceeding is one in which private person can have no interest, proceeding is not properly by relation. But attorney-general has power to institute proceeding, and in either form it is by him. If unnecessarily he adds that it is by relation of named person, that does no harm.—People ex rel. Warfield v. Sutter St. Co., 117 Cal. 604, 612, 49 Pac. 736.

As to who may be relator, see brief 57 L. R. A. 244.

147. Pleading—In general.—Proceedings in nature of quo warranto need not be commenced by summons and complaint under sections of code providing that all civil actions in courts of record, except as otherwise provided in code, must be commenced by service of summons, etc. A settled practice is to commence such proceedings by information, or petition in nature of information, setting forth facts and praying for writ of quo warranto.—Capital City W. Co. v. State ex rel. Macdonald, 105 Ala. 406, 29 L. R. A. 743, 18 So. 62.

As to pleadings in quo warranto, see note 30 Am. Dec. 44-52; brief 63 L. R. A. 768, 769.

148. Same—Answer.—Proper course for respondent is either to disclaim or justify. If he seeks to justify he must set out his title specially and distinctly.—People ex rel. Attorney-General v. Stanford, 77 Cal. 360, 377, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693; People ex rel. Gesford v. Superior Court, 114 Cal. 466, 476, 477, 46 Pac. 383; Illinois M. R. Co. v. People, 84 Ill. 426; People ex rel. Dickson v. Clayton, 4 Utah 421, 11 Pac. 206, 211.

As to rule that respondent must either justify or disclaim, see note 30 Am. Dec. 44-52; briefs 63 L. R. A. 768; 64 L. R. A. 367.

149. Defendant is at liberty to set forth by answer as many defenses as he may have.—People ex rel. Madden v. Stratton, 28 Cal. 382, 387.

As to statute of limitations and other defenses which bar action, see pars. 3-9, 200, this note.

150. Same—Same—Affirmative showing of right required, when.—Where defendants admit, or do not deny, that they are exercising rights and privileges alleged, and they attempt to establish their right to do so, they must show affirmatively by what right they are exercising franchises.—People ex rel. Attorney-General v. Stanford, 77 Cal. 360, 365, 366, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693; People ex rel. Gesford v. Superior Court, 114 Cal. 466, 477, 46 Pac. 383.

151. Where verified complaint sets up facts showing illegality of charter of corporation a general answer, or one which merely denies conclusions of law stated in complaint, or sets up affirmatively conclusions of law, is insufficient, and judgment may be rendered against defendant on pleadings.—*People v. Lowden*, 2 Cal. Unrep. 537, 8 Pac. 66, 68.

152. If defendant was exercising functions of judge as same are defined in act creating office of judge of police court of city of Oakland,—trying causes and rendering judgments,—and was called on by state to show by what authority he was doing these things, he could not defend his conduct by proving no one else had power to exercise its functions. As between people on one hand, and petitioner on other, important question was not so much whether office existed as whether he was unlawfully exercising public functions such as were attached to office when office did exist.—*Ex parte Henshaw*, 73 Cal. 486, 492, 493, 15 Pac. 110.

153. Answer must show that corporation was organized in manner required by general laws in action for usurpation of corporate franchise.—*People ex rel. Attorney-General v. Stanford*, 77 Cal. 360, 378, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

154. Same — Same — Denial sufficient, when.—Answer denying that defendants have for long time, or do now, or at any time have unlawfully claimed, or unlawfully exercised, franchises, powers, or privileges alleged in complaint, together with similar general denial of other material allegations of complaint, is sufficient where defendants rest their defense on denial that they are making such claim and exercising rights and privileges alleged.—*People ex rel. Attorney-General v. Stanford*, 77 Cal. 360, 363, 366, 367, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

155. Same — Same — Estoppel of defendant.—One who is exercising public functions of office as same were defined in repealed statute can not deny existence of office and base upon that denial right to continue exercise of powers unauthorized by law. One who has unlawfully assumed powers of office is estopped from asserting, when he is pursued for usurpation, that office no longer exists.—*Ex parte Henshaw*, 73 Cal. 486, 493, 494, 15 Pac. 110.

156. Declaration of vacancy of office made under section 975 by Political Code does not bind officer so as to prevent his contesting fact of vacancy upon proceedings brought against him in quo warranto. The law gives certain inferior jurisdictions right to make prompt, summary, and ex parte declaration that office is vacant, and at once to fill vacancy by appointment, so that question may be as speedily settled as possible, by proceedings in nature of quo warranto. This declaration of vacancy is but preparatory step to appointment, and appointment is but preparatory to proper

proceeding to settle question of title to office by proper tribunal.—*People ex rel. Attorney-General v. Scannell*, 7 Cal. 432, 439.

157. Principal is not concluded by admissions of his deputies, made in action prosecuted against them under this chapter, to which he was not party.—*People ex rel. Fleming v. Shorb*, 100 Cal. 537, 541, 38 Am. St. Rep. 310, 35 Pac. 163.

158. Same—Same—Plea of not guilty is insufficient and not to be regarded as defense. Answer must be in writing as in other civil actions (dissenting opinion of Sanderson, J. This question was not passed upon by majority of court, as question was raised in supreme court on mandamus, which they held to be not proper remedy).—*People ex rel. Gesford v. Superior Court*, 114 Cal. 466, 475, 476, 46 Pac. 383.

As to rule that not guilty and other pleas that are not good pleas, see note 30 Am. Dec. 44-52.

159. Same—Same—Relevant facts not denied are deemed admitted.—Although complaint under proceedings authorized in this state need not allege facts constituting usurpation or illegal exercise of office by defendant, and will be sufficient by merely alleging that he is unlawfully exercising office, leaving his right to such exercise to be pleaded in his defense, yet such allegation in complaint, being materially relevant to issue, must be denied, or facts thus alleged must be held to be admitted by defendant.—*People ex rel. Gesford v. Superior Court*, 114 Cal. 466, 477, 46 Pac. 383.

160. Same—Complaint—Allegations may be either general or specific.—Mode of pleading in cases of usurpation of franchises is now by no means uniform. It is undoubtedly true that state may charge corporation with usurpation of franchise in general terms, and call upon it to allege and prove facts showing its right, and thus place burden upon defendant. An information on behalf of state may, however, allege specific grounds or defects relied upon to show usurpation, instead of charging usurpation in general terms, and this mode of pleading has become quite common. But if facts upon which alleged usurpation is based are pleaded by state, facts so pleaded must be sufficient to sustain charge of usurpation if admitted, and, if denied, burden of proof is upon plaintiff.—*People ex rel. Skelton v. Los Angeles*, 133 Cal. 338, 340, 341, 65 Pac. 749.

161. It was peculiarity of both quo warranto and information in nature of quo warranto that ordinary rule of pleading was reversed, and state was bound to show nothing, and defendant was required to show his right to franchise or office in question; and if he failed to show authority, judgment went against him. Practice has, however, become quite general in this country for information to set forth facts relied upon to show intrusion, misuser, or non-user com-

plained of.—*People ex rel. Attorney-General v. Dashaway Assoc.*, 84 Cal. 114, 118, 119, 12 L. R. A. 117, 24 Pac. 277.

162. Complaint need not allege facts constituting usurpation or illegal exercise of office by defendant. It is sufficient if it merely alleges that he is unlawfully exercising office, leaving his right to such exercise to be pleaded in his defense.—*People ex rel. Gesford v. Superior Court*, 114 Cal. 466, 477, 46 Pac. 383.

163. It is sufficient in action against individuals, charging that they are wrongfully claiming to act as corporation, to allege in general terms that there never was such corporation. In such case allegation that there never was such corporation covers whole ground.—*People ex rel. Attorney-General v. Stanford*, 77 Cal. 360, 365, 367, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

164. In proceeding against toll-road company to determine its right to collect tolls, it is sufficient to allege in complaint merely fact that defendant is claiming and exercising franchise, and to aver that it is without right. If pleader alleges existence of franchise at some time he should state facts showing that it has ended or been forfeited.—*People v. Volcano C. T. R. Co.*, 100 Cal. 87, 90, 34 Pac. 522.

165. Complaint which shows that defendant is exercising franchise of being municipal corporation without being incorporated according to law states facts sufficient to constitute cause of action.—*People ex rel. Schindler v. Flint*, 64 Cal. 49, 51, 28 Pac. 495; *People ex rel. Beltner v. Riverside*, 66 Cal. 288, 291, 5 Pac. 350.

166. An averment that defendants held, used, exercised, an enjoyed office in question without license for that purpose is sufficient. These are facts constituting cause of action, and only facts necessary to be stated.—*People ex rel. Flynn v. Abbott*, 16 Cal. 359, 365.

167. Complaint which alleged that defendant "did usurp and intrude into office of auditor of public accounts in and for territory of Utah, and ever since that time has and does still hold and exercise functions of said office, without authority of law therefor," was held sufficient.—*People ex rel. Dickson v. Clayton*, 4 Utah 421, 11 Pac. 206.

As to allegations concerning relator, see pars. 178, 181, this note; also, post, § 804.

As to complaint, see, post, § 804.

As to necessary allegations in an information in the nature of quo warranto, see note 30 Am. Dec. 44-52; briefs 1 L. R. A. 771; 63 L. R. A. 768, 769.

168. Same—Same—Allegations necessary in particular cases—Defective incorporation.—If claim is that corporation is acting as such but proceeding under which it is acting is defective, facts showing that it is so claiming to act, and defects claimed to exist, should be set out specifically.—*People ex rel. Attorney-General v. Stanford*,

77 Cal. 360, 365, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

169. Same—Same—Same—Existence of corporate franchise sought to be forfeited.—Complaint which alleges that by reason of acts and omissions of defendant company, if said company ever had, as corporation, "any legal existence, right, privilege, or franchise," etc., "the same became forfeited," and does not allege that said company once had legal existence as corporation, falls to state cause of action. There could be no resumption by state or forfeiture of franchises never granted. In California it is enough to aver existence and due organization of corporation under general laws.—*People ex rel. Attorney-General v. Stanford*, 77 Cal. 360, 373, 374, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

170. Same—Same—Same—Forfeiture of street-railway franchise, for non-user.—Actual use of franchise by defendant is not in all cases necessary in order to authorize action for usurpation of such franchise. Complaint in action to forfeit franchise of street-railway company to maintain tracks upon certain street is not open to objection that it does not state cause of action because it avers that upon tracks which defendant has constructed, it has not at any time operated a railway, if complaint does say that franchise was granted upon certain conditions as to operation which had not been complied with and that defendant merely pretended to operate same by running over track one car every day, not with intention to accommodate public, but for purpose only of maintaining the franchise. Public is interested in having such franchise out of way, that right might be granted to another.—*People ex rel. Warfield v. Sutter St. R. Co.*, 117 Cal. 604, 610, 611, 49 Pac. 736.

171. Same—Same—Same—Illegality of election.—Complaint in proceeding in nature of quo warranto, brought for purpose of having it adjudicated that municipal election was illegal and for ousting from office of mayor person chosen for that office at such election, which alleges as basis of claim of illegality that in certain precincts only register of voters used was old register compiled prior to first day of year in which such election occurred, and that law required that no one could legally vote at such election who had not been registered forty days before such election on new register which clerk commenced to prepare on first day of such year, does not state facts sufficient to constitute cause of action where no fraud is alleged and it is not averred that any legal voter was denied right to vote, or that persons voting in such precincts where old register was used were not, independent of question of registration, qualified voters, or were not on legal register, or that rejection of their ballots would have changed result. If said persons, otherwise qualified voters, had caused their names to be properly registered they did, not lose their votes because officers of elec-

tion neglected to perform ministerial and directory duty of having proper register before them for examination.—*People v. Worswick*, 142 Cal. 71, 77, 75 Pac. 663.

172. Same—Same—Same—Intrusion into office.—Complaint showing that plaintiff is still holding and exercising office, and containing no allegations that defendant has usurped or intruded into any office, does not state cause of action quo warranto.—*Powers v. Hitchcock*, 129 Cal. 325, 327, 61 Pac. 1076.

173. If complaint is not sufficiently formal in averring that defendant had intruded into usurped office in question, defect should be presented by special demurrer. If allegations of complaint sufficiently show that defendant is in possession of place, and this without lawful authority, this will be sufficient allegation of intrusion and usurpation in absence of special demurrer.—*People ex rel. Palmer v. Woodbury*, 14 Cal. 43, 45.

174. Same—Same—Same—Perversion of purpose of corporation.—Where only allegations touching objects of corporation, scope of its action, and manner of its achievements are "that object and purpose for which said corporation was formed was to promote cause of temperance"; and that it has received moneys contributed and donated by its members and others for "promotion of cause of temperance," complaint is too vague and uncertain to enable court to say therefrom that fund in question is public charity, which can be administered by court of equity. It does not show that perversion of fund is injury to public, and does not state case for forfeiture of corporate franchise.—*People ex rel. Attorney-General v. Dashaway Assoc.*, 84 Cal. 114, 123, 12 L. R. A. 117, 24 Pac. 277.

175. Same—Same—Same—Termination of corporate franchise.—Where existence of corporation is expressly averred, or is admitted, it is not sufficient to allege that it has ceased to exist. Facts showing that its existence has terminated must be set forth.—*People ex rel. Attorney-General v. Stanford*, 77 Cal. 360, 365, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693. See *People v. Volcano C. T. R. Co.*, 100 Cal. 87, 90, 34 Pac. 522.

176. Same—Same—Same—Usurpation of franchise of being corporation.—In order to dissolve corporation there must be averment of usurpation of franchise of being corporation, and judgment excluding defendant from exercising said franchise, that is, from assuming to be corporation. Complaint which alleges usurpation of certain enumerated franchises other than that of being corporation, and judgment which merely declares that defendant is guilty of usurping rights and franchises "as charged and alleged in complaint," and adjudges that defendant be excluded from "such rights, privileges, and franchises," does not have effect of dissolving corporation.—*Yore v. Superior Court*, 108 Cal. 431, 436, 437, 41 Pac. 477.

As to what information for usurpation of franchise must show, see brief 63 L. R. A. 768.

177. Same—Same—Miscellaneous rulings as to complaint.—For statement of facts held to constitute sufficient complaint against corporation, whether proceeding considered one brought under this chapter or in support of writ of quo warranto, for purpose of forfeiting charter of corporation organized for purpose of promoting temperance, and for judgment declaring that its property escheat to state because of abuse of its powers and disregard of its corporate trusts.—See *People ex rel. Attorney-General v. Dashaway Assoc.*, 84 Cal. 114, 115, 116, 121, 12 L. R. A. 117, 24 Pac. 277.

178. Allegations of complaint that at general election of 1861 an election for office of district attorney of county of Sonoma was held in that county, and that relator was, by greatest number of votes cast in said county, elected district attorney, taken with an answer denying that relator was elected, and finding of court that such election was held, and that at such election relator received greatest number of votes cast in county for district attorney are sufficient to sustain judgment for relator.—*People ex rel. Wicks v. Jones*, 20 Cal. 50, 54.

179. Allegation in complaint against toll-road company alleging "that for more than six months last past defendant has had no franchise or right to demand and take toll from passengers or travelers," is not admission that prior to such time defendant had franchise. It is entirely consistent with proposition that defendant never had franchise at any time.—*People v. Volcano C. T. R. Co.*, 100 Cal. 87, 90, 34 Pac. 522.

180. Complaint is not ambiguous in that it asserts that defendant usurps and unlawfully holds and exercises franchise to maintain in and upon certain streets street-railway, while it also alleges that defendant has never operated street-railway on said streets, if whole pleading makes it plain that defendant has franchise to effect indicated, of which forfeiture is claimed because it has never operated street-railway for convenience of public, but for more than six years has maintained, pretended, simulated service only.—*People ex rel. Warfield v. Sutter Street R. Co.*, 117 Cal. 604, 610, 49 Pac. 736.

181. If complaint alleges that defendant has usurped office, erroneous allegations of statutory origin of office may be disregarded as surplusage. It will then be sufficient to give court jurisdiction to decide question of usurpation.—*Ex parte Henshaw*, 73 Cal. 486, 489, 15 Pac. 110.

182. If no relief is asked in favor of relator, allegations of complaint setting forth his right to office are superfluous and immaterial.—*People ex rel. Flynn v. Abbott*, 16 Cal. 359, 365.

As to statement that information was filed by request being regarded as surplusage, see brief 63 L. R. A. 766.

183. If allegations are insufficient to authorize determination of rights of relator, proper course is to disregard them.—People ex rel. Flynn v. Abbott, 16 Cal. 359, 365.

184. **Same—Demurrer.**—General demurrer to complaint does not raise any questions as to sufficiency of allegations relating to right of relator to office.—People ex rel. Flynn v. Abbott, 16 Cal. 359, 365.

185. General demurrer of defendant does not raise question as to whether relator's bond has been properly approved.—People ex rel. Fleming v. Shorb, 100 Cal. 537, 541, 38 Am. St. Rep. 310, 35 Pac. 163.

186. Where the words "township" and "precinct" are used synonymously in complaint, answer, and finding, and in stating facts concerning an election in said precinct, and no objection is taken by demurrer or otherwise on this ground, and statute requires that there shall be an election precinct in each township, defendant can not, on appeal, for first time object that complaint does not allege, or judge find, that said place was a "precinct" at which election could have been held.—People ex rel. Wicks v. Jones, 20 Cal. 50, 55.

As to demurrer, see also par. 169. this note.

187. **Same—Joinder of causes.**—To allege that defendant, a street-railway company, unlawfully exercises and wrongfully claims right to exercise a franchise, and that it claims right to lay tracks and make switches, is not to unite two causes of action.—People ex rel. Warfield v. Sutter Street R. Co., 117 Cal. 604, 610, 49 Pac. 736.

188. The three trustees of school district constitute board or entity charged with performance of same public duty; and where right of each member of board depends upon same facts, question is whether board, composed of three persons, has legal existence and right to exercise powers conferred upon it as such. An information in nature of quo warranto against all such trustees to determine their right of office is not open to objection that three causes of action are improperly united.—People ex rel. Lee v. Prewett, 124 Cal. 7, 13, 56 Pac. 619.

See, post, § 808.

189. **Practice—In general.**—As to procedure, action follows rules prescribed for civil cases.—People ex rel. Warfield v. Sutter Street R. Co., 129 Cal. 545, 547 79 Am. St. Rep. 137, 62 Pac. 104.

190. While statute has changed form of pleading with respect to rights and wrongs, of which quo warranto was formerly remedy, change is simply as to form, and not as to substance. The position of the parties, rules of evidence, and presumptions of law remain same as before.—People ex rel. Dickson v. Clayton, 4 Utah 421, 11 Pac. 206.

As to appeal, see, post, § 805 and note pars. 1-8.

As to right to jury trial in such cases, see notes 3 L. R. A. 510; 24 L. R. A. 806, 807; 24 L. R. A. (N. S.) 639.

As to security by relator, see, post, § 810.

191. **Same—Attorney-general has control of action** although it be brought upon relation of private party.—People ex rel. Warfield v. Sutter Street R. Co., 117 Cal. 604, 612, 49 Pac. 736.

192. Action may be brought by attorney-general for usurpation of an office or franchise.—People ex rel. Attorney-General v. Stanford, 77 Cal. 360, 372, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

193. Action is in no legal sense under control of relator. Stipulation between private attorney for relator and attorney for defendant is not binding on state.—People ex rel. Budd v. Holden, 28 Cal. 123, 139.

As to discretion of attorney-general to determine whether quo warranto shall be brought, see brief 63 L. R. A. 756, 768.

194. **Same—City has no power to institute action** to secure forfeiture of street-railway franchise. That power is invested in attorney-general.—People ex rel. Warfield v. Sutter Street R. Co., 117 Cal. 604, 612, 49 Pac. 736.

195. **Same—Dismissal.**—An information in nature of quo warranto may be dismissed for want of prosecution in same manner as any other action.—People ex rel. Stone v. Jefferds, 126 Cal. 296, 301, 58 Pac. 104.

196. **Same—Leave of court.**—It is not necessary for relator to obtain leave or order of any court to institute and prosecute this proceeding before filing information.—Capital City Water Co. v. State ex rel. Macdonald, 105 Ala. 406, 18 So. 62, 29 L. R. A. 743.

As to whether leave of court is necessary to institute proceeding by quo warranto, see note 30 Am. Dec. 44-52; brief 63 L. R. A. 767; note 1 L. R. A. (N. S.) 826.

As to discretion of court, see, ante, § 802 and note pars. 8, 9.

197. **Same—New trial of action** brought under authority of this section is permissible.—People v. Oakland, 123 Cal. 145, 146, 55 Pac. 772. See People ex rel. Warfield v. Sutter Street R. Co., 117 Cal. 604, 614, 49 Pac. 736; People ex rel. Drew v. Rodgers, 118 Cal. 393, 398, 46 Pac. 740, 50 Pac. 668; People ex rel. Fogg v. Perris Irr. Dist., 132 Cal. 289, 293, 64 Pac. 399, 773.

198. **Receiver for defendant corporation.**—Receiver of corporate property can not be appointed unless new and distinct proceeding is commenced by creditor or stockholder of corporation. Such new and distinct proceeding upon part of beneficiaries, or some of them, is an essential condition of any jurisdiction in court to take property out of control of trustees designated by law. An order appointing receiver without such application is, therefore, void, not only as to strangers to quo warranto, but

is even void as to corporation and its stockholders and vendees.—*Havemeyer v. Superior Court*, 84 Cal. 327, 362, 380, 384, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121. See *Neall v. Hill*, 16 Cal. 146, 149, 150; *Peo-ex rel. Commissioners v. Union B. & L. Assoc.*, 127 Cal. 400, 407, 59 Pac. 692; *Murray v. Superior Court*, 129 Cal. 628, 632, 633, 62 Pac. 191.

As to appointment of receiver in quo warranto proceedings, see note 72 Am. St. Rep. 86.

As to appointment of a receiver of corporate property, see note 72 Am. St. Rep. 48-60.

As to appointment of receiver in action to dissolve insurance company, see *Kerr's Cyc. Pol. Code*, 2d ed., § 803, note par. 6.

As to appointment of receiver upon dissolution of corporation, see, ante, § 565 and note.

As to settlement of affairs of corporation dissolved by action under this chapter, see, post, § 805 and note par. 25.

199. *Same*.—Estoppel to object to receivership.—Creditors of corporation are not estopped from prosecuting writ of prohibition to restrain superior court from proceeding, by means of receivership, to administer assets of corporation, by reason of fact that they have taken part in other actions to which receiver was party, to protect their rights in hands of such receiver, in which actions validity of his appointment as receiver was not questioned.—*Yore v. Superior Court*, 108 Cal. 431, 437-439, 41 Pac. 477.

200. *Same*.—Illegal monopoly not ground for receivership.—That corporation had entered into illegal trust for purpose of creating monopoly will not confer upon court, in quo warranto proceedings, right to appoint receiver of the assets of corporation.—*Havemeyer v. Superior Court*, 84 Cal. 327, 375, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

201. *Same*.—Prohibition against receivership.—Prohibition will lie to restrain superior court from proceeding, in quo warranto, with receivership of property of dissolved corporation.—*Havemeyer v. Superior Court*, 84 Cal. 327, 409, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121; *Yore v. Superior Court*, 108 Cal. 431, 439, 41 Pac. 477.

202. *Quo warranto*.—As to nature of remedy.—A quo warranto proceeding to oust one charged with wrongfully and without authority exercising the powers of a public office is not simply a civil remedy, but one wherein the interests of the public are involved.—*People v. Bailey*, 30 Cal. App. 581, 158 Pac. 1036.

See pars. 106, 223, this note.

203. *Same*.—Against drainage district.—This section authorizes the attorney-general, in the name of the people of the state, upon his own initiative, or that of a private person, to prosecute an action against one "who . . . unlawfully holds or exercises . . . any franchise within this

state," and this action is maintained hereunder.—*People ex rel. Chapman v. Sacramento Drainage Dist.*, 155 Cal. 375, 103 Pac. 207.

204. *Same*.—Laches, effect of.—A quo warranto proceeding prosecuted by the attorney-general for the purpose of having it determined that one has unlawfully intruded into and is unlawfully holding a public office, is not barred by lapse of time, and as the action can only be brought with the consent and permission of the attorney-general, it is to be assumed that he will not exercise his discretion to not permit the institution of such a suit if by reason of a great lapse of time the claim has become stale, or for any other reason the state has ceased to have a present interest in it.—*People v. Bailey*, 30 Cal. App. 581, 158 Pac. 1036.

204a. The right to prosecute a quo warranto proceeding to determine the right to a public office is not barred by laches, where the record shows that the relator had at all times been actively asserting his right to the office, but by a mistaken remedy.—*People v. Bailey*, 30 Cal. App. 581, 158 Pac. 1036.

205. *Same*.—Protection districts.—Quo warranto does not lie against.—Quo warranto does lie against a protection district to test its right to exist.—*Harpham v. Board of Supervisors*, 41 Cal. App. 192, 182 Pac. 324.

206. *Same*.—Usurpation and unlawful holding and exercising toll-road franchise.—A judgment in quo warranto against the defendants as assignees and successors in interest of the original grantee of a toll-road franchise by legislative grant, which was without limitation as to duration or as to alienation, except the reservation of a right of purchase by the county after five years, which was based upon the theory that the grant was a mere license or personal privilege to collect tolls, which terminated upon the death of the original grantee, is untenable, and must be reversed upon appeal, for the reason that such franchise is an estate in fee, and subject to alienation as other property.—*People ex rel. Splers v. Lawley*, 17 Cal. App. 331, 338, 119 Pac. 1089.

As to usurpation of franchise generally, see pars. 209-236, this note.

207. *Right of certain parties to act as trustees of a town* alleged to have been illegally formed by a board of supervisors, should be tested by proceedings in the nature of quo warranto under this and the succeeding sections, and not by a writ of review.—*Beaumont v. Samson*, 5 Cal. App. 491, 492, 90 Pac. 839.

208. *State as creditor*.—After judgment for fine.—That state, by recovering fine against corporation for usurpation of franchise, thereby becomes such creditor that it may, under section 565, ante, and section 400 of the Civil Code, procure appointment

of receiver, has been suggested but not decided.—*Havemeyer v. Superior Court*, 84 Cal 327, 371, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121; *Yorke v. Superior Court*, 108 Cal. 431, 436, 41 Pac. 477.

209. Usurpation of franchise.—In general.—If individual or corporation shall assume, without grant, to exercise powers which are prerogatives of government, and such as can be exercised by private person only when granted by government, it can not be doubted that he or it should be adjudged to be unlawfully exercising such powers.—*Ex parte Henshaw*, 73 Cal. 486, 493, 15 Pac. 110.

See, also, par. 206, this note.

As to definition of franchise, see pars. 81-45, this note.

As to public control of franchise, see brief 33 L. R. A. 218.

210. Same.—Causes of action on continuously renewed usurpations.—Continued exercise of franchise without right is continuously renewed usurpation on which new cause of action arises each day. Sovereign has at all times right to inquire into matter of user of franchise or title by which it is held.—*People ex rel. Attorney-General v. Stanford*, 77 Cal. 360, 373, 378, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693; *People v. Reclamation Dist.*, 121 Cal. 522, 525, 50 Pac. 1068, 53 Pac. 1085; *People ex rel. Stone v. Jefferts*, 126 Cal. 296, 302, 58 Pac. 704.

211. Same.—City or county asserting authority beyond lawful boundary.—Quo warranto is proper remedy where municipal corporation or county government has been guilty of usurping franchise by extending its corporate authority beyond its lawful boundaries.—*State ex rel. Crow v. Fleming*, 147 Mo. 1, 12, 44 S. W. 753; *State ex rel. Walker v. McLean Co.*, 11 N. D. 356, 360, 92 N. W. 385.

As to remedies in case of the illegal assumption of municipal authority over certain territory, see note 35 L. R. A. 745.

As to right to determine corporate existence of town in proceeding for usurpation of office of mayor, see brief 61 L. R. A. 734; also par. 128, this note.

212. Same.—Defective incorporation.—If incorporators of railroad company fail to subscribe amount of capital stock required by law, and to pay prescribed percentage thereof in cash, their acts of attempted incorporation and organization are invalid, and action may be maintained upon information in nature of quo warranto to prevent usurpation of franchise to be a corporation.—*People ex rel. Plumas Co. v. Chambers*, 42 Cal. 201, 209.

213. An information in nature of quo warranto will not lie against a corporation for usurpation of corporate functions without right, upon ground that its articles of incorporation are defective because one of purposes for which it is formed is expressed as being "to buy, sell, lease, mortgage, and otherwise deal in railroads, tramways, and

rights of way; to buy, lease, sell, mortgage, operate, construct, and maintain railroads, tramways," etc., and that incorporation was not constituted as code requires railroad corporations to be, where it appears that general purpose for which company was formed was to manufacture lumber and buy articles made of wood, and that articles of incorporation were executed in manner and in substance and form as required by general provisions of code for creation of private corporations, and that railroads and tramways mentioned in articles are merely part of manufacturing appliances of plant of such corporation and were not intended to be operated as railway for public traffic.—*People ex rel. Loy v. Mt. Shasta M. Co.*, 107 Cal. 256, 258, 40 Pac. 891.

214. Same.—Evasive compliance with law.—Any attempt to acquire corporate function by pretentious or evasive compliance with law, no matter what papers may say on their face, is fraud upon law, and is abortive, and action will lie for usurpation of franchise in an action by state.—*State ex rel. Sanche v. Webb*, 97 Ala. 111, 38 Am. St. Rep. 151, 12 So. 377.

215. Same.—Exercise of corporate powers, without charter.—Inquiry as to right of corporation doing business as such to exercise corporate powers may be made at suit of state on information of attorney-general.—*People ex rel. Attorney-General v. Stanford*, 77 Cal. 360, 372, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

See *Kerr's Cyc. Civ. Code*, 2d ed., § 358 and note.

216. Same.—Foreign corporations.—State may maintain proceedings against foreign corporations for usurping privilege of doing business within state without complying with laws relating to foreign corporations.—*Wright v. Lee*, 4 S. D. 237, 256, 55 N. W. 931.

As to quo warranto being proper remedy to oust a foreign corporation from exercising its franchise, see brief 63 L. R. A. 767.

217. Same.—Forfeiture and usurpation distinguished.—Cases of forfeiture are said to be divided into two great classes:—(1) cases of perversion; as where corporation does an act inconsistent with nature and destructive of ends and purpose of grant. In such cases, unless perversion is such as to amount to an injury to public, who are interested in the franchise, it will not work a forfeiture; (2) cases of usurpation; as where corporation exercises power which it has no right to exercise. In this last case question of forfeiture is not dependent, as in former, upon any interest of or injury to public.—*People ex rel. Attorney-General v. Dashaway Assoc.*, 84 Cal. 114, 119, 120, 121, 12 L. R. A. 117, 24 Pac. 277; *People v. Rosenstein-Cohn Cigar Co.*, 131 Cal. 153, 157, 63 Pac. 163.

218. Actual use of franchise by defendant is not in all cases necessary in order

to authorize action for usurpation of such franchise, as where forfeiture of franchise to maintain street-railway on certain streets is sought because of failure of company to comply with conditions upon which franchise was granted.—*People ex rel. Warfield v. Sutter Street R. Co.*, 117 Cal. 604, 610, 611, 49 Pac. 736.

219. Same—Forfeiture of corporate franchise—Abuse, non-user, etc.—All corporations are creatures of law, and when they fail to perform duties which they were incorporated to perform, and in which public have interest, or do acts which are not authorized or are forbidden them to do, state may forfeit franchise and dissolve them by information in nature of quo warranto.—*People ex rel. Attorney-General v. Dashaway Assoc.*, 84 Cal. 114, 117, 12 L. R. A. 117, 24 Pac. 277.

220. Information in nature of quo warranto will lie against legally existing corporation for abuse of its franchises. Scire facias, which would seem to have been more usual proceeding where legally existing body had abused powers and franchises intrusted to them, is abolished.—*People ex rel. Attorney-General v. Stanford*, 77 Cal. 360, 372, 373, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

221. Corporations are recognized as creatures of law, and they certainly owe obedience thereto, and when they fail to perform duties which they were created to discharge, and in which public have an interest, or where they do unauthorized or forbidden acts, state unquestionably has right, and it is its duty, to object, and it may interpose by information and wrest from offending corporation its franchise. Courts have enlarged rule so that an information in nature of quo warranto is now regarded not only as appropriate means of contesting right to exercise corporate franchises, but such proceedings are also appropriate remedy for abuse by corporation of powers with which it has been invested.—*State ex rel. Snyder v. Portland N. G. Co.*, 153 Ind. 483, 74 Am. St. Rep. 318, 53 L. R. A. 413, 53 N. E. 1089.

222. Proceeding in nature of quo warranto may be maintained by attorney-general of the state for purpose of procuring judgment of forfeiture of franchise granted by common council of city to lay and maintain street-railway within certain streets of city upon certain conditions, where conditions have not been performed.—*State ex rel. Attorney-General v. Madison St. R. Co.*, 72 Wis. 612, 1 L. R. A. 771, 40 N. W. 487.

223. Quo warranto will lie to oust educational institution of its charter for conduct inconsistent with purposes of its organization,—such as conferring degrees without regard to merit.—*State ex rel. Sheets v. Mt. Hope C. Co.*, 63 Ohio St. 341, 52 L. R. A. 365, 58 N. E. 799.

As to quo warranto, see pars. 202-206, this note.

224. Where declaration of business and purposes of corporation states such to be to build and maintain street-railway in certain city, and company procures from such city franchise to construct a railway upon certain streets therein upon certain conditions, proceeding in nature of quo warranto by attorney-general may be maintained against such corporation where it fails to perform conditions upon which such franchise was granted, for purpose of vacating charter and annulling existence of corporation. If corporation has so violated conditions of ordinance as to have forfeited its rights and privileges under it, it has ipso facto forfeited its charter, or, in other words, the right to do anything as corporation; for, under declaration of its business and purposes, it can not do anything other than maintain and operate such street-railway. If it can not do that it can do nothing.—*State ex rel. Attorney-General v. Madison St. R. Co.*, 72 Wis. 612, 1 L. R. A. 771, 40 N. W. 487.

As to examination of corporate affairs by attorney-general, see Kerr's Cyc. Civ. Code, 2d ed., § 382 and note.

As to examination of corporate affairs by legislature, see Kerr's Cyc. Civ. Code, 2d ed., § 383.

As to forfeiture of charter by failure to pay annual license-tax, see act approved March 20, 1905, and amendment approved June 13, 1906, repealed and supplanted in 1913. See I Henning's General Laws, 3d ed., p. 418.

As to forfeiture of charter of corporation by failure to organize and commence transaction of business within one year after date of incorporation, see Kerr's Cyc. Civ. Code, 2d ed., § 358 and note.

As to forfeiture of corporate charter for neglect or abuse of its franchise or breach of trust, see brief 63 L. R. A. 766.

As to forfeiture of franchise of railroad for failure to operate, see Kerr's Cyc. Civ. Code, 2d ed., § 468 and note.

As to forfeiture of franchise of wagon-road corporation by charging excessive toll, see Kerr's Cyc. Civ. Code, 2d ed., § 514 and note.

As to proceedings to declare forfeiture of corporate franchises, see note 30 Am. Dec. 44-52; 8 Am. St. Rep. 798-202.

As to ultra vires acts being grounds for direct proceedings by the state for judgment of forfeiture, see par. 34, this note, also note 63 L. R. A. 766.

225. Same—Same—Corporation responsible for acts of its officers.—In its relation to government, and when acts or neglects of corporation, in violation of its charter or of general law, become subject of public inquiry, with view to forfeiture of its charter, wilful acts and neglects of its officers are regarded as acts and neglects of corporation, and render corporation liable to judgment or decree of dissolution, except

that where it is made to appear that agent has departed from his duties as prescribed by corporation, or violated his instructions in performance of acts complained of and relied upon as basis for forfeiture, no such forfeiture will be declared.—*People ex rel. Attorney-General v. Dashaway Assoc.*, 84 Cal. 114, 117, 12 L. R. A. 117, 24 Pac. 277.

226. Same — Same — Dissolution dates from judgment.—Acts sufficient to cause forfeiture do not per se produce forfeiture. A corporation continues to exist until the sovereignty which created it shall by proper proceedings in proper court procure adjudication of forfeiture and enforce it.—*People ex rel. Sabichi v. Los Angeles E. R. Co.*, 91 Cal. 338, 340, 27 Pac. 673.

As to actions to dissolve insolvent insurance companies, see *Kerr's Cyc. Pol. Code*, 2d ed., § 602 and note.

As to dissolution of corporations, see *Kerr's Cyc. Civ. Code*, 2d ed., §§ 399, 400 and notes.

As to voluntary dissolution of corporations, see, post, §§ 1227, 1234 and notes.

227. Same — Same — Entering into trust combination is an act for which state may forfeit corporate charter by proceedings in quo warranto.—*San Antonio G. Co. v. State*, 22 Tex. Civ. App. 118, 126, 54 S. W. 289.

228. Same — Same — Extent of forfeiture.—Action may be for forfeiture of particular franchise or of whole charter.—*People ex rel. Attorney-General v. Dashaway Assoc.*, 84 Cal. 114, 119, 12 L. R. A. 117, 24 Pac. 227.

229. If manner in which corporation conducts its business is in disregard of laws of state regulating such business, quo warranto will lie to stop abuse, and if abuse be persistent, defiant, and flagrant, to oust company of its franchise to be corporation.—*State ex rel. Attorney-General v. Capital City D. Co.*, 62 Ohio St. 350, 57 L. R. A. 181, 57 N. E. 62.

As to right of state to proceed by quo warranto to obtain a judgment merely ousting the corporation from the further exercise of illegal and unauthorized powers when corporation is guilty of exercising powers unauthorized by its charter, see brief 63 L. R. A. 766.

As to quo warranto against corporations for making illegal charges in course of authorized business, see note 63 L. R. A. 761, 764.

230. Same — Same — Fraudulent use of power of eminent domain.—The right of corporation to build and operate a railroad upon a right of way acquired by condemnation proceedings under right of eminent domain may be inquired into by proceedings inaugurated under this section. If it appear that corporation filed articles of incorporation in which it stated its purpose to be to transport freight and passengers, intending it to be understood that proposed railway was for public use and benefit, and afterwards

exercised right of eminent domain, purporting to act as agent of state in appropriation of private property for public use, but upon acquiring such property used railroad merely for purpose of carrying coal from mines of its own stockholders and provided no cars for accommodation of public either for carrying of passengers or freight, such misuse of its authority will be inquired into by state and corporation's franchise forfeited.—*People ex rel. Robinson v. Pittsburgh R. Co.*, 53 Cal. 694, 697.

231. Same — Same — Principle of forfeiture is that franchise is trust and terms of charter are conditions of trust, and if any one of conditions of trust be violated it will work forfeiture of charter.—*People ex rel. Attorney-General v. Dashaway Assoc.*, 84 Cal. 114, 119, 12 L. R. A. 117, 24 Pac. 277; *Havemeyer v. Superior Court*, 84 Cal. 327, 379, 18 Am. St. Rep. 192, 247, 10 L. R. A. 627, 24 Pac. 121.

232. Courts treat franchise as trust, and terms of charter of corporation are conditions of trust. Forfeiture of charter takes place when some one or more of essential conditions of trust are violated.—*People v. Rosenstein-Cohn Cigar Co.*, 131 Cal. 153, 156, 63 Pac. 163.

As to rule that corporate charter shall be construed most strongly against the corporation and in favor of the state, see brief 64 L. R. A. 368.

233. Same — Same — Use of abbreviated name.—If the officers of corporation organized under particular name in exercise of its franchises use an abbreviation of that name, it is not usurpation, nor will it support proceeding by quo warranto upon part of people to oust them from enjoyment of those franchises.—*People v. Bogart*, 45 Cal. 73, 74.

234. Same — Same — Waiver of forfeiture.—Although under section 7, article 12 of constitution the legislature can not remit forfeiture of any franchise, it may waive forfeiture even after proceedings in nature of quo warranto have been commenced to have it determined that defendant has forfeited such right.—*People ex rel. Sabichi v. Los Angeles E. R. Co.*, 91 Cal. 338, 342, 27 Pac. 673.

235. Same — Injunction to protect usurped privileges.—Although right of railroad company to lay tracks along certain streets can be inquired into only by proceeding by state, nevertheless if grant of right to lay such tracks be void and another company possesses valid grant to lay tracks upon said streets, latter may remove tracks laid by former company as obstruction or impediment to prosecution of their work, and former company can not enjoin them from making such removal.—*Omnibus R. Co. v. Baldwin*, 57 Cal. 160, 166.

236. Same — Presumption of right to franchise.—As against state there is no presumption that citizens exercising franchise are exercising it rightfully.—*People ex rel.*

Attorney-General v. Stanford, 77 Cal. 360, 77, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

As to limitations of actions by state to inquire into due incorporation of company, see Kerr's Cyc. Civ. Code, 2d ed., § 358 and note.

As to statute of limitations in quo warranto proceedings, see note 52 Am. St. Rep. 312-315.

237. Usurpation of office.—While quo warranto furnishes an adequate and ap-

propriate remedy for usurpation of office, he who is first in possession and has not surrendered or abandoned his right is entitled to the protection of the writ of injunction, and those who seek to oust him should be compelled to resort to quo warranto (Sloss, J., dis. op.).—Barendt v. McCarthy, 160 Cal. 689, 118 Pac. 228.

See also pars. 55-61, this note.

As to intrusion in office, see pars. 66-78, this note.

§ 804. NAME OF PERSON ENTITLED TO OFFICE MAY BE SET FORTH IN THE COMPLAINT. IF FEES HAVE BEEN RECEIVED BY THE USURPER, HE MAY BE ARRESTED. Whenever such action is brought, the attorney-general, in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightly entitled to the office, with a statement of his right thereto; and in such case upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order may be granted by a justice of the supreme court, or a judge of the superior court, for the arrest of such defendant and holding him to bail; and thereupon he may be arrested and held to bail in the same manner and with the same effect and subject to the same rights and liabilities as in other civil actions where the defendant is subject to arrest.

History: Enacted March 11, 1872, re-enactment of § 311 Practice Act; amendment approved March 10, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 11.

As to arrest and bail, see, ante, §§ 478-504 and notes.

As to pleading, see, ante, § 803 and note pars. 144-183.

As to one action against several claimants, see, post, § 808.

As to waiver, see, ante, § 373 and note.

§ 805. JUDGMENT MAY DETERMINE THE RIGHTS OF BOTH INCUMBENT AND CLAIMANT. In every such action judgment may be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant, as justice may require.

History: Enacted March 11, 1872, re-enactment of § 312 Practice Act.

JUDGMENT — DETERMINATION OF RIGHTS OF INCUMBENT AND CLAIMANT.

- 1, 2. Appeal from judgment—In general.
3. Same—Error against respondent considered in election contest.
4. Same — Intervener may prosecute appeal.
5. Same—Record on appeal.
6. Same—Relator's right not considered, when.
- 7, 8. Same—Stay of execution, by appeal.
- 9, 10. Collateral attack on judgment.
11. Costs.
12. Default judgment.
13. Enforcement of judgment by contempt proceedings.

14. Extent of judgment.
15. Same—Corporate existence must be determined, when.
16. Same—Ouster of particular franchise.
17. Same—Relator's right may be determined.
18. Same—Relator's right need not be determined.
19. Same—Scope of judgment.
- 20, 21. Form of judgment.
22. Interest upon fine imposed.
23. Judgment in favor of relator is not "commission of office."
24. Judgment ousting defendant — Does not rest on relator's right.
25. Proceedings after judgment.

1. Appeal from judgment—In general.—Supreme court has jurisdiction of appeal taken in proceedings under this chapter.—*People ex rel. Davidson v. Perry*, 79 Cal. 105, 108, 21 Pac. 423; *People ex rel. Swift v. Bingham*, 82 Cal. 238, 242, 22 Pac. 1039; *People ex rel. Gesford v. Superior Court*, 114 Cal. 466, 472, 46 Pac. 383.

2. Judgment in action under this chapter. adjudging defendants guilty of usurping franchise to collect tolls upon public road, involves right of defendants to possess lands claimed to constitute toll-road, and is appealable.—*People ex rel. Williams v. Horsley*, 65 Cal. 381, 382.

3. Same—Error against respondent considered in election contest.—Rule that error which was committed against respondent, as shown by bill of exceptions, will not be considered upon appeal from judgment, is inapplicable to proceedings in nature of quo warranto to determine right to office resulting from election, where recount of votes is necessary. Upon recount of ballots in contested election case superior court reviews action of canvassing boards for purpose of determining whether ballots have been correctly counted, and in connection therewith to determine whether any of the ballots that were cast should be rejected from the count. In making its rulings for this purpose it is manifest that they should have uniform and impartial application to both parties, and that same ruling which it makes in reference to counting or rejecting ballots offered by one party should be made when similar ballots are offered on behalf of other party. If in making such ruling court has erroneously rejected ballot in favor of appellant, or erroneously counted one in favor of respondent, there can be no injustice in permitting respondent to show that this error against appellant is offset by similar error in his favor. If it appears from the record that errors urged by appellant are counterbalanced by similar errors against respondent, appellant fails to show that he has been prejudiced by judgment.—*People ex rel. Bledsoe v. Campbell*, 138 Cal. 11, 17, 18, 70 Pac. 918.

4. Same—Intervener may prosecute appeal from judgment dissolving corporation, notwithstanding that defendant against whom judgment was rendered does not appeal.—*People ex rel. Fogg v. Perris Irr. Dist.*, 132 Cal. 289, 290, 291, 64 Pac. 399, 773.

5. Same—Record on appeal.—In action alleging that relator received greater number of votes than defendant, but that defendant was declared elected by board of canvassers and was thereafter duly commissioned, and that he thereupon entered upon discharge of duties of office, record on appeal need not contain formal statement that all returns were given in evidence. It is sufficient if such fact appear in any manner.—*People ex rel. Budd v. Holden*, 28 Cal. 123, 129.

6. Same—Relator's rights not considered, when.—Where appeal is from judgment against defendant, rendered on his demurrer interposed as to cause of action in quo warranto against him, and not as to relator's title to office, any question of validity of relator's right is not presented to appellate court.—*People ex rel. Hicks v. Stewart*, 132 Cal. 283, 285, 64 Pac. 285.

7. Same—Stay of execution by appeal.—Execution of judgment in action against corporation for usurpation of franchise is stayed, on appeal, by filing undertaking provided by law.—*Havemeyer v. Superior Court*, 84 Cal. 327, 380, 381, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121; *State Inv. & Ins. Co. v. Superior Court*, 101 Cal. 135, 150, 35 Pac. 549.

8. Execution of judgment adjudging defendant guilty of usurping, intruding into, or unlawfully holding public office, civil or military, within this state, is not stayed by filing undertaking on appeal.—See, post, § 949 and note.

As to undertaking on appeal, see, post, §§ 941, 942, 949 and notes.

9. Collateral attack on judgment.—Judgment can not be attacked collaterally. In an action where judgment went against the defendant for usurping office and for failure to obey judgment he was adjudged guilty of contempt. He instituted habeas corpus proceedings in which he attacked judgment of court in usurpation proceedings on ground that such judgment was void because there was no office such as he was accused of usurping. It was held that another court may not determine on habeas corpus that judgment in action for usurpation was void.—*Ex parte Henshaw*, 73 Cal. 486, 491, 15 Pac. 110.

10. Existence or non-existence of office described in complaint is an issue which court has jurisdiction to try. Its finding upon that issue can not be assailed collaterally, though it should be conceded that finding was erroneous; or though, in determining issue, court may erroneously have believed and assumed a statute was not repealed which was repealed.—*Ex parte Henshaw*, 73 Cal. 486, 489, 490, 15 Pac. 110.

11. Costs.—Judgment is properly rendered against intervener for costs of proceedings incurred subsequent to filing of his complaint in intervention, where he is unsuccessful in establishing his right to office.—*People ex rel. Bledsoe v. Campbell*, 138 Cal. 11, 23, 70 Pac. 918.

As to costs, see, post, §§ 809, 1021-1040 and notes.

12. Default judgment.—If defendant is in default in answering or pleading to information he is regarded as confessing all its allegations, and court must thereupon proceed to judgment of ouster forthwith.—*People ex rel. Gesford v. Superior Court*, 114 Cal. 466, 477, 46 Pac. 383.

13. Enforcement of judgment by contempt proceedings.—A usurper who continues to exercise functions of an office after judgment awarding office to another thereby becomes guilty of contempt of court and may be punished accordingly.—*Ex parte Henshaw*, 73 Cal. 486, 498, 15 Pac. 110.

As to contempts, see, post, § 1209 and note.

14. Extent of judgment which court may make in exercise of its jurisdiction under this chapter is limited by provisions of statute.—*State Inv. & Ins. Co. v. Superior Court*, 101 Cal. 135, 146, 35 Pac. 549.

As to extent of judgment rendered, see note 63 L. R. A. 764.

As to judgment, see, post, §§ 806-809 and notes.

15. Same—Corporate existence must be determined, when.—Judgment in which non-existence of corporation is left wholly undetermined is erroneous and must be reversed in an action against defendants for usurping franchises of corporation where sole ground of complaint is based upon non-existence of corporation.—*People ex rel. Attorney-General v. Stanford*, 77 Cal. 360, 372, 2 L. R. A. 92, 18 Pac. 85, 19 Pac. 693.

16. Same—Ouster of particular franchise.—There may be judgment of ouster of particular franchise of corporation and not of whole charter.—*People ex rel. Attorney-General v. Dashaway Assoc.*, 84 Cal. 114, 119, 12 L. R. A. 117, 24 Pac. 277.

As to power of court to render judgment of ouster of particular franchise, and that it need not necessarily be of whole charter, see brief 63 L. R. A. 765.

17. Same—Relator's right may be determined.—Judgment may determine not only right of defendant, but also that of relator, and if against defendant, may order him to immediately vacate office.—*People ex rel. Dickenson v. Banvard*, 27 Cal. 470, 475; *Kelly v. Edwards*, 69 Cal. 460, 464, 11 Pac. 1.

18. Same—Relator's right need not be determined.—It is unnecessary to determine whether relator has any right to an office held by defendant. If defendant has right to exercise of an office, relator can have no right thereto; and if the defendant has no right to office it is immaterial to him whether office is vacant or to be held by relator. Although court may determine the right of relator to office, it is not required to do so.—*People ex rel. Gesford v. Superior Court*, 114 Cal. 466, 478, 46 Pac. 383.

19. Same—Scope of judgment.—The court may provide not only for the removal of

office of the relator.—*People v. Bailey*, 30 Cal. App. 581, 158 Pac. 1036.

20. Form of judgment.—In information of quo warranto there were two forms of the defendant but for the restoration to judgment. When against officer or individual, the judgment was ouster; when against corporation by its corporate name, judgment was ouster and seizure. In first case, there being no franchise forfeited, there is nothing to seize; in second case there is; consequently franchise is seized.—*People ex rel. Attorney-General v. Dashaway Assoc.*, 84 Cal. 114, 119, 12 L. R. A. 117, 24 Pac. 277.

21. Usurpation of office is one thing and usurpation of franchise another and quite different thing. In one case judgment would be that defendant be excluded from office; in the other from franchise.—*People ex rel. Beltner v. City of Riverside*, 66 Cal. 288, 290, 5 Pac. 350.

22. Interest upon fine imposed by judgment can not be collected. Such judgment is not within provisions of section 1920 of Civil Code. Judgments which are penal in their nature and have for their sole object punishment of offender do not come within either the letter or spirit of said section.—*People ex rel. Warfield v. Sutter St. R. Co.*, 129 Cal. 545, 546, 547, 79 Am. St. Rep. 137, 62 Pac. 104.

23. Judgment in favor of relator is not "commission of office" which will entitle him to salary under section 936 of the Political Code, pending an appeal from such judgment.—*Bledsoe v. Colgan*, 138 Cal. 34, 35, 36, 70 Pac. 924 (see dis. op. Beatty, C. J., p. 39).

24. Judgment ousting defendant—Does not rest on relator's right to office.—*People ex rel. Fleming v. Shorb*, 100 Cal. 537, 541, 38 Am. St. Rep. 310, 35 Pac. 163.

25. Proceedings after judgment.—After judgment in action against corporation for usurpation of franchise, adjudging that it had never been legal corporation, appropriate proceedings should be had by which affairs of such de facto corporation should be wound up and settled by trustees, whatever due to it collected, and whatever due by it paid, balance, if any, to be divided among stockholders.—*People ex rel. Schindler v. Flint*, 64 Cal. 49, 52, 28 Pac. 495.

As to power of superior court to appoint new trustees, see *Kerr's Cyc. Civ. Code*, 2d ed., § 2289 and note.

As to receiver, see, ante, § 803 and note par. 193-197.

As to settlement of affairs of dissolved corporation by directors, unless other persons are appointed by court, see *Kerr's Cyc. Civ. Code*, 2d ed., § 400 and note.

§ 806. WHEN RENDERED IN FAVOR OF APPLICANT. If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person, he will be entitled, after taking the oath

of office and executing such official bond as may be required by law, to take upon himself the execution of the office.

History: Enacted March 11, 1872, re-enactment of § 313 Practice Act.

As to vacation of office by defendant adjudged guilty of usurpation, see, ante, § 805 and note pars 13, 14, 17, 21.

§ 807. DAMAGES MAY BE RECOVERED BY SUCCESSFUL APPLICANT. If judgment be rendered upon the right of the person so alleged to be entitled, in favor of such person, he may recover, by action, the damages which he may have sustained by reason of the usurpation of the office of the defendant.

History: Enacted March 11, 1872, re-enactment of § 314 Practice Act.

1. Damages, recovery of—Amount of salary.—Since the amendment of 1891, to section 936, Political Code, this section does not authorize the recovery as damages of the amount of salary of which the party has been deprived by reason of its payment to the incumbent who held the certifi-

cate of election and discharged the duties of the office pending the contest (Henshaw and McFarland, J. J., dis.).—Chubbuck v. Wilson, 151 Cal. 168, 90 Pac. 524.

As to right to salary of office, see Kerr's Cyc. Pol. Code, 2d ed., § 936 and note.

§ 808. WHEN SEVERAL PERSONS CLAIM THE SAME OFFICE, THEIR RIGHTS MAY BE DETERMINED BY A SINGLE ACTION. When several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons, in order to try their respective rights to such office or franchise.

History: Enacted March 11, 1872, re-enactment of § 315 Practice Act.

As to parties, see, ante, § 803 and note pars. 122-143.

§ 809. IF DEFENDANT FOUND GUILTY, WHAT JUDGMENT TO BE RENDERED AGAINST HIM. When a defendant, against whom such action has been brought, is adjudged guilty of usurping or intruding into, or unlawfully holding any office, franchise, or privilege, judgment must be rendered that such defendant be excluded from the office, franchise, or privilege, and that he pay the costs of the action. The court may also, in its discretion, impose upon the defendant a fine not exceeding five thousand dollars, which fine, when collected, must be paid into the treasury of the state.

History: Enacted March 11, 1872, re-enactment of § 316 Practice Act.

1. Judgment imposing fine on corporation for usurpation of franchise is not for the purpose of compensating state, but is solely for purpose of punishment. It is not based on any evidence of loss or damage, but rests (within limit prescribed by statute), solely within discretion of court. It

would be more proper to speak of it as sentence or judgment imposed on defendant than to say it was judgment recovered against him.—People ex rel. Warfield v. Sutter St. R. Co., 129 Cal. 545, 547, 79 Am. St. Rep. 137, 62 Pac. 104.

As to judgment, see, ante, § 805 and note.

§ 810. UNDERTAKING WHEN ACTION BROUGHT UPON INFORMATION OF PRIVATE PARTY. When the action is brought upon the information or application of a private party, the attorney-general may require such

party to enter into an undertaking, with sureties to be approved by the attorney-general, conditioned that such party or the sureties will pay any judgment for costs or damages recovered against the plaintiff, and all the costs and expenses incurred in the prosecution of the action.

History: Enactment approved March 24, 1874, Code Amdts. 1873-4, p. 327.

INFORMATION OF PRIVATE PARTY— UNDERTAKING.

1. Security for costs.

2. Usurpation of office—Quo warranto.

1. **Security for costs** must be given before the proceeding is instituted, and can not be afterwards supplied if seasonable objection be made. But it is well settled that where the security is in fact given after the suit has been commenced the respondent may waive the irregularity, and that he does waive it by proceeding with the cause and omitting to move with reasonable promptness for a dismissal on account of it.—*Capital City W. Co. v. State*

ex rel. Macdonald, 105 Ala. 406, 29 L. R. A. 743, 18 So. 62.

As to qualifications of sureties, see, post, § 1056 and note.

As to undertaking by surety company, see, post, § 1056 and note.

2. **Usurpation of office—Quo warranto** adequate and appropriate remedy for those who seek to oust one who is in possession, and has not surrendered or abandoned his right, but not for the latter, who is entitled to the protection of the writ of injunction (*Sloss, J., dis. op.*).—*Barendt v. McCarthy*, 160 Cal. 689, 118 Pac. 228.

See, ante, § 803, note pars. 202-206, 237.

CHAPTER VI.

OF ACTIONS AGAINST STEAMERS, VESSELS, AND BOATS.

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| <p>§ 813. When vessels, etc., are liable. Their liabilities constitute liens.</p> <p>§ 814. Actions may be brought directly against vessels.</p> <p>§ 815. Complaint must be verified.</p> <p>§ 816. Summons, service of on master, etc.</p> <p>§ 817. Plaintiff may have such vessel, etc., attached.</p> <p>§ 818. The clerk must issue the writ of attachment.</p> <p>§ 819. Such writ must be directed to the sheriff.</p> <p>§ 820. Writ, execution of without delay.</p> <p>§ 821. The owner, master, etc., may appear and defend such vessel.</p> | <p>§ 822. Discharge of attachment on undertaking.</p> <p>§ 823. After appearance, attachment may on motion, be discharged.</p> <p>§ 824. When not discharged such vessel, etc., may be sold at public auction. Application of proceeds.</p> <p>§ 825. Mariners and others may assert their claim for wages, notwithstanding prior attachment.</p> <p>§ 826. Proof of the claims of mariners and others.</p> <p>§ 827. Sheriff's notice of sale to contain measurement, tonnage, etc.</p> |
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§ 813. WHEN VESSELS, ETC., ARE LIABLE. THEIR LIABILITIES CONSTITUTE LIENS. All steamers, vessels, and boats are liable:

1. **For services rendered on board at the request of**, or on contract with, their respective owners, masters, agents, or consignees.

2. **For supplies furnished in this state** for their use; at the request of their respective owners, masters, agents, or consignees.

3. **For work done or materials furnished in this state** for their construction, repair, or equipment.

4. **For their wharfage and anchorage** within this state.

5. **For nonperformance, or malperformance, of any contract** for the transportation of persons or property between places within the state, made by their respective owners, masters, agents, or consignees.

6. **For injuries committed by them to persons or property, in this state.**

Demands for these several causes constitute liens upon all steamers, vessels, and boats, and have priority in their order herein enumerated, and have preference over all other demands; but such liens only continue in force for the period of one year from the time the cause of action accrued.

History: Enacted March 11, 1872, re-enactment of § 317 Practice Act as amended 1860; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 327.

**VESSELS LIABLE, WHEN—LIABILITY
A LIEN.**

1. Accrual of action.
- 2-4. Actions against vessels—Construction of section.
5. Amount of the lien not limited.
6. Charter party—Reservation by owner of right to keep in repair—Retaining own engineer—Presumption of knowledge.
- 7, 8. Constitutionality of statute.
9. Construction of section—Repair and equipment.
10. Election of remedy.
11. Same—Wages of mariners.
12. Evidence—Admissions of master.
13. Same—Same—Master of vessel has no authority to make admissions of culpability of owners.
- 14, 15. Jurisdiction—Admiralty jurisdiction exclusive to federal courts.
16. Same—Same—State statute can not confer jurisdiction upon courts of admiralty.
17. Same—Same—State statute may create maritime lien.
18. Same—Same—Supplies furnished at home port.
19. Same—Same—Test of admiralty jurisdiction.
- 20, 21. Same—Same—Same—Admiralty action must relate to commerce and navigation.
22. Same—Same—Same—Locality as test.
23. Same—Same—Same—Ship out of commission.
- 24-27. Same—State courts—Common-law remedies enforceable.
28. Same—Same—Same—Proceedings in rem.
29. Same—Same—Concurrent jurisdiction of common-law remedies.
30. Same—Same—Instance of state jurisdiction denied.
- 31-34. Same—Same—Instances of state jurisdiction upheld.
35. Same—Same—Vessels used in navigating the waters of state.
36. Same—Same—Same—Must be within designated class.
37. Same—Same—Same—One terminus in tide-water.
38. Liability—Acts of agent.

- 39-42. Same—Contract and tort both covered.
43. Same—Contracts for passage partly on other vessels.
44. Same—Owner liable.
45. Same—Same—Charterer as "owner."
46. Same—Same—Same—Secret charter no protection to general owner.
47. Same—Same—Credit given to ship's husband, effect of.
48. Same—Same—Evidence of ownership—Decree upon libel in United States district court.
49. Same—Same—Same—Entry in custom-house books.
50. Same—Same—Same—Plaintiff's ownership.
51. Same—Same—Same—Possession of property.
52. Same—Same—Same—Ship's register.
53. Same—Same—Limitation of personal liability.
54. Same—Same—Ownership question for the jury.
- 55, 56. Lien—Acquired how.
57. Same—Characteristics similar to mechanics' liens.
58. Same—Extension of, when credit given.
59. Same—Vessel situated without state.
- 60, 61. Maritime contracts.
62. Same—Contract for building ship is not.
63. Same—Employment of ship's keeper.
64. Same—Lien for supplies furnished at home port.
65. Nature and office of remedy provided—Action in personam.
66. Same—Available to collect wharfage.
67. Same—Statutory remedy, unknown to common law.
68. Practice.

1. Accrual of action.—Action for supplies furnished on credit does not accrue until time of credit fixed by contract has expired.—*Edgerly v. Schooner San Lorenzo*, 29 Cal. 418, 419.

2. Actions against vessels—Construction of section.—The lien declared does not depend upon possession of the boat, but exists by virtue of the statute and continues one year. While the law gives the lien it makes no provision for its enforcement other than by an action brought or attachment sued out as in section 817, post.—

Graham v. Annis, 28 Cal. App. 754, 153 Pac. 981.

As to construction of section, see, also, par. 9, this section.

3. One who performs labor or furnishes materials in the construction, repair or equipment of a steamer, vessel or boat is not required to resort to the special proceedings provided by above sections and following sections to enforce the payment of his demands, but may bring an ordinary action against the owner therefor, and is not barred from availing himself of the general law relating to attachments, on the assumption that the debt is "secured by mortgage or lien upon real or personal property, or pledge of personal property."—Graham v. Annis, 28 Cal. App. 754, 153 Pac. 981.

4. The lien given by the code provisions and the right to enforce it continue for one year, as between the party who performs labor or furnishes material in the building or repair and the owner of the vessel, but, unless fixed and determined by action brought, it is but a floating right.—Graham v. Annis, 28 Cal. App. 754, 153 Pac. 981.

5. Amount of the lien not limited.—This section gives a lien for materials and services in connection with steamers, vessels and boats, in certain specified instances regardless of the amount of the demand.—Jensen v. Dorr, 159 Cal. 745, 116 Pac. 553.

6. Charter party—Reservation by owner of right to keep in repair—Retaining own engineer—Presumption of knowledge.—In a case in which the owner of a boat entering into a contract respecting the same with a charter party under which he stipulated for and reserved the right to retain the chief engineer, and the right to appoint to that office as well as the right "to keep the vessel in good condition," it is to be presumed that the person accepting under such charter party knew that, in operating and maintaining the steamer under the charter party, liens and encumbrances might be impressed upon such vessel under the provisions of the above section, because the above section became a part of the contract.—Frank v. Crescent Wharf & Warehouse Co., — Cal. App. —, 195 Pac. 79; following, the doctrine in Fowler v. Smith, 2 Cal. 568; Pignaz v. Burnett, 119 Cal. 157.

7. Constitutionality of statute.—Statute is constitutional so far as it may be made applicable to causes of action which are not cognizable in courts of admiralty; but so far as it attempts to confer admiralty jurisdiction, except as to common-law remedy reserved by judiciary act, it is unconstitutional. There is no objection to law merely because it authorizes a suit against vessel itself, except so far as suit is upon marine contract.—Crawford v. Bark Caroline Reed, 42 Cal. 469, 474.

See par. 14, this note.

As to when state may create liens on boats and vessels, see note 1 L. R. A. 505.

8. Code provisions are not invalid, although suit may be brought under them of which courts of state would have no jurisdiction.—Olsen v. Birch, 133 Cal. 479, 481, 65 Pac. 1032.

9. Construction of section—Repair and equipment.—Under provisions of section 4480, Political Code, this section and section 3060, Civil Code, are to be construed together; hence the present section provides a lien for materials and services furnished in connection with the construction, repair, and equipment of vessels, steamers and boats, while section 3060, Civil Code, by its terms is limited to completed ships.—Jensen v. Dorr, 159 Cal. 745, 116 Pac. 553.

As to construction of section, see, also, par. 2, this note.

10. Election of remedy.—Whenever a maritime lien arises, injured party may pursue his remedy by suit in personam or by proceedings in rem at his election. Such party may proceed in rem in admiralty, and if he elects to pursue his remedy in that mode he can not proceed in any other form, as jurisdiction of admiralty courts is exclusive in respect to that mode of proceeding; but such party is not restricted to that mode of proceeding, even in admiralty court, as he may waive his lien and proceed in personam against owner or master of vessel in same jurisdiction; nor is he compelled to proceed in admiralty at all, as he may resort to his common-law remedy in the state courts, or in the circuit court if he and his debtor are citizens of different states.—Leon v. Galceran, 78 U. S. (11 Wall.) 185, 20 L. ed. 74.

11. Same—Wages of mariners.—Mariners in suits to recover their wages may proceed against the owner or master of ship in personam, or they may proceed in rem against ship or ship and freight, at their election.—Leon v. Galceran, 78 U. S. (11 Wall.) 185, 20 L. ed. 74.

As to jurisdiction, see pars. 14-37, this note.

12. Evidence—Admissions of master are admissible in evidence in suit where vessel was in possession and under control of master, and record does not disclose that she had any other owner.—Bailey v. Steamer New World, 2 Cal. 370, 373.

13. Same—Same—Master of vessel has no authority to make admissions of culpability of owners of ship after event. Remark made before accident, showing that master knew of defects causing accident and injury, would stand upon different basis.—Silveira v. Iversen, 128 Cal. 187, 191, 60 Pac. 687.

14. Jurisdiction—Admiralty jurisdiction exclusive to federal courts.—Act of 1850 relating to subject-matter of this chapter provided that all steamers, vessels, and boats "navigating waters of this state

shall be liable," etc. Legislature of 1851, while incorporating provisions of this law into Civil Practice Act, omitted *ex industria* words limiting this application to vessels navigating waters of state, and Civil Practice Act section 317 provided that "all steamers, vessels, and boats shall be liable," among other things, for non-performance or malperformance of any contract of transportation of persons or property made by their respective owners, masters, agents, or consignees. It was held that provisions of this act were intended to apply to all vessels, as well those engaged in voyages to and from foreign ports as those navigating waters of state. Under these early laws question of jurisdiction of state courts over such actions was raised, and decisions were conflicting. As a result of such decisions the law was again amended, with object of limiting jurisdiction of state court to such actions that there would be no conflict of jurisdiction between state and federal courts. Contention on one side was that constitution of United States and Judiciary Act of 1879 conferred exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction upon district courts of United States, saving to suitors in all cases right of common-law remedy where common law is competent to give it, and that class of actions provided for by statutes of the state encroached upon this jurisdiction of federal courts. On other hand, it was claimed that the state courts possessed concurrent jurisdiction with courts of the United States. In the early case of *Averill v. Steamer Hartford*, 2 Cal. 308, 310, Heydenfeldt, J., said: "The sixth chapter of Practice Act, providing for actions against steamers, vessels, and boats, confers upon district courts admiralty jurisdiction *pro tanto*, and proceedings in such actions must be governed by principles and forms of admiralty courts, except where otherwise controlled or directed by act. Rule in regard to actions in rem in both admiralty and common-law courts gives exclusive jurisdiction in given case to that tribunal which has acquired it by judicial seizure of thing, and such seizure has always been held essential to proceeding in rem. Our statute, however, alters that rule. It makes service of process upon person standing in particular relation to thing, equivalent to its seizure for purpose of conferring jurisdiction; and it necessarily follows that jurisdiction in rem may exist in several courts at same time and over same subject. Court whose mesne or final process has made first actual seizure of thing must have exclusive power over its disposal, and distribution of fund arising therefrom." Case in which this opinion was rendered did not involve question of conflict between state and federal courts, but determined jurisdiction as between two state courts. This decision was followed in *Taylor v. Steamer Columbia*, 5 Cal. 268, in which court stated that congress has no power under constitution to make this jur-

isdiction exclusive to federal courts, and held act of California legislature conferring admiralty jurisdiction on district courts of state to be constitutional and valid. In subsequent case of *Warner v. Steamship Uncle Sam*, 9 Cal. 697, court acknowledges that it appears clear that intention of Congress was to confer exclusive original jurisdiction in such cases upon district courts of United States, but states that under United States constitution jurisdiction in admiralty cases is not given to federal judiciary in exclusive terms nor prohibited to states, and that to render grant exclusive, exercise of the power by state tribunals must be absolutely and totally contradictory and repugnant; and that, as appellate power of supreme court of United States extends to state courts in proper cases, concurrent original jurisdiction of state and federal tribunals over civil admiralty cases can be sustained; and that provision that judicial powers of United States shall extend to all such cases of admiralty and maritime jurisdiction is fully satisfied when appellate power is extended to them; that mere failure of Congress to provide for appeal from state tribunals in civil admiralty cases can not affect question as to their concurrent original jurisdiction under constitution of United States. Concerning this subject and the subsequent revision of this chapter, Temple, J., in case of *Olsen v. Birch & Co.*, 133 Cal. 479, 481, says: "First two points raised by appellants may be considered together, and practically they are: (1) that law is invalid as in conflict with section 2, article III of constitution of United States, which declares that jurisdiction of federal courts shall extend to all cases of admiralty and maritime jurisdiction; and (2) that jurisdiction of state courts is forbidden by section 711 of Revised Statutes of the United States. This statute declares that 'jurisdiction of federal courts of cases of admiralty and maritime jurisdiction is exclusive, saving to suitors in all cases rights of common-law remedy, where common law is competent to give it.' Statutes here called in question are certain sections in Code of Civil Procedure (§§ 813 et seq.). The matter is more interesting because (as is well known to writer of this opinion) these sections were carefully revised by the late Stephen J. Field in view of decisions in *The Moses Taylor*, 71 U. S. (4 Wall.) 411, 431, 18 L. ed. 397, and *Hine v. Trevor*, 71 U. S. (4 Wall.) 555, 571, 18 L. ed. 451, and in report of so-called code revisers, which was written by Judge Field, claim was made that for first time these sections had been made valid. But I think we need not enter fully into this discussion. The code provisions are certainly not invalid, although a suit may be brought under them of which courts of state would have no jurisdiction." He further held that contract involved in that case was not maritime contract, but that if claim sued upon was one arising from maritime con-

tract and owners were unknown, or if owner could not be found, and summons was only served upon master, mate, or other person in charge of vessel, a serious question would be presented. So far as the statute giving right to lien is concerned, he held that it would be perfectly valid although no action could be brought under it in state courts. It is further held in same case that act of Congress did not have effect of denying to state courts jurisdiction, except to enforce action in rem, as that action was known to courts of admiralty. An action to foreclose lien against defendant personally and unaccompanied by seizure or constructive service of process is not an action in rem. The *Moses Taylor* case above referred to was an action arising under early California statute, while case of *Hine v. Trevor* arose under statutes of Iowa. For extensive discussion of this subject, see *The Glide*, 167 U. S. 606, 42 L. ed. 296, 17 Sup. Ct. Rep. 930.

15. Whether courts of first instance possessed admiralty jurisdiction under statute of 1850 was raised but not decided in *Loring v. Illsley*, 1 Cal. 24, 30.

As to admiralty and maritime jurisdiction, see notes 3 L. R. A. 711, 712; 5 L. R. A. 684-689; see, also, notes 5 Fed. Stats. Ann., 3d ed., pp. 486-518.

As to admiralty jurisdiction of contracts, see note 66 L. R. A. 193-238.

As to exclusiveness of such jurisdiction, see brief 31 L. R. A. 239.

As to jurisdiction of actions against vessels for damages for wrongful death of a person, see brief 31 L. R. A. 716; note 31 L. R. A. 715.

As to jurisdiction over ship at sea, see note 46 L. R. A. 264-281.

16. Same—Same—State statute can not confer jurisdiction upon courts of admiralty.—It is only when subject is maritime, and so within jurisdiction of admiralty, that lien granted by local law will be recognized.—*The Curtis*, *The Camden*, *The Welcome*, 3 L. R. A. 711, 37 Fed. 705; *Crawford v. Bark Caroline Reed*, 42 Cal. 469, 474.

17. Same—Same—State statute may create maritime lien.—Where state statute has given to materialmen in home port lien upon vessel, to be enforced by proceedings like those in admiralty, district courts of the United States have jurisdiction to enforce it by libel in rem. Their jurisdiction in rem in such a case is exclusive of that of courts of state. Such lien is right of property and not matter of procedure.—*The Glide*, 167 U. S. 606, 42 L. ed. 296, 17 Sup. Ct. Rep. 930.

18. Same—Same—Supplies furnished at home port.—State courts have no jurisdiction to enforce lien given by state law for materials and supplies furnished at home port, by reason of fact that such lien is made to meet cases where no such lien existed before by maritime law, and that

federal court can not enforce such lien because it is not maritime lien. Contract for furnishing such materials and supplies is maritime contract over which admiralty undoubtedly has jurisdiction, and this jurisdiction is exclusive, except so far as state courts are permitted to take jurisdiction by saving clause in ninth section of Judiciary Act; and this saving clause is not of remedy in common-law courts, but purely a statutory remedy. It must follow from this that whenever courts of admiralty have jurisdiction of cause of action, whether it afford a remedy in rem or in personam merely, that jurisdiction is exclusive, except as to common-law remedy, reserved by that act.—*Crawford v. Bark Caroline Reed*, 42 Cal. 469, 474.

As to remedy against owner for supplies furnished at home port, see pars. 31, 44, 64, this note.

19. Same—Same—Test of admiralty jurisdiction is whether vessel is engaged substantially in maritime navigation or interior trade not on tide-waters.—*Souter v. The Sea Witch*, 1 Cal. 162, 164.

20. Same—Same—Same—Admiralty action must relate to commerce and navigation.—Cause of action to be cognizable in admiralty, whether arising out of contract, claim, service, or obligation, or liability of any kind, must relate to business of commerce and navigation.—*Bennett v. Beadle*, 142 Cal. 239, 243, 75 Pac. 843.

21. The test of admiralty jurisdiction over causes of action arising from contracts is not locality of performance of contract, but its subject-matter. It is cardinal principle of admiralty jurisprudence that to give court of admiralty jurisdiction over contracts, subject-matter thereof must be maritime. It is not enough that service which sprang from contractual relation be performed on water, or even that it be done on board and for benefit of vessel which is afloat. These are not the exclusive tests. Service arising from contract must be of maritime character, not nominally, but substantially. Expression "maritime character" or "nature" is held to mean any act which contributes to the navigation of the vessel, presently or prospectively. . . . Judge Betts in *Cox v. Murray*, 1 Abb. Adm. 340, 16 Fed. Cas. 681, gives one an excellent idea of scope of expression as applied to contracts. He says: "The subject-matter of contract—substantial object and end—must pertain to navigation, or be connected with transactions performed by vessels on sea, to become maritime in its nature, and be clothed with privilege of remedy in admiralty courts; and it appears to me that an agreement acquires this maritime quality only when matters performed or entered upon under it pertain to fitting of vessel for navigation, aid and relief supplied her in preparing for and conducting voyage, or freighting or employment of her as instrument of voyage. Collateral

contracts with or assistance by services or advances to owner or master, incidentally benefiting voyage, acquire no special property thereby which renders them maritime."—*Williams v. The Sirius*, 65 Fed. 226.

22. Same—Same—Same—Locality as test.—In cases of tort locality is test of jurisdiction in admiralty. The ultimate judicial authority has determined principle that true meaning of rule of locality is that, although origin of wrong is on tide-water, yet, if consummation and substance of injury are on land, court of admiralty has not jurisdiction; that place of locality of injury is place or locality of thing injured, and not of agent causing injury. Within this settled principle, tort is maritime and within jurisdiction of admiralty when in jury is to vessel afloat, although negligence causing injury originated on land. Injury to bridge or wharf or other structure not engaged in navigation is not within admiralty jurisdiction.—*The Curtis*, *The Camden*, *The Welcome*, 37 Fed. 705, 3 L. R. A. 711. See *Johnson v. Chicago & P. E. Co.*, 119 U. S. 388, 30 L. ed. 447, 7 Sup. Ct. Rep. 254.

See par. 21, this note.

As to territorial extent of admiralty jurisdiction, see note 32 Am. Dec. 65-68.

23. Same—Same—Same—Ship out of commission.—Admiralty jurisdiction does not extend to ships merely because they are ships, but to commerce and navigation, and to ships only because they are, and while they are, used in commerce and navigation. A ship while building is not an instrument of commerce, nor is she while out of commission and being cared for to preserve her for possible future use. A ship injured by use and only temporarily laid up for repairs, or being refitted that she may resume her voyage, is still considered engaged in commerce.—*Olsen v. Birch*, 133 Cal. 479, 483, 65 Pac. 1032.

See pars. 60, 62, 63, this note.

As to definition of ship and shipping, see *Kerr's Cyc. Civ. Code*, § 960 and note.

24. Same—State courts—Common-law remedies enforceable.—Act conferring admiralty and maritime jurisdiction on United States district court expressly saves "to suitors in all cases right of common-law remedy where common law is competent to give it."—*Crescent C. W. & L. Co. v. Simpson*, 77 Cal. 286, 289, 19 Pac. 426; *Olsen v. Birch*, 133 Cal. 479, 481, 65 Pac. 1032.

25. Saving clause is not of remedy in common-law courts, but statutory remedy.—*Crawford v. Bark Caroline Reed*, 42 Cal. 469, 474.

26. Habit of courts of common law has been to deal with ships as personal property, subject in main, like other personal property, to municipal authority, and liable to their remedial process of attachment and execution; and titles to them, or contracts and torts relating to them, are cognizable

in those courts.—*Taylor v. Carryl*, 61 U. S. (20 How.) 583, 15 L. ed. 1028, approved in *Johnson v. Chicago & P. E. Co.*, 119 U. S. 388, 30 L. ed. 447, 7 Sup. Ct. Rep. 258.

27. True distinction between such proceedings as are and such as are not invasions of exclusive admiralty jurisdiction is this: If cause of action be one cognizable in admiralty, and suit be in rem against thing itself, though monition be also issued to owner, proceeding is essentially one in admiralty. If, on other hand, cause of action be not one of which court of admiralty has jurisdiction, or if suit be in personam against an individual defendant, with an auxiliary attachment against particular thing, or against property of defendant in general, it is essentially a proceeding according to course of common law, and within saving clause of statute (§ 563) of common-law remedy.—*Knapp, S & Co. v. McCaffrey*, 177 U. S. 638, 44 L. ed. 921, 20 Sup. Ct. Rep. 824.

As to jurisdiction of state courts to enforce liens against vessels, see note 34 Am. St. Rep. 309, 310.

As to nature of remedy provided by this chapter, see pars. 64-67, this note.

As to state regulation of shipping, where congress has legislated on subject-matter, see briefs 51 L. R. A. 721; 54 L. R. A. 237.

28. Same—Same—Same—Proceeding in rem is not common-law remedy.—*Crawford v. Bark Caroline Reed*, 42 Cal. 469, 474.

29. Same—Same—Concurrent jurisdiction of common-law remedies.—State courts have concurrent jurisdiction of causes of action cognizable in admiralty where only common-law remedy is sought.—*Bohannon v. Hammond*, 42 Cal. 227, 229.

30. Same—Same—Instance of state jurisdiction denied.—Action to recover damages for malperformance of contract of transportation, under provisions of this chapter, is not in pursuit of common-law remedy such as is reserved to suitor in state courts by Judiciary Act of 1789.—*Warner v. Steamship Uncle Sam*, 9 Cal. 697, 700.

See par. 60, this note.

31. Same—Same—Instances of state jurisdiction upheld.—District court of state has jurisdiction of action against owner of vessel to recover value of supplies sold and delivered to vessel at home port. Such an action is common-law remedy.—*Crawford v. Roberts*, 50 Cal. 235, 241.

32. State courts have jurisdiction of action for wages brought by British seaman, against master, for services rendered on board British vessel, master of which is British subject, when he is discharged by master in port of United States without any fault on his part.—*Pugh v. Gillam*, 1 Cal. 485, 486.

33. State courts have jurisdiction to enforce liens against vessel for services for forming and constructing house thereon

and for services rendered as member of crew on board of vessel, which has never been in commission nor used in navigation, where vessel has not been seized but owner has been served with summons and has appeared and answered. Such proceeding is not in rem but is ordinary action in personam. It is common-law remedy in which judgment is against owner, and sale of property, if one is had, is like an ordinary sale under execution.—*Olsen v. Birch*, 133 Cal. 479, 481, 65 Pac. 1032.

34. State courts have jurisdiction of actions for breach of contract, provided for in this section.—*Ord v. Steamer Uncle Sam*, 13 Cal. 370, 371, 372.

35. Same—Same—Vessels used in navigating the waters of state.—Remedy against boats and vessels given by statute of April 10, 1850, was against vessels used in navigating waters of this state. A vessel which belonged to port of New York, which was transient ship, and had been in harbor of San Francisco but few days, and was intended for New York and China trade, and which was never otherwise used in navigating waters of this state than by sailing into harbor of San Francisco from ocean, was held not to be one of class of vessels designated in act. Vessels which are confined in their usual and substantial employment to interior navigation are only boats and vessels embraced within descriptive words of statute. Legislature meant to limit operation of act so as to avoid conflict between state and federal authorities as to jurisdiction of actions concerning maritime contracts and maritime torts.—*Souter v. The Sea Witch*, 1 Cal. 162, 163, 164; *McQueen v. Ship Russell*, 1 Cal. 165, 166; *Tucker v. Bark Sacramento*, 1 Cal. 403; *Ray v. Bark Henry Herbeck*, 1 Cal. 451.

36. Same—Same—Same—Must be within designated class.—Jurisdiction is not acquired by reason of giving of bond for release of vessel, where jurisdiction does not otherwise attach by reason of vessel not being within class designated by act.—*McQueen v. Ship Russell*, 1 Cal. 165, 166, 167.

As to what are deemed vessels within state statute, see note 1 L. R. A. 505.

37. Same—Same—Same—One terminus in tide-water.—Admiralty has no jurisdiction over vessel not engaged in maritime trade and navigation, though on her voyages she may touch at one terminus of them in tide-water, her employment being substantially on other waters.—*Souter v. The Sea Witch*, 1 Cal. 162, 164.

As to test of admiralty jurisdiction, see pars. 19-23, this note.

38. Liability—Acts of agent, master, or captain are binding on steamer and owners.—*Oakland C. M. Co. v. Jennings*, 46 Cal. 176, 182, 187; *Crawford v. Roberts*, 50 Cal. 235, 239, 241; *Trabing v. California N. & I. Co.*, 121 Cal. 137, 140, 53 Pac. 644; *Kerry v.*

Pacific M. Co., 121 Cal. 564, 568, 54 Pac. 89.

As to duties and liabilities of manager, managing owner, and owners of a ship, see *Kerr's Cyc. Civ. Code*, 2d ed., §§ 2070 et seq. and notes.

39. Same—Contract and tort both covered.—Steamer is liable to full extent of injuries, whether action prosecuted be merely for damages for breach of contract of transportation, or whether action be in nature of one in tort for damages to person for injuries inflicted by fraudulently inducing plaintiff to enter into contract, by landing him at port other than that called for in contract, and abandoning him there without proper means of accommodation and protection, and in place where he could not readily procure transportation, and subjecting him to dangers of unhealthy climate.—*Sheldon v. Steamship Uncle Sam*, 18 Cal. 526, 534, 535.

40. Where steamship company, engaged in transporting passengers between San Francisco and New York by way of Nicaragua, after cancelation of its charter for transit across isthmus by that route, and knowing that it could not carry out contract for transportation by that route, fraudulently induced plaintiff to enter into contract for transportation by that route, and did not inform plaintiff of such facts until after voyage had been commenced, and then by false representations induced her to consent to proceed to Panama, representing that upon crossing isthmus to Aspinwall she would be taken on board steamer and carried without delay to New York, but where, upon arrival at Panama, they compelled plaintiff to disembark in an open boat, in severe rain, and she was transported to Aspinwall by railroad in coal car, and was detained at Aspinwall seventeen days, during which period she was abandoned by company and left without protection or assistance, and food and accommodations at Aspinwall were bad, and climate unhealthy, and it appeared that such acts were committed in spirit of recklessness, such treatment was held to constitute gross and palpable wrong for which plaintiff might recover damages, and for which steamer would be liable.—*Sheldon v. Steamship Uncle Sam*, 18 Cal. 526, 532, 534.

41. Acts of captain in handcuffing plaintiff and chaining him to post until next landing-place was reached, at which place plaintiff was ejected from steamer, are acts performed in line of captain's employment for which owners of vessel are liable. Captain is authorized by defendant to see that persons being transported by steamer pay their fare, and to collect same, and to remove from steamer those who, not having paid their fare, refuse to pay it when demanded. That owner is liable in damages for all that captain wrongfully does to plaintiff in execution or attempted execution of that authority, even though captain acts from wanton and malicious

motives, or resorts to unlawful means in executing it, is amply sustained by modern authorities.—*Trabing v. California N. & L. Co.*, 121 Cal. 137, 140, 53 Pac. 644.

As to liability for illness resulting from failure to furnish berth, see brief 55 L. R. A. 544.

42. Compare.—Contract is substantive cause of action, and injuries received are alleged by way of special damage (Field, J., dis. op.).—*Warner v. Steamship Uncle Sam*, 9 Cal. 697, 702.

43. Same—Contracts for passage partly on other vessels.—This section formerly provided that "all steamers, vessels, and boats shall be liable for non-performance or mal-performance of any contract for transportation of person or property made by their respective owners, masters, agents, or consignees." By subdivision five, liability for non-performance or mal-performance is limited to contracts for transportation of persons or property between places within state. Under former reading of section it was held that steamer was liable where contract was made with agent of vessel, notwithstanding that entire voyage was not made in one vessel,—for instance, that contract for passage from San Francisco to New York was an entirety, and that failure at any point was violation of contract, for which vessel was liable, notwithstanding that such vessel might be used for transportation of passenger only from port of San Francisco to that of San Juan del Sur, and that some other vessel on Atlantic side should complete transportation. The agent was held to have right to bind vessel for entire contract.—*Ord v. Steamer Uncle Sam*, 13 Cal. 370, 371, 372.

44. Same—Owner liable.—Plaintiff makes out prima facie case against defending owner of vessel in an action for supplies furnished to such vessel, when he proves that, upon request of captain, he furnished articles for use of vessel, such as come under general appellation of ship's stores and provisions, that defendant was at time an owner of vessel; that alleged captain was in fact captain; and value of goods. Master's power is presumed, in absence of evidence to contrary, to extend to making contracts for supplies in home port, which shall bind owners.—*Crawford v. Roberts*, 50 Cal. 235, 238, 241.

As to ownership in general, see *Kerr's Cyc. Civ. Code*, 2d ed., §§ 669 et seq. and notes.

As to owner's liability for cargo sold by master, see *Kerr's Cyc. Civ. Code*, 2d ed., § 2385.

As to personal liability of master, see *Kerr's Cyc. Civ. Code*, 2d ed., §§ 2382-2384.

As to rights and liabilities of part owners of vessels, see note 90 Am. St. Rep. 354-410.

45. Same—Same—Charterer as "owner."—It appears to be well settled that if vessel be chartered in usual manner, either for

particular voyage, or for certain period of time, charterer having authority to appoint master, and undertaking to victual, man, and navigate her at his own expense, he will be deemed owner pro hoc vice, and general owner will not be personally liable for supplies, or under contracts of affreightment. This proceeds upon ground that as charterer appoints master, and has exclusive control of vessel, master is his agent and not agent of general owner, and does not, therefore, hold himself out to world as principal for whom master is authorized to act. In respect to contract of affreightment, general owner in such case would not be liable for further reason that, inasmuch as vessel was not navigated by him, or at his expense, or by his agents or servants, or for his benefit, he was not common carrier, and was therefore not amenable as such. It is equally clear that if owner let out whole of vessel, appointing his own master, and sailing her at his own expense, he will be responsible on contracts of affreightment made by master with shippers having no notice of charter party.—*Oakland C. M. Co. v. Jennings*, 46 Cal. 175, 183, 184; *Kerry v. Pacific M. Co.*, 121 Cal. 564, 568, 54 Pac. 89.

46. Same—Same—Same—Secret charter no protection to general owner.—Where registered owner of vessel appoints master, and thereafter enters into secret agreement with master to effect that latter is to have entire control and management of vessel; to make whatever contracts of affreightment he sees fit; to employ her in any business he desires within inland waters of state; to victual, man, and navigate her at his own expense; and to collect all her earnings; and to pay to owner one-third of her gross earnings,—defendant to keep her seaworthy and in repair,—such owner will be liable on contracts of affreightment, and for malperformance thereof, with persons dealing with master in ignorance of this understanding. Such persons are warranted in assuming that master is acting by virtue of his ordinary authority, and therefore acting for his owners in signing bills of lading. By act of appointing master, owner notifies public that master is his agent for such purposes. After thus openly proclaiming agency, he is not at liberty secretly to revoke it whilst it ostensibly continues in as far as persons are affected by it who deal with master within scope of agency in ignorance of revocation.—*Oakland C. M. Co. v. Jennings*, 46 Cal. 175, 182, 187; *Kerry v. Pacific M. Co.*, 121 Cal. 564, 568, 54 Pac. 89.

As to charterer as owner, see *Kerr's Cyc. Civ. Code*, 2d ed., § 965 and-note.

As to liability of secret part owner, see note 90 Am. St. Rep. 403.

47. Same—Same—Credit given to ship's husband, effect of.—Owners of vessel are liable for supplies furnished thereto, notwithstanding that credit for such supplies was given to ship's husband ordering them,

unless it be shown that such credit is exclusive.—*Crawford v. Roberts*, 50 Cal. 235, 239, 241.

48. Same—Same—Evidence of ownership—Decree upon libel in United States district court is conclusive, as to ownership, as to only such parties as appeared in such action; and is not admissible in another action to establish ownership in persons not intervening in such libel suit.—*Moynihan v. Drobaz*, 124 Cal. 212, 213, 56 Pac. 1026.

49. Same—Same—Same—Entry in custom-house books of register or transfer of vessel is not even prima facie evidence as against one not claiming to be an owner, unless such entry be shown to have been made by authority of person named in it; nor is decree of United States district court, in case of libellant against same steamer, evidence of such fact, and admission of such evidence is such error as entitles plaintiff to new trial, unless there is otherwise sufficient proof of ownership to warrant finding in favor of defendant.—*Moynihan v. Drobaz*, 124 Cal. 212, 213, 214, 56 Pac. 1026.

50. Same—Same—Same—Plaintiff's ownership—Evidenced that one of partners of plaintiff firm, in his own individual capacity, purchased one share in defendant corporation, owner of vessel, does not tend to show that firm or other partner are in any manner interested as owners of the vessel.—*Moynihan v. Drobaz*, 124 Cal. 212, 214, 215, 56 Pac. 1026.

51. Same—Same—Same—Possession of property is prima facie evidence of ownership. This rule of law is uniform in its application, and question of ownership of vessel forms no exception.—*Bailey v. Steamer New World*, 2 Cal. 370, 373.

52. Same—Same—Same—Ship's register is admissible as evidence in favor of persons claiming to be owners, in connection with other evidence tending to establish ownership.—*Brooks v. Minturn*, 1 Cal. 481, 482, 483.

53. Same—Same—Limitation of personal liability—Individual liability of shipowner is limited to proportion of any and all debts and liabilities that his individual share of vessel bears to whole, by section 18 of act of Congress, June 26, 1884 (Supplement to U. S. Rev. Stats. 1874-91, p. 443). This act does not restrict liability of owners on their own personal contracts, but only their liability "on account of vessel"; that is, liability that is imposed on them by law and in consequence of their ownership of vessel, viz., for contracts or acts of ship or her master without owner's express intervention, but there is nothing in act prohibiting part owners to so contract as to become liable for entire damage. Whether this act is available in suits in state courts was raised but not determined.—*Kerry v. Pacific M. Co.*, 121 Cal. 564, 571, 572, 54 Pac. 89.

As to limitation of vessel owners' liability, see 6 Fed. Stats. Ann. 2d ed., pp. 330-333.

54. Same—Same—Ownership question for jury—Question of ownership, in an action for materials furnished for construction of vessel, is one of fact to be decided by jury, and where there is shadow of conflict with respect to such fact it is error for court to withdraw such question from jury.—*Dean v. Ross*, 105 Cal. 227, 230, 231, 38 Pac. 912.

55. Lien—Acquired, how—In suit against vessel for any of causes set out in statute it is not necessary to attach her so as to acquire lien against subsequent purchasers. Service of process upon person in particular relation to thing is by statute made equivalent to its seizure, for purpose of conferring jurisdiction. It was not intention of legislature to provide that lien should be acquired only by attachment; this would virtually be denying right of creditors for small sums. It would be almost impossible for mechanic or merchant of small capital or credit, who had claim for few hundred dollars against large river steamer or sea-going vessel, to give necessary bonds to detain her until his suit could be determined, and in meantime, she might be run off and sold free of all such debts or encumbrances.—*Averill v. Steamship Hartford*, 2 Cal. 308, 310; *Meiggs v. Scannell*, 7 Cal. 406, 409.

56. Under Practice Act it was held that, as statute did not expressly create lien, lien did not exist from time cause of action accrued, but only from time service of process was had in suit.—*Fisher v. White*, 8 Cal. 419, 423.

As to attachment, see, post, § 817.

As to bottomry lien, see *Kerr's Cyc. Civ. Code*, 2d ed., §§ 3028, 3029, and notes.

As to claim of lien for services by part owner, see note 70 L. R. A. 380.

As to extinguishment of lien by lapse of time, generally, see *Kerr's Cyc. Civ. Code*, 2d ed., § 2911 and note.

As to liens for salvage, see *Kerr's Cyc. Civ. Code*, 2d ed., § 2079.

As to liens, generally, see *Kerr's Cyc. Civ. Code*, 2d ed., §§ 2872 et seq. and notes.

As to liens on ships, see *Kerr's Cyc. Civ. Code*, 2d ed., § 3060.

57. Same—Characteristics similar to mechanics' liens—Although delivery of materials in San Francisco by plaintiff to common carrier for shipbuilders who were constructing vessel in state of Oregon is delivery to shipbuilders sufficient to bind them personally, it is not "furnishing" of materials "for construction of vessel" contemplated by statute. Such delivery to shipbuilders can not of itself create lien, where materials so furnished may never find their way to vessel or be used for benefit thereof. Theory upon which such

lien is given upon property of one who is in no way personally liable for debt is that services or materials secured thereof have gone into property, and that those who furnished them have in part created very property to which lien attaches. The subdivision of this section relative to liens on vessels for materials furnished for their construction, and sections of our law relative to mechanics' liens on buildings and other structures derive their being and authority from one common source, viz., section 15, article XX of constitution of 1879. That section of the constitution provides that mechanics and materialmen shall have lien upon property "upon which they have bestowed labor or furnished material for value of such labor done and material furnished." It is firmly settled in this state that, although materials may be furnished with agreement that they are to be used in specified building, materialmen will have no lien upon that building for value of any such materials that are not actually used therein. Unless so used in the building, they are not "furnished upon" the same. In one case it is furnishing to vessel that creates lien; in the other, it is furnishing to building or other structure that creates lien. If this be true it is apparent that there can not be, within meaning of our statute, any furnishing of materials "in this state" for construction of vessel which is wholly constructed in another state, and that materials which are put into vessels in another state can not be held to have been "furnished in this state for their construction."—*Bennett v. Beadle*, 142 Cal. 239, 242, 243, 75 Pac. 843.

As to lien on vessels under mechanics' liens law, see note 1 L. R. A. 505.

As to mechanics' liens, see, post, §§ 1183 et seq. and notes.

58. Same—Extension of, when credit given.—Where credit is given for supplies furnished to vessel, lien continues for one year after time for which credit is given expires.—*Fisher v. White*, 8 Cal. 419, 423; *Edgerly v. Schooner San Lorenzo*, 29 Cal. 418, 419.

59. Same—Vessel situated without state.—Legislature has no power to impose lien upon property situate without state, and statute makes no provision for subsequent creation of lien by act of vessel coming within jurisdiction of state.—*Bennett v. Beadle*, 142 Cal. 239, 243, 75 Pac. 843.

60. Maritime contracts have reference to navigation upon sea, and in some way to vessels actually being used in commerce, or at least in navigation. A contract relating to vessel which has never been in commission and not in active use in navigation is not maritime contract.—*Olsen v. Birch*, 133 Cal. 479, 482, 65 Pac. 1083; *Bennett v. Beadle*, 142 Cal. 239, 243, 75 Pac. 843.

See par. 23, this note.

61. An action to recover damages for malperformance of contract to transport plaintiff from San Francisco, via San Juan del Sur, to city of New York, and for injuries suffered by plaintiff as result of wrongful acts of agents of defendant steamer during voyage, is an action on maritime contract.—*Warner v. Steamship Uncle Sam*, 9 Cal. 697, 702.

62. Same—Contract for building ship is not maritime contract, but contract made on land, and therefore not subject of admiralty jurisdiction.—*The Glide*, 167 U. S. 606, 42 L. ed. 296, 17 Sup. Ct. Rep. 930.

As to contract for building ship or for supplying engines, timber, or other materials for construction not being a maritime contract, and creating no maritime lien, see note 1 L. R. A. 505.

63. Same—Employment of ship's keeper.—Admiralty court has no jurisdiction of action for balance claimed to be due for services as ship-keeper or watchman, performed while ship was not in commission. Such service is not maritime service.—*Williams v. The Sirius*, 65 Fed. 226.

64. Same—Lien for supplies furnished at home port.—Lien given by state statute for repairs or supplies furnished to ship at its home port is maritime lien which may be enforced by proceedings in rem by federal courts. Such statutes merely restore lien acknowledged by civil law and law of nations, but which English courts of admiralty have limited in favor of English vessels. Being maritime lien, it must stand on equality with other maritime liens of same class, and will be preferred to mortgage even of earlier date, latter not being maritime in its nature.—*Clyde v. Steam Trans. Co.*, 36 Fed. 501, 1 L. R. A. 794. See *Crawford v. Bark Caroline Reed*, 42 Cal. 469, 473, abstracted in par. 14, this note.

As to lien for repairs made in home port, see note 90 Am. St. Rep. 397.

As to lien for supplies furnished in home port, see note 70 L. R. A. 407-413.

As to what contracts will support maritime liens, see note 70 L. R. A. 353, 439.

65. Nature and office of remedy provided—Action in personam.—Action to foreclose liens given by provision of this chapter is not proceeding in rem. It is action in personam, with right to attach interest of defendant in vessel. Such proceedings are said to be quasi in rem, which phrase has become quite common since *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565. It is there said that such proceedings are not strictly in rem because they are not against the thing as debtor.—*Olsen v. Birch*, 133 Cal. 479, 481, 483, 484, 65 Pac. 1032.

See pars. 14-34, this note.

66. Same—Available to collect wharfage.—State board of harbor commissioners may avail themselves of remedy provided by this section for purpose of collecting

tolls and wharfage.—People ex rel. State Board Harbor Comrs. v. Steamer America, 34 Cal. 676, 680.

67. Same — Statutory remedy, unknown to common law.—Remedy given against boats and vessels by act of April 10, 1850, was held to be strictly statutory remedy and of character not recognized by common law.—Souter v. The Sea Witch, 1 Cal. 162.

68. Practice in this class of cases is not to be assimilated to that prevailing in courts of admiralty, but is governed by statute, and where statute is silent common law furnishes rule of decision.—Sheldon v. Steamship Uncle Sam, 18 Cal. 526, 534, 535. See Averill v. Steamer Hartford, 2 Cal. 308, 310.

As to parties, see, post, § 814.

As to pleading, see, post, § 815.

§ 814. ACTIONS MAY BE BROUGHT DIRECTLY AGAINST VESSELS.

Actions for any of the causes specified in the preceding section must be brought against the owners by name, if known, but if not known, that fact shall be stated in the complaint, and the defendants shall be designated as unknown owners. Other persons having a lien upon the vessel may be made defendants to the action, the nature and amount of such lien being stated in the complaint.

History: Enacted March 11, 1872, re-enactment of § 318 Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 328.

ACTIONS—PARTIES.

1, 2. Parties—Defendant.

3. Same—Plaintiff.

1. Parties—Defendant.—Under statute of April 10, 1850, plaintiff might, at his option, bring suit against master agent, owner, or consignee, or institute suit against boat or vessel by name.—Loring v. Illsley, 1 Cal. 24, 30; Souter v. The Sea Witch, 1 Cal. 162.

2. Where, after setting forth cause of action, complaint alleged that A B was part owner and master of bark, and prayed that he, and other owners when made known, and bark itself, might be cited to answer under complaint, and condemned in solido to pay damages claimed, and that bark might be sold to satisfy claim, and where summons issued commanding master to appear and answer, and he did appear and put in several plea of general issue on his own behalf, and there was no answer put in on part of bark, or of either of other owners, no process served upon them, no publication of notice requiring them to appear, and no appearance of record, it was held that action was one in

personam and not in rem, and that judgment bound only interest of master.—Loring v. Illsley, 1 Cal. 24, 30.

As to definition of consignee, see Kerr's Cyc. Civ. Code, 2d ed., § 2110.

As to fictitious names, see, ante, § 474.

As to parties generally, see ante, §§ 367-390 and notes.

As to who may appear and defend, see, post, § 821.

3. Same — Plaintiff.—Husband and wife can not recover jointly in action ex contractu for breach of contract for transportation, but where complaint alleges matters constituting tort, and no demurrer is interposed for improper joinder of husband, judgment may be rendered as in action for tort for damages suffered by wife by reason of such wrongful acts. The right of recovery does not extend, however, to any matter for which husband should sue alone, as for damages on account of disbursements or expenditures made by him.—Sheldon v. Steamship Uncle Sam, 18 Cal. 526, 534, 535. See Warner v. Steamship Uncle Sam, 9 Cal. 697, 728, 729, 735, 736; Matthew v. Central Pac. R. Co., 63 Cal. 450, 451.

§ 815. COMPLAINT MUST BE VERIFIED. The complaint must designate the steamer, vessel, or boat by name, and must be verified by the oath of the plaintiff, or some one on his behalf.

History: Enacted March 11, 1872, re-enactment of § 319 Practice Act.

1. Complaint.—Court can not take judicial notice that vessel found at wharf is engaged in navigating high seas or navigable inland waters of state, or is engaged in trade, commerce, or navigation in any sort or manner. That is fact of jurisdictional consequence, and must be expressly alleged or be necessarily inferable from other facts alleged. If, therefore, complaint in an ac-

tion for collection of wharfage does not disclose fact that vessel was engaged in commerce, case can not on demurrer be considered one falling within admiralty or maritime jurisdiction.—People ex rel. State Board of Harbor Comrs. v. Steamship America, 34 Cal. 676, 679.

2. Allegation in complaint that services were rendered on board of vessel, and as

members of her crew, is not necessarily an allegation that vessel was engaged in commerce, although that may be the most obvious and ordinary meaning of language. The words may also apply to force put on board vessel to care for it, before ship has been enrolled or is in commission, merely for preservation of ship. If finding shows latter to be meaning, although there may be an ambiguity which was reached by special

demurrer, refusal of court to sustain such demurrer, and failure to amend complaint, can not injure defendant, because complaint could easily have been amended. Such objection is not sufficient ground for reversal of judgment on appeal.—*Olsen v. Birch*, 133 Cal. 479, 484, 485, 65 Pac. 1032.

As to verification, see, ante, § 446 and note.

§ 816. SUMMONS, SERVICE OF ON MASTER, ETC. The summons and copy of the complaint must be served on the owners if they can be found; otherwise, they may be served on the master, mate, or person having charge of the steamer, vessel, or boat.

History: Enacted March 11, 1872, re-enactment of § 320 Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 328; March 10, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 12.

As to service of summons, generally, see, ante, §§ 410 et. seq. and notes.

§ 817. PLAINTIFF MAY HAVE SUCH VESSEL, ETC., ATTACHED. The plaintiff, at the time of issuing the summons, or at any time afterward, may have the steamer, vessel, or boat, with its tackle, apparel, and furniture, attached as security for the satisfaction of any judgment that may be recovered in the action.

History: Enacted March 11, 1872, re-enactment of § 321 Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 328.

1. Attaching vessel — Construction. — There is nothing herein to prevent a mechanic or laborer from bringing an ordinary action against the owner of a vessel for labor or materials in the repairs of a vessel and obtaining judgment and enforcing it by

execution as in ordinary cases.—*Graham v. Annis*, 28 Cal. App. 754, 153 Pac. 981.

As to attachment, generally, see, ante, §§ 537-560 and notes.

As to lien acquired, see, ante, § 813 and note pars. 55-59.

§ 818. THE CLERK MUST ISSUE THE WRIT OF ATTACHMENT. The clerk of the court must issue a writ of attachment, on the application of the plaintiff, upon receiving a written undertaking on behalf of the plaintiff, executed by two or more sufficient sureties, to the effect that if the judgment be rendered in favor of the owner of the steamer, vessel, or boat, as the case may be, he will pay all costs and damages that may be awarded against him, and all damages that may be sustained by him from the attachment, not exceeding the sum specified in the undertaking, which shall in no case be less than five hundred dollars.

History: Enacted March 11, 1872, re-enactment of § 322 Practice Act, with last two sentences added, amended March 24, 1874, Code Amdts. 1873-4, p. 328.

As to attachment bond, generally, see, ante, § 539 and note.

As to instructions to sheriff, see, ante, § 543 and note.

As to issuance of writ, see, ante, § 538 and note.

As to qualification of sureties, see, post, § 1057 and note.

As to undertaking, see, ante, § 539 and note.

§ 819. SUCH WRIT MUST BE DIRECTED TO THE SHERIFF. The writ must be directed to the sheriff of the county within which the steamer, vessel,

or boat lies, and direct him to attach such steamer, vessel, or boat, with its tackle, apparel, and furniture, and keep the same in his custody until discharged in due course of law.

History: Enacted March 11, 1872, re-enactment of § 323 Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 329.

§ 820. WRIT, EXECUTION OF WITHOUT DELAY. The sheriff to whom the writ is directed and delivered must execute it without delay, and must attach and keep in his custody the steamer, vessel, or boat named therein, with its tackle, apparel, and furniture, until discharged in due course of law; but the sheriff is not authorized by any such writ to interfere with the discharge of any merchandise on board of such steamer, vessel, or boat, or with the removal of any trunks or other property of passengers, or of the captain, mate, seamen, steward, cook, or other persons employed on board.

History: Enacted March 11, 1872, re-enactment of § 324 Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 329.

As to claim of third party, see, ante, § 549 and note.

As to execution of writ of attachment, see, ante, § 542 and note.

§ 821. THE OWNER, MASTER, ETC., MAY APPEAR AND DEFEND SUCH VESSEL. The owner, or the master, agent, or consignee of the steamer, vessel, or boat, may, on behalf of the owner, appear and answer, or plead to the action; and may except to the sufficiency of the sureties on the undertaking filed on behalf of the plaintiff, and may require sureties to justify as upon bail on arrest.

History: Enacted March 11, 1872, re-enactment of § 325 Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 329.

As to answer, see, ante, § 437 and note.

As to justification of sureties, see, ante, § 495 and note.

As to appearance, see, post, § 1014 and note.

As to parties, see, ante, § 814 and note.

§ 822. DISCHARGE OF ATTACHMENT ON UNDERTAKING. After the attachment is levied, the owner, or the master, agent, or consignee of the steamer, vessel, or boat, may, in behalf of the owner, have the attachment discharged, upon giving to the sheriff an undertaking of at least two sufficient sureties in an amount sufficient to satisfy the demand in suit, besides costs, or depositing that amount with the sheriff. Upon receiving such undertaking or amount, the sheriff must restore to the owner, or the master, agent, or consignee of the owner, the steamer, vessel, or boat attached.

History: Enacted March 11, 1872, re-enactment of § 326 Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 330.

As to bond not conferring jurisdiction, where not otherwise obtained, see, ante, § 813 and note par. 36.

As to discharge after claim filed for wages of employees, see, post, § 825 and note.

As to discharge of attachment, see, ante, §§ 540, 554, 555 and notes.

§ 823. AFTER APPEARANCE, ATTACHMENT MAY, ON MOTION, BE DISCHARGED. After the appearance in the action of the owner, the attachment may, on motion, also be discharged in the same manner, and on like terms

and conditions, as attachments in other cases, subject to the provisions of section eight hundred and twenty-five.

History: Enacted March 11, 1872, re-enactment of § 327 Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 330.

As to discharge of attachment, generally, on motion, see, ante, § 556 and note.

§ 824. WHEN NOT DISCHARGED SUCH VESSEL, ETC., MAY BE SOLD AT PUBLIC AUCTION. APPLICATION OF PROCEEDS. If the attachment be not discharged, and a judgment be recovered in the action in favor of the plaintiff, and an execution be issued thereon, the sheriff must sell at public auction, after publication of notice of such sale for ten days, the steamer, vessel, or boat, with its tackle, apparel, and furniture, or such interest therein as may be necessary, and must apply the proceeds of the sale as follows:

1. When the action is brought for demands other than the wages of mariners, boatmen, and others employed in the service of the steamer, vessel, or boat sold, to the payment of the amount of such wages, as specified in the execution.

2. To the payment of the judgment and costs, including his fees.

3. He must pay any balance remaining to the owner, or to the master, agent, or consignee who may have appeared on behalf of the owner, or if there be no appearance, then into court, subject to the claim of any party or parties legally entitled thereto.

History: Enacted March 11, 1872, re-enactment of § 328 Practice Act; amendment approved, March 24, 1874, Code Amdts. 1873-4, p. 330; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 166, held unconstitutional, see history, § 5 ante.

**JUDGMENT—SALE—UNDERTAKING
ON APPEAL.**

1. Findings concerning undertaking.
2. Judgment.
3. Judgment of nonsuit—On ground of variance.
4. Master's possession—Effect of execution-sale.
5. Undertaking on appeal.

1. **Findings concerning undertaking.**—Finding that at time of issuance of writ of attachment written undertaking was received by clerk which was not to effect that if judgment was rendered in favor of owner of steamer plaintiffs would pay all costs and damages awarded against them, or all damages that might be sustained by owners not exceeding sum specified in undertaking, there being no issue presented in case on which this finding is required, and it being stipulated that at commencement of action vessel was seized under provision of code relating to attachment, and was released upon bond being given on part of defendants as therein required, will not support conclusion of law that plaintiffs at time of commencement of action had no lien upon steamer and are not entitled to recover anything in an action, but that defendants are entitled to their costs.—Moynihan v. Drobaz, 124 Cal. 212, 215, 56 Pac. 1026.

2. **Judgment is against owner, and sale of property if one is had, will be like an ordinary sale under execution.**—Olsen v. Birch, 133 Cal. 479, 483, 65 Pac. 1032.

3. **Judgment of nonsuit—On ground of variance between contract alleged and that proven is erroneous in an action for breach of passenger contract where contract alleged in complaint is not denied in answer.**—Ord v. Steamer Uncle Sam, 13 Cal. 370, 373.

As to motion for nonsuit on ground of variance, see 22 Cyc. Pl. & Pr. 636.

4. **Master's possession—Effect of execution-sale.**—Judgment against master as part owner, and execution-sale of his interest, can not deprive him of possession of vessel where his interest was but one-third of vessel. He can be displaced only by majority of part owners. His agency for other owners can not be affected by judgment and sale on execution of his interest.—Loring v. Illsley, 1 Cal. 24, 30.

As to sale of attached property, see, ante, § 550 and note.

5. **Undertaking on appeal.**—Judgment rendered foreclosing liens is not judgment which "directs payment of money" within meaning of section 942, post, and a three-hundred-dollar undertaking given on appeal stays proceedings in court below, pending

appeal. There is no necessity for an undertaking in twice amount of judgment to stay execution, and if such an undertaking be

given, it is without consideration, and void as to sureties.—*Olsen v. Birch*, 1 Cal. App. 99, 103, 81 Pac. 656.

§ 825. MARINERS AND OTHERS MAY ASSERT THEIR CLAIM FOR WAGES, NOTWITHSTANDING PRIOR ATTACHMENT. Any mariner, boatman, or other person employed in the service of the steamer, vessel, or boat attached, who may wish to assert his claim for wages against the same, the attachments being issued for other demands than such wages, may file an affidavit of his claim, setting forth the amount and the particular service rendered, with the clerk of the court; and thereafter no attachment can be discharged upon filing an undertaking, unless the amount of such claim, or the amount determined as provided in the next section, be covered thereby, in addition to the other requirements; and any execution issued against such steamer, vessel, or boat, upon judgment recovered thereafter, must direct the application of the proceeds of any sale:

1. **To the payment of the amount of such claims filed**, or the amount determined, as provided in the next section, which amount the clerk must insert in the writ;

2. **To the payment of the judgment and costs**, and sheriff's fees, and must direct the payment of any balance to the owner, master, or consignee, who may have appeared in the action; but if no appearance by them be made therein, it must direct a deposit of the balance in court.

History: Enacted March 11, 1872, substantial re-enactment of § 329 Practice Act.

1. **Purpose of section.**—This section is intended to provide summary mode of determining claims of particular class which have not been adjudicated by competent tribunal. But where such claims have neither been presented nor filed with court according to requirements of this section, nor any suits been instituted thereon to enforce them, but such claims have been filed and suits instituted in court of another district or county, court whose mesne of final process has made first actual seizure of thing must have exclusive power over its disposal, and distribution of fund arising therefrom. The judgments of other

courts, when properly authenticated and filed in court having custody of fund, must be regarded as complete adjudication of subject-matter of litigation which they disclose and entitle to distribution according to their respective merits. — *Averill v. Steamship Hartford*, 2 Cal. 308, 309.

As to seaman's lien for wages, see *Kerr's Cyc. Civ. Code*, 2d ed., § 3056.

As to shipmaster's lien for advances, see *Kerr's Cyc. Civ. Code*, 2d ed., § 3019 and note par. 64 and § 3055.

As to wages of seaman, see *Kerr's Cyc. Civ. Code*, 2d ed., §§ 2052 et seq.

§ 826. PROOF OF THE CLAIMS OF MARINERS AND OTHERS. If the claim of the mariner, boatman, or other person filed with the clerk of the court, as provided in the last section, be not contested within five days after notice of the filing thereof by the owner, master, agent, or consignee of the steamer, vessel, or boat against which the claim is filed, or by any creditor, it shall be deemed admitted; but if contested, the clerk must indorse upon the affidavit thereof a statement that it is contested, and the grounds of the contest, and must immediately thereafter order the matter to a single referee for his determination, or he may hear the proofs and determine the matter himself.

The judgment of the clerk or referee may be reviewed by a court in which the action is pending or a judge thereof immediately after the same is given,

and the judgment of the court or judge shall be final. On the review the court or judge may use the minutes of the proofs taken by the clerk or referee, or may take the proofs anew.

History: Enacted March 11, 1872, re-enactment of § 330 Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 331; March 10, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 12.

§ 827. SHERIFF'S NOTICE OF SALE TO CONTAIN MEASUREMENT, TONNAGE, ETC. The notice of sale published by the sheriff must contain a statement of the measurement and tonnage of the steamer, vessel, or boat, and a general description of her condition.

History: Enacted March 11, 1872, re-enactment of § 331 Practice Act; repeal by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 166, held unconstitutional, see history, § 5 ante.

TITLE XI.

OF PROCEEDING IN JUSTICES' COURTS.

- Chapter I. PLACE OF TRIAL OF ACTIONS IN JUSTICES' COURTS, §§ 832-838.
- II. MANNER OF COMMENCING ACTIONS IN JUSTICES' COURTS, §§ 839-850.
- III. PLEADINGS IN JUSTICES' COURTS, §§ 851-860.
- IV. PROVISIONAL REMEDIES IN JUSTICES' COURTS, §§ 861-870.
- V. JUDGMENT BY DEFAULT IN JUSTICES' COURTS, §§ 871, 872.
- VI. TIME OF TRIAL AND POSTPONEMENTS IN JUSTICES' COURTS, §§ 873-877.
- VII. TRIALS IN JUSTICES' COURTS, §§ 878-887.
- VIII. JUDGMENTS (OTHER THAN BY DEFAULT) IN JUSTICES' COURTS, §§ 889-900a.
- IX. EXECUTIONS FROM JUSTICES' COURTS, §§ 901-905.
- X. CONTEMPTS IN JUSTICES' COURTS, §§ 906-910.
- XI. DOCKETS OF JUSTICES, §§ 911-918.
- XII. GENERAL PROVISIONS RELATING TO JUSTICES' COURTS, §§ 919-926.
- XIIa. SAME. SMALL CLAIMS COURTS, §§ 927, 927p.

CHAPTER I.

PLACE OF TRIAL OF ACTIONS IN JUSTICES' COURTS.

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| § 832. Actions, in what township or city may be commenced. | § 836. Proceedings after order changing place of trial. |
| § 833. Place of trial may be changed in certain cases. | § 837. Effect of an order changing place of trial. [Repealed.] |
| § 834. Limitation on the right to change. | § 838. Transfer of cases to the superior court. |
| § 835. To what court transferred. | |

§ 832. ACTIONS, IN WHAT TOWNSHIP OR CITY TO BE COMMENCED.

Actions in justices' courts must be commenced, and, subject to the right to change the place of trial, as in this chapter provided, must be tried:

1. If there is no justices' court for the township or city in which the defendant resides—in any city or township of the county [in which] he resides;
2. When two or more persons are jointly, or jointly and severally, bound in any debt or contract, or otherwise jointly liable in the same action, and reside in different townships or different cities of the same county, or in different counties—in the township or city in which any of the persons liable may reside;

3. In cases of injury to the person or property—in the township or city where the injury was committed, or where the defendant resides;

4. If for the recovery of personal property, or the value thereof, or damages for taking or detaining the same—in the township or city in which the property may be found, or in which the property was taken, or in which the defendant resides;

5. When the defendant is a nonresident of the county—in any township or city wherein he may be found;

6. When the defendant is a nonresident of the state—in any township or city in the state;

7. When a person has contracted to perform an obligation at a particular place, and resides in another county, township, or city—in the township or city in which such obligation is to be performed, or in which he resides; and the township or city in which the obligation is incurred is deemed to be the township or city in which it is to be performed, unless there is a special contract in writing to the contrary;

8. When the parties voluntarily appear and plead without summons—in any township or city in the state;

9. In all other cases—in the township or city in which the defendant resides.

History: Enacted March 11, 1872, founded on § 535 Practice Act, as amended 1853 (Stats. 1853, p. 276); amendment approved March 24, 1874, Code Amdts. 1873-4, p. 221; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 166, held unconstitutional, see history, § 5 ante; amendment approved March 22, 1907, Stats. and Amdts. 1907, p. 878, Kerr's Stats. and Amdts. 1906-7, p. 466.

ACTIONS—IN WHAT TOWNSHIP OR CITY TO BE COMMENCED.

1. Construction of section—Actions against nonresidents.
2. Same—No repugnancy between what sections.
3. Same—Recorder's court of city of Fresno.
4. Same—With section 890, post—Waiver of objection to jurisdiction.
5. Fact of defendant's residence is jurisdictional.
6. Justice's judgment as police judge has no validity.
7. Matters of equitable cognizance.
8. Suit for damages for breach of contract—Venue.
9. Suit not brought in proper township—Effect of.

As to justices' and police courts, see, ante, § 85 and note.

1. **Construction of section — Actions against nonresidents.**—The statutes of 1867-68, p. 552, provided that "nothing in this act shall be considered to preclude bringing of actions in justices' courts of this state against any party or parties residing out of state."

2. **Same—No repugnancy between what sections.**—There is no repugnancy between this section and section 106, ante, and sec-

tions 848 and 849, post.—*Cole v. Fisher*, 66 Cal. 441, 443, 5 Pac. 915.

3. **Same—Recorder's court of city of Fresno.**—Jurisdiction conferred, by section 806 of an act entitled "Municipal Corporation Bill" (II Henning's General Laws, 3d ed., p. 2114) on recorder's court of city of Fresno is concurrent with this and next succeeding sections of this chapter as to all matters ordinarily cognizable in justices' court, within corporate limits of city of Fresno.—*Prince v. Fresno*, 88 Cal. 407, 410; 26 Pac. 606.

4. **Same—With section 890, post—Waiver of objection to jurisdiction.**—This section must be construed in connection with section 890, post, which provides for mode of waiving objection to jurisdiction which is fully as effective as voluntary appearance without summons.—*McGorray v. Superior Court*, 141 Cal. 266, 267, 74 Pac. 853.

5. **Fact of defendant's residence is jurisdictional one which law requires to exist, but law does not require that defendant's residence shall be recorded in docket of justice, or be made to appear in written evidence of proceedings; but fact of residence may be proved by parol.**—*Jolley v. Foltz*, 34 Cal. 321, 326.

6. **Justice's judgment as police judge has no validity.**—It is essential to validity of judgment that court which renders it shall have jurisdiction. A justice of peace can

try defendant only in his own court, and no validity can attach to his judgment rendered in any other forum. Hence, if person who is at all times justice of peace, assumes to act as judge of police court, no validity can attach to his judgment rendered as police judge, for in such case police court has no legal existence.—*Ex parte Glambo-nini*, 117 Cal. 573, 575, 576, 49 Pac. 732.

7. **Matters of equitable cognizance.**—The foreclosure of mortgages, and sales of premises for payment of debts secured thereby, are all matters of purely equitable cognizance.—*Willis v. Farley*, 24 Cal. 490, 499.

8. **Suit for damages for breach of contract—Venue.**—An action brought in justices' court to recover damages for breach of contract, may be brought in township or city where obligation is to be performed, or

in which defendant resides; and, if it is brought in place where obligation is to be performed, summons may be served out of county of justice before whom action is brought.—*Cole v. Fisher*, 66 Cal. 441, 443, 5 Pac. 915. See *Allen v. Napa Co.*, 82 Cal. 187, 188, 23 Pac. 43.

9. **Suit not brought in proper township—Effect of.**—If record in case does not show that suit was brought in proper township, court is forced to void that proceedings are coram non judge and void. It is not necessary for defendant to appear and object to jurisdiction. He may waive objection by voluntary appearance, but jurisdiction is affirmative matter to be shown by record, and question is not whether defendant appeared and objected, but does affirmative matter sufficiently appear upon face of record.—*Lowe v. Alexander*, 15 Cal. 296, 301.

§ 833. PLACE OF TRIAL MAY BE CHANGED IN CERTAIN CASES.

The court may, at any time before the trial, on motion, change the place of trial in the following cases:

1. When it appears to the satisfaction of the justice before whom the action is pending, by affidavit of either party, that such justice is a material witness for either party;
2. When either party makes and files an affidavit that he believes that he can not have a fair and impartial trial before such justice, by reason of the interest, prejudice, or bias of the justice;
3. When a jury has been demanded, and either party makes and files an affidavit that he cannot have a fair and impartial trial, on account of the bias or prejudice of the citizens of the township or city against him;
4. When, from any cause, the justice is disqualified from acting;
5. When the justice is sick or unable to act.

History: Enacted March 11, 1872, founded on § 582 Practice Act, as amended 1853, Stats. 1853, p. 276.

CHANGING PLACE OF TRIAL.

1. Construction of section—As not applying to criminal causes.
2. Same—As to intent of legislature.
3. Same—Transfer to justice out of city, but in same county.
4. Denial of motion—Effect of on subsequent proceedings.
5. Imperative duty to transfer case.
6. Same—Though it has already been once changed.
7. No right to change on ground of residence.
8. Proceeding for change of venue—What is not.

See, also, *Kerr's Cyc. Pen. Code*, 2d ed., § 1431 and note.

As to waiver of misjoinder of causes of action by failure to demur or answer, see, ante, § 430, note pars. 94, 95.

1. Construction of section—As not applying to criminal causes.—The construc-

tion given this section does not apply to section 1431 of the Penal Code applicable to criminal cases.—*Miles v. Justices' Court*, 13 Cal. App. 454, 455, 110 Pac. 349.

2. **Same—As to intent of legislature.**—It seems to have been contemplated by legislature in framing subdivision 2 of this section, applicable to justices' court, that justice shall be relieved from ever delegating trying duty of deciding on question of his own disqualification, and mere fact that suitor in his court makes affidavit of his belief that such justice is biased against him, renders it imperative upon justice to transfer case to some other disinterested officer.—*People v. Compton*, 123 Cal. 403, 414, 56 Pac. 44.

3. **Same—Transfer to justice out of city, but in same county.**—There was nothing in section 12 of act to reincorporate city of San Diego (Stats. 1875-76, p. 812) showing that this section and section 836, post, are not applicable to case which was properly

brought before justice of that city, and at special instance and request of city was transferred to justice out of city but in same county. That act does not say that judgment shall not be recovered before any justice out of city.—*Palmer v. Snyder*, 67 Cal. 105, 106, 7 Pac. 196.

4. Denial of motion—Effect of on subsequent proceedings.—Conceding that subdivision 2 of this section was mandatory and that defendant's motion for change of venue, based on affidavit stating that he believes that he can not have fair trial before justice by reason of interest, prejudice, and bias of such justice, is denied, it does not follow that all subsequent proceedings are without jurisdiction.—*Ritzman v. Burnham*, 114 Cal. 522, 524, 525, 46 Pac. 379.

5. Imperative duty to transfer case.—Subdivision 2 of this section is found in section 582 of Practice Act. Place of trial, where action is commenced in justices' court, must be changed when either party makes and files an affidavit that he believes that he can not have fair and impartial trial before such justice, and by reason of interest, prejudice, or bias of justice. Under this law, it has always been held that filing

of affidavit in conformity with its provisions makes it duty of judge to transfer cause.—*People v. Compton*, 123 Cal. 403, 413, 56, Pac. 44.

6. Same—Though it has already been once changed.—It would seem that upon filing of affidavit, as required by statute, it would be duty of justice not to try case, but to transfer it; and fact that it had already been changed once can make no difference, as object of law is to provide parties with disinterested, unprejudiced, and unbiased tribunal to adjudicate their cause.—*People ex rel. Flagley v. Hubbard*, 22 Cal. 34, 37.

As to limitation on right to change place of trial, see, post, § 834.

7. No right to change on ground of residence.—There is no right to have change of place of trial of action pending in justices' court upon ground of residence.—*Powell v. Sutro*, 80 Cal. 559, 561, 22 Pac. 308.

8. Proceeding for change of venue—What is not.—A proceeding for transfer of cause from state to federal court is not proceeding for change of venue.—*Ritzman v. Burnham*, 114 Cal. 522, 524, 525, 46 Pac. 379.

§ 834. LIMITATION ON THE RIGHT TO CHANGE. The place of trial can not be changed, on motion of the same party, more than once, upon any or all the grounds specified in the first, second, and third subdivisions of the preceding section.

History: Enacted March 11, 1872.

§ 835. TO WHAT COURT TRANSFERRED. When the court orders the place of trial to be changed, the action must be transferred for trial to a court the parties may agree upon; and if they do not so agree, then to another justices' court in the same county.

History: Enacted March 11, 1872.

§ 836. PROCEEDINGS AFTER ORDER CHANGING PLACE OF TRIAL. After an order has been made, transferring the action for trial to another court, the following proceedings must be had:

1. The justice ordering the transfer must immediately transmit to the justice of the court to which it is transferred, on payment by the party applying, of all the costs that have accrued, all the papers in the action, together with a certified transcript from his docket of the proceedings therein;

2. Upon the receipt by him of such papers, the justice to whom the case is transferred has thereafter the same jurisdiction over the action as though it had been commenced in his court.

History: Enacted March 11, 1872; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 166, held unconstitutional, see history, § 5 ante; amendment approved March 22, 1907, Stats. and Amdts. 1907, p. 879, Kerr's Stats. and Amdts. 1906-7, p. 466.

1. Construction of section.—This section authorizes an action to recover fine, commenced before justice of city of San Diego, to be transferred for trial to justice having

his office outside corporate limits of such city, but in same county.—*Palmer v. Snyder*, 67 Cal. 105, 106, 7 Pac. 196.

§ 837. EFFECT OF AN ORDER CHANGING PLACE OF TRIAL. [Repealed.]

History: Enacted March 11, 1872; repeal by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 167, held unconstitutional see history, § 5 ante; repeal approved March 22, 1907, Stats. and Amdts. 1907, p. 879, Kerr's Stats. and Amdts. 1906-7, p. 467.

§ 838. TRANSFER OF CASES TO THE SUPERIOR COURT. The parties to an action in a justices' court can not give evidence upon any question which involves the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine; nor can any issue presenting such question be tried by such court; and if it appear, from the answer of the defendant, verified by his oath, that the determination of the action will necessarily involve the question of title or possession to real property, or the legality of any tax, impost, assessment, toll, or municipal fine, the justice must suspend all further proceedings in the action and certify the pleadings, and, if any of the pleadings are oral, a transcript of the same, from his docket to the clerk of the superior court of the county; and from the time of filing such pleadings or transcript with the clerk, the superior court shall have over the action the same jurisdiction as if it had been commenced therein; provided, that in cases of forcible entry and detainer, of which justices' courts have jurisdiction, any evidence, otherwise competent, may be given, and any question properly involved therein may be determined.

History: Enacted March 11, 1872, founded on § 581 Practice Act; amendment approved March 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 18.

TRANSFER TO SUPERIOR COURT.

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| <ol style="list-style-type: none"> 1. Action for damages by trespassing stock—Less than three hundred dollars. 2. Action for damages for negligently killing stock—Title, etc., to realty involved—Justices' court without jurisdiction. 3. Same—Same—Necessarily involves title to land. 4. Same—Same—Removal of cause—Verified answer not necessary, when. 5. Action of forcible entry and detainer. 6-8. Action of unlawful detainer. 9. Action on promissory note—Defense of failure of consideration. 10. Amendments in superior court—Allowance of. 11. Same—Effect of, on jurisdiction of superior court. 12, 13. Construction of section—As to purpose. 14. Same—No evidence can be received, when. 15. Improper certification of cause—Effect of. 16. Insufficiency of affidavit. 17, 18. Jurisdiction, in general. 19. Jurisdiction of old district court. | <ol style="list-style-type: none"> 20. Jurisdiction of superior court—Acquisition of. 21. Same—How invoked. 22. Same—How not affected. 23. Same—Must appear on face of pleadings. 24. Same—Original jurisdiction. 25. Same—Same—Not conferred by filing of pleadings certified by justice. 26. Same—Same—Not obliged to reverse and remand, when. 27. Same—Same—Whether involution be incidental or not. 28. Same—Recovery of city taxes in police court. 29. Justice of the peace—Can not summarily divest himself of jurisdiction. 30. Same—Jurisdiction of, where title is not in issue. 31. Same—No authority to certify, when. 32, 33. Same—Same—Suit on note given for "assessment." 34, 35. Same—When case does not involve title or possession. 36. Opinions of witnesses not evidence of title. 37. Refusal of justice to certify—Review on appeal. 38, 39. Transfer is proper—Where legality of tax is involved. |
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40. Same—Where question of title or possession, etc., is involved.
41. Transfer of cause from police court.
- 42, 43. Same—Case overruled.
44. Same—Ousting jurisdiction of police court.
45. Unverified answer—Does not oust court of jurisdiction.
46. Same—Effect of, as to evidence.
47. Same—Facts constitute test of jurisdiction.
48. Same—When not required.

1. **Action for damages by trespassing stock—Less than three hundred dollars.**—An action for damages of less than three hundred dollars for injuries caused by trespassing cattle under act of March 23, 1907, may be brought in justices' court. The "lawful possession" mentioned in that statute means only peaceable and quiet possession, or "actual possession," and such being a mere incident and not the basis of the action may be shown in the justices' court.—*Fisch v. Nice*, 12 Cal. App. 60, 62, 106 Pac. 598.

2. **Action for damages for negligently killing stock—Title, etc., to realty involved—Justices' court without jurisdiction.**—Where the title to real property is put in issue by the complaint, if it is necessarily involved in determining the cause between the parties, it follows that the justices' court in which such complaint is filed has no jurisdiction to try the cause, under the provisions of above section.—*Cloudthirst v. Southern Pac. R. Co.*, — Cal. App. —, 193 Pac. 796.

3. **Same—Same—Necessarily involves title to land.**—An action brought under section 485 of Civil Code, to recover damages against a railroad corporation for negligently killing stock necessarily involves the ownership or possession of real property, and therefore a justices' court has no jurisdiction to try such action.—*Cloudthirst v. Southern Pac. R. Co.*, — Cal. App. —, 193 Pac. 796, following doctrine in *Holman v. Taylor*, 31 Cal. 338; *Boyd v. Southern Cal. R. Co.*, 126 Cal. 571, 58 Pac. 1046; *Wills v. Southern Pac. R. Co.*, 31 Cal. App. 723, 161 Pac. 501.

4. **Same—Same—Removal of cause—Verified answer not necessary, when.**—In those cases in which it appears from the face of the complaint that the title to or possession of real property is necessarily involved in the issues presented, the defendant may have the cause removed to the superior court without filing a verified answer. A verified answer is required in those cases only in which the want of jurisdiction of the justices' court does not appear from the face of the complaint.—*Cloudthirst v. Southern Pac. R. Co.*, — Cal. App. —, 193 Pac. 796.

As to effect of answer being unverified, see par. 451, this note.

5. **Action of forcible entry and detainer.**—Statutory provisions relating to proceedings in forcible entry and detainer in this state are to be construed to include proceedings in "unlawful detainer." To sustain such proceeding, the facts must show an express letting of the lands or show impliedly at least that the defendant occupies as a tenant of the plaintiff, and this must be something more than a mere quasi tenancy.—*Richmond v. Superior Court*, 9 Cal. App. 62, 64, 98 Pac. 57.

6. **Action of unlawful detainer, if it be found that the defendants were not the tenants of the plaintiff, the action must fail.**—*Richmond v. Superior Court*, 9 Cal. App. 62, 64, 98 Pac. 57.

7. In action of unlawful detainer, the justices' court has jurisdiction to try the question whether or not the relation of landlord and tenant existed, in order to determine whether the question of title is involved.—*Richmond v. Superior Court*, 9 Cal. App. 62, 65, 98 Pac. 57.

8. Where the action is for unlawful holding over after the lease has determined, the title may become involved in some cases, and where this is the case, removal may be required, but each case is to be construed with relation to the issues necessarily involved in its determination.—*Richmond v. Superior Court*, 9 Cal. App. 62, 64, 98 Pac. 57.

9. **Action on promissory note—Defense of failure of consideration.**—Where defendant by verified answer bases his defense to an action on a promissory note upon a failure of consideration in that the plaintiff had no title to property contracted to be transferred, he is bound to offer evidence to show the plaintiff was not the owner of the real property and the court was required to decide whether he was or was not such owner and the case was therefore a proper one to be transferred to the superior court under the provisions of this section.—*Duncan v. Clark*, 159 Cal. 30, 112 Pac. 718.

10. **Amendments in superior court—Allowance of.**—When case has been transferred from justices' court to superior court under provisions of this section, amendments may be allowed to same extent as if action had been commenced in superior court.—*Baker v. Southern Cal. R. Co.*, 114 Cal. 501, 506, 46 Pac. 604.

11. **Same—Effect of, on jurisdiction of superior court.**—When case commenced in justices' court has been certified to superior court under provisions of this section, any amendment made in case which does not eliminate facts upon which right to transfer of case to superior court depended, does not affect jurisdiction of last named court.—*Baker v. Southern Cal. R. Co.*, 114 Cal. 501, 506, 46 Pac. 604.

12. **Construction of section—As to purpose.**—It is conceivable that author of this section was of opinion that title or right to possession of real property was not in-

volved unless an issue to be tried was raised, but considering decisions of this court, that view can not be maintained. It seems that defendant could not make such an issue save by verified pleading.—*Boyd v. Southern Cal. R. Co.*, 126 Cal. 571, 574, 58 Pac. 1046.

13. The purpose of this section is to secure to the superior court the right to hear and determine the causes that are by the constitution placed within its jurisdiction.—*Dungan v. Clark*, 159 Cal. 30, 112 Pac. 718.

14. Same—No evidence can be received, when.—If any question involving legality of any tax, impost, assessment, toll, or municipal fine is made in case originating in justices' court, it must be by answer, verified by oath of defendant; and, unless so raised, no evidence as to such legality can be received.—*Williams v. Mecartney*, 69 Cal. 556, 558, 11 Pac. 186.

15. Improper certification of cause.—Effect of.—If justice of peace improperly certifies case to superior court, case is legally before superior court for determination; having no jurisdiction thereof, superior court commits no error in denying motion for change of venue.—*McAlister v. Tindal*, 1 Cal. App. 236, 81 Pac. 1117.

16. Insufficiency of affidavit.—Affidavit for transfer of case from justice of peace to superior court under this section, is insufficient where it merely gives statement of opinion of affiant that title of real estate would be brought into issue on trial. Facts should be stated from which such conclusion would follow.—*McAlister v. Tindal*, 1 Cal. App. 236, 81 Pac. 1117.

17. Jurisdiction in general.—Jurisdiction of court over any subject-matter that is not included within its general jurisdiction must appear upon record of its proceedings.—*Ralsch v. Sausalito L. & F. Co.*, 131 Cal. 215, 217, 63 Pac. 346.

18. Jurisdiction of the superior court over an action transferred to it under this section can not be affected by the fact that the court finds against the contention of the defendant.—*Dungan v. Clark*, 159 Cal. 30, 112 Pac. 718.

19. Jurisdiction of old district court under this section was special, and that court could hear and determine cause transferred to it only after pleadings before justice were filed with its clerk. The district court had jurisdiction only because pleadings had before justice, and filed with its clerk, presented issue of legality of validity of tax or impost; and it could then take jurisdiction only for purpose of trying such issue, and where amount was less than three hundred dollars justices' court had jurisdiction to pass upon every other issue. Such action had to be tried and determined in district court upon pleadings in justices' court.—*City of Santa Cruz v. Santa Cruz R. Co.*, 56 Cal. 143, 147.

20. Jurisdiction of superior court—Acquisition of.—Superior court can not exercise jurisdiction in any instance until after it has acquired it, and it can acquire it only in mode prescribed by statute. Mere fact that justice of peace certifies to county clerk pleadings in case pending before him does not confer jurisdiction upon superior court of matter of which jurisdiction has not been conferred upon it by constitution. Nor does it acquire jurisdiction of parties to said cause by thereafter determining that it has jurisdiction, and by proceeding in trial of cause and rendering judgment therein.—*Arroyo D. & W. Co. v. Superior Court*, 92 Cal. 47, 52, 27 Am. St. Rep. 91, 28 Pac. 54.

21. Same—How invoked.—Plaintiff may invoke jurisdiction of superior court when title or right of possession of real estate is involved, irrespective of amount of his money demand, by alleging that fact in his complaint when setting forth matters out of which question arises; but when his demand is for less than three hundred dollars, and he brings an action therefor in justices' court without showing that such question is involved, defendant, if he would invoke jurisdiction of superior court, must comply with procedure authorized therefor.—*Ralsch v. Sausalito L. & F. Co.*, 131 Cal. 215, 217, 63 Pac. 346.

22. Same—How not affected.—Where case has been certified to superior court under provisions of this section, and amended complaint in case shows, upon its face, that title or possession of real property is necessarily involved in action, jurisdiction of superior court is not affected.—*Baker v. Southern Cal. R. Co.*, 114 Cal. 501, 506, 46 Pac. 604.

23. Same—Must appear on face of pleadings.—Jurisdiction of superior court must appear on face of pleadings certified to it by justice of peace, and any amendment of pleadings which would show that justice had jurisdiction to try case would doubtless justify court in remanding it.—*Baker v. Southern Cal. R. Co.*, 114 Cal. 501, 506, 46 Pac. 604.

24. Same—Original jurisdiction.—Jurisdiction exercised by superior court under this section is original and not appellate.—*Baker v. Southern Cal. R. Co.*, 114 Cal. 501, 507, 46 Pac. 604.

25. Same—Same—Not conferred by filing of pleadings certified by justice.—Jurisdiction exercised by superior court under provisions of this section is original, and not appellate, and provision in this section, that "from time of filing such pleadings or transcript with clerk, superior court shall have over action same jurisdiction as if it had been commenced therein," implies that if it would have had no jurisdiction over action if it had been commenced therein, it can have no jurisdiction by filing of pleadings certified by justice.—*Arroyo D. & W. Co. v. Superior Court*, 92 Cal. 47, 51, 27 Am. St. Rep. 91, 28 Pac. 54.

26. Same—Same—Not obliged to reverse and remand, when.—Superior court has original jurisdiction of all questions pertaining to possession of real property; and, where an action was commenced in justices' court, and involved title and possession of real property, and an appeal was taken to superior court, the superior court may act in matter in exercise of its original jurisdiction, and is not obliged to reverse judgment of justice of peace and remand case for purpose of having it presented to superior court under this action in order to obtain original jurisdiction to try it, as superior court has such original jurisdiction without this circuitous, dilatory, and vain process.—*Hart v. Carnall-Hopkins Co.*, 103 Cal. 132, 139, 140, 141, 37 Pac. 196.

27. Same—Same—Whether involution be incidental or not.—If issue of title or possession is so involved in an action that it must be decided in order to determine case, superior court has original, and supreme court appellate, jurisdiction, whether involution may be said to be incidental or not.—*Hart v. Carnall-Hopkins Co.*, 103 Cal. 132, 142, 37 Pac. 196.

28. Same—Recovery of city taxes in police court.—Superior court has jurisdiction of an action to recover city taxes assessed against property; but if such action is brought in police court, which renders judgment therein, and appeal is taken to superior court, last named court has no appellate jurisdiction in matter, because judgment of police court is void, but such fact does not affect original jurisdiction of superior court, notwithstanding irregular manner in which it has acquired jurisdiction over parties.—*City of Santa Barbara v. Eldred*, 95 Cal. 378, 381, 30 Pac. 562.

29. Justice of the peace—Can not summarily devert himself of jurisdiction.—While justice of peace has jurisdiction to pass upon any question of fact or of law which is involved in trial of an issue properly before him, so that his judgment will be binding upon parties in absence of appeal or review, yet he has not summary power to devert himself of jurisdiction or to transfer cause which is within his jurisdiction to tribunal which has no jurisdiction to determine it.—*Arroyo D. & W. Co. v. Superior Court*, 92 Cal. 47, 50, 27 Am. St. Rep. 91, 28 Pac. 54.

30. Same—Jurisdiction of, where title is not in issue.—Justices' jurisdiction may be sustained in tax suit where title to real property has not been put in issue.—*Willard City v. Woodland*, 7 Utah 192, 198, 26 Pac. 284.

31. Same—No authority to certify, when.—Under this section a justice has no authority to certify pleadings to superior court, nor will superior court obtain jurisdiction of case by his certifying them to it, unless defendant shall have presented in justices' court an answer, verified by his oath, that question mentioned in this section is necessarily involved in determination of action.

When case is thus certified to superior court, jurisdiction exercised by it is not an appellate jurisdiction, but is original jurisdiction given it over this question by constitution.—*Ralsch v. Sausalito L. & F. Co.*, 131 Cal. 215, 217, 63 Pac. 346.

32. Same—Same—Suit on note given for "assessment."—If note for twenty-one dollars is executed to private corporation in payment of pretended assessment upon its capital stock and suit is brought upon note, and defendant attacks note upon ground that assessment for which it was given is illegal, justices' court has jurisdiction, not only of amount in controversy, but to determine all questions relating to assessment, and is not authorized to certify pleadings to superior court, as such superior court has no jurisdiction to determine question.—*Arroyo D. & W. Co. v. Superior Court*, 92 Cal. 47, 49, 50, 27 Am. St. Rep. 91, 28 Pac. 54.

33. Term "assessment" used in article VI section 5 of constitution, does not include instalments or "calls," which are sometimes termed assessments, made under provision of Civil Code section 331 by private corporation upon its stockholders in accordance with agreement upon their part, express or implied, to pay into its treasury amount subscribed by them to its capital stock. It has reference to such assessments only as are authorized by those provisions of constitution which relate to review and taxation, and to such as may be made under authority of municipal or other public corporation for purpose of meeting cost or expense of some public improvements. A justices' court, therefore, has full power to determine all questions relating to an assessment upon corporate stock, when such questions are brought before it, and amount is within its jurisdiction.—*Arroyo D. & W. Co. v. Superior Court*, 92 Cal. 47, 50, 27 Am. St. Rep. 91, 28 Pac. 54.

See Kerr's Cyc. Civ. Code, 2d ed., § 331 and note.

34. Same—When case does not involve title or possession.—Where title or possession of real property is incidentally brought into action, or is only collaterally in question, it can not be said that case involves title or possession.—*Copertini v. Oppermann*, 76 Cal. 181, 184, 185, 18 Pac. 256.

35. In action to recover deposit made by purchaser under executory contract for sale of land, by which he agreed to purchase, if title was good, and if not, that deposit should be returned, title is not directly drawn in question by evidence which tends to prove averments of his complaint, and that abstract of title with which he was furnished disclosed that "two unpaid mortgages encumber the land," etc., and that upon ascertaining fact he declined to complete purchase, and demanded return of money which he had paid.—*Schroeder v. Wittram*, 66 Cal. 636, 638, 6 Pac. 737.

36. Opinions of witnesses not evidence of title.—Opinions of witnesses as to title of

real property are not evidence of title.—*Schroeder v. Wittram*, 66 Cal. 636, 638, 6 Pac. 737.

37. Refusal of justice to certify—Review on appeal.—Refusal of justice to certify pleadings to higher court, when it ought to be done, is, if followed by judgment against defendant, subject to review on appeal.—*Clark v. Minnis*, 50 Cal. 509, 510.

38. Transfer is proper—Where legality of tax is involved.—Where it appears from answer of defendant in justices' court, verified by his oath, that determination of action would necessarily involve legality of license tax sued for, justice should suspend proceeding and certify pleadings to superior court.—*County of Monterey v. Abbott*, 77 Cal. 541, 542, 18 Pac. 113, 20 Pac. 73.

39. If defendant, in an action commenced in justices' court, files verified answer, in which he avers illegality of taxes, such answer makes it necessary for justice to suspend all further proceedings, and certify case to superior court.—*Powell v. Sutro*, 80 Cal. 559, 560, 562, 22 Pac. 308.

40. Same—Where question of title or, possession, etc., is involved.—It is proper to transfer an action brought in justices' court, where an answer is filed alleging that determination of action necessarily involves question of title to, or possession of, real property.—*Baker v. Southern Cal. R. Co.*, 126 Cal. 516, 58 Pac. 1055.

41. Transfer of cause from police court to district court was authorized under this section where legality of tax was denied by answer.—*City of Santa Barbara v. Stearns*, 51 Cal. 499, 501.

42. Same—Case overruled.—This section authorizes transfer of cause from police court to superior court, where answer raises an issue as to legality of tax sought to be recovered, and it is duty of court to transfer action to superior court for trial upon such answer being filed.—*City of Santa Barbara v. Eldred*, 95 Cal. 378, 380, 30 Pac. 562.

43. Overruling: *City of Santa Cruz v. Santa Cruz R. Co.*, 56 Cal. 143, 148.

44. Same—Ousting jurisdiction of police court.—Where an action is brought in police court to recover city taxes assessed

against property, and answer discloses facts which require transfer of cause to superior court, police court is ousted of its jurisdiction, from time of filing of such answer, to proceed further upon merits presented by pleadings, and if it renders judgment, such judgment is void.—*City of Santa Barbara v. Eldred*, 95 Cal. 378, 380, 30 Pac. 562.

45. Unverified answer—Does not oust court of jurisdiction.—An unverified answer consisting of general denial of allegations of complaint in justices' court and motion to transfer action to superior court on ground that title to real property is involved, does not oust justices' court of its jurisdiction. The justice is called on to transfer cause only when verified answer is filed as required by this section, and, until this is done, justice does not err in proceeding with cause.—*Schroeder v. Wittram*, 66 Cal. 636, 641, 6 Pac. 737.

As to verified answer not required where complaint shows want of jurisdiction on its face, see par. 4, this note.

46. Same—Effect of, as to evidence.—Language of this section is clear and explicit to effect that parties are not allowed to give evidence on any question which involves title or possession of real property, and is mandatory in its terms; and fact that defendant files an unverified answer is immaterial, where complaint is unverified, as in such case an unverified answer raises every issue that verified answer would.—*King v. Kutner-Goldstein Co.*, 135 Cal. 65, 68, 67 Pac. 10.

47. Same—Facts constitute test of jurisdiction.—It is an elementary principle that facts, and not verified answer, constitute final test of jurisdiction upon any cause of action inaugurated in justices' court.—*King v. Kutner-Goldstein Co.*, 135 Cal. 65, 68, 67 Pac. 10.

48. Same—When not required.—If complaint itself shows that question of title or right to possession of real estate is necessarily involved in an action brought before justice of peace, there would be no propriety in requiring verified answer before case could be transferred to superior court.—*Boyd v. Southern Cal. R. Co.*, 126 Cal. 571, 574, 58 Pac. 1046.

CHAPTER II.

MANNER OF COMMENCING ACTIONS IN JUSTICES' COURTS.

- § 839. Actions, how commenced.
 § 840. Summons may issue within a year.
 § 841. Defendant may waive summons.
 § 842. Parties may appear in person or by attorney.
 § 843. When guardian necessary, how appointed.
 § 844. Summons, how issued, directed and what to contain.
 § 845. Time for appearance of defendant.
 § 846. Alias summons.
 § 847. Same. [Within a year.]
 § 848. Service of summons outside of county.
 § 849. Summons, by whom served and returned.
 § 850. Notice of hearing.

§ 839. ACTIONS, HOW COMMENCED. An action in a justice's court is commenced by filing a complaint.

History: Enacted March 11, 1872; amended March 11, 1876, Code Amdts. 1875-6, p. 98.

Actions—When deemed pending.—See, post, § 1049 and note.

Same—In cities and counties, title, etc.—See, ante, § 89 and note.

As to commencement of actions, generally, see, ante, §§ 350, 405 and notes.

Same—Justices' courts.—See, ante, § 89 and note.

As to how actions are commenced, see, ante, § 405 and note.

As to justices' courts and justices, see, ante, §§ 85-115 and notes.

As to payment of fees in advance in justices' courts, see, ante, § 91 and note.

As to police courts, see, ante, § 121 and note.

As to time of commencement of actions in general, see, ante, § 350 and note.

As to what complaint must contain, see, ante, § 426 and note.

§ 840. SUMMONS MAY ISSUE WITHIN A YEAR. The court must indorse on the complaint the date upon which it was filed, and at any time within one year thereafter the plaintiff may have summons issued.

History: Enacted March 11, 1872.

As to how complaint must be indorsed, and as to when summons may be issued, and how waived, see, ante, § 406.

As to payment of fees in advance in justices' courts for all proceedings, issue and service of papers, etc., see, ante, § 91 and note.

§ 841. DEFENDANT MAY WAIVE SUMMONS. At any time the complaint is filed, the defendant may, in writing, or by appearing and pleading, waive the issuing of summons.

History: Enacted March 11, 1872.

APPEARANCE—WAIVER.

1. Effect of special appearance—As to jurisdiction.
2. Legal service of summons—Includes what.
3. What appearance does not waive defendant's rights.

As to appeals to superior courts, see, post, §§ 974-980 and notes.

As to appearance, and notices of appearance, see, post, § 1014 and note.

As to how complaint must be indorsed, and as to when summons may be issued, see, ante, § 406 and note.

As to powers of superior court on appeal, see, post, § 980 and note.

As to waiver, see, ante, § 406 and note.

As to when jurisdiction of action is acquired, see, ante, § 416 and note.

Summons, by whom and how served and returned.—See, post, § 849 and note.

1. Effect of special appearance.—As to jurisdiction.—The justice's court does not secure jurisdiction to proceed against defendant corporation by reason of its special appearance for purpose of moving to set aside defective service of summons.—*Southern Pac. R. Co. v. Superior Court*, 59 Cal. 471, 473.

2. Legal service of summons.—Includes what.—Legal service of summons which gives jurisdiction of person of defendant, includes, as necessary part of such service,

service of complaint.—Southern Pac. R. Co. v. Superior Court, 59 Cal. 471, 473.

3. What appearance does not waive defendant's rights.—Appearance of defendant in action brought before justice of peace

for purpose of making motion to dismiss case because summons was dated, issued, and served more than ten days before its return, does not waive his rights.—Deidesheimer v. Brown, 8 Cal. 339, 340.

§ 842. PARTIES MAY APPEAR IN PERSON OR BY ATTORNEY. Parties in justices' courts may appear and act in person or by attorney; and any person, except the constable by whom the summons or jury process was served, may act as attorney.

History: Enacted March 11, 1872, re-enactment of § 534 Practice Act.

APPEARANCE IN PERSON OR BY ATTORNEY.

1. Notice of appeal—May be signed by whom.
2. Right of disbarred attorney—To practice in justices' courts.

As to appeal from judgment of justices' or police courts in a civil action, see, post, § 974 and note.

As to attorneys and counselors at law, in general, see, ante, §§ 275-299 and notes.

As to who may not appear as attorneys before justices of the peace, see, ante, § 96 and note.

1. Notice of appeal—May be signed by whom.—Statute does not require that attorney should sign notice of appeal from justices' court, if there is an attorney in the case. It may be signed by party or any person he may select for that purpose.—Totton v. Superior Court, 72 Cal. 37, 38, 13 Pac. 72.

2. Right of disbarred attorney—To practice in justices' courts.—Disbarment does not take away the right of an attorney to appear in the justices' courts, but operates only to deprive him of the privileges conferred by his license to practice in all the courts of the state.—Ex parte Hittson, 39 Cal. App. 91, 178 Pac. 149.

§ 843. WHEN GUARDIAN NECESSARY, HOW APPOINTED. When an infant, insane, or incompetent person is a party, he must appear either by his general guardian if he have one, or by a guardian ad litem appointed by the justice. When a guardian ad litem is appointed by the justice, he must be appointed as follows:

1. If the infant, insane, or incompetent person, be plaintiff, the appointment must be made before the summons is issued, upon the application of the infant, if he be of the age of fourteen years; if under that age, or if insane or incompetent, upon the application of a relative or friend.

2. If the infant, insane, or incompetent person, be defendant, the appointment must be made at the time the summons is returned, or before the answer, upon the application of the infant, if he be of the age of fourteen years and apply at or before the summons is returned; if he be under the age of fourteen, or be insane or incompetent, or neglect so to apply, then upon the application of a relative or friend, or any other party to the action, or by the justice, on his own motion.

History: Enacted March 11, 1872, re-enactment of § 539 Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 333; March 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 18.

As to how guardian is appointed, see, ante, § 373 and note.

That an infant must appear by guardian, see, ante, § 372 and note.

§ 844. SUMMONS, HOW ISSUED, DIRECTED, AND WHAT TO CONTAIN. The summons must be directed to the defendant, signed by the justice, and must contain:

1. The title of the court, name of the county, city and county, or township in which the action is brought, and the names of the parties thereto;
2. A direction that the defendant appear and answer before the justice, at his office, as specified in section eight hundred and forty-five of this code;
3. A notice that unless the defendant so appear and answer, the plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or will apply to the court for the relief demanded in the complaint. If the plaintiff appears by attorney, the name of the attorney must be indorsed upon the summons.

History: Enacted March 11, 1872, founded on § 540 Practice Act; amendment approved April 3, 1876, Code Amdts. 1875-6, p. 98; March 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 19; March 14, 1899, Stats. and Amdts. 1899, p. 100; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 167, held unconstitutional, see history, § 5 ante.

SUMMONS—HOW ISSUED AND DIRECTED—WHAT TO CONTAIN.

1. Construction of section.
2. No service, and judgment by default, void, when.
3. Summons—How issued in San Francisco.
4. Same—Is insufficient to support judgment, when.
5. Same—Service of, gains jurisdiction.
6. Same—What to contain.
7. Same—When fatally defective.
8. What mistake does not present jurisdictional question.
9. What recitals only are evidence of their truth.

As to modification of rule laid down in this section, see, ante, § 91, note par. 11.

1. Construction of section.—Rule declared in this section regarding proper party to sign summons in justices' court is modified by section 91, ante, as to city and county of San Francisco.—*Helms v. Dunne*, 107 Cal. 117, 118, 40 Pac. 100.

2. No service, and judgment by default, void, when.—If action is commenced against "Independent Company," instead of "Independent Tunnel Company," as intended, and justice addresses summons to "Independent Tunnel Company," a thing which he has no right to do, and return shows that summons was served on Randlett, a member of "Independent Company," and not on "Independent Tunnel Company," there is no service upon latter company, and judgment entered by default against "Independent Tunnel Company" is utterly null and void, as record fails to show either action against or service upon "Independent Tunnel Company."—*King v. Randlett*, 33 Cal. 318, 322.

3. Summons—How issued in San Francisco.—In city and county of San Francisco, justice's clerk may issue summons upon order of presiding justice.—*Helms v. Dunne*, 107 Cal. 117, 118, 40 Pac. 100.

4. Same—Is insufficient to support judgment, when.—If in summons and proceed-

ings in justices' court, defendants are in no other way designated than by name of "Adams & Co." a return of service of summons "by leaving copy thereof with Captain Charles B. Maca," is insufficient to support judgment.—*Adams v. Town*, 3 Cal. 247, 249.

5. Same—Service of, gains jurisdiction.—Jurisdiction of person of defendant is gained, either in superior or justices' court, by service of summons.—*Keybers v. McComber*, 67 Cal. 395, 397, 7 Pac. 838.

6. Same—What to contain.—Summons in cases arising in superior courts is in substance same as those issued from justices' courts. Each is required to contain same notice to defendant, viz., in cases arising on contract for recovery of money or damages only, that if defendant fails to answer, judgment will be taken against him for sum claimed, stating it. In other actions, notice that unless defendant so appear and answer, plaintiff will apply to court for relief demanded.—*Keybers v. McComber*, 67 Cal. 396, 397, 7 Pac. 838.

7. Same—When fatally defective.—A summons, under this section which does not contain name of plaintiff is fatally defective.—*Tucker v. Justices' Court*, 120 Cal. 512, 514, 52 Pac. 808.

8. What mistake does not present jurisdictional question.—Mistake upon face of summons of name of particular person who was at time presiding justice, and who ordered clerk to issue such summons, does not in any way present jurisdictional question.—*Helms v. Dunne*, 107 Cal. 117, 119, 40 Pac. 100.

9. What recitals only are evidence of their truth.—Only those recitals in summons which law requires to be recited there are evidence of their truth. As to recitals of matters of mere surplusage, they prove nothing. Recitals as to matters which are not subject to the statutory requirement are not conclusive as to the facts recited.—*Helms v. Dunne*, 107 Cal. 117, 119, 40 Pac. 100.

§ 845. TIME FOR APPEARANCE OF DEFENDANT. The time specified in the summons for the appearance of the defendant must be as follows:

1. **If an order of arrest is indorsed** upon the summons, forthwith:
2. **In all other cases**, within five days, if the summons is served in the city and county, township, or city, in which the action is brought, within ten days, if served out of the township or city, but in the county in which the action is brought; and within twenty days, if served elsewhere.

History: Enacted March 11, 1872, founded on § 541 Practice Act; amendment approved March 28, 1874, Code Amdts. 1873-4, p. 407; April 3, 1876, Code Amdts. 1875-6, p. 99; March 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 19; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 167, held unconstitutional, see history, § 5 ante; amendment approved March 22, 1907, Stats. and Amdts. 1907, p. 879, Kerr's Stats. and Amdts. 1906-7, p. 467.

TIME FOR APPEARANCE OF DEFENDANT.

1. Return day—Can not be after ten days from date.
2. Same — Same — Unless publication is required.
3. What appearance does not waive defendant's rights.

1. **Return day—Can not be after ten days from date.**—Justice can not make summons returnable in eleven days from its date. If he could do that, he could make it returnable in eleven months. Defendant has an interest in speedy trial as well as plaintiff.

—Deldesheimer v. Brown, 8 Cal. 339, 340; Hisler v. Carr, 34 Cal. 641, 646.

2. **Same — Same — Unless publication is required.**—Summons can not be made returnable more than ten days from its date unless publication is required.—Hisler v. Carr, 34 Cal. 641, 646.

See, post, § 849.

3. **What appearance does not waive defendant's rights.**—Appearance of defendant for purpose of making proper motion to dismiss case because summons was dated, issued, and served more than ten days before the return thereof, does not waive his rights.—Deldesheimer v. Brown, 8 Cal. 339, 340.

§ 846. ALIAS SUMMONS. If the summons is returned without being served upon any or all of the defendants, the justice, upon the demand of the plaintiff, may issue an alias summons, in the same form as the original, except that he may fix the time for the appearance of the defendant at a period not to exceed ninety days from its date.

History: Enacted March 11, 1872.

ALIAS SUMMONS.

1. Regularity of issuance not jurisdictional question.
2. What does not render judgment by default void.

1. **Regularity of issuance not jurisdictional question.**—An alias summons issued by justice of peace is sufficient at least as against collateral attack against judgment. Whether alias summons was regularly issued or not is not jurisdictional question.—

Dore v. Dougherty, 72 Cal. 232, 234, 1 Am. St. Rep. 48, 13 Pac. 621.

2. **What does not render judgment by default void.**—Justice's judgment by default, after personal service of alias summons, is not void, though it was issued without any return of original, and did not sufficiently state nature of cause of action, in that it failed to notify defendant to appear and answer at justice's office.—Dore v. Dougherty, 72 Cal. 232, 233, 1 Am. St. Rep. 48, 13 Pac. 621.

§ 847. SAME. [WITHIN A YEAR.] The justice may, within a year from the date of the filing of the complaint, issue as many alias summons[es] as may be demanded by the plaintiff.

History: Enacted March 11, 1872.

As to issuance of alias summons, see, ante, §§ 408, 846 and notes.

§ 848. SERVICE OF SUMMONS OUTSIDE OF COUNTY. The summons can not be served out of the county wherein the action is brought, except in the following cases:

1. When the action is upon the joint contract or obligation of two or more persons, one of whom resides within the county;
2. When the action is brought against a party who has contracted in writing to perform an obligation at a particular place, and resides in a different county, in which case the summons may be served in the county where he resides;
3. When the action is for injury to person or property, and the defendant resides in a different county, in which case summons may be served in the county wherein he may be found;
4. In all cases where the defendant was a resident of the county when the action was brought, or when the obligation was incurred and thereafter departed therefrom, in which event he may be served wherever he may be found;
5. In actions of forcible entry and detainer, or to enforce and foreclose liens on, or to recover possession of, personal property situate within the county.

History: Enacted March 11, 1872; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 333; April 3, 1875, Code Amdts. 1875-6, p. 99; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 167, held unconstitutional, see history, § 5 ante; amendment approved March 22, 1907, Stats. and Amdts. 1907, p. 879, Kerr's Stats. and Amdts. 1906-7, p. 467; March 13, 1909, Stats. and Amdts. 1909, p. 355.

SERVICE OF SUMMONS OUTSIDE COUNTY.

1. Construction of section—Exception to rule that summons can not be served out of county.
 2. Same—Repugnancy—Repeals by implication.
 3. Improper issuance and service of summons.
 4. Motion to set aside service—Burden of proof.
 5. Same—Jurisdiction to hear and decide.
 6. Same—Should be granted, when.
 7. Same—What does not foreclose inquiry.
 - 8, 9. Service made outside of county—Subdivision 2.
 10. Same—Oral contract basis of action—Does not confer jurisdiction.
 11. Same—Same—Default judgment—Execution—Burden on execution-creditor.
 - 12, 13. Same—Same—Same—Injunction—Sufficiency of complaint.
 14. Same—Same—Same—Proper procedure.
 15. Waiver of question of jurisdiction.
- See, post, § 1103 and note.

1. Construction of section—Exception to rule that summons can not be served out of county.—Subdivision 2 of above section is an exception to general rule that summons can not be served out of county of justice before whom action is brought.—*Cole v. Fisher*, 66 Cal. 441, 442, 5 Pac. 915.

2. Same—Repugnancy—Repeals by implication.—There is no repugnancy between above section and sections 106, 832, subdivision 7, ante. Repeals by implication are not favored, and there is nothing to support implication that this and next succeeding section were repealed by amendment of section 106, ante, in 1880.—*Cole v. Fisher*, 66 Cal. 441, 443, 5 Pac. 915.

3. Improper issuance and service of summons.—A summons improperly issued or served, remedy is by a motion to quash the service, if that be denied by review on appeal.—*Burge v. Justices' Court*, 11 Cal. App. 213, 215, 104 Pac. 581.

4. Motion to set aside service—Burden of proof.—Upon defendant's motion to set aside service of summons made upon him in county other than that in which action is pending, burden of proving improper service is upon him, and he should be required to present clear case.—*History Co. v. Light*, 97 Cal. 56, 57, 31 Pac. 627.

5. Same—Jurisdiction to hear and decide.—Upon defendant's motion before justice of peace to set aside service of summons

made upon him in county other than that in which action was pending, justice has jurisdiction to hear and decide motion, and decision thereon will not be reversed or annulled upon certiorari, no matter whether it was right or wrong on evidence before him.—*History Co. v. Light*, 97 Cal. 57, 58, 31 Pac. 627.

6. Same—Should be granted, when.—It is clear that defendant has right to present motion before justice of peace to set aside service of summons made upon him in county other than that in which action is pending, and, when such motion is properly made upon affidavits showing ground therefor, it should be granted.—*History Co. v. Light*, 97 Cal. 56, 57, 31 Pac. 627.

7. Same—What does not foreclose inquiry.—Upon defendant's motion to set aside service of summons made upon him in county other than that in which action was pending, fact that verified complaint filed in action alleges that contract sued upon was to be performed by defendant therein in county in which such action was brought, does not foreclose all inquiry as to fact and deprive justice of peace of jurisdiction to pass upon truth of that allegation.—*History Co. v. Light*, 97 Cal. 56, 57, 31 Pac. 627.

8. Service made outside of county—Subdivision 2.—Where a sheriff is called upon to justify the levying of an execution as a result of a judgment rendered by default made upon service of a summons made outside the county, it must be affirmatively shown that the justices' court had jurisdiction. In making such proof it is essential to show that the action was such as is provided in this subdivision, which alone would warrant the service of the summons outside the county.—*Newman v. Barnett*, 165 Cal. 423, 132 Pac. 588.

9. The burden of proof is upon the defendant to show that he was not a resident of the county where he was served, on a motion to set aside a judgment by default.—*Roberts v. Justices' Court*, 29 Cal. App. 768, 157 Pac. 511.

10. Same—Oral contract basis of action—Does not confer jurisdiction.—Under the provisions of the above section, where a suit is brought upon an oral contract to be performed within the county, service upon a defendant outside of the county does not confer jurisdiction upon the justices' court to enter default judgment.—*Smith v. Ross*, — Cal. App. —, 191 Pac. 974.

11. Same—Same—Default judgment—Execution—Burden on execution-creditor.—A justices' court being of limited jurisdiction, one relying on its judgment must show affirmatively every fact necessary to con-

fer jurisdiction.—*Smith v. Ross*, — Cal. App. —, 191 Pac. 974, following doctrine in *Rowley v. Howard*, 23 Cal. 401.

As to affirmative proof of jurisdiction being required, see, post, §§ 849, note pars. 1, 859, note pars. 26 et seq.

12. Same—Same—Same—Injunction—Sufficiency of complaint.—Where action is brought upon an oral contract to be performed within the county, service of process is made upon the defendant out of the county, default judgment taken, a transcript filed in the county of residence of the defendant, an execution issued thereon; in an action to enjoin the sheriff from proceeding to execute the writ of execution a complaint which fails to allege and show that the plaintiff, who is execution-defendant, has not a plainer, speedier, and more adequate remedy at law, than in equity, it will be insufficient to warrant the injunctive relief sought.—*Smith v. Ross*, — Cal. App. —, 191 Pac. 974.

See, also, post, § 859, note Part III.

13. Upon authority it was determined in this state as early as 1887 that injunction will not lie to restrain the enforcement of an execution issued on a default judgment in a justices' court in a suit where the justice had not acquired jurisdiction, for the reason that the defendant has an adequate remedy at law by motion in the justices' court to set aside the execution.—*Smith v. Ross*, — Cal. App. —, 191 Pac. 974, following doctrine in *Luco v. Brown*, 73 Cal. 3, 2 Am. St. Rep. 772, 14 Pac. 366.

14. Same—Same—Same—Proper procedure.—In a case in which the circumstances exist set forth in paragraph 13 above, the proper method of procedure of the judgment-defendant will be to apply, by motion, in the justices' court rendering the default judgment to have that judgment set aside for want of jurisdiction of the justice to render it and on denial of the motion he could obtain relief on appeal from the order denying the motion, or might possibly secure injunctive relief.—*Smith v. Ross*, — Cal. App. —, 191 Pac. 974.

As to relief in equity after denial of motion to open default, see, post, § 859, note pars. 27 et seq.

15. Waiver of question of jurisdiction.—If motion is made to dismiss action in justices' court, on ground of want of jurisdiction in court to try case, defendant's involuntarily consenting to and withdrawing their motion to dismiss case and going to trial on merits, is waiver of question of jurisdiction raised on motion under this section where action is in its nature personal.—*Luco v. Superior Court*, 71 Cal. 555, 556, 12 Pac. 677.

§ 849. SUMMONS, BY WHOM SERVED AND RETURNED. The summons may be served by a sheriff or constable of any of the counties of this state or by any other person of the age of eighteen years, or over not a party

to the action. When a summons issued by a justice of peace is to be served out of the county in which it is issued the summons must have attached to it a certificate, under seal by the county clerk of such county to the effect that the person issuing the same was an acting justice of the peace at the date of the summons and must be served and returned as provided in title five, part two of the code, or

It may be served by publication and sections four hundred and thirteen and four hundred and twelve so far as they relate to the publication of summons are made applicable to justices' courts, the word justice being substituted for the word judge wherever the latter word occurs.

History: Enacted March 11, 1872, founded on §§ 542, 613 as amended 1860; and § 164 Practice Act; amendment approved March 28, 1874, Code Amdts. 1873-4, p. 407; March 10, 1891, Stats. and Amdts. 1891, p. 51; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 168, held unconstitutional, see history, § 5 ante; amendment re-enacted February 28, 1905, Stats. and Amdts. 1905, p. 27.

SERVICE AND RETURN OF SUMMONS— BY WHOM MAY BE MADE.

1. Affirmative proof of jurisdiction required.
2. Construction of section.
3. Same—Provisions are mandatory.
4. Jurisdiction is given by service.
5. Legal service includes, what.
6. Publication of summons—Affidavit required.
7. Same—Order for, is not invalid, when.
8. Same—Proof of facts—Return.
9. Same—Summons is returnable, when.
10. Return—In San Francisco.
11. Same—Presumption.
12. Same—What is good.

1. Affirmative proof of jurisdiction required.—Where title under execution-sale is claimed, under default judgment in a justices' court, inasmuch as such courts are of special and limited jurisdiction, affirmative proof of such jurisdiction is required, involving proof, in the case of a default judgment, where summons was served outside the county in which it was issued, that the certificate of the county clerk was attached thereto, as herein provided, stating that the person issuing the summons was, at the date of issue, an acting justice of the peace, since without such certificate no valid service of summons out of the county of issuance should be made.—*Ferguson v. Basin Consol. Mines*, 152 Cal. 715, 93 Pac. 867.

As to burden of proof being on execution-creditor, see, ante, § 848, note par. 11.

2. Construction of section.—This section is same in effect as Montana Code of Civil Procedure section 1510 (§ 7003 Rev. Codes).—*State ex rel. Reagan v. Harrington*, 31 Mont. 294, 78 Pac. 484, 485.

3. Same—Provisions are mandatory.—Statutory provisions prescribing method by which resident defendant shall be notified

in justices' court that an action has been commenced against him, to end that jurisdiction of his person may be obtained, are mandatory and must be strictly pursued, and failure to observe them in any material manner will prevent court issuing summons from obtaining jurisdiction of defendant's person.—*State ex rel. Reagan v. Harrington*, 31 Mont. 294, 78 Pac. 484, 485.

4. Jurisdiction is given by service.—Jurisdiction of person of sole defendant in justices' court is obtained by service of summons and copy of complaint.—*Southern Pac. R. Co. v. Superior Court*, 59 Cal. 471, 473.

5. Legal service includes, what.—Legal service of summons includes, as necessary part of such service, service of complaint.—*Southern Pac. R. Co. v. Superior Court*, 59 Cal. 471, 473.

6. Publication of summons—Affidavit required.—To entitle plaintiff in justices' court to have summons by publication, he must make and file with justice affidavit required by law, which must show that cause of action exists in his favor and against defendant; and unless affidavit does show this, summons is unauthorized and void.—*Hisler v. Carr*, 34 Cal. 641, 646.

See, ante, §§ 412, 413 and notes.

7. Same—Order for, is not invalid, when.—In justices' court an order for publication of summons is not invalid because it does not state that paper designated is "most likely to give notice to person to be served."—*Seaver v. Fitzgerald*, 23 Cal. 85, 91.

8. Same—Proof of facts—Return.—Publication of summons issued by justice of peace may be proved by affidavit of principal clerk of publishers of newspaper, and fact that copy of summons had been duly deposited in postoffice and properly directed may be proved by affidavit of competent witness. This is proper mode of proving such facts, and return of such facts, indorsed on summons by constable or sheriff,

is not necessary in such case.—*Seaver v. Fitzgerald*, 23 Cal. 85, 91.

9. *Same*—Summons is returnable, when.—Under this section and Practice Act section 541 (ante, § 845), a summons, where it is required to be published, may be made returnable more than ten days from its date.—*Seaver v. Fitzgerald*, 23 Cal. 85, 92; *Hisler v. Carr*, 34 Cal. 641, 646.

10. *Return—In San Francisco*.—That summons issued from justices' court of city and county of San Francisco may be served and returned as provided in sections 405-418, ante.—See act approved April 3, 1876, Stats. 1875-6, p. 855.

11. *Same*—Presumption.—Return of justice's summons is presumed to show all that was done by person making service.—State

ex rel. *Reagan v. Harrington*, 31 Mont. 294, 78 Pac. 484, 485.

12. *Same*—What is good.—While justices' courts are inferior courts of limited jurisdiction, and their jurisdiction must affirmatively appear or their judgments will be absolutely void, and while no intendments can be indulged in favor of jurisdiction of such courts, yet, within these rules, return of service of summons and complaint on defendant as follows: "I hereby certify that I have served within summons by delivering a copy thereof together with true copy of complaint personally at township and county of Los Angeles this twenty-fifth day of April, 1879. W. Bettis, Constable, etc." is good, and will support judgment by default.—*Cardwell v. Sabichl*, 59 Cal. 490, 493.

§ 850. NOTICE OF HEARING. When all the parties served with process shall have appeared, or some of them have appeared, and the remaining defendants have made default, the justice must fix the day for the trial of said cause, whether the issue is one of law or fact, and give notice thereof to the parties to the action who have appeared, but in case any of the parties are represented by an attorney, then to such attorney; provided, however, that where a party has appeared in person, such party shall leave with the justice or justice's clerk, and the same shall be entered upon the register in the action, an address where service of the notice of hearing of such matter may be made; provided, further, that such notice shall be personally served on said person if he can be found at said address, but in case said person can not, after due diligence, be found at said address and such fact appears by affidavit to the satisfaction of the court or a judge thereof, then the service of such notice may be by registered mail and in the manner hereinafter provided for service of notice by mail. Such notice shall be in writing, signed by the justice, and substantially in the following form, filling blanks according to the facts:

[Form of notice.] In the justice court, ... township (or city, or city and county), county, or city and county of, state of California.

..... plaintiff, v. defendant.

To plaintiff, or attorney for plaintiff, and to defendant, or attorney for defendant.

You and each of you will please take notice that the undersigned justice of the peace before whom the above-entitled cause is pending, has set for hearing the demurrer of, filed in said cause (or has set the said cause for trial, as the case may be), before me at my office in said township (or city, or city and county), at o'clock m., on the day of, 19...

Dated this day of, 19...

(Signed)

Justice of the peace.

[Service of notice.] Said notice shall be served by mail or personally. When served by mail the justice of the peace shall deposit copies thereof in a sealed

envelope in the post-office at least ten days before the trial or hearing addressed to each of the persons on whom it is to be served at their place of residence and the postage prepaid thereon;

[Service by mail.] provided, that such notice shall be served by mail only when the person on whom service is to be made resides out of the county in which said justice's court is situated, or is absent therefrom or has appeared in person. When personally served said notice shall be served at least five days before the trial or hearing on the persons on whom it is to be served by any person competent and qualified to serve a summons in a justice's court, and when personally served it shall be served, returned and filed in like manner as a summons. When a party has appeared by attorney the notice may be served in the manner prescribed by subdivision one of section one thousand eleven of this code.

[Docket entries.] The justice shall enter on his docket the date of trial or hearing; and when such notice shall have been served by mail the justice shall enter on his docket the date of mailing such notice of trial or hearing and such entry shall be prima facie evidence of the fact of such service. The parties are entitled to one hour in which to appear after the time fixed in said notice, but are not bound to remain longer than that time unless both parties have appeared and the justice being present is engaged in the trial of another cause.

History: Enacted March 11, 1872; amendment approved April 3, 1876, Code Amdts. 1875-6, p. 199; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 168, held unconstitutional, see history, § 5 ante; amendment approved March 23, 1901, Stats. and Amdts. 1900-1, p. 598; March 1, 1905, Stats. and Amdts. 1905, p. 33; April 16, 1913, p. 234; May 24, 1917, Stats. and Amdts. 1917, p. 190. In effect July 27, 1917.

NOTICE OF HEARING.

1. Appearance—Effect—Party entitled to notice.
2. Construction of section—In general.
3. Same—Intention of legislature.
4. Same—Right to show want of notice.
5. Default—Occurs, when.
6. Fixing day for trial—Evidence as to, admissible in superior court.
7. Same—When not necessary.
8. Notice of day fixed for trial—Can not be given over telephone.
9. Same—Can not be waived by telephone.
10. Same—Should be in writing and form part of record.
11. Same—What is sufficient.
12. Service of notice of day fixed for trial—Is jurisdictional prerequisite.
13. Same—Docket entry is not proof of notice.
14. Same—Verbal statement of service of notice should not be received.

1. Appearance—Effect—Party entitled to notice.—When a party served with process has appeared, he is entitled to notice of the time fixed by the justice for the trial of the cause, and such notice is imperative, and is

as essential to the authority of the justice to proceed upon the trial of the case as is the summons and return of the service thereof to his entering judgment by default.—*Elder v. Justices' Court*, 136 Cal. 364, 68 Pac. 1022; *Green v. Rogers*, 18 Cal. App. 572, 575, 123 Pac. 974.

2. Construction of section—In general.—Provisions of this section have reference only to "trial" as is authorized by nature of appearance. If by such appearance an issue of law only is presented, there can be trial of such issue, and trial of fact can not be had unless issue of fact is presented after trial and disposition of such issue of law.—*Stewart v. Justices' Court*, 109 Cal. 616, 617, 42 Pac. 158.

3. Same—Intention of legislature.—This section, requiring notice of day fixed for trial to be given, is imperative, because no man should be deprived of his property without notice of opportunity to be heard. It was intention of legislature to relieve parties to actions in justices' courts from necessity of making daily inquiry at justices' office to learn when case was to be tried.—*Jones v. Justices' Court*, 97 Cal. 523, 524, 32 Pac. 575; *Elder v. Justices' Court*, 136 Cal. 364, 366, 68 Pac. 1022.

4. Same—Right to show want of notice.—If requirement of this section, that jus-

tice must fix day for trial of said case and notify plaintiff and defendants who have appeared thereof, be jurisdictional, and time for appeal has elapsed before defendant has notice that case has been set for trial, and trial is had and judgment entered against him, it would seem to be harsh rule which would preclude him from showing upon certiorari that he had never had any notice of trial, because justice is not required to enter in his docket any minute of service of notice of time of trial, nor is he required to file any proof of such service.—Weimmer v. Sutherland, 74 Cal. 341, 345, 15 Pac. 849.

5. Default—Occurs when defendant fails to answer or demur as described in this section and section 871, post.—Weimmer v. Sutherland, 74 Cal. 341, 344, 15 Pac. 849.

6. Fixing day for trial—Evidence as to, admissible in superior court.—Upon appeal from judgment of justice of peace, it is not, perhaps, improper for superior court to admit evidence of constable as to day fixed for trial of case, not as contradicting record of justice, but as supplemental thereto.—Los Angeles v. Young, 118 Cal. 295, 298, 62 Am. St. Rep. 234, 50 Pac. 534.

7. Same—When not necessary.—Where defendants file demurrer to complaint, and justice fixes following day for hearing upon demurrer, there is no occasion for justice to fix any day for trial other than that which he has already fixed, as there is no issue of fact to be tried.—Stewart v. Justices' Court, 109 Cal. 616, 617, 42 Pac. 158.

8. Notice of day fixed for trial—Can not be given over telephone.—A valid notice setting cause for trial can not be given by justice by talking over telephone.—Elder v. Justices' Court, 136 Cal. 364, 366, 68 Pac. 1022.

9. Same—Can not be waived by telephone.—As notice setting case for trial, under this section, must be in writing, it can not be waived by conversation over telephone in which defendant's attorney con-

sents that case shall be set.—Elder v. Justices' Court, 136 Cal. 364, 367, 68 Pac. 1022.

10. Same—Should be in writing and form part of record.—Notice required to be given by this section should be given in writing and form part of record, and there should be entry thereof, and also mode in which it was given, in justices' docket, so that there may be affirmative evidence of his authority to render judgment. This notice, and proof thereof, are as essential to authority of justice to proceed upon trial of case as is summons and return of service thereof to his entering judgment of default. The giving of notice is duty which statute imposes upon justice before he has any authority to proceed with trial.—Jones v. Justices' Court, 97 Cal. 523, 526, 32 Pac. 572; Elder v. Justices' Court, 136 Cal. 364, 366, 68 Pac. 1022.

11. Same—What is sufficient.—Under this section, it is sufficient notice of day fixed for trial where defendant has appeared by attorney, if such notice is given to attorney as such, and defendant is notified by him thereof.—Grant v. Justices' Court, 1 Cal. App. 383, 82 Pac. 263, 264.

12. Service of notice of day fixed for trial—Is jurisdictional prerequisite.—Los Angeles v. Young, 118 Cal. 295, 296, 62 Am. St. Rep. 234, 50 Pac. 534.

13. Same—Docket entry is not proof of notice.—Mere entry in justices' docket that plaintiff's attorney filed affidavits of service of notice of trial is not evidence that they contained proper proof that such notice had been given to defendant.—Jones v. Justices' Court, 97 Cal. 523, 526, 32 Pac. 575.

14. Same—Verbal statement of service of notice should not be received.—While it is not necessary for justice to serve notice of day fixed for trial, he ought not to accept verbal statement of plaintiff that such notice has been served upon defendant.—Jones v. Justices' Court, 97 Cal. 523, 526, 32 Pac. 575; Elder v. Justices' Court, 136 Cal. 364, 366, 68 Pac. 1022.

CHAPTER III.

PLEADINGS IN JUSTICES' COURTS.

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| <p>§ 851. Form of pleadings.
 § 852. Pleadings in justices' courts.
 § 853. Complaint defined.
 § 854. When demurrer to complaint may be put in.
 § 855. Answer. [What to contain.]
 § 856. If the defendant omits to set up counter-claim.</p> | <p>§ 857. When plaintiff may demur to answer.
 § 857a. When affirmative judgment may be rendered for defendant.
 § 858. Proceedings on demurrer.
 § 859. Amendment of pleadings.
 § 860. Answer or demurrer to amended pleadings.</p> |
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§ 851. FORM OF PLEADINGS. Pleadings in justices' courts:

1. Are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended;
2. May, except the complaint, be oral or in writing;
3. Must not be verified, unless otherwise provided in this title;
4. If in writing, must be filed with the justice;
5. If oral, an entry of their substance must be made in the docket.

History: Enacted March 11, 1872.

PLEADINGS—FORM OF.

1. Construction of section.
2. Pleadings—Not required to be in any particular form.
3. Same—Construction—Conclusions of law or fact.
4. Same—Issues joined.
5. Same—Same—Cross-complaint not allowed.
6. Same—Power of clerk to pass on sufficiency of pleading.
7. Revocation of order for payment of money—Estoppel.
8. Rulings in action on appeal-bond.

1. **Construction of section.**—Under above section as it formerly stood (Practice Act § 571), it was not required that an answer to verified complaint should controvert specifically material allegations of complaint.—*Minturn v. Burr*, 20 Cal. 48, 49.

2. **Pleadings—Not required to be in any particular form.**—Pleading in justices' court is not required to be in any particular form. It is sufficient if it shows value of claim asserted by plaintiff against defendant in such way that person of common understanding may know what was intended.—*Aucker v. McCoy*, 56 Cal. 524, 525.

3. **Same—Construction—Conclusions of law or fact.**—Pleadings in justices' courts are not required to be in any particular form, and when case comes before superior court on appeal, their effect and sufficiency are to be judged by same standard as when it was before justice of peace. In construing them, when they come under consideration collaterally, rule excluding conclusions of law as no proper part of pleading does not apply. Indeed, it may be doubted

if, for purpose of exhibiting contentions of respective parties in cases in justices' courts, conclusions either of law or fact are not always to be given full effect in any subsequent review of proceedings.—*Koehler v. Holt Mfg. Co.*, 146 Cal. 335, 338, 80 Pac. 73.

4. **Same—Issues joined.**—As a matter of pleading in the justices' court, the facts set forth in the answer of appellant could only be treated as a counter-claim, and as such the plaintiff in that action was not called upon to file any answer respecting it. It constituted an allegation in the answer of new matter, which was deemed controverted. Under section 880, post, applicable to justices' courts, when the answer of the appellant was filed, an issue of fact arose as to all allegations in the complaint controverted by the answer and "upon any new matter in the answer."—*Purcell v. Richardson*, 164 Cal. 150, 128 Pac. 31, 33.

5. **Same—Same—Cross-complaint not allowed.**—There is no such pleading as a cross-complaint provided for among the pleadings available to a defendant in a justices' court. The provisions of the Code of Civil Procedure, relative to pleadings in those courts, prescribe specifically of what they shall consist, and those available to a defendant consist of a right to demur or answer the complaint (Code Civ. Proc. § 852). As to the answer, it is provided that it "may contain a denial of any or all of the material facts stated in the complaint . . . and also a statement . . . of any other facts constituting a defense or counter-claim upon which an action might be brought by the defendant against the plaintiff or his assignor in the justices' court" (Code Civ. Proc., § 855). It is quite

apparent from a simple reading of this last section that no such pleading as a cross-complaint in a justices' court is permitted. Appellant has apparently sought to invoke, in aid of the right to set up a cross-complaint in a justices' court, the provisions of the Code of Civil Procedure which apply to actions in the superior court, and where the filing of a cross-complaint is specifically provided for (Code Civ. Proc., § 442). But that section has no application to pleadings in the justices' courts.—*Purcell v. Richardson*, 164 Cal. 150, 128 Pac. 31, 32.

6. Same—Power of clerk to pass on sufficiency of pleading.—Even though the answer to a complaint be defective, irregular, or insufficient to constitute a defense, the clerk of the superior court possesses no judicial power to pass thereon. The question as to the sufficiency of the answer was one for the court to determine upon a motion for judgment upon the pleadings, or motion to strike the purported answer from the files.—*Rose v. Leland*, 20 Cal. App. 502, 129 Pac. 599, 600.

7. Revocation of order for payment of money—Estoppel.—If an order was given for payment of money, and it appears that order was accepted; that it was afterwards revoked; that suit was brought to recover amount due under terms of order; that effect of revocation was litigated and submitted to court in such action; that court decided that revocation was valid; that effect of such revocation was to abrogate and annul defendant's acceptance of such order, and put an end to defendant's liability thereon; and that judgment was rendered accordingly, defendant is estopped in subsequent action from contending to contrary of what was decided in former action, though it was commenced in justices' court.—*Koehler v. Holt Mfg. Co.*, 146 Cal. 335, 337, 338, 80 Pac. 73.

8. Rulings in action on appeal-bond.—For various rulings upon questions involved in action on bond given on appeal from justice of peace, see *Nolan v. Fidelity & Deposit Co.*, 2 Cal. App. 1, 82 Pac. 1119.

§ 852. PLEADINGS IN JUSTICES' COURTS. The pleadings are:

1. The complaint by the plaintiff;
2. The demurrer to the complaint;
3. The answer by the defendant;
4. The demurrer to the answer.

History: Enacted March 11, 1872, founded on § 570 Practice Act.

PLEADINGS ALLOWED IN JUSTICES' COURTS.

1. Pleadings—Cross-complaint.
2. Same—Must be construed liberally.
3. Same—Not held to much strictness.
4. Same—When sufficient.

As to time when trial must be commenced, see, post, § 873 and note.

As to use of abbreviations and figures, see, ante, § 186 and note.

As to what answer shall contain, in general, see, ante, § 437 and note.

As to what complaint must contain, in general, see, ante, § 426 and note.

1. Pleadings—Cross-complaint can not be filed in a justices' court.—*Purcell v. Richardson*, 164 Cal. 150, 128 Pac. 31.

As to reasons for not allowing cross-complaint in justices' courts, see, ante, § 851, note par. 5.

As to what pleadings are allowed, in general, see, ante, § 422 and note.

2. Same—Must be construed liberally.—While pleadings in justices' court must be liberally construed, yet cause of action must be stated, and it must be one relied on, for, in such court, as in every court, the allegata and probata must correspond, and judgment must be upon demand and within pleadings.—*Terry v. Superior Court*, 110 Cal. 85, 88, 42 Pac. 464.

3. Same—Not held to much strictness.—Pleadings in justices' courts are not held to much strictness.—*Liening v. Gould*, 13 Cal. 598, 599.

4. Same—When sufficient.—Pleadings in justices' courts must be construed with great liberality, and if facts stated are sufficient to show nature of claim or defense relied upon, nothing further is required. *Stuart v. Lander*, 16 Cal. 372, 374, 76 Am. Dec. 538.

As to power of justices' clerk to pass upon sufficiency of pleading, see, ante, § 851, note par. 6.

§ 853. COMPLAINT DEFINED. The complaint in justices' courts is a concise statement, in writing, of the facts constituting the plaintiff's cause of action; or a copy of the account, note, bill, bond, or instrument upon which the action is based.

History: Enacted March 11, 1872.

COMPLAINT.

1. Copy of account.
2. Copy of note.
3. Note with indorsements.
4. Subscription to, unnecessary.
5. When sufficient.

1. **Copy of account.**—A copy of an account filed with justice is good complaint under this section.—*Montgomery v. Superior Court*, 68 Cal. 407, 410, 9 Pac. 720.

2. **Copy of note.**—Under this section, copy of note "upon which action is based" is good complaint, though such copy does not show plaintiff to be corporation.—*McFall v. Buckeye G. W. Assoc.*, 122 Cal. 468, 470, 68 Am. St. Rep. 47, 55 Pac. 253.

3. **Note with indorsements.**—Under this section, note with indorsements thereon, filed with justice, is sufficient complaint.—*Hamilton v. McDonald*, 18 Cal. 128, 130.

4. **Subscription to, unnecessary.**—It is not necessary for complaint in justices' court to be subscribed by party or his attorney.—*Montgomery v. Superior Court*, 68 Cal. 407, 410, 9 Pac. 720.

5. **When sufficient.**—Complaint in justices' court is sufficient if it shows value of claim asserted by plaintiff in such way that person of common understanding may know what was intended.—*Aucker v. McCoy*, 56 Cal. 524, 525.

As to power of justices' clerk to pass upon sufficiency, see, ante, § 851, note par. 6.

§ 854. WHEN DEMURRER TO COMPLAINT MAY BE PUT IN. The defendant may, at any time before answering, demur to the complaint.

History: Enacted March 11, 1872, founded on § 578 Practice Act.

1. **Order sustaining or overruling demurrer** is not appealable.—*Litch v. Kerns*, 8 Cal. App. 747, 748, 97 Pac. 897.

As to demurrer, generally, see, ante, § 430 and note.

As to when defendant may demur to complaint, see, ante, § 430 and note.

§ 855. ANSWER. [WHAT TO CONTAIN.] The answer may contain a denial of any or all of the material facts stated in the complaint, which the defendant believes to be untrue, and also a statement, in a plain and direct manner, of any other facts constituting a defense or counter-claim, upon which an action might be brought by the defendant against the plaintiff, or his assignor, in a justice's court.

History: Enacted March 11, 1872, re-enactment of § 574 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 168, held unconstitutional, see history, § 5 ante; amendment approved March 22, 1907, Stats. and Amdts. 1907, p. 880, *Kerr's Stats. and Amdts. 1906-7*, p. 467.

ANSWER—WHAT TO CONTAIN.

1. Extent of counter-claim.
2. Setting up new matter as counter-claim
—Notice of trial—Void judgment.
- 3, 4. Sufficiency of denial.

1. **Extent of counter-claim.**—Under this section defendant can not set up counter-claim in excess of three hundred dollars.—*Maxfield v. Johnson*, 30 Cal. 545, 546; *Griswold v. Pieratt*, 110 Cal. 259, 265, 42 Pac. 820.

As to when counter-claim has no standing, see, post, § 856, note par. 2.

2. **Setting up new matter as counter-claim—Notice of trial—Void judgment.**—A pleading of the defendant, setting up new matter by way of counter-claim, as provided by above section, was simply an answer, which when filed raised an issue of fact to be tried under notice given by the justice to the respective parties to the action. The justice was without juris-

diction to enter any judgment at all until after such notice of the trial had been given. and, in the absence of such notice, an attempted judgment entered by him against the plaintiff and in favor of the defendant, on the new matter pleaded as a counter-claim, was void.—*Purcell v. Richardson*, 164 Cal. 150, 128 Pac. 31.

As to counter-claim and set-off generally, see, ante, § 438 and note.

As to cross-complaint generally, see, ante, § 442 and note.

As to cross-complaint not being permissible in justices' courts, see, ante, § 851, note par. 5.

3. **Sufficiency of denial.**—It is sufficient under this section if answer deny material allegations of complaint, either generally or specifically.—*Minturn v. Burr*, 20 Cal. 48, 49.

4. **Answer in justices' court denying generally allegations of complaint conforms substantially to requirements of statute.**—*Sullivan v. Cary*, 17 Cal. 80, 85.

§ 856. IF THE DEFENDANT OMITTS TO SET UP COUNTER-CLAIM. If the defendant omit to set up a counter-claim in the cases mentioned in the last section, neither he nor his assignee can afterward maintain an action against the plaintiff therefor.

History: Enacted March 11, 1872.

COUNTER-CLAIM.

1. Civil jurisdiction—Amount—Interest.
2. Counter-claim has no standing, when.

As to counter-claim generally, see, ante, § 855.

1. Civil jurisdiction—Amount—Interest.—Justices' court shall have civil jurisdiction in actions arising on contract for recovery of money only, if sum claimed, exclusive of interest, does not amount to three

hundred dollars (ante, § 112).—See *Malsof v. Vaughn*, 23 Cal. 61, 62 (holding that "interest" under former law should be included in estimating amount of justice's jurisdiction).

2. Counter-claim has no standing, when.—Counter-claim interposed by defendant has no standing in justices' court where amount is such that defendant could not have brought action in such court against plaintiff.—*Malsof v. Vaughn*, 23 Cal. 61, 63.

§ 857. WHEN PLAINTIFF MAY DEMUR TO ANSWER. When the answer contains new matter in avoidance, or constituting a defense or a counter-claim, the plaintiff may, at any time before the trial, demur to the same for insufficiency, stating therein the grounds of such demurrer.

History: Enacted March 11, 1872.

As to demurrer to answer, generally, see, ante, § 443 and note.

As to when plaintiff may demur to answer, see, ante, § 443 and note.

As to order sustaining or overruling demurrer not being an appealable order, see, post, § 954, note par. 1.

§ 857a. WHEN AFFIRMATIVE JUDGMENT MAY BE RENDERED FOR DEFENDANT. Affirmative judgment may be rendered for the defendant on his cross-complaint whenever the defendant proves that he is entitled to more than the plaintiff has proven or whenever the plaintiff fails to prove that he is entitled to any judgment.

History: Enactment approved May 18, 1919, Stats. and Amdts. 1919, p. 727. In effect July 22, 1919.

§ 858. PROCEEDINGS ON DEMURRER. The proceedings on demurrer are as follows:

1. If the demurrer to the complaint is sustained, the plaintiff may, within such time, not exceeding two days, as the court allows, amend his complaint;
2. If the demurrer to a complaint is overruled, the defendant may answer forthwith;
3. If the demurrer to an answer is sustained, the defendant may amend his answer within such time, not exceeding two days, as the court may allow;
4. If the demurrer to an answer is overruled, the action must proceed as if no demurrer had been interposed.

History: Enacted March 11, 1872.

PROCEEDINGS ON DEMURRER.

1. Construction of section.
2. Failure to answer "at once," effect of.
3. Time for preparation of written answer.

1. Construction of section.—Section 874, post, is general in its terms and controls provision of this section and of sections 871, 872, post. Under section 874, post, justice, after overruling defendant's demurrer

to complaint, has power to allow defendant two days in which to answer, and to postpone trial for that period.—Hall v. Kerrigan, 135 Cal. 4, 5, 66 Pac. 868.

2. Failure to answer "at once," effect of.—Under this section, defendant may answer forthwith upon overruling of demurrer; but, if he fails to do so, justice is authorized, under section 872, post, to render judgment "in like manner as if defendant had failed to appear and answer or demur." If defendant fails to answer "at once," when required to do so, judgment by default may be rendered in favor of plaintiff.—Stewart v. Justices' Court, 109 Cal. 616, 617, 42 Pac. 158.

3. Time for preparation of written answer.—Although pleadings in justices' court

may be oral, yet they are not required to be so, and there are many instances in which defense can be better presented by written pleading; and, as defendant can not know in advance whether his demurrer will be sustained or overruled, he ought not to be required to prepare his answer in advance of hearing upon demurrer, unless statute so demands. Whether, in any particular case, court should allow time for preparation of answer after order upon demurrer, as well as time which it will allow, must depend upon facts of that case; but, so long as it has power to make such order, its action can not be disregarded. As statute forbids postponement of trial for more than two days for this purpose, there can not ordinarily be any abuse of this power.—Hall v. Kerrigan, 135 Cal. 4, 5, 66 Pac. 868.

§ 859. AMENDMENT OF PLEADINGS. Either party may, at any time before the conclusion of the trial, amend any pleadings; but if the amendment is made after the issue, and it appears to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment must be granted. The court may also, in its discretion, when an adjournment will by the amendment be rendered necessary, require as a condition to the allowance of such amendment, made after issue joined, the payment of costs to the adverse party, to be fixed by the court, not exceeding twenty dollars. The court may also, on such terms as may be just, and on payment of costs, relieve a party from a judgment by default taken against him by his mistake, inadvertence, surprise, or excusable neglect, but the application for such relief must be made within ten days after notice of the entry of the judgment and upon an affidavit showing good cause therefor.

History: Enacted March 11, 1872, re-enactment of § 580 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 169, held unconstitutional, see history, § 5 ante; amendment re-enacted March 18, 1905, Stats. and Amdts. 1905, p. 254.

AMENDMENT OF PLEADINGS—RELIEF FROM DEFAULT.

I. IN GENERAL, 1-18.

II. RELIEF FROM DEFAULT, 19-25.

III. RELIEF IN EQUITY, 26-31.

I. IN GENERAL.

1. A judgment entered after a demurrer to the complaint has been overruled.
2. Amendments—Furtherance of justice.
3. Same—Liberality allowed.
4. Collateral attack—Judgment fair on its face.
5. Same—Judgment not absolutely void.
6. Judgment by default—As to when voidable.
7. Same—A motion to set aside—Must be made within ten days.
8. Same—Same—Effect of denial of motion.
9. Same—Same—Is properly denied if not made within time.

10. Same—Same—Jurisdiction not lost by continuing hearing for argument.
11. Same—Same—Loss of rights, where no motion is made and no appeal taken.
12. Same—Same—No jurisdiction, when.
13. Same—Same—Party can not extend his own time, how.
14. Power of justice to vacate his own judgment—After regular trial.
- 15, 16. Same—Exists only by statutory authority.
- 17, 18. Same—Is confined to "judgment by default."

II. RELIEF FROM DEFAULT.

19. As to power of justices' courts to grant.
- 20, 21. Application to set aside default.
- 22, 23. Same—Time of filing.
24. Notice of default judgment—Mailed to person other than defendant—Idem sonans.

25. Same—First notice of default, presenting of execution—Motion within ten days thereafter—Jurisdiction of justice.

III. RELIEF IN EQUITY.

26. Affirmative showing of good defense—When required.
 27. After denial of motion to open judgment.
 28. Injunction—After denial of motion to open judgment.
 29. Same—Denied where party was negligent.
 30. Same—Denied where remedy by motion exists.
 31. Same—Though relief might have been sought in a different form of action.

I. IN GENERAL.

1. A judgment entered after a demurrer to the complaint has been overruled and failure of the defendant to answer in the justices' court is to be treated as a default judgment, which may be set aside, under the provision of this section.—*Fast v. Young*, 19 Cal. App. 577-580, 126 Pac. 854.

2. Amendments—Furtherance of justice.—Amendments should be readily allowed whenever they will tend to furtherance of justice, and greatest liberality in this respect should be extended to pleadings of justices' court.—*Butler v. King*, 10 Cal. 342, 343.

3. Same—Liberality allowed.—Greatest liberality should be exercised in allowing pleadings in justices' courts to be amended.—*Butler v. King*, 10 Cal. 342, 343.

4. Collateral attack—Judgment fair on its face.—A judgment of justice of peace against person who was never served with summons and never appeared in cause is in fact void, but if record shows service and appearance and judgment is fair on its face, it can not be collaterally attacked.—*Harnish v. Bramer*, 71 Cal. 155, 159, 11 Pac. 888.

5. Same—Judgment not absolutely void.—Where action has been brought in justices' court for trespass upon land, the summons, though defective in containing notice simply that in case of failure to answer plaintiff will take judgment for sum specified, that being sum claimed in complaint, does not render judgment by default rendered in such action, after personal service upon defendant, absolutely void, and such judgment can not, therefore, be attacked collaterally.—*Keybers v. McComber*, 67 Cal. 395, 396, 7 Pac. 838.

6. Judgment by default—As to when voidable.—A judgment in justices' court is voidable if entered by default before time for answering has expired.—*Harnish v. Bramer*, 71 Cal. 155, 159, 11 Pac. 888.

7. Same—A motion to set aside—Must be made within ten days.—If motion made in justices' court to set aside judgment is

based upon mistake, inadvertence, surprise, or excusable neglect of defendant, court has no jurisdiction over it, where it has not been made within ten days after judgment.—*Simons v. Justices' Court*, 127 Cal. 45, 48, 59 Pac. 296.

8. Same—Same—Effect of denial of motion.—If motion is made under this section before expiration of ten days to vacate judgment by default and for leave to answer, and such motion is denied, order denying such motion will not be reviewed on certiorari, although it is erroneous, where justice had jurisdiction.—*Reagan v. Justices' Court*, 75 Cal. 253, 255, 17 Pac. 195.

9. Same—Same—Is properly denied if not made within time.—If default judgment is rendered against party, his motion to set it aside, made more than ten days after notice of entry of judgment, is properly denied, though summons in action does not contain name of plaintiff, but another name is inserted therein as plaintiff.—*Tucker v. Justices' Court*, 120 Cal. 512, 514, 52 Pac. 808.

10. Same—Same—Jurisdiction not lost by continuing hearing for argument.—If motion to set aside default judgment in justices' court is made within time, court does not lose jurisdiction by continuing hearing for argument, or for further evidence.—*Spencer v. Branham*, 109 Cal. 336, 340, 41 Pac. 1095.

11. Same—Same—Loss of rights, where no motion is made and no appeal taken.—If summons in justices' court is fatally defective, defendant may appear and move court to quash it for such defect, and his motion will probably be granted; and if judgment is entered, he has right to move court to set aside default judgment, if such motion is made within ten days after judgment was entered; but if he does not make that motion within such time, and no appeal is taken from judgment or order, he is not entitled to writ of review for relief.—*Tucker v. Justices' Court*, 120 Cal. 512, 514, 52 Pac. 808.

12. Same—Same—No jurisdiction, when.—An application for relief against judgment by default must be made within ten days after entry of judgment. It is making and not filing of an application that is required. Attention of court must be called to it, and court moved to grant it, or there is no jurisdiction to set aside such default.—*Spencer v. Branham*, 109 Cal. 336, 340, 41 Pac. 1095.

13. Same—Same—Party can not extend his own time, how.—Application to set aside judgment by default under this section must be made upon notice within ten days after notice of entry of judgment. A party can not extend his own time by filing written motion within period in which motion must be made upon notice and give notice of hearing at time after such period has expired.—*Spencer v. Branham*, 109 Cal. 336, 339, 41 Pac. 1095.

14. **Power of justice to vacate his own judgment.—After regular trial.**—Justice of peace has no power under this section to set aside judgment rendered after regular trial.—Heilen v. Phillips, 88 Cal. 557, 559, 26 Pac. 366.

15. **Same.—Exists only by statutory authority.**—Justices' courts have no power to review their own judgments, unless by some method expressly provided by law.—Weimmer v. Sutherland, 74 Cal. 341, 343, 15 Pac. 849.

16. Justices' court has no power to review its own judgment, unless statutory authority therefor is given, and it can review no judgment except judgment by default.—Jones v. Justices' Court, 97 Cal. 523, 524, 32 Pac. 575.

17. **Same.—Is confined to "judgments by default."**—Power given to justice under this section to relieve from judgment by default taken against party by mistake, inadvertence, surprise, or excusable neglect, is confined to cases of "judgment by default," and time is limited to ten days after entry of judgment. Section 473, ante, does not apply to justices' courts.—Weimmer v. Sutherland, 74 Cal. 341, 15 Pac. 849.

18. Justices' court can vacate judgment only in cases where it is expressly authorized by statute, and, as this section allows it only as to judgments upon default, court can not vacate its judgment in any other case.—American T. F. Co. v. Justices' Court, 133 Cal. 319, 320, 65 Pac. 742, 978.

II. RELIEF FROM DEFAULT.

'See, also, ante, § 848, note pars. 8-14.

19. **As to power of justices' courts to grant.**—Under the provisions of above section a justices' court may relieve a party from a judgment by default taken against him by his mistake, inadvertence, surprise, or excusable neglect, "but the application for such relief must be made within ten days after notice of the entry of the judgment and upon an affidavit showing good cause therefor."—Engelken v. Justices' Court, — Cal. App. —, 195 Pac. 265.

20. **Application to set aside default.**—Upon an application made to set aside a default judgment in a justices' court, it is error to grant the application without making the order conditional upon the payment of plaintiff's costs, but the failure to impose such condition does not, however, devert the justices' court of jurisdiction to proceed with the cause.—Arbogast v. Superior Court, 32 Cal. App. 372, 162 Pac. 909.

21. Such written notice of entry of judgment is required in cases where personal service of the summons and complaint is made, as in cases where there has been a constructive service of summons.—Arbogast v. Superior Court, 32 Cal. App. 372, 162 Pac. 909.

22. **Same.—Time for filing.**—An application for relief hereunder from a default

judgment must not only be filed but must be called up for action by the court and the court moved to grant it within ten days after notice of the decision has been served on the losing party. The time to file the application begins to run from the service of the notice required by section 893, post, and the service of such notice is not waived by the mere preparation of affidavits to be used upon the application to be relieved.—Peterson v. Superior Court, 30 Cal. App. 466, 158 Pac. 547.

23. The time to file an application under above section to be relieved from a judgment entered by default in a justices' court on the ground that such judgment had been taken by mistake, inadvertence, surprise and excusable neglect, begins to run from service of written notice of entry of the judgment as required by section 893 of such code, as amended in 1915.—Arbogast v. Superior Court, 32 Cal. App. 372, 162 Pac. 909.

24. **Notice of default judgment.—Mailed to person other than defendant.—Idem sonans.**—In a case in which there is no claim on the part of the plaintiff that any other notice was given Faria than the notice mailed by the justice, that notice was not addressed to Faria, but to Faira. It was not delivered through the post-office to Faria, but was returned undelivered to the justice of the peace. It is too plain for argument that a notice of a default judgment addressed to a person other than the judgment-debtor is not such a notice as is required by above section, to start time running within which a motion to vacate the judgment may be made. Faira and Faria are not idem sonans.—Engelken v. Justices' Court, — Cal. App. —, 195 Pac. 265.

25. **Same.—First notice of default, presenting of execution.—Motion within ten days thereafter.—Jurisdiction of justice.**—In a case in which the first notice of a default judgment is received by the defendant on the date the execution was presented to him, and within ten days of that time he gave notice of motion, it was within time and the justices' court had power to hear and determine the questions arising upon his showing of any of the grounds specified in the statute.—Engelken v. Justices' Court, — Cal. App. —, 195 Pac. 265.

III. RELIEF IN EQUITY.

26. **Affirmative showing of good defense.—When required.**—Where money judgment was recovered in justices' court, but causes of action set out in case were barred by limitation before commencement of action for relief against such judgment, and there is nothing to show that plaintiff in justices'-court case was guilty of any fraud in procurement of judgment, it would be inequitable to set aside judgment without affirmative showing in complaint that there was good defense to action of justices' court.—Burbridge v. Rauer, 146 Cal. 21, 79 Pac. 526, 527.

27. After denial of motion to open judgment.—Where judgment was rendered against plaintiff in justices' court, and he did not learn that judgment had been entered against him until time for an appeal had expired, and he then makes an application to court by motion to open judgment, which motion is granted, but justice on following day and without notice to plaintiff or his attorney vacates such order, his subsequent action in vacating this order is equivalent to denial of motion, and from this order there is no appeal to superior court. Hence, such denial gives to court of equity same authority to interfere as if other court was powerless to render aid. Rule under which court of equity declines to interfere until after application for relief has been made to court in which judgment was rendered has no application when relief has been sought in that court and denied. *Merriman v. Walton*, 105 Cal. 403, 407, 45 Am. St. Rep. 50, 30 L. R. A. 786, 38 Pac. 1108.

28. Injunction—After denial of motion to open judgment.—After denial of motion to set aside judgment by default in justices' court, under this section, on ground of mistake, court of equity will not issue an injunction to restrain collection or assignment of such judgment.—*Reagan v. Fitzgerald*, 75 Cal. 230, 231, 233, 17 Pac. 198.

29. Same—Denied where party was negligent.—Where equity is invoked to restrain enforcement of judgment by justice of peace and it appears from complaint that plaintiff was informed of all grounds which he urges in support of his action, within week after verdict was given by jury, he will be denied relief, because he had complete remedy against all errors committed at trial

by appeal to superior court; and his failure to take such appeal until more than thirty days after rendition of judgment was his own negligence, which can not be invoked as ground for interference of equity.—*Hollenbeak v. McCoy*, 127 Cal. 21, 23, 59 Pac. 201.

30. Same—Denied where remedy by motion exists.—A court of equity will not grant injunction to restrain enforcement of execution issued on judgment by default rendered in justices' court, if judgment is void upon its face, because there is speedy, complete, adequate, and summary remedy by motion in justices' court.—*Luco v. Brown*, 73 Cal. 3, 6, 20 Am. St. Rep. 772, 14 Pac. 366.

31. Same—Though relief might have been sought in different form of action.—It is familiar rule that separate action to restrain enforcement of judgment will not be sustained where same relief can be obtained through motion or other proceeding in action in which judgment was obtained; and, in jurisdiction in which legal and equitable relief is dispensed within different tribunals, court of equity will not grant relief against judgment when same relief can be obtained by aid of court that rendered judgment. But, under system of procedure which obtains in this state, where various kinds of relief are administered by same tribunal, and where there is but one form of civil action for enforcement or protection of civil rights, party who presents complaint showing his right to relief asked is not to be denied that relief because he might have sought it under different form of action.—*Merriman v. Walton*, 105 Cal. 403, 407, 45 Am. St. Rep. 50, 30 L. R. A. 786, 38 Pac. 1108.

§ 860. ANSWER OR DEMURRER TO AMEND PLEADINGS. When a pleading is amended, the adverse party may answer or demur to it within such time, as the court may allow, not exceeding five days after notice of the amendment.

History: Enacted March 11, 1872; amendment approved May 16, 1921, Stats. and Amdts. 1921, p. 122. In effect July 29, 1921.

As to time to plead, see, ante, § 432 and note.

CHAPTER IV.

PROVISIONAL REMEDIES IN JUSTICES' COURTS.

Article I. ARREST AND BAIL, §§ 861-865.

II. ATTACHMENT, §§ 866-869.

III. CLAIM AND DELIVERY OF PERSONAL PROPERTY, § 870.

ARTICLE I.

ARREST AND BAIL.

- § 861. Order of arrest and arrest of defendant.
 § 862. Affidavit and undertaking for order of arrest.
 § 863. A defendant arrested must be taken before the justice immediately.
 § 864. The officer must give notice to the plaintiff of arrest.
 § 865. The officer must detain the defendant.

§ 861. ORDER OF ARREST AND ARREST OF DEFENDANT. An order to arrest the defendant may be indorsed on a summons issued by the justice, and the defendant may be arrested thereon by the sheriff or constable, at the time of serving the summons, and brought before the justice, and there detained until duly discharged, in the following cases:

1. In an action for the recovery of money or damages on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the state, with intent to defraud his creditors;

2. In an action for a fine or penalty, or for money or property embezzled or fraudulently misapplied, or converted to his own use by one who received it in a fiduciary capacity;

3. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought;

4. When the defendant has removed, concealed, or disposed of his property, or is about to do so, with intent to defraud his creditors.

But no female can be arrested in any action.

History: Enacted March 11, 1872, founded on § 544 Practice Act.

ARREST IN CIVIL ACTIONS.

1. As to construction of section.
2. Conditions upon which order of arrest may be made.
3. Same—Woman exempt from.

As to arrest and bail, see, ante, § 478 and note.

As to issuing meane and final process from justices' court to any part of county, see §§ 94, 106 and notes

As to what proceedings are to be had when complaint is amended, see, ante, § 432 and note.

1. As to construction of section.—The only provisions of statute pertaining to arrest in civil actions in justices' courts, or

applicable in such cases, are those found in this and succeeding four sections. Under these, before an order of arrest can be made by justice in an action for recovery of debt, it must be proved to satisfaction of justice that there is cause of action arising upon contract, express or implied; and either that defendant is about to depart from state with intent to defraud his creditors, or that he has been guilty of fraud in contracting debt or incurring obligation, or that he has removed, concealed, or disposed of his property, or is about to do so, with intent to defraud his creditors. This proof may be made by affidavit by party or some other person. That it be made, however, is jurisdictional, and without it there is no jurisdiction to issue such an order.—In re Vinich, 86 Cal. 70, 71, 26 Pac. 528.

2. Conditions upon which order of court may be made.—The order must be made in the manner and under the conditions prescribed. There must be a complaint, showing that a cause of action exists, which, though not as full and specific as to be maintainable against demurrer in the superior court, must be sufficient as a statement of a cause of action in a justices' court; and the party applying for the order must show to the satisfaction of the jus-

tice, by his own or the affidavit of another person, that the facts necessary to authorize the order, under the provisions of this section, exist.—*Matter of Application of La Due*, 161 Cal. 634, 120 Pac. 13.

3. Same—Woman exempt from.—Under this section, a woman can not be arrested upon process issued in a civil action.—*Nelson v. Kellogg*, 162 Cal. 621, 622, 123 Pac. 1115.

§ 862. AFFIDAVIT AND UNDERTAKING FOR ORDER OF ARREST.

Before an order for an arrest can be made, the party applying must prove to the satisfaction of the justice by the affidavit of himself, or some other person, the facts upon which the application is founded. The plaintiff must also execute and deliver to the justice a written undertaking in the sum of three hundred dollars, with sufficient sureties, to the effect that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful, or without sufficient cause, not exceeding the sum specified in the undertaking.

History: Enacted March 11, 1872, re-enactment of § 545 Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 334.

AFFIDAVIT FOR ARREST.

1, 2. Sufficiency of.

3. When fundamentally defective.

1. Sufficiency of.—The person making the affidavit upon which an order of arrest in a civil action is asked may follow the statute and declare in positive terms that the defendant is about to depart from the state with intent to defraud his creditors, or he may set up the facts which will warrant the judge in concluding such to be the intent of the defendant. In either case the affidavit is sufficient.—*In re Caples*, 26 Cal. App. 786, 148 Pac. 795.

2. An affidavit for arrest in a civil action which recites that the defendant is about to leave the state, with the intent to defraud his creditors, is sufficient, without stating the facts constituting the evidence from which the intent is to be deduced.—*In re Caples*, 26 Cal. App. 786, 148 Pac. 795.

3. When fundamentally defective.—Affidavit in case showing that action has been begun for recovery of an "alleged indebtedness," but wherein there is no averment that such indebtedness or any cause of action exists, is fundamentally defective, and therefore, whatever else may be averred, court is left without jurisdiction to make an order of arrest.—*In re Vinich*, 86 Cal. 70, 71, 26 Pac. 528.

§ 863. A DEFENDANT ARRESTED MUST BE TAKEN BEFORE THE JUSTICE IMMEDIATELY. The defendant immediately upon being arrested, must be taken to the office of the justice who made the order, and if he is absent or unable to try the action, or if it appears to him by the affidavit of defendant that he is a material witness in the action, the officer must immediately take the defendant before another justice of the township or city, if there is another, and if not, then before the justice of an adjoining township, who must take jurisdiction of the action, and proceed thereon, as if the summons had been issued and the order of arrest made by him.

History: Enacted March 11, 1872, re-enactment of § 546 Practice Act.

§ 864. THE OFFICER MUST GIVE NOTICE TO THE PLAINTIFF OF ARREST. The officer making the arrest must immediately give notice thereof to the plaintiff, or his attorney or agent, and indorse on the summons, and

subscribe a certificate, stating the time of serving the same, the time of the arrest, and of his giving notice to the plaintiff.

History: Enacted March 11, 1872, re-enactment of § 547 Practice Act.

As to construction of this section, see, ante, § 861, note par. 1.

§ 865. THE OFFICER MUST DETAIN THE DEFENDANT. The officer making the arrest must keep the defendant in custody until he is discharged by order of the justice.

History: Enacted March 11, 1872, re-enactment of § 548 Practice Act.

As to construction of this section, see, ante, § 861, note par. 1.

ARTICLE II

ATTACHMENT.

§ 866. Writ of attachment shall issue upon affidavit.
§ 867. Undertaking on attachment must be required.

§ 868. Writ of attachment, to whom directed.
§ 869. Certain provisions apply to all attainments in justices' courts.

§ 866. WRIT OF ATTACHMENT SHALL ISSUE UPON AFFIDAVIT. A writ to attach the property of the defendant must be issued by the justice at the time of, or after issuing summons in actions in which the sum claimed exclusive of interest exceeds ten dollars, on receiving an affidavit by or on behalf of the plaintiff, showing the same facts as are required to be shown by the affidavit specified in section five hundred and thirty-eight.

History: Enacted March 11, 1872, founded on §§ 551, 552 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 169, held unconstitutional, see history, § 5 ante; amendment approved March 22, 1907, Stats. and Amdts. 1907, p. 880, Kerr's Stats. and Amdts. 1906-7, p. 467; March 20, 1911, Stats. and Amdts. 1911, p. 399.

ATTACHMENT.

1. Fails for want of summons, when.
2. Right to remedy—Injuries by trespassing animals.
3. Same—Provisions of code.
4. What does not vitiate.

1. **Fails for want of summons, when.**—Where summons is unauthorized and void, an attachment in justices' court must fail for want of summons.—Hisler v. Carr, 34 Cal. 641, 646.

2. **Right to remedy—Injuries by trespassing animals.**—Under act of March 7, 1878 (Stats. 1877-8, p. 176), plaintiff who seeks to recover for injuries caused by trespassing animals is not deprived of his remedy by attachment, because, after distraint, he has continuing lien upon animals.—Wigmore v. Buell, 122 Cal. 144, 146, 54 Pac. 600.

3. **Same—Provisions of code.**—All provisions of this code relating to attachment process apply to actions against owner to recover damages for injuries caused by trespassing animals, subject only to following modification, to wit: That instead of filing affidavit required by section 538, ante, and this section, plaintiff is entitled to issuance of writ of attachment against property of defendant upon filing his complaint stating cause of action, properly verified according to law.—Wigmore v. Buell, 122 Cal. 144, 146, 54 Pac. 600.

4. **What does not vitiate.**—Fact that defendant absents himself so that summons can not be served on him before return day thereof, and fact that it is returned not served, can not have effect of vitiating attachment.—Seaver v. Fitzgerald, 23 Cal. 85, 90.

§ 867. UNDERTAKING ON ATTACHMENT MUST BE REQUIRED. Before issuing the writ, the justice must [1] require a written undertaking on the part of the plaintiff, [2] with two or more sufficient sureties, [3] in a sum

not less than fifty nor more than three hundred dollars, [4] to the effect that if the defendant recovers judgment, the plaintiff will pay [a] all costs that may be awarded to the defendant, and [b] all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking.

At any time after the issuing of the attachment, but not later than five days after notice of its levy, the defendant may except to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them.

When excepted to they must justify in the manner and within the time provided in section five hundred and thirty-nine, otherwise the justice must order the writ of attachment vacated.

History: Enacted March 11, 1872, re-enactment with additions of § 553 Practice Act as amended 1858 (Stats. 1858, p. 132) and 1860; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 169, held unconstitutional, see history, § 5 ante; amendment approved March 22, 1907, Stats. and Amdts. 1907, p. 880, Kerr's Stats. and Amdts. 1906-7, p. 468.

UNDERTAKING ON ATTACHMENT.

1. Amount in excess of jurisdiction—Proceedings void.
2. Attachment is void, when.
3. Relation of proceedings in attachment to each other.
4. Undertaking is void, when.

1. **Amount in excess of jurisdiction—Proceedings void.**—Justice of peace has no authority to issue attachment in suit to recover sum of one thousand dollars, nor has he any authority to take bond on attachment in case. Under such circumstances, proceedings are void.—*Benedict v. Bray*, 2 Cal. 251, 255, 56 Am. Dec. 332.

2. **Attachment is void, when.**—Attachment is unauthorized and void unless

issued in substantial conformity with provisions of statute, including undertaking required to be given.—*Hisler v. Carr*, 34 Cal. 641, 646.

3. **Relation of proceedings in attachment to each other.**—An attachment bond is antecedent of attachment, and accompanies in point of time affidavit, which must be made before writ is issued. It depends for its legal effect upon writ. If no writ is issued bond is null and void. It has no effect except as connected with attachment, and they must exist together.—*Benedict v. Bray*, 2 Cal. 251, 254, 56 Am. Dec. 332.

4. **Undertaking is void, when.**—If an undertaking on attachment is executed after writ of attachment has been levied, and attachment dismissed, undertaking is void.—*Benedict v. Bray*, 2 Cal. 251, 254, 56 Am. Dec. 332.

§ 868. WRIT OF ATTACHMENT, TO WHOM DIRECTED. The writ may be directed to the sheriff or any constable of the county in which such justice court is situate and must require him to attach and safely keep all of the property of the defendant within his county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand against the defendant, the amount of which must be stated in conformity with the complaint, unless the defendant, whose property has been or is about to be attached, give him security by the undertaking of two sufficient sureties, in an amount sufficient to satisfy such demand against such defendant besides costs; in which case to take such undertaking;

[**Keeper.**] provided, however, that whenever a levy shall be made upon personal property, other than money, belonging to a going concern, then the sheriff must, if the defendant consents, place a keeper in charge of said attached property at plaintiff's expense for at least two days or more, and said keeper's fees must be prepaid by the attaching creditor. After the expira-

tion of said two days, the sheriff shall take said property into his immediate custody, unless other disposition is made by the court or parties.

[If more than one defendant.] In the event that the action is against more than one defendant, any defendant whose property has been or is about to be attached in such action may give the sheriff such undertaking, and the sheriff shall take the same, and such undertaking shall not subject such defendant to or be answerable for any demand against any other defendant, nor shall the sheriff thereby be prevented from attaching or be obliged to release from attachment, any property of any other defendant; provided, however, that such defendant, at the time of giving such undertaking to the sheriff, shall file with the sheriff a statement duly verified under oath, wherein such defendant shall aver and declare that the other defendant or defendants in the action in which said undertaking was given has or have not any interest or claim of any nature whatsoever in or to said property. Such statement must further contain the character of such defendant's title and the manner in which he acquired title to such attached property.

[Service out of county.] Several writs may be issued at the same time to the sheriffs or constables of different counties; provided, that where a writ of attachment issued by a justice of the peace is to be served out of the county in which it was issued, the writ of attachment shall have attached to it a certificate under seal by the county clerk of such county, to the effect that the person issuing the same was an acting justice of the peace of said county at the date of the writ.

History: Enacted March 11, 1872, re-enactment of § 554, Practice Act; amendment approved March 18, 1905, Stats. and Amdts. 1905, p. 208; April 22, 1915, Stats. and Amdts. 1915, p. 112; May 26, 1917, Stats. and Amdts. 1917, p. 939. In effect July 27, 1917.

As to whom writ of attachment must be directed, and what to state, see, ante, § 540 and note.

§ 869. CERTAIN PROVISIONS APPLY TO ALL ATTACHMENTS IN JUSTICES' COURTS. The sections of this code from section five hundred and forty-one to section five hundred and fifty-nine, both inclusive, are applicable to attachments issued in justices' courts, the word "constable" being substituted for the word "sheriff," whenever the writ is directed to a constable, and the word "justice" being substituted for the word "judge."

History: Enacted March 11, 1872, re-enactment of § 555 Practice Act.

As to attachment of property, see, ante, §§ 541-559 and notes.

ARTICLE III.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

§ 870. How claim and delivery enforced.

§ 870. HOW CLAIM AND DELIVERY ENFORCED. In an action to recover possession of personal property, the plaintiff may, at the time of issuing summons or at any time thereafter before answer, claim the delivery of such property to him; and the sections of this code from section five hundred and ten to section five hundred and twenty-one, both inclusive, are applicable to such claim when made in justices' courts, the powers therein given and duties imposed on sheriffs being extended to constables, and the word "justice" substituted for "judge."

History: Enacted March 11, 1872.

1. Landlord and tenant—Taking property to enforce lien—Not larceny though wrongful.—When the lease of an apartment was upon the condition that the lessor should have a lien upon the property of the lessee for unpaid charges, including charges for cleaning the apartment and laundering soiled linen, and providing that if any rent or other charges remained unpaid, the lessor might remove the lessee's

property, and after three months' time might sell the property, if the charges were not paid within that time; act of lessor in seizing articles of property of lessee on claim that apartment was not clean did not constitute grand larceny, under section 484 of Penal Code, though wrongful.—Ex parte Bayles, — Cal. App. —, 190 Pac. 1034.

As to claim and delivery of personal property, see, ante, §§ 510-520 and notes.

CHAPTER V.

JUDGMENT BY DEFAULT IN JUSTICES' COURTS.

§ 871. Judgment when defendant fails to appear.

§ 872. Judgment against defendant on demurrer.

§ 871. JUDGMENT WHEN DEFENDANT FAILS TO APPEAR. If the defendant fail to appear, and to answer or demur within the time specified in the summons, then, upon proof of service of summons, the following proceedings must be had:

1. If the action is based upon a contract, and is for the recovery of money, or damages only, the court must render judgment in favor of plaintiff for the sum specified in the summons.

2. In all other actions the court must hear the evidence offered by the plaintiff, and must render judgment in his favor for such sum (not exceeding the amount stated in the summons) as appears by such evidence to be just

History: Enacted March 11, 1872; amendment approved April 3, 1876, Code Amdts. 1875-6, p. 100; March 16, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 113.

DEFAULT JUDGMENT.

1, 2. Construction of section.

3. Default occurs, when.

4. Plaintiff is entitled to judgment, when.

5. Sufficiency of proof of service.

6. What is not judgment by default.

7. Same—No right to render, where defendants answered, but were absent from trial.

1. **Construction of section.**—This section is controlled by section 874, post, which is general in its terms.—*Hall v. Kerrigan*, 135 Cal. 4, 7, 66 Pac. 868.

2. This section does not direct the justice to enter a judgment by default within any prescribed time. The entry of the non-appearance of the defendant executed by sections 911 and 912, post, is a ministerial duty, and in San Francisco such entry is made by the clerk of the justices' court. The failure to execute such a ministerial duty does not divest a court of jurisdiction.—*Hall v. Justices' Court*, 5 Cal. App. 133, 137, 87 Pac. 870.

3. **Default occurs when defendant fails to answer or demur as described in this section and in section 850, ante.**—*Weimmer v. Sutherland*, 74 Cal. 341, 344, 15 Pac. 849.

4. **Plaintiff is entitled to judgment, when.**—Upon sufficient statement of his cause of action plaintiff is entitled to judgment for amount demanded, if defendant fails to appear and answer to complaint.—*Schroeder v. Witttram*, 66 Cal. 636, 638, 6 Pac. 737.

5. **Sufficiency of proof of service.**—Where return afforded some evidence that copy of

complaint served was copy of complaint in action, court will not say, in absence of other evidence, that proof in this respect was not sufficient to authorize justice to render judgment by default.—*Cardwell v. Sabichi*, 59 Cal. 490, 493.

6. **What is not judgment by default.**—If defendant in justices' court has an answer on file which puts in issue allegations of complaint, justice can not enter judgment by default against him. Such judgment could not be judgment by default, notwithstanding justices' record might contain an entry to that effect.—*State ex rel. Grissom v. Justices' Court*, 31 Mont. 258, 78 Pac. 498, 500.

7. **Same—No right to render, where the defendants answered, but were absent from trial.**—After defendants in a justices' court have appeared and answered, there is no provision of law requiring them to be present at trial if they feel disposed to absent themselves, and no valid judgment by default can be rendered against them by reason of such absence.—*State ex rel. Grissom v. Justices' Court*, 31 Mont. 258, 78 Pac. 498, 500.

§ 872. JUDGMENT AGAINST DEFENDANT ON DEMURRER. In the following cases the same proceedings must be had and judgment must be rendered in like manner as if the defendant had failed to appear and answer, or demur:

1. If the complaint has been amended, and the defendant fails to answer it, as amended, within the time allowed by the court;

2. If the demurrer to the complaint is overruled, and the defendant fails to answer within the time allowed by the court, not to exceed five days.

3. If the demurrer to the answer is sustained and the defendant fails to amend the answer within the time allowed by the court.

History: Enacted March 11, 1872; amendment approved May 16, 1921, Stats. and Amdts. 1921, p. 122. In effect July 29, 1921.

JUDGMENT AGAINST DEFENDANT— ON DEMURRER.

1. Construction of section—With section 858, ante.
2. Disposition of case as to one defendant—Duty of court as to other defendants.
3. Justice is not required to give time to answer, or notice.

As to waiver, see, ante, § 373 and note.

1. **Construction of section.**—With section 858, ante.—Under this section and section 858, ante, defendants may answer forthwith upon overruling of their demurrer, but if they fail to answer "at once," justice is authorized, if no issue of fact has been presented for trial, to render judgment in favor of plaintiff.—*Stewart v. Justices' Court*, 109 Cal. 616, 617, 618, 42 Pac. 158.

2. **Disposition of case as to one defendant—Duty of court as to other defendants.**—In an action against stockholders of a corporation it is obvious that there may possibly be as many adverse issues made, and as many trials had, resulting in several judgments, as there are separate defendants, so that disposition of case as to one defendant can have no effect on right and duty of court to ascertain proportion of claim or debt for which each defendant is liable, and to render judgment in conformity therewith.—*Grimwood v. Barry*, 118 Cal. 274, 276, 50 Pac. 430.

3. **Justice is not required to give time to answer, or notice.**—There is no provision of code which requires justice to allow defendant any time within which to answer complaint in case his demurrer shall be overruled, or to give to him any notice of that fact.—*Stewart v. Justices' Court*, 109 Cal. 616, 618, 42 Pac. 158.

CHAPTER VI.

TIME OF TRIAL AND POSTPONEMENTS IN JUSTICES' COURTS.

§ 873. Time when trial must be commenced.

§ 874. When court may, of its own motion, postpone trial.

§ 875. Postponement by consent.

§ 876. Postponement upon application of a party.

§ 877. No continuance for more than ten days to be granted, unless upon filing of undertaking.

§ 873. TIME WHEN TRIAL MUST BE COMMENCED. Unless postponed, as provided in this chapter, or unless transferred to another court, the trial of the action must commence at the expiration of one hour from the time specified in the notice mentioned in section eight hundred and fifty, and the trial must be continued, without adjournment for more than twenty-four hours at any one time, until all the issues therein are disposed of.

History: Enacted March 11, 1872; amendment approved April 3, 1876, Code Amdts. 1875-6, p. 100.

TIME OF COMMENCEMENT OF TRIAL.

1. Construction of section.

2. Duty of court as to other defendants—Where case has been disposed of as to one.

3. Refusal of justice to proceed—Remedy—Power of justice.

1. Construction of section.—Provision in this section that trial must commence one hour from time specified in notice referred to, implies that this notice should be given in writing and form part of record, and that there should be entry thereof, and also of mode in which it is given, in justices' docket, so that there may be affirmative evidence of his authority to render judgment.—*Jones v. Justices' Court*, 97 Cal. 523, 526, 32 Pac. 575.

See, ante, § 850 and note.

2. Duty of court as to other defendants—Where case has been disposed of as to one.—In action against several stockholders

of corporation there may possibly be as many diverse issues made, and as many trials had, resulting in several judgments, as there are separate defendants, so that disposition of case as to one defendant can have no effect on right and duty of court to "ascertain" the "proportion of claim or debt for which each defendant is liable," and to render judgment "in conformity therewith."—*Grimwood v. Barry*, 118 Cal. 274, 276, 50 Pac. 430.

3. Refusal of justice to proceed—Remedy—Power of justice.—If justice of the peace should refuse to proceed with trial of case as required by this section, remedy would be to obtain writ of mandate compelling him forthwith to proceed with such trial; but upon service of such writ he would still have right to entertain motion for its further continuance, and if sufficient cause were shown therefor, in accordance with provisions of code, he would be justified in granting it.—*Whaley v. King*, 92 Cal. 431, 432, 28 Pac. 579.

§ 874. WHEN COURT MAY, OF ITS OWN MOTION, POSTPONE TRIAL.

The court may, of its own motion, postpone the trial:

1. **For not exceeding one day**, if, at the time fixed by law or by an order of the court for the trial, the court is engaged in the trial of another action;

2. **For not exceeding two days**, if, by an amendment of the pleadings, or the allowance of time to make such amendment or to plead, a postponement is rendered necessary;

3. **For not exceeding three days**, if the trial is upon issues of fact, and a jury has been demanded.

History: Enacted March 11, 1872.

POSTPONEMENT OF TRIAL—COURT'S OWN MOTION.

1. Construction of section—In general.

2. Same—Controls what sections.

3. Same—Right to allow two days in which to answer.

4. Justices' court does not divest itself of jurisdiction to proceed, when.

1. **Construction of section—In general.**—Provision in this section by which court may postpone trial, if postponement is necessary by reason of allowance of time "to plead," must have been intended by legislature to have some effect, and must refer to pleading that has not yet been made or filed. This clause also implies that court may allow party time, not exceeding two days, within which to file an original pleading, when he has no such pleading on file.—Hall v. Kerrigan, 135 Cal. 4, 6, 66 Pac. 868.

2. **Same—Controls what sections.**—This section, being general in its terms, controls the provisions of sections 858, 871,

872, ante.—Hall v. Kerrigan, 135 Cal. 4, 7, 66 Pac. 868.

3. **Same—Right to allow two days in which to answer.**—Under this section justice has right, after overruling defendant's demurrer, to allow him two days in which to answer, and to postpone trial for that period.—Hall v. Kerrigan, 135 Cal. 4, 6, 66 Pac. 868.

4. **Justices' court does not devent itself of jurisdiction to proceed further in action** because, of its own motion, it continues case for few hours, or because it refuses to grant defendant continuance to some future time. Such rulings are at most only error, reviewable only on appeal to superior court.—Disque v. Herrington, 139 Cal. 1, 2, 3, 72 Pac. 336.

§ 875. POSTPONEMENT BY CONSENT. The court may, by consent of the parties, given in writing or in open court, postpone the trial to a time agreed upon by the parties.

History: Enacted March 11, 1872.

§ 876. POSTPONEMENT UPON APPLICATION OF A PARTY. The trial may be postponed upon the application of either party, for a period not exceeding four months:

1. **The party making the application must prove**, by his own oath or otherwise, that he can not, for want of material testimony, which he expects to procure, safely proceed to trial, and must show in what respect the testimony expected is material, and that he has used due diligence to procure it, and has been unable to do so;

2. **If the application is on the part of the plaintiff**, and the defendant is under arrest, a postponement for more than three hours discharges the defendant from custody, but the action may proceed, notwithstanding, and the defendant is subject to arrest on execution, in the same manner as if he had not been discharged;

3. **If the application is on the part of a defendant under arrest**, before it can be granted he must execute an undertaking, with two or more sufficient sureties, to be approved by, and in a sum to be fixed by, the justice, to the effect that he will render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein; or that the sureties will pay to the plaintiff the amount of any judgment which he may recover in the action, not exceeding the amount specified in the undertaking. On filing the undertaking specified in this subdivision, the justice must order the defendant to be discharged from custody;

4. **The party making the application must**, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, may be then taken by deposition before the justice, and that the testimony so taken may be read on the trial, with the same effect, and subject to the same objections, as if the witness was produced; but the court may require the party making the application to state, upon affidavit, the evidence

which he expects to obtain; and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed.

History: Enacted March 11, 1872.

§ 877. NO CONTINUANCE FOR MORE THAN TEN DAYS TO BE GRANTED, UNLESS UPON FILING OF UNDERTAKING. No adjournment must, unless by consent, be granted for a period longer than ten days, upon the application of either party, except upon condition that such party file an undertaking, in an amount fixed by the justice, with two sureties, to be approved by the justice, to the effect that they will pay to the opposite party the amount of any judgment which may be recovered against the party applying, not exceeding the sum specified in the undertaking.

History: Enacted March 11, 1872, re-enactment of § 585 Practice Act.

CHAPTER VII.

TRIALS IN JUSTICES' COURTS.

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| § 878. Issue defined, and the different kinds. | § 885. Challenges to jurors. |
| § 879. Issue of law, how raised. | § 886. Manner of pleading a written instrument. |
| § 880. Issue of fact, how raised. | § 887. If a copy of an instrument be filed, the signatures will be deemed admitted, unless denied under oath. |
| § 881. Issue of law, how tried. | |
| § 882. Issue of fact, how tried. | |
| § 883. Jury, how waived. | |
| § 884. Either party failing to appear, trial may proceed at request of other party. | |

§ 878. ISSUE DEFINED, AND THE DIFFERENT KINDS. Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party and is controverted by the other. They are of two kinds:

1. Of law; and,
2. Of fact.

History: Enacted March 11, 1872.

As to cases in which judgment may be had upon failure of defendant to answer, see, ante, § 585 and note. Compare this and next four sections with §§ 585-592, ante.

§ 879. ISSUE OF LAW, HOW RAISED. An issue of law arises upon a demurrer to the complaint or answer, or to some part thereof.

History: Enacted March 11, 1872.

See, ante, § 878 and note.

§ 880. ISSUE OF FACT, HOW RAISED. An issue of fact arises:

1. Upon a material allegation in the complaint controverted by the answer; and,
2. Upon new matter in the answer, except an issue of law is joined thereon.

History: Enacted March 11, 1872.

See, ante, § 878 and note.

§ 881. ISSUE OF LAW, HOW TRIED. An issue of law must be tried by the court.

History: Enacted March 11, 1872.

As to issue of law, how tried, see, ante, § 591 and note.

§ 882. ISSUE OF FACT, HOW TRIED. An issue of fact must be tried by a jury, unless a jury is waived, in which case it must be tried by the court.

History: Enacted March 11, 1872, founded on § 593 Practice Act.

As to issue of fact, how tried, and as to disposition of both issues of law and fact, see, ante, § 592 and note.

§ 883. JURY, HOW WAIVED. A jury may be waived:

1. By consent of parties, entered in the docket;
2. By a failure of either party to demand a jury within two days after service upon him of notice of trial of an issue of fact, as provided in section eight hundred fifty;
3. By the failure of either party to appear at the time fixed for the trial of an issue of fact.

History: Enacted March 11, 1872, founded on § 587 Practice Act; Amendment approved May 25, 1919, Stats. and Amdts. 1919, p. 1013. In effect July 25, 1919.

As to when and how trial by jury may be waived, see, ante, § 631 and note.

§ 884. EITHER PARTY FAILING TO APPEAR, TRIAL MAY PROCEED AT REQUEST OF OTHER PARTY. If either party fails to appear at the time fixed for trial, the trial may proceed at the request of the adverse party.

History: Enacted March 11, 1872.

DUTY OF JUSTICE WHERE EITHER PARTY FAILS TO APPEAR.

1. Duty of justice where defendant fails to appear.
2. Judgment by default in justices' court.

1. Duty of justice where defendant fails to appear.—When defendant fails to appear at trial justice may proceed with trial at request of plaintiff, but he should not, without any evidence, render judgment in favor of plaintiff, if answer denies averments of complaint, as such judgment would be erroneous. Such judgment must be treated simply as judgment without evidence to sustain it.—Curtis v. Superior Court, 63 Cal. 435, 436.

2. Judgment by default in justices' court.—Where the plaintiff failed to appear the defendant may proceed with the trial until, as provided in section 873, ante, all the issues were disposed of. Inasmuch as a judgment for the defendant was a bar to another action based upon the same claim, the only remedy for the plaintiff was by appeal to the superior court upon issues both of law and of fact and a trial de novo. A judgment in such a case in the superior court will not be annulled in a proceeding for a writ of review upon the ground that the superior court had no jurisdiction to entertain the appeal.—Winnett v. Superior Court, 26 Cal. App. 332, 146 Pac. 1050.

§ 885. CHALLENGES TO JURORS. The challenges are either peremptory or for cause. Each party is entitled to three peremptory challenges. Either party may challenge for cause on any grounds set forth in section six hundred and two. Challenges for cause must be tried by the justice.

History: Enacted March 11, 1872, substantial re-enactment of § 590 Practice Act.

As to ground of challenge in superior court, see, ante, 602 and note.

That each party in superior court is entitled to three peremptory challenges.—See, ante, § 601 and note.

§ 886. MANNER OF PLEADING A WRITTEN INSTRUMENT. When the cause of action or counter-claim arises upon an account or instrument for the payment of money only, the court, at any time before the trial, may, by an order under his hand, require the original to be exhibited to the inspection of, and a copy to be furnished to, the adverse party, at such time as may be fixed in the order; or, if such order is not obeyed, the account or instrument can not be given in evidence.

History: Enacted March 11, 1872, substantial re-enactment of § 576 Practice Act.

As to demand and order for inspection and copy of book, paper, etc., see, post, § 1000 and note.

§ 887. IF COPY OF AN INSTRUMENT BE FILED, THE SIGNATURE WILL BE DEEMED ADMITTED, UNLESS DENIED UNDER OATH. If the [1] complaint of the plaintiff, or [2] the answer of the defendant, contains a [a] copy or [b] consists of the original of the written obligation upon which the action is brought or the defense founded, the

Genuineness and due execution of such instrument are deemed admitted, unless [1] the answer denying the same is verified, or [2] unless the plaintiff, within two days after the service on him of such answer, [a] files with the justice an affidavit denying the same, and [b] serves a copy thereof on the defendant.

History: Enacted March 11, 1872, re-enactment of § 577 Practice Act as amended 1854 (Stats. 1854, p. 84); amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 169, held unconstitutional, see history, § 5 ante; amendment approved March 22, 1907, Stats. and Amdts. 1907, p. 880, Kerr's Stats. and Amdts. 1906-7, p. 468.

As to what constitutes complaint in justices court, see, ante, § 853 and note.

That copy of written instrument contained in complaint is admitted, unless answer is verified.—See, ante, § 447 and note.

When defense is founded on written instrument, which written instrument is set out in answer, its execution is to be considered admitted unless denied by plaintiff under oath.—See, ante, § 448 and note.

CHAPTER VIII.

JUDGMENTS (OTHER THAN BY DEFAULT) IN JUSTICES' COURTS.

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| § 889. Judgment by confession. | § 895. Offer to compromise before trial. |
| § 890. Judgment of dismissal entered without prejudice, when. | § 896. Costs must be included in the judgment. |
| § 890a. Judgment of dismissal to be entered, when. | § 897. Abstract of judgment. |
| § 891. Judgment upon verdict. | § 898. Abstract may be filed and docketed in county clerk's office. |
| § 892. Judgment after trial by the court. [Entry of judgment in thirty days.] | § 899. Effect of docketing. |
| § 893. Judgment when the defendant is subject to arrest. [Notice.] | § 900. Judgment not a lien unless abstract is recorded in the recorder's office. |
| § 894. If the sum found due exceeds the jurisdiction of the justice, the excess may be remitted. | § 900a. Correction of clerical mistake in judgment. |

§ 889. JUDGMENT BY CONFESSION. Judgments upon confession may be entered up in any justices' court specified in the confession.

History: Enacted March 11, 1872, re-enactment of § 536 Practice Act.

As to confession of judgment without action, see, post, §§ 1132-1135 and notes. upon confession of defendant, see, ante, § 112 subd. 6 and note.

As to power of justice of peace to take and enter judgment for recovery of money

§ 890. JUDGMENT OF DISMISSAL ENTERED WITHOUT PREJUDICE, WHEN.—Judgment that the action be dismissed, without prejudice to a new action, may be entered with costs, in the following cases:

1. When the plaintiff voluntarily dismisses the action before it is finally submitted; or fails to prosecute the action to judgment with reasonable diligence; provided a counter-claim has not been made or affirmative relief sought by the cross-complaint or answer of the defendant; if a provisional remedy has been allowed, the undertaking must thereupon be delivered by the justice to the defendant [,] who may have his action thereon;
2. When he fails to appear at the time specified in the summons, or at the time to which the action has been postponed, or within one hour thereafter;
3. When, after a demurrer to the complaint has been sustained, the plaintiff fails to amend within the time allowed by the court;
4. When the action is brought in the wrong county, or township, or city.

History: Enacted March 11, 1872, re-enactment of § 591 Practice Act with addition of last paragraph; amendment approved March 3, 1905, Stats. and Amdts. 1905, p. 44.

DISMISSAL WITHOUT PREJUDICE, ETC.

1. Action of justice of peace—In sustaining demurrer to complaint—Not bar to subsequent action in superior court, when.
- 2-4. Construction of section.
5. Same—Subdivision 1.
6. Same—With section 832, ante.
7. Jurisdiction over person—Objection to—Waived by general appearance.
8. Objection to jurisdiction—How taken.
- 9, 10. Same—How waived.
11. Power of superior court.

1. **Action of justice of peace—In sustaining demurrer to complaint—Not bar to subsequent action in superior court, when.**—Action of justice of peace in sustaining demurrer to complaint does not constitute judgment of court. Where there has been no trial upon merits, such action is but order in regard to sufficiency of complaint, and not a judgment. Order upon demurrer is only decision upon correctness or sufficiency of practice in seeking to obtain judgment. It may form basis for rendering judgment, but it is not itself judgment. But if judgment is afterwards entered upon such order, it must be that action be dismissed without prejudice to new action. Hence, such decision sustaining the demurrer is no bar to subsequent action in superior court.—*Sivers v. Sivers*, 97 Cal. 518, 522, 32 Pac. 571.

2. **Construction of section.**—If defendant sued in wrong county had no defense upon merits, and his objection to jurisdiction is overruled, there would be no object in taking plea on any other question, and so far as that ground is concerned it could only result in reversal of judgment; but it was certainly not purpose of this section

to prevent defendant, when he conceived judgment to be wrong upon merits also, of having his appeal upon both questions, and this he could have only by appealing upon questions of both law and fact, and in such case no statement is required. Such appeal absolutely vacates judgment in justices' court, since upon such appeal case is heard de novo, and judgment of superior court is executed just as though case had been originally brought therein, and is not remitted to justices' court for any purpose. If this construction is correct, it is obvious that authorities cited to effect that general appearance, as by answering to merits, waives question of jurisdiction over person of defendant, can have no application.—*Holbrook v. Superior Court*, 106 Cal. 589, 593, 39 Pac. 936.

3. This section being in the title particularly and solely applicable to justices' courts is the exclusive remedy upon the subject-matter contained therein, and section 581, ante, being upon the same subject-matter, is therefore not applicable to actions prosecuted in justices' courts.—*Hubbard v. Superior Court*, 9 Cal. App. 166, 168, 98 Pac. 394.

4. Under this section a justices' court has no power to pass upon and grant a motion for non-suit, and this section has limited the causes for which a judgment of dismissal may be entered. The failure of the plaintiff to establish his case by satisfactory evidence is not one of those causes.—*Peacock v. Superior Court*, 163 Cal. 701, 704, 126 Pac. 976.

5. **Same—Subdivision 1.**—Subdivision 1 of above section, which provides when a justices' court in its discretion may dismiss an action pending before it for failure to prosecute the same to judgment, applies to an action pending in the justices' court, and not to an appeal pending in the

superior court in such an action.—*Pistolesi v. Superior Court*, 26 Cal. App. 403, 147 Pac. 104.

6. *Same*—With section 832, ante.—This section must be considered in connection with section 832, ante, and it provides for mode of waiving objection to jurisdiction fully as effective as voluntary appearance without summons.—*McGorray v. Superior Court*, 141 Cal. 266, 267, 74 Pac. 853.

7. *Jurisdiction over person*—*Objection to*—*Waived by general appearance*.—Since the amendment to subdivision 4 of above section in 1905, an objection that the action is brought in the wrong county can not be taken at the trial, and a general appearance of a defendant at the trial waives objection that court has no jurisdiction over the person of the defendant.—*Vance v. Superior Court*, — Cal. App. —, 191 Pac. 945; following *Olcese v. Justices' Court*, 156 Cal. 82, 103 Pac. 317; *American Law Book Co. v. Superior Court*, 164 Cal. 327, 128 Pac. 921.

As to objection and waiver of, see pars. 8-10, this note.

8. *Objection to jurisdiction*—*How taken*.—Under this section it is not essential that defendant appear specially and move to

dismiss action for want of jurisdiction, but objection may be taken by answer and be urged upon trial, but "if not taken at trial it is waived."—*Holbrook v. Superior Court*, 106 Cal. 589, 592, 39 Pac. 936.

9. *Same*—*How waived*.—Where action is in its nature personal, defendant, by withdrawing his motion to dismiss, and going to trial upon merits, waives any objection to jurisdiction.—*Luco v. Superior Court*, 71 Cal. 555, 556, 12 Pac. 677.

As to waiver of objection to jurisdiction of the person, see par. 7, this note.

10. An objection to jurisdiction of justice, that action has not been commenced in proper township, is waived, under subdivision 4 of above section, unless such objection was taken at trial.—*McGorray v. Superior Court*, 141 Cal. 266, 267, 74 Pac. 853.

11. *Power of superior court*.—The right of the superior court to dismiss a justices' court appeal for the failure to prosecute it with reasonable diligence does not depend upon either subdivision 1 of above section, or upon section 583, ante, thereof, but is a matter within its inherent power limited only by a sound discretion.—*Pistolesi v. Superior Court*, 26 Cal. App. 403, 147 Pac. 104.

§ 890a. JUDGMENT OF DISMISSAL TO BE ENTERED WHEN. Judgment of dismissal must be entered whenever the plaintiff fails to bring the action to trial within two years after the case is brought to an issue of law or fact, except where the parties have stipulated in writing that the time may be extended; provided, however, that in any action pending when this act takes effect, a judgment of dismissal shall not be entered under the direction hereof sooner than January 22, 1920.

History: Enacted March 11, 1872, re-enactment of § 591 Practice Act with addition of last paragraph; amended March 3, 1905, Stats. and Amdts. 1905, p. 44; amendment approved May 3, 1919, Stats. and Amdts. 1909, p. 137. In effect July 22, 1919.

§ 891. JUDGMENT UPON VERDICT. When a trial by jury has been had, judgment must be entered by the justice, at once, in conformity with the verdict.

History: Enacted March 11, 1872.

JUDGMENT UPON VERDICT.

1. Failure to make formal entry of judgment—Effect of.
2. Form of judgment not essential.
3. Judgment must be entered at once.
4. Judgment entered for sum and costs of suit—Person in whose favor rendered not given—A nullity.
5. *Same*—*Same*—Void for uncertainty.
6. Necessity of entry of judgment for purpose of appeal.

1. *Failure to make formal entry of judgment*—*Effect of*.—Fact that justice of peace does not formally render judgment on ver-

dict would not render execution issued by justice void, but such execution would be irregular, and failure to make objection that no judgment was rendered upon verdict would amount to waiver of irregularity. If justice does not make formal entry of judgment on verdict he may be compelled to do so by proceeding instituted against him for that purpose by plaintiff. But it is verdict itself that constitutes judgment of law in case, and fact that, under statute of this state, justice is authorized to grant new trial in cases before him does not affect question.—*Lynch v. Kelly*, 41 Cal. 232, 234.

2. *Form of judgment not essential*.—The judgment need not be formulated with the

particularity required in judgments of the superior court; but some entry is essential to show that judgment has been rendered, as a substantial compliance with this provision.—*June v. Superior Court*, 16 Cal. App. 129, 116 Pac. 293.

As to requirement judgment must be in favor of and against some person, see para. 4 et seq., this note.

3. Judgment must be entered at once.—Upon rendition of verdict in case of jury trial judgment must be entered at once.—*Montgomery v. Superior Court*, 68 Cal. 407, 411, 9 Pac. 720; *Webster v. Hanna*, 102 Cal. 177, 180, 36 Pac. 421.

4. Judgment entered for sum and costs of suit.—Person in whose favor rendered not given—A nullity.—Under the provisions of above section, when a trial by jury has been had, judgment must be entered by the justice at once "in conformity with the verdict." This means that it must be entered in favor of the party securing the verdict; otherwise the judgment is meaningless. An entry in the justice's trial docket: "Judgment entered for seventy-four dollars and costs of suit," without further notation, not referring to the verdict, it can not be ascertained therefrom in whose favor

the justice intended to enter judgment. Section 893, post, provides that the judgment of the justice must be entered substantially in the form required by section 667, ante, and that "no judgment shall have effect for any purpose until so entered."—*Shriver v. Superior Court*, — Cal. App. —, 192 Pac. 124.

As to form and sufficiency of judgments, see par. 3 this note, and discussion and authorities 15 R. C. L. p. 592, § 29.

5. Same—Same—Void for uncertainty.—A judgment not entered in accordance with the requirements of the code provision regulating, and fails to indicate with clearness the person against whom and the person in favor of whom the judgment is rendered and entered, will be void for uncertainty.—*Shriver v. Superior Court*, — Cal. App. —, 192 Pac. 124, approving doctrine in *Furrell v. Simmons*, 63 W. Va. 45, 129 Am. St. Rep. 962, 59 S. E. 752.

6. Necessity of entry of judgment for purpose of appeal.—Until judgment is entered as herein prescribed, jurisdiction on appeal can not be acquired by the superior court.—*June v. Superior Court*, 16 Cal. App. 129, 116 Pac. 293.

§ 892. JUDGMENT ON TRIAL BY COURT. [ENTRY OF JUDGMENT IN THIRTY DAYS.] When the trial is by the court, judgment must be entered within thirty days after the submission, and no justice of the peace who is paid a salary, shall draw or receive any monthly salary unless he shall make and subscribe an affidavit before an officer entitled to administer oaths, that no cause in his court remains pending and undecided, that has been submitted for decision for a period of thirty days.

History: Enacted March 11, 1872; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 170, held unconstitutional, see history, § 5 ante; amendment approved March 22, 1907, Stats. and Amdts. 1907, p. 881, Kerr's Stats. and Amdts. 1906-7, p. 468; April 23, 1913, Stats. and Amdts. 1913, p. 77. In effect April 10, 1913.

TRIAL BY COURT—JUDGMENT IN THREE DAYS.

1. Construction of section—Is directory.
2. Same—No penalty for violation.
- 3, 4. Judgment after lapse of several months is valid.
5. Judgment after a lapse of six weeks is not void.

1. Construction of section—Is directory.—Construction of above section that judgment must be rendered at close of trial is merely directory.—*Heinlen v. Phillips*, 88 Cal. 557, 559, 26 Pac. 366; *Jones v. Justices' Court*, 97 Cal. 523, 525, 32 Pac. 575; *American T. F. Co. v. Justices' Court*, 133 Cal. 319, 320, 65 Pac. 742, 978. See *Webster v. Hanna*, 102 Cal. 177, 180, 36 Pac. 421.

2. Same—No penalty for violation.—No penalty is prescribed or consequence attached to violation of above section. If legislature had intended that delay of day by

justice (for that would be violation of provision) could subject parties to expense of retrial, it would have said so in express terms. Similar but much stronger provision was enacted in relation to district courts, but it was held to be merely directory.—*Heinlen v. Phillips*, 88 Cal. 557, 559, 26 Pac. 366.

3. Judgment after lapse of several months is valid.—A judgment rendered by justice of peace where trial was had by court is valid though rendered after lapse of several months from close of trial.—*American T. F. Co. v. Justices' Court*, 133 Cal. 319, 320, 65 Pac. 742, 978.

4. Beatty, C. J., dissented from order denying rehearing.—He thought that court in bank should not hesitate to set aside its former ruling if satisfied that it was erroneous, and he was satisfied that *Heinlen v. Phillips*, 88 Cal. 557, 26 Pac. 366, was incorrectly decided, and that this case is an illustration of the abuses that are pos-

sible under the practice there sanctioned. "A justice of the peace," said he, "may hold a case under advisement for an indefinite time (it was nearly fifteen months in this instance), and unless the losing party has kept constant watch upon the proceedings a judgment may have passed beyond the reach of review before he has any notice of its entry. There is no requirement of a notice of the justice's judgment, but the law commanding him to enter judgment at the close of the trial, if held mandatory,

as it is in terms, would serve all the purposes of notice. As notice is essential for the security of the losing party, I think the law can not too soon be relieved of a construction which destroys its efficacy."—*American T. F. Co. v. Justices' Court*, 133 Cal. 319, 320, 65 Pac. 742, 978.

5. Judgment after a lapse of six weeks is not void.—Justice's judgment, where trial was had by court, is not void because it was not rendered until six weeks after case was submitted.—*Heinlen v. Phillips*, 88 Cal. 557, 559, 26 Pac. 366.

§ 893. JUDGMENT WHEN THE DEFENDANT IS SUBJECT TO ARREST.

[NOTICE.] The judgment of a justice of the peace must be entered substantially in the form required in section six hundred and sixty-seven, and where the defendant is subject to arrest and imprisonment thereon the fact must be stated in the judgment. No judgment shall have effect for any purpose until so entered. Notice of the rendition of judgment must be given to the parties to the action in writing signed by the justice. Where any of the parties are represented by an attorney, notice shall be given to the attorney. Said notice shall be served by mail or personally, and shall be substantially in the form of the abstract of judgment required in section eight hundred and ninety-seven of this code. When served by mail the justice of the peace shall deposit copies thereof in a sealed envelope in the post-office not later than five days after the rendition of the judgment, addressed to each of the persons on whom notice is to be served at their place of residence, or place of business if on an attorney, and the postage prepaid thereon. When served personally said notice shall be served within five days after the rendition of the judgment. Entry of the date of mailing shall be made by the justice in his docket.

History: Enacted March 11, 1872, re-enactment of § 597, Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 334; by Code Commission Act, March 8, 1901, Stats. and Amdts. 1900-1, p. 170, held unconstitutional, see history, § 5 ante; amendment approved March 22, 1907, Stats. and Amdts. 1907, p. 881, Kerr's Stats. and Amdts. 1906-7, p. 468; June 11, 1915, Stats. and Amdts. 1915, p. 1441. In effect August 10, 1915.

JUDGMENT—NOTICE OF ENTRY.

- 1, 2. Construction of section—Written notice of judgment required.
3. Entry of judgment in justices' court—Amendment of 1907.
4. Same—Duty of justice—Mandamus.
5. Same—Substantial compliance with statute.
6. For purposes of appeal.

As to arrest and bail, see, ante, §§ 861, 865 and notes.

As to form and sufficiency of judgments, see, ante, § 881 and note.

That mesne and final process of any justices' court in a county may be issued to and served in any part of the county, see, ante, § 106 and note.

1. Construction of section—Written notice of judgment required.—Prior to the amendment it was held that where, under various provisions of the code, notice of

decision is required to be given, written notice is usually intended. But under the amendment to this section it is imperatively required.—*Peterson v. Superior Court*, 30 Cal. App. 466, 158 Pac. 547.

2. A justices' court judgment is not void on its face because of the absence of any affirmative statement therein or in the return of summons that the defendant resided in the county in which he was served (other than that in which the action was brought), where the complaint alleges that the defendant entered into a contract with plaintiff's assignor, which contract is set forth in the form of a written order for certain merchandise signed by the defendant, and it is further alleged that the obligation was incurred and made payable in the county in which the action was brought, and an order setting aside such judgment and dismissing the action is properly annulled.—*Roberts v. Justices' Court*, 29 Cal. App. 768, 157 Pac. 511.

3. Entry of judgment in justices' court—Amendment of 1907.—Under the provisions of this section, as amended in 1907, requiring that the judgment must be entered substantially in the form prescribed in section 667, ante, it is held that the entry of the verdict of the jury in the justice's docket is not such an entry of judgment as will support an appeal therefrom.—*Thomson v. Superior Court*, 161 Cal. 331, 119 Pac. 98.

4. Same—Duty of justice—Mandamus.—If the justice refuse to render judgment upon the verdict, as required by this and accompanying sections, he may be compelled to perform such statutory duty by

writ of mandate.—*Thomson v. Superior Court*, 161 Cal. 333, 119 Pac. 98.

5. Same—Substantial compliance with statute.—The justice is not required to formulate the judgment with the particularity that is necessary in the superior court, but he must make some entry in his docket showing that he has rendered judgment on the verdict, in order to constitute a substantial compliance with the statute.—*Thomson v. Superior Court*, 161 Cal. 333, 119 Pac. 98.

6. For purposes of appeal.—Until entry of judgment as required by above section, it is ineffective for the purpose of an appeal to the superior court under section 974, post.—*June v. Superior Court*, 16 Cal. App. 129, 116 Pac. 293.

§ 894. IF THE SUM FOUND DUE EXCEEDS THE JURISDICTION OF THE JUSTICE, THE EXCESS MAY BE REMITTED. When the amount found due to either party exceeds the sum for which the justice is authorized to enter judgment, such party may remit the excess, and judgment may be rendered for the residue.

History: Enacted March 11, 1872, re-enactment of § 595 Practice Act.

JUDGMENT—AMOUNT IN EXCESS OF JURISDICTION.

1. Action on foreign judgment—What defense excluded.
2. Jurisdiction—Right of justice to determine question of.
3. Same—Test of—Sufficiency of complaint is not.

1. Action on a foreign judgment—What defense excluded.—In action upon judgment rendered in justices' court of sister state defendant can not interpose defense going to merits of action in which such justice's judgment was rendered.—*Banister v. Campbell*, 138 Cal. 455, 457, 71 Pac. 504, 703.

2. Jurisdiction—Right of justice to determine question of.—Justice of the peace

has jurisdiction to determine question of his jurisdiction, whether his decision is right or wrong. If he commits error, remedy is by appeal. His judgment can not be collaterally attacked for error in determining question of his jurisdiction, though complaint was fatally defective.—*Brush v. Smith*, 141 Cal. 466, 469, 75 Pac. 55.

3. Same—Test of—Sufficiency of complaint is not.—Sufficiency of complaint is not conclusive test of jurisdiction of justices' court. Judgment of such court is not void if it has jurisdiction and power to grant relief contained in judgment, as where amount claimed is less than three hundred dollars exclusive of interest.—*Brush v. Smith*, 141 Cal. 466, 469, 75 Pac. 55.

§ 895. OFFER TO COMPROMISE BEFORE TRIAL. If the defendant, at any time before the trial, offers, in writing, to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued; but if he does not accept such offer before the trial, and fails to recover in the action a sum in excess of the offer, he can not recover costs incurred after the offer, but costs must be adjudged against him, and, if he recovers, be deducted from his recovery.

The offer and failure to accept it can not be given in evidence nor affect the recovery, otherwise than as to costs.

History: Enacted March 11, 1872, re-enactment of § 596 Practice Act; amendment approved March 2, 1878, Code Amdts. 1877-8, p. 103; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 170, held unconstitutional, see history, § 5 ante; March 22, 1907, Stats. and Amdts. 1907, p. 881, Kerr's Stats. and Amdts. 1906-7, p. 468.

As to proceedings on offer of defendant to compromise after suit brought, see, post, § 997 and note.

§ 896. COSTS MUST BE INCLUDED IN THE JUDGMENT. The justice must tax and include in the judgment the costs allowed by law to the prevailing party.

History: Enacted March 11, 1872, founded on § 598 Practice Act.

As to costs, see, post, §§ 1021-1039 and notes.

That prevailing party, in city and county of San Francisco, shall be allowed, under

§ 6 of act approved Feb. 9, 1866 (Stats. 1866, p. 66), five per cent on amount recovered.—See, post, § 1021 and note.

§ 897. ABSTRACT OF JUDGMENT. The justice, on the demand of a party in whose favor judgment is rendered, must give him an abstract of the judgment in substantially the following form (filling blanks according to the facts):

State of California, ... county (or city and county)., plaintiff, v., defendant. In justices' court, before, justice of the peace, ... township (or city, or county), ..., 19.. (inserting date of abstract). Judgment entered for plaintiff (or defendant), for \$., on the day of I certify that the foregoing is a correct abstract of a judgment rendered in said action in my court, ..., or (as the case may be) in the court of, justice of the peace, as appears by his docket, now in my possession, as his successor in office., Justice of the Peace.

History: Enacted March 11, 1872; amendment approved March 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 19.

ABSTRACT OF JUDGMENT.

1. Construction of Practice Act.
2. Same—Prerequisite to creation of lien.
3. To create lien, an "abstract" must be filed.
4. Same—"Certified" copy is not "abstract."
5. Same—Filing with county auditor an abstract.
6. Same—Same—Otherwise under Practice Act, section 599.

1. **Construction of Practice Act.**—Section 599 Practice Act did not prescribe time in which execution might be issued, but object of section was to define manner of making judgment-lien upon real estate of debtor, and to prescribe by whom execution in satisfaction of judgment should be issued. Before filing and docketing of transcript, justice alone could issue execution; after it was filed and docketed, clerk had to issue execution that was to be executed in another county.—Kerns v. Graves, 26 Cal. 156, 157.

2. **Same—Prerequisite to creation of lien.**—Under Practice Act it was necessary, in order to create lien upon real estate of the judgment-debtor, that transcript of judgment, certified by justice, should be filed

and recorded in county recorder's office. Filing and recording in recorder's office of copies of justice's judgment-docket entries did not constitute lien on real estate of judgment-debtor.—Bagley v. Ward, 27 Cal. 369, 371.

3. **To create lien, an "abstract" must be filed.**—Under this section, in order that justice's judgment may become lien on judgment-debtor's property, it is necessary that an "abstract" of judgment be filed in the county recorder's office. It is not sufficient that "certified" copy be filed.—Frazier v. Crowell, 52 Cal. 399, 401.

4. **Same—"Certified" copy is not "abstract,"** and this section makes distinction and prescribes exact form in which abstract is to be prepared. This is an innovation upon former statute (Practice Act § 599), which required "transcript of judgment" to be filed in recorder's office.—Frazier v. Crowell, 52 Cal. 399, 401.

5. **Same—Filing with county auditor an abstract** under this section insufficient to entitle party to benefits of section 710, ante.—Erkson v. Parker, 3 Cal. App. 98, 84 Pac. 437.

6. **Same—Same—Otherwise under Practice Act section 599** (Stats. 1854, p. 69).—Erkson v. Parker, 3 Cal. App. 98, 84 Pac. 437. See Bagley v. Ward, 27 Cal. 370.

§ 898. ABSTRACT MAY BE FILED AND DOCKETED IN COUNTY CLERK'S OFFICE. The abstract may be filed in the office of the county clerk

of the county in which the judgment was rendered, and the judgment docketed in the judgment docket of the superior court thereof. The time of the receipt of the abstract by the clerk must be noted by him thereon, and entered in the docket.

History: Enacted March 11, 1872; amendment approved March 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 20.

As to when judgment-lien begins, and where it expires, see, ante, § 671 and note.

That execution may issue on judgment of a justices' court at any time within five years, see, post, § 901 and note.

That transcript of judgment may be filed in any county and judgment become a lien there, see, ante, § 674.

§ 899. EFFECT OF DOCKETING. From the time of docketing in the county clerk's office execution may be issued thereon by the county clerk to the sheriff of any county of the state, other than the county in which the judgment was rendered in the same manner and with like effect as if issued upon a judgment of the superior court. Upon the return of the execution, the county clerk shall cause the same to be filed with the justice of the peace who issued the abstract of judgment.

History: Enacted March 11, 1872; amendment approved March 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 20; May 3, 1919, Stats. and Amdts. 1919, p. 239. In effect July 22, 1919.

DOCKETING JUDGMENT—EFFECT OF.

1. Docketing of judgment-entry—Effect of.
2. Execution may be recalled, when.
3. Issuance of execution.
4. No recording of abstract is necessary, when.
5. Provisions where in same county property.

1. **Docketing of judgment-entry—Effect of.**—Docketing of judgment-entry does not give it new vitality or prolong its existence. It simply enables execution to be issued to another county.—*Kerns v. Graves*, 26 Cal. 156, 157.

2. **The execution may be recalled, when.**—Execution issued upon justice's judgment may be recalled by justice who rendered judgment, especially where such judgment is void, notwithstanding fact that execution was issued by county clerk, on

transcript of justice's docket filed in his office.—*Gates v. Lane*, 49 Cal. 266, 269.

3. **Issuance of execution.**—Under the statute providing that execution may issue by county clerk upon judgment obtained before justice of peace, where transcript is filed in office of county clerk, "as upon judgments recovered in higher courts," execution can issue only within five years after judgment rendered by justice, and execution is still upon, and by virtue of, judgment rendered by such justice.—*McMann v. Superior Court*, 74 Cal. 106, 107, 75 Pac. 448.

4. **No recording of abstract is necessary, when.**—No recording of abstract is necessary for county in which judgment was rendered.—*Campbell v. Wickware*, 19 Cal. 145, 146.

5. **Provisions where in same county with property.**—*Campbell v. Wickware*, 19 Cal. 145, 146.

§ 900. JUDGMENT NO LIEN UNLESS ABSTRACT IS RECORDED IN RECORDER'S OFFICE. A judgment rendered in a justice's court creates no lien upon any lands of the defendant, unless such an abstract is filed in the office of the recorder of the county in which the lands are situated. When so filed, and from the time of filing, the judgment becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterwards and before the lien expires, acquire. The lien continues for two years, unless the judgment be previously satisfied.

At any time before the expiration of two years from the time of filing such abstract of judgment, and while the judgment is yet in force or unsatisfied, a

successive abstract of such judgment may be likewise filed, and it shall have the effect of continuing such lien for a further period of two years from the time of filing the subsequent abstract of judgment; provided, however, that no such lien shall continue or be in force after five years from the time of the rendition of such judgment.

History: Enacted March 11, 1872; amendment approved April 16, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 114; March 20, 1911, Stats. and Amdts. 1911, p. 398.

JUDGMENT A LIEN, WHEN.

1. Judgment-lien—How constituted.
2. Lien of execution is not that of judgment.

1. **Judgment-lien — How constituted.**—There is but one mode of constituting justice's judgment-lien upon lands of judgment-debtor, and that is filing of abstract thereof

in office of recorder of county in which land is situated.—*Frazier v. Crowell*, 52 Cal. 399, 401; *Beaton v. Reid*, 111 Cal. 484, 486, 44 Pac. 167.

2. **Lien of execution is not that of judgment.**—Execution neither creates judgment-lien nor extends judgment-lien once created.—*Beaton v. Reid*, 111 Cal. 484, 486, 44 Pac. 167.

§ 900a. CORRECTION OF CLERICAL MISTAKES IN JUDGMENT. The justice shall have power upon motion of the injured party and notice to the adverse party to correct any clerical mistakes in his judgment as entered, so as to conform to the judgment ordered. Said justice shall have power to set aside any void judgment upon motion of either party to the action after notice to the adverse party, and thereupon said action shall be treated as if no judgment had been entered.

History: Enactment approved May 18, 1919, Stats. and Amdts. 1919, p. 730. In effect July 22, 1919.

CHAPTER IX.

EXECUTIONS FROM JUSTICES' COURTS.

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| <p>§ 901. Execution may issue at any time within five years.</p> <p>§ 901a. Stay of execution of judgment.</p> <p>§ 902. Execution, contents of.</p> | <p>§ 903. Renewal of execution.</p> <p>§ 904. Duty of officer receiving execution.</p> <p>§ 905. Proceedings supplementary to execution.</p> |
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§ 901. EXECUTION MAY ISSUE AT ANY TIME WITHIN FIVE YEARS. Execution for the enforcement of a judgment of a justices' court may be issued by the justice who entered the judgment, or his successor in office, on the application of the party entitled thereto, at any time within five years from the entry of judgment.

History: Enacted March 11, 1872, re-enactment, with additions, of § 600 Practice Act.

EXECUTION—MAY ISSUE WITHIN WHAT TIME.

1. Limitation of five years.
 2. Same—Applies to clerk as well as justice.
 3. Same—Loss of docket would not prevent running of time.
 4. Power to recall execution—Though issued by clerk.
1. **Limitation of five years.**—There is no provision allowing execution to be issued by justices of peace after lapse of five

years. Unless execution be issued within that period it is void.—*White v. Clark*, 8 Cal. 512, 513.

2. **Same—Applies to clerk as well as justice.**—The power to issue execution upon judgment rendered by justice of peace, within five years from time of its entry, amounts to limitation, and negatives by implication the right to issue execution after that period; and this limitation applies alike to all executions authorized to be issued on such judgment. This limitation applies not only to justice, who can

not issue execution upon his judgment after expiration of five years from its entry, but also applies to clerk, for section is general and is as applicable to him as to justice.—*Kerns v. Graves*, 26 Cal. 156, 157.

3. Same—Loss of docket would not prevent running of time limited by this section.—*White v. Clark*, 8 Cal. 512, 513.

4. Power to recall the execution—Though issued by clerk.—An execution emanating from justices' court, though issued by county clerk, may be recalled by justice who rendered judgment.—*Gates v. Lane*, 49 Cal. 266, 269.

§ 901a. STAY OF EXECUTION OF JUDGMENT. The court, or any justice thereof, may stay the execution of any judgment, including any judgment in a case of forcible entry or unlawful detainer, for a period not exceeding ten days.

History: Enacted June 14, 1906, Stats. and Amdts. 1907, Extraordinary Session 1906, p. 35. In effect immediately.

§ 902. EXECUTION, CONTENTS OF. The execution must be directed to the sheriff or to a constable of the county in which it is to be served, and must be subscribed by the justice and bear date the day of its delivery to the officer. It must intelligibly refer to the judgment, by stating the names of the parties, and the name of the justice before whom, and of the county and the township or city where, and the time when it was rendered; the amount of judgment, if it be for money; and, if less than the whole is due, the true amount due thereon. It must contain, in like cases, similar directions to the sheriff or constable, as are required by the provisions of title nine, part two, of this code, in an execution to the sheriff.

History: Enacted March 11, 1872, re-enactment of § 601 Practice Act; amendment approved May 16, 1921, Stats. and Amdts. 1921, p. 123. In effect July 29, 1921.

WRIT OF EXECUTION—CONTENTS OF.

1. Construction of section—Filling of blanks.
2. Same—Omissions—Amendment.
3. Same—Practice Act section 601—Service of writ by constable outside of his township.

1. **Construction of section—Filling of blanks.**—It is not necessary to valid execution of writ of execution that blank after word "defendant" should be filled, but if it should be, it may be done by way of amendment, and that would be done by court; and such amendment would not be filling of blanks by another. Code provision was intended to prevent persons other than court from making changes in writ.—*Brann v. Blum*, 138 Cal. 644, 650, 72 Pac. 168.

2. **Same—Omissions—Amendment.**—This section does not provide form of writ, but omission of township of justice who rendered judgment may be amended where writ intelligently refers to judgment, by stating name of party, name of justice

before whom and of county where, and time when it was rendered, and amount of judgment as required by this section. Proof of township should not be excluded in such case, for there is something to amend where writ rightfully issued, and where name of justice is given, and name of county also appears where judgment was rendered. It is not case of "entire omission" of place where judgment was rendered.—*Brann v. Blum*, 138 Cal. 644, 647, 649, 72 Pac. 168. See *Hunt v. Loucks*, 38 Cal. 372, 99 Am. Dec. 404; *O'Donnell v. Maguire*, 131 Cal. 527, 82 Am. St. Rep. 389.

3. **Same—Practice Act section 601—Service of writ by a constable outside of his township.**—Construction which Civil Practice Act section 601 seems to have received was that it meant "any" constable of county, and consequently writ of execution might be directed to constable of different township from that of justice, or from that where property to be levied upon was situated. Inference was that constable could act outside of his township.—*Allen v. Napa County*, 82 Cal. 187, 188, 23 Pac. 48.

§ 903. RENEWAL OF EXECUTION. An execution may, at the request of the judgment creditor, be renewed before the expiration of the time fixed for its return, by the word "renewed," written thereon, with the date thereof,

and subscribed by the justice. Such renewal has the effect of an original issue, and may be repeated as often as necessary. If an execution is returned unsatisfied, another may be afterward issued.

History: Enacted March 11, 1872.

1. **Duty of judge of recorder's court.—To issue another execution.**—Fact that judge of recorder's court, in excess of lawful authority, directed return of one execution unsatisfied, and that his order was com-

plied with, does not relieve him from obligation to issue another. His duty to issue execution is purely ministerial; he has no discretion in matter.—*Hayward v. Pimental*, 107 Cal. 386, 390, 40 Pac. 545.

§ 904. DUTY OF OFFICER RECEIVING EXECUTION. The sheriff or constable to whom the execution is directed must execute the same in the same manner as the sheriff is required by the provisions of title nine, part two, of this code, to proceed upon executions directed to him; and the constable, when the execution is directed to him, is vested for that purpose with all the powers of the sheriff.

History: Enacted March 11, 1872, founded on § 602 Practice Act as amended 1854 (Stats. 1854, p. 84).

DUTY OF OFFICER RECEIVING WRIT OF EXECUTION.

1. Claim by third person—Verdict as protection, and evidence.
2. Constable may serve execution out of his township.
3. Execution on property in same county.

1. **Claim by third person—Verdict as protection, and evidence.**—Where attached property is claimed by third person, and after trial is had verdict is against claimant, such verdict does not protect officer in a subsequent suit brought against him by claimant, and is not admissible in evidence as defense.—*Sheldon v. Loomis*, 28 Cal. 122, 123.

2. **Constable may serve execution out of his township.**—*Lafontaine v. Greene*, 17 Cal. 294, 297, distinguishing: *Lowe v. Alexander*, 15 Cal. 296, 302 (which related to service of summons).

3. **Execution on property in same county.**—It was not essential under Practice Act section 602 to sell real estate of judgment-debtor in satisfaction of judgment rendered by justice of peace, that transcript of judgment should have been filed in office of recorder of county so as to become lien upon property, except as to property in different county. With reference to property in same county, provisions for enforcement of execution were identical with those relating to district court.—*Campbell v. Wickware*, 19 Cal. 145, 146.

§ 905. PROCEEDINGS SUPPLEMENTARY TO EXECUTION. The sections of this code, from seven hundred fourteen to seven hundred twenty-one, both inclusive, are applicable to justices' courts, the word "constable" being substituted, to that end, for the word "sheriff," whenever the writ is directed to a constable, the word "justice" for "judge." If the judgment debtor does not reside in the county wherein the judgment was entered, an abstract of the judgment, in the form prescribed by section eight hundred ninety-seven, may be filed in the office of the justice of any town, township, or city wherein the defendant resides, and such justice may issue execution on such judgment, and may take and exercise such jurisdiction in proceedings supplemental to execution, as if such judgment were originally entered in his court.

[**Service outside of county.**] Where an execution issued by a justice of the peace is to be served out of the county in which it was issued, the execution shall have attached to it a certificate under seal, by the county clerk of such county to the effect that the person issuing the same was an acting justice of the peace of said county at the date of the writ. Thereafter such execution

may be served and levied against any property in any county of the state by the sheriff or any constable therein.

History: Enacted March 11, 1872; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 170, held unconstitutional, see history, § 5 ante; amendment approved March 22, 1907, Stats. and Amdts. 1907, p. 881, Kerr's Stats. and Amdts. 1906-7, p. 469; May 16, 1921, Stats. and Amdts. 1921, p. 123. In effect July 29, 1921.

1. **Construction of section.**—This section provides that sections 714-721, ante, both inclusive, shall be applicable to justices' courts. These sections relate to "proceedings supplementary to execution," and define steps which are to be pursued in order to compel judgment-debtor to disclose his property,

and to secure its application toward payment of execution.—Ex parte Latimer, 47 Cal. 131, 132; West Coast S. F. Co. v. Wulff, 133 Cal. 315, 317, 85 Am. St. Rep. 171, 65 Pac. 622.

As to contempts, generally, see, post, §§ 1209-1222 and notes.

CHAPTER X.

CONTEMPTS IN JUSTICES' COURTS.

§ 906. Contempts, a justice may punish for.
 § 907. Proceedings for contempts. [When committed in presence of court.]
 § 908. Same. [When not committed in presence of court.]

§ 909. Punishments for contempts.
 § 910. The conviction must be entered in the docket.

§ 906. CONTEMPTS, A JUSTICE MAY PUNISH FOR. A justice may punish as for contempt, persons guilty of the following acts, and no other:

1. **Disorderly, contemptuous, or insolent behavior** toward the justice while holding, tending to interrupt the due course of a trial or other judicial proceeding;

2. **A breach of the peace, boisterous conduct, or violent disturbance** in the presence of the justice, or in the immediate vicinity of the court held by him, tending to interrupt the due course of a trial or other judicial proceeding;

3. **Disobedience or resistance to the execution of a lawful order or process,** made or issued by him;

4. **Disobedience to a subpoena** duly served, or refusing to be sworn or to answer as a witness;

5. **Rescuing any person or property in the custody of an officer** by virtue of an order or process of the court held by him;

6. **[Other grounds for punishment.]** Any of the acts specified in subdivisions four, eight, or eleven, of section twelve hundred and nine.

History: Enacted March 11, 1872; re-enactment of § 616 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 170, held unconstitutional, see history, § 5 ante; amendment approved March 22, 1907, Stats. and Amdts. 1907, p. 881, Kerr's Stats. and Amdts. 1906-7, p. 469.

As to incidental powers of courts respecting conduct of proceedings, see, ante, §§ 128, 177-179 and notes.

As to power of judicial officers to punish for contempt, see, ante, § 178 and note.

As to power of judicial officers concerning conduct of proceedings, see, ante, § 177 and note.

§ 907. PROCEEDINGS FOR CONTEMPTS. [WHEN COMMITTED IN PRESENCE OF COURT.] When a contempt is committed in the immediate view and presence of the justice, it may be punished summarily; to that end an order must be made reciting the facts as they occurred, and adjudging that the person proceeded against is thereby guilty of contempt, and that he be punished as therein prescribed.

History: Enacted March 11, 1872, re-enactment of first portion of § 617 Practice Act.

That contempt committed in presence of court may be punished summarily, but that when not so committed affidavit or state- ment shall be made, see, post, § 1211 and note.

§ 908. SAME. [WHEN NOT COMMITTED IN PRESENCE OF COURT.] When the contempt is not committed in the immediate view and presence of the justice, a warrant of arrest may be issued by such justice, on which the person so guilty may be arrested and brought before the justice immediately, when an opportunity to be heard in his defense or excuse must be given. The justice may, thereupon, discharge him, or may convict him of the offense.

History: Enacted March 11, 1872, re-enactment of last portion of § 617 Practice Act.

That warrant of attachment may issue in case of contempt, or notice to show cause, see, post, § 1212 and note.

§ 909. PUNISHMENTS FOR CONTEMPTS. A justice may punish for contempts, by fine or imprisonment, or both; such fine not to exceed, in any case, one hundred dollars, and such imprisonment one day.

History: Enacted March 11, 1872.

1. Construction of section.—This section must be understood as limiting power of justice to punish for contempt merely as such.—Ex parte Latimer, 47 Cal. 131, 132, 133.

§ 910. THE CONVICTION MUST BE ENTERED IN THE DOCKET. The conviction, specifying particularly the offense and the judgment thereon, must be entered by the justice in his docket.

History: Enacted March 11, 1872, re-enactment of § 618 Practice Act.

CHAPTER XI.

DOCKETS OF JUSTICES.

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| <p>§ 911. Docket, what to contain.</p> <p>§ 912. Entries therein prima facie evidence of the fact.</p> <p>§ 913. An index to the docket must be kept.</p> <p>§ 914. Dockets must be delivered by justice to his successor or to county clerk.</p> <p>§ 915. Proceedings when office becomes vacant and before a successor is appointed.</p> | <p>§ 916. A justice may issue execution or other process upon the docket of his predecessor.</p> <p>§ 917. Successor of a justice, who shall be deemed.</p> <p>§ 918. Judge to designate succeeding justice, when.</p> |
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§ 911. DOCKET, WHAT TO CONTAIN. Every justice must keep a book, denominated a "docket," in which he must enter:

1. **The title of every action** or proceeding.
2. **The object of the action** or proceeding; and if a sum of money be claimed, the amount thereof.
3. **The date of the summons**, and the time of its return; and if an order to arrest the defendant be made, or a writ of attachment be issued, a statement of the fact.
4. **The time when the parties, or either of them, appear**, or their non-appearance, if default be made; a minute of the pleadings and motions; if in writing, referring to them; if not in writing, a concise statement of the material parts of the pleading.
5. **Every adjournment**, stating on whose application and to what time.
6. **The demand for a trial by jury**, when the same is made, and by whom made, the order for the jury, and the time appointed for the return of the jury and for the trial.
7. **The names of the jurors** who appear and are sworn, and the names of all witnesses sworn, and at whose request.
8. **The verdict of the jury**, and when received; if the jury disagree and are discharged; the fact of such disagreement and discharge.
9. **The judgment of the court**, specifying the costs included and the time when rendered.
10. **The issuing of the execution**, when issued and to whom; the renewals thereof, if any, and when made, and a statement of any money paid to the justice, when and by whom.
11. **The receipt of a notice of appeal**, if any be given, and of the appeal bond, if any be filed.

History: Enacted March 11, 1872, re-enactment of § 604 Practice Act as amended 1855 (Stats. 1855, p. 196); amendment approved March 24, 1874, Code Amdts. 1873-4, p. 334.

DOCKET OF JUSTICE—WHAT TO CONTAIN.

1. Construction of section—Filing of affidavits upon attachment.
2. Same—Residence of defendant.
- 3, 4. Same—Service of summons.

5. Same—Service, or proof, of notice of time of trial.
6. Justice's docket as evidence of judgment.

1. Construction of section—Filing of affidavits upon attachment.—This section does

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not require entry in justice's minutes of fact that affidavits upon attachment were filed.—*Banning v. Marleau*, 133 Cal. 485, 487, 65 Pac. 964.

2. **Same—Residence of defendant.**—Fact of residence of defendant is jurisdictional fact, and it must exist, but it is not required that its existence shall be recorded in docket of justice or be made to appear in written evidence of proceedings.—*Jolley v. Foltz*, 34 Cal. 321, 326.

3. **Same—Service of summons.**—This and next succeeding section do not require fact of service of summons to be entered in docket. Provision of this section relating to summons is merely that its date, and time of its return, shall be stated in docket.—*Fisk v. Mitchell*, 124 Cal. 359, 360, 57 Pac. 149.

4. Service of summons not one of the matters required herein to be entered in the docket, and such entry can not be accepted as evidence of service, or that the justice ever acquired jurisdiction to render judgment.—*Ferguson v. Basin Consolidated Mines*, 152 Cal. 715, 93 Pac. 867.

5. **Same—Service, or proof, of notice of time of trial.**—Justice is not required by this section to enter in his docket any minute of service of notice of time of trial, nor is he required to file any proof of such service.—*Weimmer v. Sutherland*, 74 Cal. 341, 345, 15 Pac. 849.

6. **Justice's docket as evidence of judgment.**—Justice's docket containing a minute of judgment is sufficient evidence of judgment.—*Beardsley v. Frame*, 85 Cal. 134, 24 Pac. 721; *Fisk v. Mitchell*, 124 Cal. 359, 360, 57 Pac. 149.

§ 912. ENTRIES THEREIN PRIMA FACIE EVIDENCE OF THE FACT.

The several particulars of the last section specified must be entered under the title of the action to which they relate, and (unless otherwise in this title provided) at the time when they occur. Such entries in a justice's docket, or a transcript thereof, certified by the justice, or his successor in office, are prima facie evidence of the facts so stated.

History: Enacted March 11, 1872, re-enactment of § 605 Practice Act; amendment approved March 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 20.

1. As evidence of facts stated in entries prescribed by next preceding section.
2. As evidence of judgment.
3. As evidence of truth of recitals.
- 4, 5. **Same—Fact of service of summons.**
6. **Same—Return of service of summons.**
7. **Same—Where papers are attached together.**
8. **Recitals in—Do not show jurisdiction.**

As to service of summons not one of the matters required to be entered in a justice's docket, see, ante, § 911, pars. 3, 4.

1. **As evidence of facts stated in entries prescribed by next preceding section.**—Entries prescribed by next preceding section are primary evidence to prove facts stated in such entries, but where fact in question, such as residence of defendant, is not enumerated, and it is not provided in what manner other facts than such entries in justice's docket shall be proved or made to appear, it does not follow, conceding that facts required to be entered must be proved by the docket, that other facts not required to be so entered shall not be proved by other evidence; and if such other evidence offered does not in any respect contradict docket, but, on contrary, is entirely consistent with it and supports judgment, it should be admitted.—*Jolley v. Foltz*, 34 Cal. 321, 326, 327.

2. **As to evidence of judgment.**—Justice's docket containing minute of judgment is C. C. P.—130

sufficient evidence of judgment.—*Beardsley v. Frame*, 85 Cal. 134, 24 Pac. 721.

3. **As evidence of truth of recitals.**—A justice's docket entries are prima facie evidence of truth of recital that judgment for costs was apparently rendered on day that case was tried; and if they are not rebutted by anything else in record, judgment of superior court dismissing writ of certiorari should be affirmed, as court will not consider matters alleged in petition which are inconsistent with docket in this particular, as they are no part of record on appeal, as where asserted fact of antedated clause in judgment does not appear from justice's docket entries returned with writ.—*Rauer v. Justices' Court*, 115 Cal. 84, 46 Pac. 870.

4. **Same—Fact of service of summons.**—This and next preceding section do not require fact of service of summons to be entered in docket; hence they do not impart to such entry, if made, character of prima facie evidence.—*Fisk v. Mitchell*, 124 Cal. 359, 360, 57 Pac. 149.

5. Entry in docket of justice of service of summons proves nothing, where docket is not required to contain any finding that service has been made.—*Scorpion S. M. Co. v. Marsano*, 10 Nev. 370, 382.

6. **Same—Return of service of summons.**—Recitals in justice's docket to effect that summons was returned served does not show such service as law requires to give jurisdiction of person.—*Kane v. Desmond*, 63 Cal. 464, 466.

7. Same—Where papers are attached together.—In action for damages occasioned by malicious prosecution of criminal action against plaintiff before justice of peace, court does not err in overruling objection to introduction in evidence of copies of complaint, warrant of arrest, proceedings, and docket entries in criminal action tried before such justice of peace and certified by him, where papers are attached together, and were objected to as whole, and where they include certified copy of entries in docket, and there was no specification of

any particular portion to which objecting party addressed his objections. Such entry is made *prima facie* evidence of facts stated, by provisions of this section, and as some of evidence offered as whole was admissible, whole of it should have been admitted in absence of any such specifications.—*Shatto v. Crocker*, 87 Cal. 629, 630, 631, 25 Pac. 921.

8. Recitals in—Do not show jurisdiction.—Recitals of justice's docket do not show jurisdiction.—*Kane v. Desmond*, 63 Cal. 464, 466.

§ 913. AN INDEX TO THE DOCKET MUST BE KEPT. A justice must keep an alphabetical index to his docket, in which must be entered the names of the parties to each judgment, with a reference to the page of entry. The names of the plaintiffs must be entered in the index, in the alphabetical order of the first letter of the family name.

History: Enacted March 11, 1872, re-enactment of § 606 Practice Act.

§ 914. DOCKETS MUST BE DELIVERED BY JUSTICE TO HIS SUCCESSOR OR TO COUNTY CLERK. Every justice of the peace, upon the expiration of his term of office, must deposit with his successor his official dockets and all papers filed in his office, as well his own as those of his predecessors, or any other which may be in is custody to be kept as public records.

History: Enacted March 11, 1872, re-enactment of first half of § 607 Practice Act.

§ 915. PROCEEDINGS WHEN OFFICE BECOMES VACANT AND BEFORE A SUCCESSOR IS APPOINTED. If the office of a justice become vacant by his death or removal from the township or city, or otherwise, before his successor is elected and qualified, the docket and papers in possession of such justice must be deposited in the office of some other justice in the township, to be by him delivered to the successor of such justice. If there is no other justice in the township, then the docket and papers of such justice must be deposited in the office of the county clerk of the county, to be by him delivered to the successor in office of the justice.

History: Enacted March 11, 1872, re-enactment with additions of the last half of § 607 Practice Act.

§ 916. A JUSTICE MAY ISSUE EXECUTION OR OTHER PROCESS UPON THE DOCKET OF HIS PREDECESSOR. Any justice with whom the docket of his predecessor, or of any other justice, is deposited, has and may exercise over all actions and proceedings entered in such docket, the same jurisdiction as if originally commenced before him.

In case of the creation of a new county, or the change of the boundary between two counties, any justice into whose hands the docket of a justice formerly acting as such within the same territory may come, is, for the purposes of this section, considered the successor of such former justice.

History: Enacted March 11, 1872, re-enactment of § 608 Practice Act as amended 1855 (Stats. 1855, p. 303).

§ 917. SUCCESSOR OF A JUSTICE, WHO SHALL BE DEEMED. The justice elected to fill a vacancy is the successor of the justice whose office became vacant before the expiration of a full term. When a full term expires, the same or another person elected to take office in the same township or city, from that time is the successor.

History: Enacted March 11, 1872, re-enactment of § 609 Practice Act.

§ 918. JUDGE TO DESIGNATE SUCCEEDING JUSTICE, WHEN. When two or more justices are equally entitled, under the last section, to be deemed the successors in office of the justice, a judge of the superior court must, by a certificate subscribed by him and filed in the office of the county clerk, designate which justice is the successor of a justice going out of office, or whose office has become vacant.

History: Enacted March 11, 1872, re-enactment of § 610 Practice Act; amendment approved March 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 20.

CHAPTER XII.

GENERAL PROVISIONS RELATING TO JUSTICES' COURTS.

§ 919. Justices may issue subpoenas and final process to any part of the county.

§ 920. Blanks must be filled in all papers issued by a justice, except subpoenas.

§ 921. Justices to receive all moneys collected and pay same to parties.

§ 922. In case of disability of justice, another justice may attend on his behalf.

§ 923. Justices may require security for costs.

§ 924. Who entitled to costs.

§ 925. What provisions of code applicable to justices' courts.

§ 926. Deposit of money in lieu of undertaking.

§ 919. JUSTICES MAY ISSUE SUBPŒNAS AND FINAL PROCESS TO ANY PART OF THE COUNTY. Justices of the peace may issue subpoenas in any action or proceeding in the courts held by them, and final process on any judgment recovered therein, to any part of the county.

History: Enacted March 11, 1872, re-enactment of § 619 Practice Act.

As to territorial extent of civil jurisdiction of justices of peace in townships, see, ante, §§ 105, 106 and notes.

As to territorial extent of jurisdiction of justices' courts of cities and counties, see, ante, § 94 and note.

§ 920. BLANKS MUST BE FILLED IN ALL PAPERS ISSUED BY A JUSTICE, EXCEPT SUBPŒNAS. The summons, execution, and every other paper made or issued by a justice, except a subpoena, must be issued without a blank left to be filled by another, otherwise it is void.

History: Enacted March 11, 1872, re-enactment of § 611 Practice Act.

BLANKS MUST BE FILLED IN ALL PAPERS.

1. Construction of section—Filling blanks.
2. Filing blanks in written insurances.

1. Construction of section—Filling blanks.—This provision of code was intended to prevent persons other than court from making change in writ of execution. It is not necessary to valid execution of

writ that blank after word "defendant" should be filled, but if it were, it may be done by amendment, and that would be done by court, and that would not be "filled by another" in sense of code.—*Brann v. Blum*, 138 Cal. 644, 650, 72 Pac. 168.

2. Filling blanks in written insurances, as to generally.—See 13 Am. Dec. 669-671; 1 L. R. A. 648; 6 L. R. A. 649; 19 L. R. A. 729.

§ 921. JUSTICES TO RECEIVE ALL MONEYS COLLECTED AND PAY SAME TO PARTIES. Justices of the peace must receive from the sheriff or constables of their county, all moneys collected on any process or order issued from their courts respectively, and must pay the same, and all moneys paid to them in their official capacity, over to the parties entitled or authorized to receive them, without delay.

History: Enacted March 11, 1872, re-enactment of § 633 Practice Act; amendment approved March 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 20.

§ 922. IN CASE OF DISABILITY OF JUSTICE, ANOTHER JUSTICE MAY ATTEND ON HIS BEHALF. In case of the sickness or other disability or necessary absence of a justice, another justice of the same county may, at his request, attend in his behalf, and thereupon is vested with the power and may perform all the duties and issue all the papers or process of the absent justice. In case of a trial the proper entry of the proceedings before the attending justice, subscribed by him, must be made in the docket of the justice before whom the summons was returnable. If the case is adjourned, the justice before whom the summons was returned may resume jurisdiction.

History: Enacted March 11, 1872, re-enactment of § 612 Practice Act; amendment approved March 13, 1909, Stats. and Amdts. 1909, p. 328.

§ 923. JUSTICES MAY REQUIRE SECURITY FOR COSTS. Justices may in all cases require a deposit of money or an undertaking, as security for costs of court, before issuing a summons.

History: Enacted March 11, 1872, re-enactment of § 634 Practice Act.

As to payment of fees to justices in cities and counties, see, ante, § 91 and note.

§ 924. WHO ENTITLED TO COSTS. The prevailing party in the justices' courts is entitled to costs of the action, and also of any proceedings taken by him in aid of an execution, issued upon any judgment recovered therein.

In actions for the recovery of wages for labor performed, the court shall add, as part of the costs, in any judgment recovered by the plaintiff, an attorney's fee not exceeding twenty per cent of the amount recovered.

History: Enacted March 11, 1872, re-enactment of § 631 Practice Act as amended 1854 (Stats. 1854, p. 84) and 1855 (Stats. 1855, p. 250); amendment approved March 24, 1874, Code Amdts. 1873-4, p. 335; February 28, 1907, Stats. and Amdts. 1907, p. 69, Kerr's Stats. and Amdts. 1906-7, p. 469.

That costs may be included in judgment, see, ante, § 896.

§ 925. WHAT PROVISIONS OF CODE APPLICABLE TO JUSTICES' COURTS. Justices' courts being courts of peculiar and limited jurisdiction, only those provisions of this code which are, in their nature, applicable to the organization, powers, and course of proceedings in justices' courts, or which have been made applicable by special provisions in this title, are applicable to justices' courts and the proceedings therein.

History: Enacted March 11, 1872, founded on § 603 Practice Act as amended 1854 (Stats. 1854, p. 84).

PROVISIONS OF CODE APPLICABLE TO JUSTICES' COURTS.

1. Complaint in intervention.
- 2-4. Construction of section.
5. Same—Necessary inference from language used.
6. Same—Limitation of action on judgment of justices' court.
7. Subject of dismissal of action for want of prosecution, etc.

1. **Complaint in intervention.**—Right of justices' court to permit complaint in intervention to be filed therein was assumed by counsel on both sides, but question was not decided.—*Rossi v. Superior Court*, 114 Cal. 371, 373, 46 Pac. 177.

2. **Construction of section.**—Language of this section is of difficult construction, and cases might well arise where it would be extremely doubtful whether or not certain acts of justices' courts were justified by its provisions. It will be observed that section expressly preserves notion of "peculiar and limited jurisdiction" of these courts, and, moreover, that its general character is negative rather than positive. The grant is somewhat in shape of parenthesis in clause of limitation. If, therefore, that part of code which expressly deals with proceedings in justices' courts prescribes power of those courts in relation to general subject about which courts of record are expressly prescribed in another particular, then powers of justices' courts with respect to that subject are to be looked for in former and not in latter provision.—*Weimer v. Sutherland*, 74 Cal. 341, 343, 15 Pac. 349.

3. Under this section, justices' courts are declared to be courts of peculiar and limited jurisdiction, and only those provisions of the codes which are in their nature applicable to the organization, powers, and course of proceedings in such

courts, or which have been made applicable by special provisions, are so applicable.—*Peacock v. Superior Court*, 163 Cal. 701, 703, 126 Pac. 976.

4. The language of this section is somewhat difficult of construction. It, however, expressly preserves the notion of the peculiar and limited jurisdiction of the justices' courts and its general character is negative rather than positive. The grant is somewhat of a shape of a parenthesis in a clause of limitations. If, therefore, that part of the code which expressly deals with proceedings in justices' courts prescribed the powers of those courts in relation of a general subject about which the powers of courts of record are expressly prescribed in another part, the powers of the justices' courts with respect to that subject are to be looked for in the former and not in the latter provision.—*Hubbard v. Superior Court*, 9 Cal. App. 166, 170, 98 Pac. 394.

5. **Same—Necessary inference from language used.**—The necessary inference from language used in this section is that those provisions of this code which are in their nature applicable "to organization, powers, and course of proceedings in justices' courts," shall be applicable to them.—*Ex parte Latimer*, 47 Cal. 131, 133.

6. **Same—Limitation of action on judgment of justices' court.**—This section does not authorize an independent action on a judgment of a justices' court after the expiration of the five-year limitation prescribed in section 336, ante.—*John Heinlen Co. v. Cadwell*, 3 Cal. App. 80, 84 Pac. 443.

7. **Subject of the dismissal of actions for want of prosecution, etc.** being expressly treated in section 890, ante, in the title treating of the powers of justices' courts, etc., section 581, ante, treating of the same subject-matter in courts of record does not apply to proceedings pending in justices' courts.—*Hubbard v. Superior Court*, 9 Cal. App. 166, 170, 98 Pac. 394.

§ 926. DEPOSIT OF MONEY IN LIEU OF UNDERTAKING. In all civil cases arising in justices' courts, wherein an undertaking is required as prescribed in this code, the plaintiff or defendant may deposit with said justice a sum of money in United States gold coin equal to the amount required by the said undertaking, which said sum of money shall be taken as security in place of said undertaking.

History: Enacted February 25, 1878, Code Amdts. 1877-8, p. 103.

DEPOSIT OF MONEY IN LIEU OF UNDERTAKING.

1. Construction of section.
2. Same—"Civil case," what it is.
3. Same—Not repealed by amendment of 1880 to section 978, post.

As to depositing money in lieu of the written undertaking required by law, see note Ann. Cas. 1912C, 356.

1. **Construction of section.**—This section was enacted in 1878, and was placed by legislature in chapter 12 tit. II pt. II, the original head of which was "General Provisions Relating to Justices' Courts." This clearly indicates intention to make this provision applicable to all proceedings in justices' courts, and as filing and serving of notice of appeal to superior court and giving of necessary security to make such

appeal effectual are both proceedings in justices' court, it is obvious that this section applies to security to be given upon such appeal, as fully as to any other provision requiring giving of undertaking in proceeding in justices' court.—*Laws v. Troutt*, 147 Cal. 172, 81 Pac. 401.

2. Same—"Civil case," what it is.—A civil case appealed, or about to be appealed, from justices' court to superior court, is clearly "civil case arising in justices' court," and no valid ground appears for holding this section inapplicable to undertaking for costs on appeal required by first clause of section 978, post, to make effectual an appeal from justices' court to superior court. The section makes no provision for transmission to superior court of money de-

posited in lieu of undertaking for costs of appeal as does similar clause of section 978, post, with regard to money deposited in lieu of an undertaking for stay of proceedings pending appeal. This, however, is immaterial, and sum of money deposited with justice, who is under bond and bound further by his official oath, is manifestly as good security to respondent as undertaking would ordinarily be, and legislature may give right of appeal as well upon that security as upon security of undertaking.—*Laws v. Troutt*, 147 Cal. 172, 81 Pac. 401.

3. Same—Not repealed by amendment 1880 to section 978, post.—This section is not inconsistent with section 978, post, as amended in 1880, and is not repealed by that amendment.—*Swem v. Monroe*, 148 Cal. 741, 83 Pac. 1074.

[The legislature of the forty-fourth session amended Part II, Title XI, Chapter XII, in so radical a manner as to justify setting the new matter off in a separate chapter, as follows:]

CHAPTER XIII.

SMALL CLAIMS COURTS.

§ 927. Jurisdiction.

§ 927a. Commencement of action.

§ 927b. Affidavit.

§ 927c. Filing affidavit.

§ 927d. Appearance of defendant.

§ 927e. Entries in docket.

§ 927f. Assignee of claim.

§ 927g. Attorneys not to appear.

§ 927h. Informal pleadings.

§ 927i. Payment of judgment.

§ 927j. Appeal by defendant.

§ 927k. Statement of defendant's appeal.

§ 927l. Bond of defendant.

§ 927m. Abstract of judgment.

§ 927n. Filing of abstract.

§ 927o. Supervisors to supply forms.

§ 927p. No fees to be charged.

§ 927. JURISDICTION. All justices of the peace shall exercise the jurisdiction conferred by this title and while sitting in the exercise of said jurisdiction shall be known and referred to as the small claims court; provided, that the jurisdiction of such justices' court, when sitting as a small claims court, shall be confined to cases for the recovery of money only where the amount claimed does not exceed fifty dollars and the defendant named is a resident of the township or city and county in which the action is to be maintained.

History: Enactment approved May 16, 1921, Stats. and Amdts. 1921, p. 117. In effect July 29, 1921.

§ 927a. COMMENCEMENT OF ACTION. Actions shall be commenced, heard, and determined in the small claims courts under the provisions of this title whenever any person appears before any justice of the peace and executes an affidavit substantially in the form set forth in section nine hundred twenty-seven b of this title [chapter].

History: Enactment approved May 16, 1921, Stats. and Amdts. 1921, p. 118. In effect July 29, 1921.

§ 927b. AFFIDAVIT. The affidavit mentioned in the last section shall be made on a blank substantially in the following form:

In the small claims court of, county of, state of California.

.....
Plaintiff,

v.

.....
Defendant.

State of California,
County of } ss.

....., being first duly sworn, deposes and says: that the defendant is indebted to the plaintiff in the sum of \$.....; that this affiant has demanded payment of said sum; that the defendant refused to pay the same and no part thereof has been paid; that the defendant resides at, in the above-named county; that this affiant resides at, county of in the state of California.

Subscribed and sworn to before me this day of, 19...

.....
Justice.

On the said affidavit shall be printed:

ORDER.

The people of the state of California, to the within named defendant, greeting:

You are hereby directed to appear and answer the within and foregoing claim at my office in, in county of, state of California, on the day of, 19.., at the hour of o'clock in the noon of said day; and to have with you, then and there, all books, papers, and witnesses needed by you to establish your defense to said claim.

And you are further notified that in case you do not so appear, judgment will be given against you for the amount of said claim as it is stated in said affidavit.

Dated this day of, 19...

.....
Justice of the peace.

History: Enactment approved May 16, 1921, Stats. and Amdts. 1921, p. 118. In effect July 29, 1921.

§ 927c. FILING AFFIDAVIT. When the claimant appears he shall prepare such an affidavit as is set forth in section nine hundred twenty-six b of this title or, at his request, the judge of the court shall draft the same for him. Upon the affidavit being sworn to by the claimant the justice shall file the same and make a true and correct copy thereof. At the same time the justice shall fill in the blanks in the order printed on said copy and sign the order. Immediately thereafter the said justice shall enclose said copy and order in

an envelope, address the said envelope to the said defendant at the address so stated in said affidavit, prepay the postage and mail said envelope to said defendant by registered mail, and request a return receipt, or said justice may deliver personally, or cause to be delivered, said copy and order to the defendant in person. The justice shall then attach to the original affidavit the receipt for the registered letter and the return card thereon or other evidence of service.

History: Enactment approved May 16, 1921, Stats. and Amdts. 1921, p. 118. In effect July 29, 1921.

§ 927d. APPEARANCE OF DEFENDANT. The date for the appearance of the defendant as provided in the order indorsed on the affidavit shall not be more than fifteen days nor less than five days from the date of the said order. When the justice has fixed the date for the appearance of the defendant he shall inform the plaintiff of said date and at the same time order the plaintiff to appear on said date and to have with him his books, papers, and witnesses necessary to prove his claim.

History: Enactment approved May 16, 1921, Stats. and Amdts. 1921, p. 119. In effect July 29, 1921.

§ 927e. ENTRIES IN DOCKET. The justice shall enter in the docket kept by him as a justice of the peace:

1. The title of every action;
2. The sum of money claimed;
3. The date of the order provided for in section nine hundred twenty-seven b, and the date of the trial as stated in said order;
4. The date when the parties appear, or their nonappearance if default be made;
5. Every adjournment, stating on whose application and to what time;
6. The judgment of the court and when returned;
7. A statement of any money paid to the justice, when, and by whom; and the date of the issuance of any abstract of the judgment.
8. The date of the receipt of a notice of appeal, if any be given, and of the appeal bond, if any be filed.

History: Enactment approved May 16, 1921, Stats. and Amdts. 1921, p. 119. In effect July 29, 1921.

§ 927f. ASSIGNEE OF CLAIM. No claim shall be filed or prosecuted in such small claims court by the assignee of such claim.

History: Enactment approved May 16, 1921, Stats. and Amdts. 1921, p. 119. In effect July 29, 1921.

§ 927g. ATTORNEYS NOT TO APPEAR. No attorney-at-law or other person than the plaintiff and defendant shall take any part in the filing or the prosecution or defense of such litigation in the small claims court. The plaintiff and defendant shall have the right to offer evidence in their behalf by witnesses appearing at such hearing, or at any other time. The justice may also informally make any investigation of the controversy between the parties

either in or out of court and give judgment and make such orders as to time of payment or otherwise as may, by him, be deemed to be right and just.

History: Enactment approved May 16, 1921, Stats. and Amdts. 1921, p. 119. In effect July 29, 1921.

§ 927h. INFORMAL PLEADINGS. No formal pleading, other than the said claim and notice, shall be necessary and the hearing and disposition of all such actions shall be informal, with the sole object of dispensing speedy justice between the parties. No attachment or garnishment shall issue from the small claims court, but execution may issue in the manner prescribed in chapter nine, Code of Civil Procedure of the state of California.

History: Enactment approved May 16, 1921, Stats. and Amdts. 1921, p. 119. In effect July 29, 1921.

§ 927i. PAYMENT OF JUDGMENT. If the judgment or order be against the defendant, he shall pay the same forthwith or at such times and upon such terms and conditions as the justice shall prescribe.

History: Enactment approved May 16, 1921, Stats. and Amdts. 1921, p. 120. In effect July 29, 1921.

§ 927j. APPEAL BY DEFENDANT. The judgment of said court shall be conclusive upon the plaintiff. If the defendant is dissatisfied, he may, within five days from the entry of said judgment against him, appeal to the superior court of the county in which said court is held, and if final judgment is rendered against him in such superior court, then he shall pay, in addition to said judgment, an attorney's fee to the plaintiff in the sum of fifteen dollars.

History: Enactment approved May 16, 1921, Stats. and Amdts. 1921, p. 120. In effect July 29, 1921.

§ 927k. STATEMENT OF DEFENDANT'S APPEAL. The defendant's appeal may be taken by filing in the small claims court a statement substantially in the following terms:

In the small claims court of, county of, state of California.

.....
Plaintiff,

v.

.....
Defendant.

Comes now the defendant and appeals from the judgment of the above entitled court in the above entitled action, to the superior court in and for the above named county and state.

Dated this day of, 19...

.....
Appellant.

History: Enactment approved May 16, 1921, Stats. and Amdts. 1921, p. 120. In effect July 29, 1921.

§ 927 l. BOND OF DEFENDANT. The statement mentioned in the last section shall be accompanied by a bond substantially in the following form:

In the small claims court of, county of, state of California.

.....
Plaintiff,

v.

.....
Defendant.

Whereas the above entitled court in the above entitled action did on the day of, 19.., enter judgment in favor of the plaintiff and against the defendant in the sum of \$.; and

Whereas the defendant is about to appeal to the superior court of the state of California in and for the above named county;

Now, therefore, the undersigned does undertake and promise that if said judgment is affirmed that then and in that event the undersigned will pay said judgment and also fifteen dollars as an attorney fee to the said plaintiff on demand.

Dated this day of, 19...

.....
Surety.

State of California,
City and county of } ss.

....., the surety named in the above bond, being duly sworn, says that he is a holder and resident within said state and is worth the sums hereinabove mentioned, over and above all his debts and liabilities, exclusive of property exempt from execution.

.....
Subscribed and sworn to before me this day of, 19...

.....
History: Enactment approved May 16, 1921, Stats. and Amdts. 1921,
p. 129. In effect July 29, 1921.

§ 927m. ABSTRACT OF JUDGMENT. If no appeal be taken by the defendant and the defendant fails to pay the judgment according to the terms and conditions thereof, the justice before whom such a hearing was had, shall, on application of the plaintiff, certify such judgment in substantially the following form:

In the small claims court of, county of, state of California.

.....
Plaintiff,

v.

.....
Defendant.

ABSTRACT OF JUDGMENT.

In the above entitled court and action on the day of 19.., judgment was entered for plaintiff for \$......; that no appeal from said judgment has been taken.

Dated this day of, 19...

Justice of said court.

History: Enactment approved May 16, 1921, Stats. and Amdts. 1921, p. 121. In effect July 29, 1921.

§ 927n. FILING OF ABSTRACT. The abstract may be filed in the office of the county clerk of the county in which the judgment was rendered, and the judgment docketed in the judgment docket of the superior court thereof. The date of the receipt of the abstract by the clerk must be noted by him thereon, and entered in the docket.

History: Enactment approved May 16, 1921, Stats. and Amdts. 1921, p. 121. In effect July 29, 1921.

§ 927o. SUPERVISORS TO SUPPLY FORMS. The board of supervisors of every county wherein said small claims courts shall exist, shall furnish to every justice of the peace in such county a reasonable supply of various blank forms set forth in this title, also all forms, docket-book and stationery necessary for the use of such justice sitting as a small claims court.

History: Enactment approved May 16, 1921, Stats. and Amdts. 1921, p. 121. In effect July 29, 1921.

§ 927p. NO FEES TO BE CHARGED. No fee or charge of any kind or nature shall be charged or collected by any officer for any services rendered under this title [chapter].

[**Expenses of justices.**] But the justice may, in the manner provided by law, make a claim against the county to reimburse him for moneys expended for postage stamps and registry charges of the post-office department when the said justice was sitting as such small claims court; provided, that in those counties where the compensation of justices of the peace consists of fees allowed by law, the justice of the small claims courts may charge and collect the same fees which a justice of the peace may charge and collect and no others.

History: Enactment approved May 16, 1921, Stats. and Amdts. 1921, p. 121. In effect July 29, 1921.

TITLE XII.

PROCEEDINGS IN CIVIL ACTIONS IN POLICE COURTS.

§ 929. How commenced.

§ 930. Summons must issue on filing complaint.

§ 931. Defendant may plead orally or in writing.

§ 932. Trial by jury, when defendant is entitled to.

§ 933. Proceedings to be conducted as in justices' courts.

§ 929. HOW COMMENCED. Civil actions in police courts are commenced by filing a complaint, setting forth the violation of the ordinance complained of, with such particulars of time, place, and manner of violation as to enable the defendant to understand distinctly the character of the violation complained of, and to answer the complaint. The ordinance may be referred to by its title. The complaint must be verified by the oath of the party complaining, or of his attorney or agent.

History: Enacted March 11, 1872, re-enactment of § 636 Practice Act.

CIVIL ACTIONS IN POLICE COURTS.

1. Jurisdiction of action for "fine, forfeiture, or penalty."

2, 3. Transfer of cause from police court.

See, also, post, § 933 and note.

1. Jurisdiction of action for "fine, forfeiture, or penalty."—Action to recover "fine, forfeiture, or penalty," imposed by ordinance of city may perhaps be maintained in police court as "civil action," where certain specific sum is imposed as fine and penalty for breach of ordinance;

but, if such action may be maintained in police court, it must rest upon theory that each corporator has agreed to pay specific sum fixed by way of penalty in case he shall not comply with ordinance.—City of Santa Cruz v. Santa Cruz R. Co., 56 Cal. 143, 148.

2. Transfer of cause from police court.—There was no provision of law authorizing transfer of cause from police court to district court.—City of Santa Cruz v. Santa Cruz R. Co., 56 Cal. 143, 148.

3. Overruled: City of Santa Barbara v. Eldred, 95 Cal. 378, 380, 30 Pac. 562.

§ 930. SUMMONS MUST ISSUE ON FILING COMPLAINT. Immediately after filing the complaint, a summons must be issued, directed to the defendant, and returnable either immediately or at any time designated therein, not exceeding four days from the date of its issuing.

History: Enacted March 11, 1872, re-enactment of § 637 Practice Act.

As to jurisdiction of police court over action to recover a fine, forfeiture or penalty, see, ante, § 929 and note.

§ 931. DEFENDANT MAY PLEAD ORALLY OR IN WRITING. On the return of the summons, the defendant may answer the complaint. The answer may be oral or in writing, and immediately thereafter the case must be tried, unless for good cause shown, an adjournment is granted.

History: Enacted March 11, 1872, re-enactment of § 638 Practice Act.

As to jurisdiction of police court over action to recover a fine, forfeiture or penalty, see, ante, § 929 and note.

§ 932. TRIAL BY JURY, WHEN DEFENDANT IS ENTITLED TO. In all actions for violation of an ordinance, where the fine, forfeiture, or penalty imposed by the ordinance is less than fifty dollars, the trial must be by the

court. In actions where the fine, forfeiture, or penalty imposed by the ordinance is over fifty dollars, the defendant is entitled to a trial by jury.

History: Enacted March 11, 1872, re-enactment of § 639 Practice Act.

As to jurisdiction of police court over action to recover fine, forfeiture or penalty, see, ante, § 929 and note.

§ 933. PROCEEDINGS TO BE CONDUCTED AS IN JUSTICES' COURTS.

All proceedings in civil actions in police courts must, except as in this title otherwise provided, be conducted in the same manner as civil actions in justices' courts.

History: Enacted March 11, 1872, re-enactment of § 641 Practice Act.

POLICE COURTS—CIVIL ACTION.

1. Jurisdiction—Violation of ordinances.

2. Transfer of cause from police court.

See, also, ante, § 929 and note.

1. **Jurisdiction—Violation of ordinances.**
—Police court has jurisdiction of all proceedings for violation of any ordinance of city.—City of Santa Barbara v. Stearns, 51 Cal. 499, 500.

2. **Transfer of cause from police court.**—

The transfer of cause from police court to district court was expressly authorized by Practice Act.—City of Santa Barbara v. Stearns, 51 Cal. 499, 500, 501; Santa Barbara v. Eldred, 95 Cal. 378, 380, 30 Pac. 562, overruling City of Santa Cruz v. Santa Cruz R. Co., 56 Cal. 143, 148.

See, ante, § 838 and note.

TITLE XIII.

OF APPEALS IN CIVIL ACTIONS.

Chapter I. APPEALS IN GENERAL, §§ 936-959.

II. APPEALS TO SUPREME COURT, §§ 963-971.

III. APPEALS TO SUPERIOR COURTS, §§ 974-982.

CHAPTER I.

APPEALS IN GENERAL.

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- § 941a. Same. Alternative method of appeal. [Repealed.]
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§ 936. JUDGMENT AND ORDERS MAY BE REVIEWED. A judgment or order, in a civil action, except when expressly made final by this code, may be reviewed as prescribed in this title, and not otherwise.

History: Enacted March 11, 1872, re-enactment of § 333 of Practice Act as amended 1854, Stats. 1854, p. 84.

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As to appeals to supreme court, see, post, § 963 and note.

As to appeals to superior court, see, post, § 974 and note.

As to dismissal of appeal, see pars. 22-31, this note.

1. **Editorial note**—Wealth of material is again embarrassing and the editor has determined that the treatment most likely to be satisfactory to everybody,—or at least to a majority,—will be a preliminary annotation in which are gathered together some important preliminary matters, many of which do not properly distribute to particular sections, and some of which may possibly find reference under individual sections. The matter distinctly relating to the construction and application of the particular sections will be gathered under the appropriate sections.

2. **Same**—New and alternative method of appeal is now confined to the provisions found in sections 953-953c, sections 941a-941c, post, having been repealed. All the decisions heretofore rendered under sections 941a-941c, post, are therefore largely, if not purely, academic; but as they may still be of interest and possible value, they are gathered under those sections for the benefit of such as may wish to consult them.

3. **Same**—New-trial order appeals are now under new regulations. If the motion for a new trial is sustained and an order made awarding a new trial, an appeal lies from the order, and the papers on appeal therefrom are governed by the provisions of section 951, post. Where the motion for a new trial is denied, the order denying

the new-trial motion is not an appealable order, under the present section 963, post, but is reviewable upon appeal from the final judgment only, and the papers on appeal are governed by section 963, post.

4. Same—Tied together by cross-references to the various individual sections and from the individual sections to the introductory annotation, the matter collected in the introductory annotation will be so interwoven with each section that the user consulting any particular section will have his attention called to the wealth of matter in the introductory annotation, and what is there gathered will not escape his attention.

5. As to right of appeal, generally.—Statutes making provisions in aid of appeals should be liberally interpreted.—*Colburn v. Parrett*, 25 Cal. App. 749, 145 Pac. 540.

As to right of appeal after judgment has been enforced, see pars. 37-39, this note.

6. The right of appeal is derived from our constitution or statutes, and, as the constitution nowhere, expressly or impliedly, gives the right of appeal in cases of contempt, section 1222, post, can not be held unconstitutional on the theory that, if it is applicable to cases of constructive contempt, it is invalid.—*Gale v. Tuolumne County Water Co.*, 169 Cal. 46, 145 Pac. 532.

7. Abatement of nuisance—Costs not paid.—Appeal from order directing abatement of nuisance and allowing plaintiff costs will not be dismissed by reason of fact that defendant has abated nuisance, but has not paid costs.—*White v. Gaffney*, 1 Cal. App. 715, 82 Pac. 1088.

8. Academic question—Appeal raising, will be dismissed.—*Foster v. Smith*, 115 Cal. 611, 612, 47 Pac. 591.

As to abstract question presented by appeal, see par. 36, this note.

9. Acceptance of fruits of judgment—Destroys right of appeal therefrom.—*Estate of Shavers*, 131 Cal. 219, 221, 63 Pac. 340.

See pars. 10, 117, 118.

10. Acceptance of property under decree of distribution—Destroys right of distributee to appeal from such decree.—*Estate of Shavers*, 131 Cal. 219, 221, 63 Pac. 340.

See pars. 9, 117, 118, this note.

11. Appeal from part of judgment—As to right to.—A party may appeal from a specific part of a judgment, and such appeal ordinarily will bring up for review only the part appealed from, leaving all other parts of the judgment in full force. In that case the appellate court has no jurisdiction to review any part of the judgment except the part to which the appeal is directed, and an order of reversal, although general in its terms, will be construed to apply only to the part brought up for review.—*C. Gannahl Lumber Co. v. Weinsveig*, 168 Cal. 664, 143 Pac. 1025.

12. Appeal from refusal of court to render judgment.—On matters which are unsupported either by averment or evidence will be dismissed.—*Bank of Visalia v. Curtis*, 131 Cal. 178, 179, 63 Pac. 344.

13. Appealable order—Will not be reviewed on certiorari.—Where an order is appealable, it will not be reviewed on certiorari, either before or after the expiration of the time allowed by law for appealing therefrom.—*People v. Turner*, 1 Cal. 153; *Clary v. Hoagland*, 13 Cal. 173; *People v. Shepard*, 28 Cal. 117; *Faut v. Mason*, 47 Cal. 7; *Newman v. Superior Court*, 62 Cal. 543, 545; *Golden Gate Consol. Hydraulic Min. Co.*, 65 Cal. 187, 3 Pac. 628; *Slavonic Illyric Mut. Benevolent Assoc. v. Superior Court*, 65 Cal. 500, 4 Pac. 500; *Stuttmeister v. Superior Court*, 71 Cal. 322, 2 Pac. 270; *McCue v. Superior Court*, 71 Cal. 545, 12 Pac. 615; *Estate of McConnell*, 74 Cal. 217, 15 Pac. 746; *Weill v. Light*, 98 Cal. 193, 23 Pac. 943; *Noble v. Superior Court*, 109 Cal. 523, 527, 42 Pac. 155.

14. Same—Same—Reason for the rule is that the statute providing for the procedure was to give a remedy where none existed in the first instance, and not to supplement one lost through the laches of the party himself.—*Ramsey v. Pettengill*, 14 Oreg. 207, 209, 12 Pac. 439.

15. Assignment of errors—As to sufficiency of specification.—A specification of the insufficiency of evidence "that the evidence was wholly insufficient to justify a judgment in favor of the plaintiffs" is not a compliance with section 648, ante, requiring a specification of the particulars wherein the evidence is insufficient to justify the decision.—*Rousseau v. Cohn*, 20 Cal. App. 469, 129 Pac. 618.

16. It is unfair and improper practice to request this court to examine sixty-six folios of the complaint to discover some ground for reversing the order sustaining the demurrer, without any aid given in the search, or showing wherein the order sustaining the same was improper.—*Sanguinetti v. Vallecita Min. Co.*, 16 Cal. App. 781, 117 Pac. 1037.

17. It is a rule of convenience for the expedition of the business of this court that it will not ordinarily entertain a motion to dismiss involving an examination of the record in advance of the hearing upon the merits; but where a mere inspection of the record discloses that no relief can be given to the appellant, this court will consider the question to save unnecessary delay and expense to litigants.—*Hibernia Sav. & L. Soc. v. Doran*, 161 Cal. 118, 118 Pac. 526.

18. Record not so voluminous or bulky as to require in its examination more than ordinary labor, motion to dismiss for want of assigned error was denied in the particular case; the court expressly declaring it did not establish a rule applicable to all that class of cases.—*Naylor v. Adams*, 15 Cal. App. 548, 114 Pac. 997.

19. Consent judgments and orders—Will not be reviewed on appeal.—*Erlanger v. Southern Pac. R. Co.*, 109 Cal. 395, 42 Pac. 31.

As to appeals from consent judgments, see note 13 Am. Dec. 547.

20. Construction of section—As being exclusive, and hence writ of error will not lie where appeal is authorized by code.—*Haight v. Gay*, 8 Cal. 297, 300, 68 Am. Dec. 323.

21. Death of wife—Subsequent to entry of divorce takes from appellate court right to review action of superior court in rendering judgment or denying motion for new trial.—*Begbie v. Begbie*, 128 Cal. 154, 155, 49 L. R. A. 141, 60 Pac. 667.

22. Dismissal or abandonment of appeal—In general.—A motion to dismiss an appeal will be entertained where the transcript and the appellants' brief were not filed within the time prescribed by paragraphs 1 and 4, respectively, of Rule II of the rules of the supreme court.—*McCowen v. Trumann*, 22 Cal. App. 361, 134 Pac. 341.

As to dismissal of appeal, generally, see Part III, this note.

23. Where the attorney for the appellant, after due notice and for good cause, withdraws from the case, and no briefs are on file, and the attention of the appellate court is not drawn to any error in the record, the judgment will be affirmed.—*Morris v. Occidental Life Ins. Co.*, 22 Cal. App. 367, 134 Pac. 341.

24. An appeal is given as a matter of right from an order granting or denying a motion for a new trial; and, when properly taken and perfected, the appellate court has jurisdiction to and must hear and determine the same upon its merits, notwithstanding an alleged irregularity or defect in the procedure prescribed as a preliminary to the presentation of a motion for a new trial.—*Turner v. F. W. Ten Winkel Co.*, 24 Cal. App. 213, 140 Pac. 1086.

25. The failure to give notice of intention to move for a new trial is not ground for dismissing an appeal from the order denying a new trial, although such failure is sufficient reason for the refusal by the lower court of a new trial, and constitutes ground for affirmance by the appellate court when the appeal is heard on its merits.—*Turner v. F. W. Ten Winkel Co.*, 24 Cal. App. 213, 140 Pac. 1086.

26. A motion to dismiss an appeal from an order denying a motion for a new trial on the ground that the statement on the motion for the new trial was not settled by the judge who heard the cause at the trial, notwithstanding he was not shown to have been without the state, or otherwise conditioned as is specified in the cases mentioned in section 653, ante, must be denied.—*Lincoln v. Sibeck*, 25 Cal. App. 331, 143 Pac. 789.

27. The matter of the irregularity of proceedings occurring prior to the making

of an order denying a motion for a new trial can not be considered on a motion to dismiss the appeal from the order, although the same may constitute sufficient cause for affirming or reversing the order, when the appeal is regularly considered.—*Lincoln v. Sibeck*, 25 Cal. App. 331, 143 Pac. 789.

28. Same—Absence of controversy.—An appeal from an order dissolving an injunction against the issuance of improvement bonds on the ground of their invalidity will be dismissed, where pending the appeal the bonds are issued, since a decision would have no binding authority and would not affect the legal rights of the parties.—*Bernard v. Weaver*, 23 Cal. App. 532, 138 Pac. 941.

29. In such case, where the complaint alleges that the city treasurer will, unless restrained, immediately issue the bonds, the appellate court will accept this allegation as true and assume that he has performed the duty imposed upon him by law, and that therefore the bonds were issued upon the dissolution of the injunction and during the pendency of the appeal.—*Bernard v. Weaver*, 23 Cal. App. 532, 138 Pac. 941.

30. In such case the appellants can not insist upon a decision upon the merits by reason of the fact that a judgment for costs was rendered against them, where it appears from the record that no judgment for costs in any sum was rendered, it being recited therein that defendant recover costs of suit amounting to the sum of — dollars.—*Bernard v. Weaver*, 23 Cal. App. 532, 138 Pac. 941.

31. Where an appeal is taken from an order vacating a default judgment in an action of ejectment, and thereafter both of the parties transfer their respective interests in the property to a third person, the appeal will be dismissed.—*Wilson v. Chesley*, 23 Cal. App. 630, 138 Pac. 958.

32. Effect of appeal on jurisdiction of trial court—In general.—The effect of an appeal is to remove from the jurisdiction of the trial court all questions going to the validity or correctness of the judgment or order appealed from.—*Parkside Realty Co. v. MacDonald*, 167 Cal. 342, 139 Pac. 805.

As to power of trial court to entertain and determine motion for new trial after appeal from the judgment, see, post, 939, note par. —.

As to effect of reversal, defendant must account for property adjudged to him in judgment reversed, see pars. 714-716, this note.

33. A superior court that has rendered a judgment against a party of whose person it had never in fact acquired jurisdiction because of nonservice of summons and of want of authority of the attorney appearing for such party, has no jurisdiction to vacate its judgment after an appeal has been taken therefrom by such party through such attorney and while the appeal is still

pending.—Parkside Realty Co. v. MacDonald, 167 Cal. 342, 139 Pac. 805.

34. Same—Subsequent orders of trial court.—An appeal from an order setting aside a default judgment is not abrogated by a subsequent order of the trial court consolidating the action with others pending in such court.—Durbrow v. Chesley, 23 Cal. App. 627, 138 Pac. 917.

35. After the taking and perfecting of an appeal to the supreme or appellate courts from a judgment or an order rendered or made by the superior court, the latter tribunal loses jurisdiction to make any order or to carry out any proceedings in the action which would have the effect of vitiating the appeal or preventing the review of all alleged errors brought up by a duly prepared and authenticated record.—Durbrow v. Chesley, 23 Cal. App. 627, 138 Pac. 917.

36. Eminent domain—Abstract question.—Appeal from order authorizing plaintiff in condemnation proceedings to take possession of premises during pendency of, and until conclusion of litigation, will be dismissed where it was made after judgment condemning land had been affirmed on appeal. It presented merely an abstract question.—Mendocino County v. Peters, 2 Cal. App. 34, 82 Pac. 1124.

As to academic question raised by appeal, see par. 8, this note.

37. Enforcement of judgment by plaintiff—Does not deprive defendant of his right to appeal.—Ramsbottom v. Fitzgerald, 6 Cal. Unrep. 214, 55 Pac. 984.

As to right of appeal, generally, see pars. 5, 6, this note.

As to voluntary payment of judgment destroying right of appeal, see pars. 114-116, this note.

38. Right of defendant to appeal from judgment against him can not be taken away by enforcement of execution on judgment and satisfaction of judgment thereby before time to appeal has expired.—Kenney v. Parks, 120 Cal. 22, 52 Pac. 40.

39. Same—Satisfaction of judgment by setting off against it judgment in favor of appellant does not cut off right to appeal.—Haskins v. Jordan, 123 Cal. 157, 162, 55 Pac. 786.

40. Failure to file transcript in time.—A motion to dismiss an appeal for failure to file the transcript of the record within the time limited by Rule II of the supreme court must be granted, where the proposed bill of exceptions to be used on the appeal was withdrawn by stipulation on the day of its presentation for settlement and the respondent allowed thirty days to prepare amendments thereto, and no further steps were thereafter taken by the appellant to obtain the settlement of the bill, which at the time of the hearing of the motion showed a default for a period of over five

years.—Harbaugh v. Lassen Irr. Co., 24 Cal. App. 773, 881, 142 Pac. 847.

As to failure to file transcript in time under the new and alternative method of appeal, see, post, § 953a and note.

41. In such a case there is no "proceeding pending for a settlement of a bill of exceptions" within the meaning of such rule, as the effect of the stipulation is the same as if the bill of exceptions had never been presented for settlement as provided by section 650, ante.—Harbaugh v. Lassen Irr. Co., 24 Cal. App. 773, 881, 142 Pac. 847.

42. Finality of judgment—In general.—A judgment dissolving a partnership, directing a sale of the firm property, and providing for the distribution of the proceeds between the parties, is a "final judgment" within the meaning of the code sections governing appeals, although the compensation of the receiver appointed in the action, and the amount of money to be paid to the creditors of the partnership, are reserved for future determination.—Zappettini v. Buckles, 167 Cal. 27, 138 Pac. 696.

43. The general rule applicable in determining whether a judgment is final or merely interlocutory is, that if anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the judgment is interlocutory only.—Zappettini v. Buckles, 167 Cal. 27, 138 Pac. 696.

44. A judgment in an action to quiet the title to land which leaves nothing further to be determined by judicial action of the court for a final ascertainment and determination of the respective rights of the parties is a final and not an interlocutory judgment (Olds v. Thornton, — Cal. App. —, 190 Pac. 496, 497); and an order making an allowance for alimony and suit-money pendente lite in a divorce proceeding is a final determination and judgment.—Millar v. Millar, — Cal. App. —, 197 Pac. 811, 814.

45. Grounds of appeal—Presentation and reservation in trial court—As to necessity of in general.—Issues upon which the trial court has made no specific findings can not be considered on appeal.—Estate of Yoell, 164 Cal. 540, 129 Pac. 999, 1002.

As to mode of preserving oral evidence for review in equity cases, see note Ann. Cas. 1913A, 529.

As to scope and effect of a writ of error, see note 91 Am. Dec. 193.

As to review, on appeal from final judgment, of interlocutory appealable order, decision, etc., not theretofore appealed from, see note Ann. Cas. 1913A, 816.

As to review of an order denying a new trial, see note 4 Ann. Cas. 304.

Same—Rule changed by amendment of section 903, post.—See par. 3, this note, also § 963, post, and note.

As to the right of the appellate court in respect to limiting the issues to be tried by the jury upon granting of a new trial, see note Ann. Cas. 1912D, 593.

46. An appellant can not raise for the first time on appeal objections not raised in the court below.—*Reed Orchard Co. v. Superior Court*, 19 Cal. App. 648, 128 Pac. 9.

As to questions raised for the first time on appeal, see pars. 57, 109-111, 522, this note.

47. **Same—Same—Absence of exception—Ruling on error of law.**—Where plaintiff's bill of exceptions fails to indicate any ruling of the court or any exception registered on her behalf, the supreme court can not pass upon any alleged errors of law committed at the trial.—*Smith v. Smith*, 163 Cal. 630, 126 Pac. 475.

48. **Same—Same—Conclusions of trial court as to jurisdiction—Failure to object thereto.**—The supreme court will not upon appeal review the conclusions of a trial court as to facts essential to its jurisdiction, concerning which such court was vested with the power to hear and determine, at the instance of a party who has appeared in that court in the action or proceeding and has omitted there to in any way urge his objection, but has proceeded therein upon the theory that the court had jurisdiction.—*Estate of Dombrowski*, 163 Cal. 290, 125 Pac. 233.

49. **Same—Same—Failure to ask for ruling on variance.**—If the allegations of a complaint and the proof do not correspond, there is a variance, but where this is not specified as one of the grounds for a motion for nonsuit, this objection can not be considered on appeal for the first time; the attention of the plaintiff should have been called to the supposed defect, so that he might have had an opportunity to remedy it.—*Keefe v. Keefe*, 19 Cal. App. 310, 125 Pac. 929.

As to variance, generally, see pars. 549, 580, this note.

As to variance between pleadings and proof on nonsuit, see par. 62, this note.

50. **Same—Same—Grounds of defense or opposition.**—In an action by an assignee of warehouse receipts, one of the warehouse receipts shows an indorsement "to the order of T. E. Callahan," and it is claimed that the judgment as to this receipt has no evidence to support it, and, as it is impossible to say how much of the gross value of the goods was represented by this receipt, the judgment must be reversed. A sufficient answer is found in the fact that in their pleadings defendants treated all the receipts as indorsed to plaintiff. They admitted delivery to plaintiff, and the cause was tried on the assumption that the indorsements were in plaintiff's name as assignee. The evidence showed that it was Wilkins' intention to indorse all the receipts to plaintiff. Obviously, the error in the in-

dorsement was clerical.—*Callahan v. Marshall*, 163 Cal. 552, 126 Pac. 358.

51. In an action to set aside a deed alleged to have been obtained by duress and undue influence, the denial of defendant's motion for judgment on the ground of laches amounted to a declaration and finding to the effect that the plaintiff was not guilty of laches.—*Suhr v. Lauterbach*, 164 Cal. 591, 130 Pac. 2, 3, following doctrine in *Stevinson v. San Joaquin & Kings River Canal & Irr. Co.*, 162 Cal. 141, 121 Pac. 398.

52. **Same—Same—Objection to admission of evidence.**—Objections urged by other defendants to the action of the trial court in relation to a transcript of the evidence of the lessee in a bankruptcy case, a portion of which was read by plaintiff to show his admissions against interest, which other defendants were not permitted to read until notices of counsel of plaintiff written thereon were erased, will not be considered where the whole deposition was admitted in evidence and is set out in full in the record upon appeal.—*Delger v. Jacobs*, 19 Cal. App. 197, 125 Pac. 258.

53. **Same—Same—Same—Rereading testimony.**—The rereading to a jury of a portion of the testimony of the plaintiff can not be assigned as error on appeal, in the absence of any objection thereto at the trial.—*Hardy v. Schirmer*, 163 Cal. 272, 124 Pac. 993.

54. **Same—Same—Objections to exclusion of evidence.**—Where the defendant made no statement to the court showing what he claimed the substance of the excluded conversation to be, it can not be determined whether the exclusion of the evidence was erroneous or not, and this ruling of itself will constitute no ground for reversal.—*Snowball v. Snowball*, 164 Cal. 476, 129 Pac. 784, 785.

As to objection in addition to exception being necessary, see note Ann. Cas. 1912B, 1231.

55. **Same—Same—Objection to failure to answer cross-complaint.**—In an action upon a note, the execution of which was admitted, but a cross-complaint reiterated a defense set forth in the answer, that the note was given in renewal of a note for which security was pledged, so that upon default the security should be treated as payment, and that the note sued upon was without consideration, and the cross-complaint sought further to reform a certificate given by defendant to plaintiff that the first note was secured, so as to correspond with such defense, to which cross-complaint plaintiff demurred, which demurrer was pending when both parties went to trial by jury, treating the cross-complaint as in issue, and the verdict was for plaintiff, who was not in default upon the cross-complaint, under the circumstances, defendant will not be permitted to object upon appeal for the first time that the cross-complaint was not

answered.—*Kern Valley Bank v. Koehn*, 19 Cal. App. 247, 125 Pac. 358.

56. Same—Same—Objection to interpretation of pleading.—Where the complaint is uncertain or ambiguous or susceptible of two interpretations as to its meaning, and all parties to the action appear to have adopted or acquiesced in an interpretation that sustains the jurisdiction of the court over the subject-matter of the action, the losing party in such action should not be allowed, upon appeal, for the first time, to insist upon a different interpretation of the pleading that will oust the court of its jurisdiction.—*Barnett v. Hull*, 19 Cal. App. 91, 124 Pac. 885.

57. Same—Same—Objection to parties, not raised below.—In an action by a building contractor to recover the reasonable value of his services, the point that he was a party defendant to certain lien claimants' action consolidated with the present one can not be considered on appeal, since it was not raised in the court below.—*Tubbs v. Deillo*, 19 Cal. App. 612, 127 Pac. 516.

As to objections raised for first time on appeal, see pars. 46, 109-111, 522, this note.

58. Same—Same—Objection to report of referee.—Where the report of the referee in a partnership accounting was filed in the office of the county clerk, and counsel for defendant notified of such filing, but no objection thereto was made before such report was incorporated in the final decree, it will be assumed on appeal that no ground existed for objection thereto.—*Doudell v. Shoo*, 20 Cal. App. 424, 129 Pac. 478, 487.

59. Same—Same—Objection to sufficiency of record-title.—In an action of ejectment, where the plaintiff made no objection in the trial court to the record-title of the respondent to certain lands, he can not for the first time on appeal maintain an attack upon such a patent issued with all the formalities of law.—*People's Water Co. v. Lewis*, 19 Cal. App. 622, 127 Pac. 506.

60. Same—Same—Review of rulings on pleadings.—Where there was no demurrer to an amended complaint, and issues were joined on it by answer, the original complaint was superseded, and the ruling on the original complaint is immaterial. This is equally true where the complaint is amended to conform to the proofs.—*Dieckmann v. Merkh*, 20 Cal. App. 655, 130 Pac. 27, 28.

61. Same—Same—Specific objection necessary.—An objection to testimony which fails to state the ground thereof must be disregarded.—*Bakersfield & V. R. Co. v. Fairbanks, Morse & Co.*, 20 Cal. App. 412, 129 Pac. 610.

62. Same—Same—Same—Nonsuit—Variance between pleadings and proof.—Since, upon a motion for nonsuit, the court is at liberty to consider only those grounds which are presented in the motion, where

the ground upon which a nonsuit was sought was that the defendant had not been shown to be guilty of negligence, a question as to variance between the pleadings and proof can not be considered on appeal from such nonsuit.—*Breidenbach v. M. McCormick Co.*, 20 Cal. App. 184, 128 Pac. 423, 426.

As to variance generally, see pars. 49, 549, 580, this note.

63. Same—Same—Statement on appeal—Provisions of the Practice Act for a statement on appeal were not incorporated in the Code of Civil Procedure of 1872: *Wall v. Mines*, 128 Cal. 136, 138, 60 Pac. 682. By comparing sections 659, 661, ante, 951, and 952, post, it will be seen that the only statement which can be used on appeal is the one used on the hearing of a motion for a new trial, or the subsequent statement provided for by section 661, ante, and which section prescribes what such subsequent statement shall contain. The following citations, however, may be of some use notwithstanding the fact that the sections cited were not preserved.

As to statement on appeal, and the clear intention of the legislature, see pars. 122-124, 197, this note.

64. Same—Same—Same—Scope and sufficiency of.—For the purpose of showing error in the making of an order denying a motion for a new trial, appellant printed in his transcript the statement of the case which the court had ordered stricken from the files. Since this proposed statement was never settled, it could not be used upon the hearing of the motion. Incorporating it in a bill of exceptions to be used on an appeal never taken from an order striking it from the files does not entitle it to consideration as a statement in support of the motion for a new trial.—*De Mitchell v. Croake*, 20 Cal. App. 643, 129 Pac. 946, 947.

65. Same—Same—Same—Without specifications.—Statement of the case, without specifications, and therefore fatally defective in connection with an appeal from an order denying a motion for a new trial, may nevertheless be sufficient upon which to base a review of the judgment upon the grounds stated.—*Carver v. San Joaquin Cigar Co.*, 16 Cal. App. 766, 118 Pac. 92.

66. Judgment—Can be reviewed by direct appeal, only.—*Brisson v. Brisson*, 90 Cal. 323, 327, 27 Pac. 186.

67. Judgment or order in civil proceeding, which is not expressly made final by code, can be reviewed by supreme court only when it is brought upon appeal pursuant to code, and appeal taken in any other mode leaves case below undisturbed.—*Home of Inebriates v. Kaplan*, 84 Cal. 486, 488, 24 Pac. 119.

68. Orders and judgments appealable—In general.—An order denying a motion to vacate a default, upon which no judgment has been entered, is not appealable under

section 963, post.—*Sherman v. Lewis*, 166 Cal. 524, 137 Pac. 249.

As to appealable judgments and orders, see, ante, § 963 and note.

69. By the express provisions of section 663a, ante, an order vacating a prior judgment for the defendants and directing a new judgment for the plaintiff made on the motion of the latter for amendments of the conclusions of law and for the entry of a judgment in conformity therewith, is appealable.—*Copple v. Aigeltinger*, 167 Cal. 706, 140 Pac. 1073.

70. No appeal lies from an order denying a motion in arrest of judgment, but the order may be reviewed on the appeal from the judgment. The motion is held to be without merit in this case.—*People v. Bundy*, 168 Cal. 777, 145 Pac. 537.

71. An appeal from an order sustaining a demurrer to a complaint without leave to amend must be dismissed, where the record does not show that any judgment was entered and does not contain any other notice of appeal, since an order sustaining or overruling a demurrer is not an appealable order.—*Rickert v. Zoeger*, 169 Cal. 399, 146 Pac. 894.

72. An order refusing to set aside an order of sale of land belonging to the estate of a deceased person is not an order either in favor of or against the making of a conveyance of real property within the meaning of subdivision 3 of section 963, post, and therefore is not an appealable order.—*Estate of McCarthy*, 169 Cal. 708, 147 Pac. 941.

73. Generally, the party aggrieved by a judgment or an order must take his appeal from the judgment or order itself, if an appeal therefrom is authorized by statute, and not from a subsequent order refusing to set it aside.—*Altpeter v. Postal Telegraph-Cable Co.*, 25 Cal. App. 255, 143 Pac. 93.

74. No appeal lies from an order sustaining a demurrer without leave to amend, and an appeal purporting to have been taken from such an order will be dismissed.—*Brunson v. Santa Monica*, 25 Cal. App. 383, 143 Pac. 792.

75. The only method of review of such an order is through an appeal from the final judgment thereafter entered in the action itself, if the judgment is unfavorable.—*Brunson v. Santa Monica*, 25 Cal. App. 383, 143 Pac. 792.

76. Where a judgment is modified, the appeal is properly taken from the modified judgment as entered.—*Taber v. Bailey*, 22 Cal. App. 617, 135 Pac. 975.

77. An order relieving a party moving for a new trial from its alleged default in failing to prepare and serve its proposed bill of exceptions within the time prescribed by law, upon the ground of inadvertence and excusable neglect, is appealable, and an appeal taken therefrom must therefore be dismissed.—*Kramm v. Stockton Elec. R. Co.*, 22 Cal. App. 737, 761, 136 Pac. 523, 534.

78. An order sustaining the defendant's demurrer to the plaintiff's amended complaint is not appealable. The judgment is itself an adjudication upon the demurrer; and it is only from the judgment, and not from the order sustaining the demurrer, that the plaintiff could appeal.—*Baldwin v. Wall*, 23 Cal. App. 349, 137 Pac. 1066.

79. No appeal lies from an order denying a motion in arrest of judgment, although such ruling is subject to review on appeal taken from the judgment.—*People v. Peery*, 26 Cal. App. 143, 146 Pac. 44.

80. An order setting aside a default in an action where no judgment has been entered upon the default is not the subject of a separate appeal.—*Lapique v. Plummer*, 24 Cal. App. 685, 142 Pac. 107.

81. No appeal lies from an order denying the motion of the plaintiff for an order directing the sale of perishable property seized under a writ of attachment.—*Henry Cowell Lime & Cement Co. v. Figel*, 27 Cal. App. 11, 148 Pac. 796.

82. Order denying motion for new trial—May be reviewed on appeal though judgment has become final by reason of failure to appeal.—*Houser & H. M. Co. v. Hargrove*, 129 Cal. 90, 91, 61 Pac. 660.

83. Same—Rule changed by amendment to section 963, post, and now reviewable on appeal from the final judgment, only.—See par. 3, this note, and, post, § 963 and note.

84. Placing on calendar of wrong district—Effect of.—Where an appeal is set for hearing in the wrong district on account of an inadvertence of the clerk of the appellate court in numbering the district where the transcript was filed, and neither the appellant nor its attorneys have any notice of the setting of the case, the hearing and submission of the case is irregular, and the submission will be vacated.—*Schmidt v. Union Oil Co.*, 168 Cal. 617, 143 Pac. 776.

85. While counsel may not be entitled to any specific notice that a case is set on one of the calendars for hearing, they are entitled to assume that it will not be put upon the calendar of a district to which the case does not belong.—*Schmidt v. Union Oil Co.*, 168 Cal. 617, 143 Pac. 776.

86. Point decided—Law of the case—Editorial note.—The principle and rules of "the law of the case" do not apply to hearings on appeal only, being equally applicable to the hearing on a retrial; but having been heretofore classified under "appeal and error," we retain the classification.—See, ante, § 53 and note Part XVI.

87. Same—Same—As to generally.—Under the doctrine of the "law of the case," the legal propositions declared on the first appeal in this case, reported in 147 Cal. 725, establishing a trust relation in the defendants as to certain property, based on the fact that it had been, in legal effect, bought by the administrator of the plaintiff estate, with money loaned him by the

predecessors in interest of the defendants, would be controlling on this appeal, except for the fact that the trial court has made a finding that no such loan was made. It is held, however, on this appeal that such finding is not supported by the evidence.—*Smith v. Goethe*, 159 Cal. 628, 115 Pac. 223.

88. Questions urged upon the present appeal, which were decided against the appellant upon a former appeal, must now be considered as the law of the case.—*Conde v. Sweeney*, 16 Cal. App. 157, 116 Pac. 319.

89. Where the evidence on the second trial was in no material particular different from that given on the former trial, and there is nothing new in the case, the views expressed by the supreme court on a former appeal must control as the law of the case; and it was the duty of the trial court to give effect to those views, and to sustain the action upon the note.—*Muller v. Swanton*, 17 Cal. App. 232, 119 Pac. 200.

90. If the instructions given by the trial court to the jury are not set out in the transcript, it may be assumed on appeal that those instructions correctly stated the law, and that if the effect of any of the evidence should have been limited by the instructions, then such instructions were declared to the jury.—*McNutt v. Pabst*, 25 Cal. App. 177, 143 Pac. 77.

91. No point in a case can be said to have been decided on appeal except the one specifically dealt with, and such others as may be said to be necessarily determined by the decision of the point under discussion.—*Parkin v. Grayson-Owen Co.*, 25 Cal. App. 269, 143 Pac. 257.

92. An order denying a motion to dismiss an appeal after it has become final is the law of the case in a subsequent appeal on the merits as to points involved on the motion.—*Hartfield v. Alderete*, 26 Cal. App. 604, 147 Pac. 991.

93. Same—Same—Construction given to judgment of lower court by the supreme court, in determining an appeal therefrom, constitutes the law of the case, and is binding on the lower court in all subsequent proceedings and whenever its interpretation is material.—*Gallatin v. Corning Irr. Co.*, 163 Cal. 405, 126 Pac. 864.

94. Same—Same—Decision on former appeal that the judgment foreclosing the mortgage purchased with the money so loaned did not estop the present plaintiff from claiming that a trust relation was created in the defendants is the law of the case on this appeal.—*Smith v. Goethe*, 159 Cal. 628, 115 Pac. 223.

95. Same—Same—Decision purchaser has ten years in which to perform, under a contract for cutting and removing timber from a tract of land, and that after ten years he does not forfeit his right to the timber, but under the terms of the contract still retains the title and right of removal, made by the supreme court on an appeal, constitutes the law of the case in all future

trials touching the same contract and matter.—*Gibbs v. Peterson*, 163 Cal. 758, 127 Pac. 62.

96. Presumptions on appeal—In general.—Where evidence is omitted from the record an appellate court must presume that the omitted evidence fully justified the order appealed from, although the evidence contained in the record itself is insufficient.—*Berri v. Rogero*, 168 Cal. 736, 145 Pac. 95. See, also, para. 334, 587, 607-626, this note.

As to presumptions that usual proceedings pursued, see par. 204, this note.

97. In reviewing an order directing a verdict on an opening statement, the appellate court must apply rules analogous to those which govern it in reviewing an order granting a nonsuit after the introduction of evidence. Every fact which counsel has stated as among the matters to be proved, together with all favorable inferences reasonably to be drawn therefrom, must be accepted by the court as facts which would have been proved if the case had been allowed to be tried.—*Bias v. Reed*, 169 Cal. 33, 145 Pac. 516.

98. If an appellate court can, without transgressing the bounds of fairness and reason, conceive of any state of facts upon which all of the findings would be true, it is bound to assume that this state of facts was shown.—*Price v. Occidental Life Ins. Co.*, 169 Cal. 800, 147 Pac. 1175.

99. Where the record on appeal from an order made in a divorce action, requiring the husband to pay to the wife certain sums of money for counsel fees and traveling expenses, shows that an affidavit made by her in a previous case between the parties for the same cause was received and considered by the court, but its contents are not stated, it must be assumed that it contained facts sufficient to support the order.—*Kellogg v. Kellogg*, 170 Cal. 84, 148 Pac. 518.

100. A judgment or order will not be reversed unless error is shown, and the burden is upon the appellant to show the error.—*Kellogg v. Kellogg*, 170 Cal. 84, 148 Pac. 518.

101. Abuse of discretion by a trial judge will not be presumed, but must be made clearly to appear before his discretion will be interfered with on appeal.—*Kaiser v. Hancock*, 25 Cal. App. 323, 143 Pac. 614.

102. It will be presumed on appeal from an order denying a motion for a new trial that the ruling was correct, where neither the grounds upon which the motion was based nor the affidavits of newly discovered evidence are incorporated in the record.—*People v. Vukojevich*, 25 Cal. App. 459, 143 Pac. 1058.

103. Findings of fact must be resolved in such a way as will result in the judgment being sustained if they are susceptible of a construction to that end.—*Baker v. Eilers Music Co.*, 26 Cal. App. 371, 146 Pac. 1056.

104. Where the statement contains specifications of errors on appeal from an order denying a new trial, presumably the specifications contain the ground on which the motion was made, although the grounds of the motion are not directly shown by the record.—*Griswold v. Winters*, 26 Cal. App. 758, 148 Pac. 527.

105. An appellate court will presume that, where books of account were admitted in evidence at the trial, they justified the findings although they were never formally balanced.—*Rich v. Smith*, 26 Cal. App. 775, 148 Pac. 545.

106. Where an appeal is taken upon the judgment-roll, it will be assumed that, if an express finding as to the extent of defects in the plaintiff's title was necessary, the trial court failed to so find because of the absence of any evidence upon that issue of the case.—*Agnew v. Nelson*, 27 Cal. App. 39, 148 Pac. 819.

107. An appellate court will never indulge in presumptions to defeat a judgment.—*Williams v. Reed*, 43 Cal. App. 425, 185 Pac. 515, following the doctrine in *Ohleyer v. Bunce*, 65 Cal. 544, 4 Pac. 549.

108. Proof of claim by creditor.—In insolvency proceedings will not prevent his appeal from order adjudicating petitioner to be insolvent.—In re *Chope*, 112 Cal. 630, 632, 44 Pac. 1066. See *Stateler v. Superior Court*, 107 Cal. 536, 40 Pac. 949.

109. Questions raised for first time on appeal.—Where, in an action for the specific performance of an alleged oral contract to devise real property, the pleadings and proof are based on the theory that a contract was made, the theory of a resulting trust in the property, can not be advanced for the first time on appeal.—*Blanc v. Connor*, 167 Cal. 719, 141 Pac. 217.

See pars. 46, 57, 522, this note.

As to necessity for preservation and reservation in lower court, see pars. 45-65, this note.

110. Objections to certain instructions raised for the first time by the appellant in his brief, the respondent having had no opportunity to be heard on the questions, will not be considered by the appellate court.—*Glasspoole v. Pacific Lumber Co.*, 22 Cal. App. 338, 134 Pac. 349.

111. Errors of law in the admission of evidence are not available on appeal, if no objection was made to the reception of the evidence.—*Hastaran v. Marchand*, 23 Cal. App. 126, 137 Pac. 297.

112. Rehearing.—In supreme court.—In cases directly appealable to the district court of appeal the supreme court grants a rehearing only when error appears on the face of the opinion or when an important question is presented as to which a further argument is desired.—*People v. Vaughn*, 49 Cal. Dec. 53, 147 Pac. 117.

As to when rehearing denied, see par. 169, this note.

113. Resignation of guardian of minor.—Operates as acquiescence in previous order of court annulling his letters, and hence precluded him from assigning any error in such order, and rendered order dismissing appeal taken by him from such order proper.—In re *Treadwell*, 111 Cal. 189, 191, 43 Pac. 584.

114. Voluntary satisfaction of judgment by defendant.—Destroys his right to appeal therefrom.—(*Moore v. Morrison*, 130 Cal. 80, 81, 62 Pac. 268) even though he pays under protest.—*State v. Conkling*, 54 Kan. 108, 45 Am. St. Rep. 270, 37 Pac. 992.

As to appeal from satisfied judgment, see note 45 Am. St. Rep. 271.

As to enforcement of judgment by plaintiff not destroying defendant's right of appeal, see pars. 37, 38, this note.

As to satisfaction of judgment by setting off against it judgment in favor of judgment-debtor, not affecting right of latter's appeal, see par. 39, this note.

115. Where after appeal was taken from judgment refusing to issue tax-deed, appellant redeemed property by paying taxes, costs, and proceedings required, appeal will not be considered.—*Dehail v. Los Angeles*, 5 Cal. Unrep. 866, 51 Pac. 27.

116. Same.—Payment of judgment by administratrix to redeem property sold will not prevent her from appealing or from prosecuting such appeal nor will appeal be dismissed as to other defendants who joined in appeal.—*Warner Bros. Co. v. Freud*, 131 Cal. 639, 646, 82 Am. St. Rep. 400, 63 Pac. 1017.

117. Waiver of right to appeal.—Acceptance of fruits of judgment is waiver of right to appeal.—*Estate of Shavers*, 131 Cal. 219, 221, 63 Pac. 340.

As to acceptance of fruits of judgment cutting off right of appeal, see pars. 9, 10, this note.

118. Right to accept fruits of judgment or order and right to appeal therefrom are not concurrent, but wholly inconsistent, and election of either is waiver and renunciation of the other; hence where plaintiff accepted money ordered paid as condition of order setting aside judgment by default, he will be deemed to have consented to order and to have waived right of appeal.—*County of San Bernardino v. Riverside County*, 135 Cal. 618, 620, 67 Pac. 1047.

119. Same.—Settlement of case.—Where settlement of the case has been effected, after an appeal has been taken, the appeal will be dismissed.—*Bank of Martinez v. Jahn*, 104 Cal. 238, 38 Pac. 41.

As to appeal after enforcing or accepting benefits from judgment, see note 13 Am. Dec. 548.

As to appeal by defendant after payment or compliance with judgment, see note 13 Am. Dec. 549.

As to waiver of appeal, see note 13 Am. Dec. 546.

II. BRIEFS—POINTS AND AUTHORITIES.

As to printing facts of record in brief, on appeal by new and alternative method, see, post, §§ 953a, 953c and notes.

120. As to general rule.—The rule of the supreme court which requires printed briefs is applicable to the district court of appeals; and the fact that this court examines the briefs in a case where the rule has been violated does not give assurance that a like violation in the future will be similarly treated.—*Weill v. Danziger*, 22 Cal. App. 688, 136 Pac. 308.

121. Where an appeal is taken under section 953a, post, and the appellant, pursuant to the requirements of section 953c, post, prints in his brief such parts of the record as he deems pertinent to the questions involved on the appeal, but the respondent files no brief and raises no question as to the correctness of sufficiency of the record as presented by the appellant, the appellate court will accept the evidence as set out in the appellant's brief as true and correct.—*Beckett v. Stuart*, 23 Cal. App. 373, 138 Pac. 115.

122. As to statement of cause or facts.—Clear intention of legislature in enacting section 953c, post, was to require that there should be inserted in the brief something in the nature, substantially, of a statement or bill of exceptions, to be printed in a supplement appended to the brief, to elucidate all the questions relied upon on the appeal. The language of the section seems to be mandatory, requiring that, in filing briefs upon such appeals, the parties must print in their briefs, or in supplement appended thereto, such portions of the record as they desire to call to the attention of the appellate court. When so printed, the brief becomes part of the record upon appeal.—*San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 16 Cal. App. 235, 116 Pac. 378.

As to statement on appeal, see pars. 63-65, 197, this note.

123. Where an appeal is taken in accordance with the provisions of section 953a, post, designated as the alternative plan of appeal, although no printed transcript of the record is required, the parties must print in their briefs, or in a supplement thereto, such portions of the record as they desire to call to the attention of the court. (Code Civ. Proc., § 953c.) Where this is not done, and there are but meager references to the evidence, an appellate court will not assume the labor of examining the entire record for the purpose of ascertaining whether or not the evidence supports a finding attacked for want of sufficiency of evidence.—*Williams v. Hawkins*, 20 Cal. App. 161, 128 Pac. 754, 755.

124. Where the action was to recover damages from defendant for injuries sustained by plaintiff's wife from alleged negligence of defendant in performing a surgical operation upon her, and the transcription on appeal from a judgment of dismissal

is correctly prepared as provided by sections 953a, 953c, post, but counsel for appellant did not print in his brief, or at all, any part of the testimony or evidence on the subject of want of care or skill on the part of defendant, as required by section 953c, post, nor did he in his brief point out or refer to such evidence on the part of the record where it might be found, nor did he argue the question at all, it will be assumed on review that there was no evidence of such want of care or skill.—*Marcucci v. Vowinkel*, 164 Cal. 693, 130 Pac. 430, 431.

125. Default in filing the brief required by the appellant within the time provided gives the respondent the right to move to dismiss the appeal, and a subsequent filing of the brief will not restrict the right of the respondent; his rights are controlled by the state of facts existing at the time the notice of motion to dismiss is given.—*Barnhart v. Conley*, 17 Cal. App. 230, 119 Pac. 200.

126. Failure to file.—Effect of.—No brief having been filed by either party, and no oral argument made when the case is reached upon the calendar, the judgment should be affirmed.—*Delger v. Jacobs*, 18 Cal. App. 698, 124 Pac. 95.

127. No brief being filed by the appellant in a criminal case, and no assignment of error appearing in any form upon the record, the appellate court is not required to search the record for the purpose of determining whether the trial was conducted by the court below in all respects without prejudice to the substantial rights of the accused.—*People v. Perry*, 16 Cal. App. 771, 117 Pac. 1036.

128. In such case the order appealed from will be affirmed.—*People v. Jones*, 16 Cal. App. 12, 115 Pac. 1008.

129. Points and authorities.—In general.—Where alleged errors, are not argued by an appellant in his brief, the appellate court is justified in disregarding them.—*Rogers v. Schlotterback*, 167 Cal. 35, 138 Pac. 728.

As to dismissal for failure to file points and authorities, see pars. 151-153, this note.

130. An appellate court is not called upon to give any consideration to an appeal wherein no brief is filed by the appellant and no appearance is made by him at the oral argument.—*Placerville Gold Min. Co. v. Beal*, 168 Cal. 682, 144 Pac. 748.

131. An appellate court is not called upon to examine instructions which were refused by the trial court, where the appellant refers to them in his brief only by their numbers.—*People v. Duncan*, 22 Cal. App. 430, 134 Pac. 797.

132. Same.—As to right to compel filing under the rule requiring the respective parties to an appeal to file points and authorities within a specified time after filing of the transcript, is a right the litigants may

enforce.—*Barnhart v. Conley*, 17 Cal. App. 230, 119 Pac. 200.

133. Same—Points not argued.—Where the brief states that "the court erred in permitting the witness to answer the following question," citing page of transcript, but the alleged errors are not argued, counsel merely calling attention to the exceptions reserved by the plaintiff at certain folios of the transcript, a point so presented to an appellate court will not be considered.—*Madeira v. Sonoma Magnesite Co.*, 20 Cal. App. 719, 130 Pac. 175, 181.

See, also, pars. 486-488.

134. Alleged errors of law relating to the reception and rejection of testimony, not stated or argued in the brief of the appellant, but merely adverted to in a general way in an unauthenticated document purporting to be a bill of exceptions, will not be considered by the appellate court.—*Hastaran v. Marchand*, 23 Cal. App. 126, 137 Pac. 297.

135. Where no oral argument is made nor brief filed on an appeal from a judgment and an order refusing a new trial, the appellate court will not assume the burden of investigating the merits of the appeal, but will affirm the judgment and order.—*McNutt v. Pabst*, 23 Cal. App. 232, 143 Pac. 68.

136. Where the attorneys of record for the defendant and appellant in a criminal case fail to file any memorandum of points and authorities, and do not appear when the case is called for argument, and thereupon additional time to file authorities is given to another attorney, and he likewise fails to file the same, the appellate court will assume that no ground for reversal exists and affirm the judgment under section 1253 of the Penal Code.—*People v. Roy*, 26 Cal. App. 128, 146 Pac. 44.

As to points not argued or discussed, see pars. 485-488, this note.

III. DISMISSAL OF APPEAL.

As to abandonment or dismissal of appeal, see pars. 22-31, this note.

As to dismissal for insufficiency of record, see pars. 335, 336, this note.

137. In general—Affirmance, when.—Motion to dismiss appeal from order sustaining demurrer to petition in intervention will be sustained because such order is not appealable.—*Hodsall v. Case*, 15 Cal. App. 541, 115 Pac. 330.

138. Same—Same—Compromise out of court.—As the judgment and order must be affirmed upon the record, held not necessary to pass upon a motion to dismiss the appeal, on the ground that the controversy has been settled out of court, by a grant deed from the appellant to the respondents, presented on the motion.—*Brode v. Gosselin*, 16 Cal. App. 632, 117 Pac. 778.

139. Same—Same—Examination of record in advance of hearing on the merits.—Ordinarily the appellate court will not en-

tertain a motion to dismiss an appeal where the motion involves an examination of the record in advance of the hearing on the merits; but where such examination need be no more than a mere inspection of the record to disclose the fact that no relief can be given the appellant, the court will consider the question to save the litigants unnecessary delay.—*Hibernia Sav. & L. Soc. v. Doran*, 161 Cal. 120, 118 Pac. 526.

140. By consent—Effect of dismissal of an appeal from the judgment by consent is to affirm the judgment.—*Spaeth v. Ocean Park Realty Min. & Invest. Co.*, 16 Cal. App. 329, 116 Pac. 980.

141. Failure to file transcript in time—Excuse—Application of Rule III.—The time to file the transcript on appeal from a judgment, where a proceeding on motion for new trial is pending, is extended forty days after the disposition of such motion.—*People v. Bank of San Luis Obispo*, 152 Cal. 233, 92 Pac. 481.

As to dismissal for inexcusable neglect to file transcript in time, see par. 230, this note.

142. Same—Construction of Rule XV.—The object of Rule XV is to enable the appellant to remedy a defect or omission of the transcript, for the purpose of enabling him to present his appeal on the merits, and the rule is to be liberally construed for that purpose.—*Poole v. Grand Council W. O. W.*, 17 Cal. App. 229, 119 Pac. 201.

143. Where motion is noticed to dismiss an appeal for failure to file the transcript within the time allowed by law, and before the hearing of the motion a certified transcript of the record is filed, the filing thereof is a sufficient answer to the motion, and the motion will be denied; in such a case all that is essential to a review of the action of the trial court is before the appellate court.—*Poole v. Grand Circle W. O. W.*, 17 Cal. App. 229, 119 Pac. 201.

144. Same—Effect of dismissal of appeal from a judgment by consent is to affirm the judgment.—*Spaeth v. Ocean Park Realty Min. & Invest. Co.*, 16 Cal. App. 329, 116 Pac. 980.

145. Failure to file transcript not ground for dismissal, when.—Failure to file transcript within forty days not ground for dismissal "where there is a proceeding pending for the settlement of a bill of exceptions or statement which may be used in support of" the appeal, regardless of all questions as to whether the proceeding for settlement can ultimately avail or not.—*Dernham v. Bagley*, 151 Cal. 217, 90 Pac. 543.

146. Same—Filing before hearing—Denial of motion.—Where a motion is noticed to dismiss an appeal for a failure to file a transcript of the judgment-roll, and before the hearing of the motion a certified transcript of the record is filed, the filing thereof is a sufficient answer to the motion, and it will be denied. In such case, all that is

essential to a review of the action of the superior court is before this court.—*Poole v. Grand Circle W. O. W.*, 17 Cal. App. 229, 119 Pac. 201.

147. Same—Same—Rule XV of supreme court.—The appeal will not be dismissed where, within seven days after notice of the motion and before the hearing thereof, the appellant causes a transcript to be filed embracing the papers required.—*Poole v. Grand Circle W. O. W.*, 17 Cal. App. 230, 119 Pac. 201.

148. Same—Inexcusable delay.—Where the transcript is not filed within the time specified by law, and none is on file at the time the notice of motion to dismiss is given, in the absence of a showing on the part of the appellant excusing such failure to file, the appeal will be dismissed.—*Gervais v. Joyce*, 15 Cal. App. 189, 114 Pac. 409, following *Buckley v. Althorf*, 86 Cal. 643, 25 Pac. 134, and *Tompkins v. Montgomery*, 116 Cal. 122, 47 Pac. 1006.

149. Same—Same—Laches in procuring settlement of pending statement.—Where the appellant has been guilty of such a degree of laches in procuring the settlement of a pending statement as would justify the appellate court in saying that it amounted practically to an abandonment of the appeal, the point should be urged in the trial court, when the statement comes up for settlement, by a motion to dismiss the proceedings on account of the failure of the moving party to proceed with reasonable diligence. If the motion is denied, or respondent's objections overruled, they can be incorporated in the record, and the action reviewed on the appeal from the order.—*Curtin v. Ingle*, 155 Cal. 57, 99 Pac. 430.

150. Same—Nature of motion to dismiss under rule.—A motion to dismiss an appeal under Rule XV of the supreme court may be considered as an objection to the transcript, affecting the appellant's right to be heard, which is answered by the filing of the requisite transcript before the objection is sustained.—*Poole v. Grand Circle W. O. W.*, 17 Cal. App. 229, 119 Pac. 201.

151. Failure to file points and authorities—Construction of Rule II.—Under subdivision 4 of Rule II of the supreme court, the points and authorities of appellant must be filed within thirty days after the filing of the transcript, unless the time is extended by stipulation or order of court; where no extension of time appears, and the time allowed by the rule has elapsed without the filing of any points and authorities, the respondent is entitled, on motion therefor, to a dismissal of the appeal.—*Barnhart v. Conley*, 17 Cal. App. 230, 119 Pac. 200.

As to points and authorities generally, see pars. 129-136, this note.

152. The rule requiring the points and authorities of the respective parties to be filed within a specified time after the filing of the transcript, confers rights which may

be enforced by litigants.—*Barnhart v. Conley*, 17 Cal. App. 230, 119 Pac. 200.

153. Same—Subsequent filing not restriction on right.—The determination of respondent's right to dismiss the appeal, after the default of the appellant, is controlled by the facts existing at the time when the notice of the motion to dismiss is given; the subsequent filing of points and authorities for the appellant will not have the effect to restrict such right.—*Barnhart v. Conley*, 17 Cal. App. 230, 119 Pac. 200.

154. Old method of appeal—As to regulations of Rules II and IV.—An appeal taken under the old method must be dismissed for failure to file the printed transcript within the time prescribed by Rule II of the supreme court, where the certificate of the clerk is made setting forth the facts required by Rule IV of that court. It is no legal excuse that the attorney for the appellant had taken a former appeal under the new and alternative method prescribed by section 941b, post, and relied upon the promise of the clerk to certify and transmit within the time required by law in the pending appeal.—*Erving v. Napa Valley Brewing Co.*, 16 Cal. App. 41, 116 Pac. 331.

155. To accept such an excuse as a legal justification for appellant's failure to comply with the rule of court designed to expedite and facilitate the disposition of causes upon their merits, would be to discourage diligence in the prosecution of appeals and establish a precedent that might lead to vexatious delays in the future.—*Erving v. Napa Valley Brewing Co.*, 16 Cal. App. 41, 116 Pac. 331.

156. Same—Same—Laches in procuring settlement of statement on motion for new trial.—The question as to whether a party has been guilty of laches in procuring the settlement of a statement, after having delivered it to the clerk for the judge, as provided by subdivision 3, section 659, post, is one primarily for the determination of the trial court, and the appellate court should not be called upon to decide it upon a motion to dismiss the appeal for failure to file the transcript in time, upon the theory that the extension of time to file the transcript resulting from the provisions of Rule II is only available to the party who proceeds with diligence to procure the settlement of a pending statement.—*Curtin v. Ingle*, 155 Cal. 57, 99 Pac. 430.

157. Same—"Adverse party"—Dismissal for failure to serve.—An appeal will not be dismissed for failure to serve an interested lienholder with notice thereof, where it can be determined as to the parties thereto properly before the court by giving such relief as the record warrants and providing expressly that the judgment shall in no wise affect the rights or interests of such lienholder.—*Burnett v. Piercy*, 149 Cal. 182, 86 Pac. 603, following doctrine in *Williams*

v. Santa Clara Min. Assoc., 66 Cal. 195, 5 Pac. 85.

As to dismissal of appeal for failure to serve notice on "adverse party," see par. 157, this note.

As to who are adverse parties, see pars. 263-283, this note.

158. On new and alternative method of appeal.—As to generally.—In the absence of a rule of the supreme court regulating the practice upon appeals taken under the new and alternative method prescribed in sections 953a, 953b and 953c, post, an appeal will not be dismissed merely for failure to print in appellant's brief the whole portion of the record upon which he relies for reversal, where the only point involved in the appeal is that the court erred in granting a nonsuit, and the brief contains some evidence and correctly refers to the transcript for the remainder, and discusses fully the questions involved, which could not impose much extra labor on the appellate court in deciding whether the trial court erred in denying the motion. It would not be just to dismiss the appeal in such cases.—San Joaquin & Kings River C. & Irr. Co. v. Stevinson, 16 Cal. App. 235, 116 Pac. 373.

159. Where appeal is taken under sections 941a and 941b, post, and no notice of entry of judgment was given, a motion to dismiss the appeal will be denied, where the appeal was taken within six months of the entry of judgment.—Larson v. Larson, 15 Cal. App. 531, 115 Pac. 340.

160. Same.—As to Rules II and V not being applicable.—Appeal prosecuted under new and alternative method not subject to Rules II and V of the supreme court as to the filing of the transcript; but where the right to prosecute an appeal in that manner is lost for failure to give the notice required and appellant fails to file the transcript within the time fixed by the rule under the old method, the appeal will be dismissed.—Estate of Keating, 158 Cal. 111, 110 Pac. 109.

161. The appeal will not be dismissed for failure to file the transcript within the time prescribed by law, where the appeal is by the new and alternative method, and such failure was owing to the reporter's refusal to file the transcript with the clerk, notwithstanding the appellant neglected to enforce such filing within a reasonable time by proceeding in mandamus.—Gjurich v. Fleg, 160 Cal. 334, 116 Pac. 745.

162. Same.—Entry of judgment.—Notice of not given.—Appeal taken under sections 941a and 941b, post, where no notice of entry of judgment has been given, a motion to dismiss the appeal will be denied where the appeal was taken within six months after the entry of judgment.—Larson v. Larson, 15 Cal. App. 531, 115 Pac. 340.

163. Same.—Excuse.—Reporter's failure to file with clerk.—The failure to file the transcript within the time limited by law,

owing to the reporter's refusal to file it with the clerk because of the nonpayment of his fees, will not warrant a dismissal of the appeal, notwithstanding the appellant neglected to enforce such filing within a reasonable time by a proceeding in mandamus against the reporter.—Gjurich v. Fleg, 160 Cal. 331, 116 Pac. 745.

164. Same.—Insufficient transcript.—Where on an attempted appeal from a judgment the only papers filed in the appellate court, as constituting the record on appeal, consist of a typewritten transcript of the evidence taken at the trial, certified by the trial judge to be correct, together with loose copies of the complaint and answer, attested by the clerk, there being no attempt by the appellant, so far as shown by the record, to comply with section 953a, post, in securing a proper authentication of the requisite papers to be used upon such appeal, the appeal will be dismissed.—Dyer Law and Col. Co. v. Salisbury, 17 Cal. App. 393, 119 Pac. 947.

165. Same.—Nonconformity of transcript to Rules VII and VIII of the supreme court, being the ground of a motion to dismiss the appeal, the appeal being taken under the new and alternative method provided in sections 953a, 953b and 953c, post, motion will be denied where the record is not so voluminous as to require in its examination more than ordinary labor.—Naylor v. Adams, 15 Cal. App. 548, 114 Pac. 997.

166. Ruling against dismissal in the above instance not to form a precedent for any future case showing inexcusable breach of the rules.—Naylor v. Adams, 15 Cal. App. 548, 114 Pac. 997.

167. Same.—Testimony printed in the brief not enabling the court to comprehend the points in the case, the order appealed from must of necessity be affirmed upon the ground that no error has been shown.—Estate of McPhee, 156 Cal. 335, 342, 104 Pac. 455.

168. Whatever motive of utility or economy suggested the new sections regarding appeals added to the code by the statute of 1907, it is quite clear the legislature did not intend to require the reviewing court to grope through an unprinted transcription of the phonographic report of the trial to find the testimony and documents relied upon by the parties, or that it would be sufficient compliance with the statute for the parties to indicate in their briefs the portions of the record relied upon by simply citing the pages of this transcription where such portions are to be found. This is shown by the closing paragraph of this section.—Roussin v. Kirkpatrick, 8 Cal. App. 7, 8, 95 Pac. 1123.

169. Rehearing.—Denied, when.—Where the court had dismissed the appeal on motion of the respondent, a petition for a rehearing of the order of dismissal will be denied where the record shows that the judgment was entered July 15, 1908, that

thereafter motions were made to set aside a default and vacate the judgment which were finally denied June 13, 1910, but no appeal was taken from such order; the only notice of appeal being from the judgment, and made long after the lapse of the time within which the same could be made.—*Sheehan v. Lapique*, 15 Cal. App. 517, 115 Pac. 965.

As to rehearing generally, see par. 112, this note.

170. Taken or perferred too late—As to generally.—An appeal from a judgment taken more than six months after it is entered, is too late, and will be dismissed.—*Hellman v. Longley*, 154 Cal. 78, 97 Pac. 17; *Allen v. Allen*, 159 Cal. 198, 113 Pac. 160; *Sheehan v. Lapique*, 15 Cal. App. 517, 115 Pac. 965; *Bennett v. Potter*, 16 Cal. App. 183.

As to dismissal of appeal taken or notice served more than six months after judgment entered, see pars. 170-172, this note.

171. Appeal from an order denying a motion for a new trial taken sixty-one days after entry, will be dismissed on the ground that the appellate court is without jurisdiction to entertain these appeals.—*Hellman v. Longley*, 154 Cal. 78, 97 Pac. 17.

172. Same.—Failure to file transcript in time.—Where the transcript upon appeal was not filed within the forty days required after the appeal was perfected, and was not on file when the notice of motion to dismiss the appeal was given, assuming that facts might exist which would excuse the default, no such excuse was made to appear by an affidavit of appellant's attorney that he left the transcript with respondent's attorney for examination, before certifying to its correctness, that it was returned to his office in ample time to file the same, and that appellant's attorney, through inadvertence and neglect, overlooked the time for filing the same; and respondent is entitled to have the appeal dismissed.—*Gervais v. Joyce*, 15 Cal. App. 189, 114 Pac. 406.

173. Same.—Same.—Affidavit of merits essential.—If rules similar to those governing applications for relief under section 473, ante, are to be applied in the appellate court, the party asking relief from his default must at least show that he has consulted counsel, and has been advised by them that he has reasonable grounds to expect a reversal if the appeal is heard upon its merits.—*Erving v. Napa Valley Brewing Co.*, 16 Cal. App. 41, 116 Pac. 331.

174. The appellant here stands contending merely for the technical right of appeal, not even the attorney in his affidavit intimating that he believes there is any merit in the appeal.—*Erving v. Napa Valley Brewing Co.*, 16 Cal. App. 41, 116 Pac. 331.

IV. TRANSFER OF CAUSE—REQUISITE PROCEEDINGS.

As to supersedeas and stay of process, see post, § 949 and note.
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As to undertaking on appeal, see, post, §§ 942, 945, 947 and notes.

175. In general.—Construction.—The provisions of section 941, post, and the succeeding sections with regard to taking appeals does not repeal the old method and it is sufficient if an appeal is perfected under either method and thus an appeal is perfected by the filing of a notice of appeal which is sufficient under the new method, although no sufficient undertaking under the old method was filed.—*Russell v. Banks*, 11 Cal. App. 450, 451, 105 Pac. 261.

176. The taking of appeal under section 941, post, and the succeeding sections does not dispense with the necessity of complying with the statutory provisions for the preparation of bills of exceptions, etc., to be used on the appeal or to dispense with the giving of notice to adverse parties of intention to move for new trial or of settlement of bill of exceptions, etc., and appealing party must comply with the statute in this respect or his bill of exceptions can not be reviewed or considered.—*Ford v. Braslan Seed Growers Co.*, 10 Cal. App. 762, 766, 103 Pac. 946.

177. Appeal from judgment under the provisions of section 941, post, and the succeeding sections upon filing of a notice of appeal without service brings up for review the judgment and whatever is properly part of the judgment-roll, and an appeal from an order brings up the order for the sections refer to orders as well as to judgments.—*Ford v. Braslan Seed Growers Co.*, 10 Cal. App. 762, 766, 103 Pac. 946.

178. Same.—Method of perfecting appeal.—Preparation of transcript.—The supreme court has jurisdiction of appeal taken under the provisions of section 940, post, whether the transcript is prepared and filed as provided by the rules of the supreme court, or under sections 953a, et seq., post, and its jurisdiction is not ousted by the preparation of the transcript by either method.—*Lang v. Lilley & Thurston Co.*, 161 Cal. 297, 119 Pac. 100.

179. Same.—Proceedings to perfect appeal.—Generally.—Statutes providing for appeals should be liberally construed and applied, and only a substantial departure from the rules thus laid down, or from the rules relating to and regulating the appellate practice and procedure, should be held sufficient to deprive a litigant of the right to have the merits of his cause reviewed by the courts of last resort.—*Jaques v. Yuba County Supervisors*, 22 Cal. App. 627, 135 Pac. 686.

180. An appeal taken from a judgment on the judgment-roll alone need not be prosecuted under the old method.—*Jaques v. Yuba County Supervisors*, 22 Cal. App. 627, 135 Pac. 686.

181. Same.—Same.—In case of superintendent of banks.—Mandamus will not lie to compel the superior court to direct the

issuance of a writ of execution upon a decree of foreclosure of a deed of trust, where an appeal has been taken from the judgment by the state superintendent of banks, who appeared in the action and contested the validity of all bonds secured by the deed of trust except those held by the insolvent bank that he represented, and the court has ordered that no undertaking shall be required of him to stay the execution pending the appeal, since such order is justified by both sections 946 and 1058, post.—*Mercantile Trust Co. v. Miller*, 166 Cal. 563, 137 Pac. 913.

182. The state superintendent of banks, when performing the duties of his office required of him by the statute in taking possession of and proceeding to liquidate the assets of a banking corporation, is acting as a state officer in his official capacity within the meaning of section 1058, post, and the effect thereof is to exempt him from the obligation to give an undertaking on appeal from a stay of execution when he takes an appeal from any judgment in which, as such superintendent of banks, he is interested on behalf of any bank under his control and of whose assets he has taken possession.—*Mercantile Trust Co. v. Miller*, 166 Cal. 563, 137 Pac. 913.

183. The purpose of section 946, post, in providing that the court below may, in its discretion, dispense with or limit the security required on appeal when the appellant is an executor, administrator, trustee or other person acting in another's right, is to excuse a stay bond when the trial court in its discretion shall so order, where the appellant is a trustee acting under and by virtue of some official authority, whether by appointment of the court or by appointment under a statute as an officer of the state.—*Mercantile Trust Co. v. Miller*, 166 Cal. 563, 137 Pac. 913.

184. **Intention to move for new trial.—Notice of.**—Where the notice of intention to move for a new trial does not set forth, among those relied upon for a new trial, the ground that the court abused its discretion by its disallowance by the proposed amendment, but merely charges, so far as are concerned, the grounds embraced within the first subdivision of section 657, post, "Irregularity in the proceedings of the court," "Irregularity in the proceedings and conduct of the jury," and "Irregularity and misconduct on part of the plaintiff," it is very clear that the alleged abuse of discretion can not be reviewed upon either of the foregoing grounds, and it therefore follows that there is no record authorizing an appellate court to review the action of the trial court in denying defendant's application to amend its answer.—*Cook v. Suburban Realty Co.*, 20 Cal. App. 538, 129 Pac. 801, 803.

185. A notice of intention to move for a new trial, printed elsewhere in the transcript, and stating certain grounds for the

motion, but not incorporated in the statement of the case used upon the motion, can not be considered as part of the record upon appeal from the order denying the motion for a new trial.—*Carver v. San Joaquin Cigar Co.*, 16 Cal. App. 761, 118 Pac. 92.

186. **Notice that transcript of testimony be made up (New Method).**—As to giving of being jurisdictional.—Notice of appeal, service of, is not necessary under this section, but notice that transcript of testimony be made up and prepared is necessary, and the same within the time fixed therefor is jurisdictional.—*Watson v. Dingley*, 14 Cal. App. 88, 111 Pac. 106.

See par. 208, this note.

187. **Same.—Duty of reporter.**—The reporter is required not only to prepare but also to file the transcript, and if he refuses may be compelled to do so by mandate.—*Gjurich v. Fleg*, 160 Cal. 332, 116 Pac. 745.

188. **Same.—Time begins to run, when.**—Rule as to commencement of time to give notice to clerk to prepare transcript, in the absence of formal notice of entry of judgment, held to follow the rule as to time to amend or answer after demurrer sustained, as prescribed in section 476, ante, as such rule is stated in *Barron v. Delaval*, 58 Cal. 96, and subsequent decisions.—*Estate of Keating*, 158 Cal. 111, 110 Pac. 109.

See, ante, § 476 and note.

189. **Old method of appeal.—In general.—Prematurely taken, can not be entertained.**—An appeal taken before actual entry of the judgment in the judgment-book required by law to be kept for the purpose can not be entertained.—*Wood, Curtis & Co. v. Missouri Pac. R. Co.*, 152 Cal. 344, 846, 92 Pac. 868.

190. **Same.—Same.—Probate orders included.**—Under the provisions of section 1704, post, probate orders are required to be entered in the minute book of the court, and it is held that such entry starts the time running within which an appeal therefrom must be prosecuted.—*Tracy v. Coffey*, 153 Cal. 358, 95 Pac. 150.

191. **Same.—Time of taking.—Generally.**—An appeal from a judgment taken more than six months after its entry was taken too late and the points urged under it can not be considered.—*Roney v. Reynolds*, 152 Cal. 324, 92 Pac. 847; *Sequeira v. Collins*, 153 Cal. 427, 95 Pac. 376; *Dundas v. Lankershim School Dist.*, 155 Cal. 693, 102 Pac. 925; *Allen v. Allen*, 159 Cal. 198, 113 Pac. 160; *Sessions v. Southern Pac. Co.*, 159 Cal. 601, 114 Pac. 982; *Breidenbach v. M. McCormick Co.*, 20 Cal. App. 184, 128 Pac. 423, following *Brownlee v. Reiner*, 147 Cal. 641, 82 Pac. 324, and *Sheakley v. Nelson*, 13 Cal. App. 379, 109 Pac. 891.

192. A notice of appeal filed more than seven months after entry of judgment is too late and the appeal will be dismissed.—*Bennett v. Potter*, 16 Cal. App. 185, 116 Pac. 681.

193. Same—Same—Appeal from order on motion for new trial must be taken within sixty days after the order is entered.—*Union Lumber Co. v. Sunset Road Oil Co.*, 17 Cal. App. 462, 120 Pac. 44.

194. Same—Same—Effect of delay.—Upon appeal from the judgment taken more than sixty days after the rendition of the judgment, the sufficiency of the evidence to justify the decision is not reviewable, such review being expressly forbidden by section 939, post.—*Layne v. Johnson*, 19 Cal. App. 95, 124 Pac. 860.

195. Same—Same—Interlocutory judgment in partition.—Must be taken in sixty days of entry in the minutes, and if taken afterwards, though within sixty days after entry in the judgment-book, will be dismissed.—*Bloom v. Gordan*, 150 Cal. 763, 90 Pac. 115.

196. Same—Same—Judgment of foreclosure of mortgage can not be reviewed on appeal, where it is taken after six months from entry thereof.—*West v. Mears*, 17 Cal. App. 719, 121 Pac. 700.

197. Same—Same—Review of evidence—Amendment of 1907.—Where the appeal was taken prior to such amendment, the sixty-day period within which the appeal was required to be taken to authorize a review of the evidence, began to run from the rendition of judgment and not, as after such amendment, from its entry.—*Boin v. Spreckels*, 155 Cal. 616, 102 Pac. 937.

As to statement on appeal, and clear intention of legislature, see pars. 63-65, 122-124, this note.

198. New and alternative method of appeal—In general.—Authentication by trial judge necessary.—*Credit Clearance Bureau v. Weary & Alford Co.*, 18 Cal. App. 467, 468, 123 Pac. 548.

As to notice that transcript be made up, under this method of appeal, see pars. 186-188, 208, this note.

As to review of evidence on appeal taken under the new and alternative method, see pars. 13, 14, this note.

199. Correct notice of appeal and requisites thereof are prescribed by section 941b, post.—*Bolling v. Alton*, 162 Cal. 297, 122 Pac. 461.

200. Where order appealed from is identified with reasonable certainty, no more is required.—*Larsen v. Larsen*, 15 Cal. App. 536, 115 Pac. 340.

201. Where the appellant desires to dispense with a bill of exceptions and secure an authenticated transcript under the provisions of this section, he must file the notice prescribed herein, otherwise no duty devolves upon the clerk to prepare, authenticate, and send up the judgment-roll, without which, or a printed transcript of the papers required for use on appeal, there is no record of a judgment from which an appeal would lie, and no record showing

that an appeal was taken.—*Dyer Law & Col. Co. v. Sallsbury*, 17 Cal. App. 395, 119 Pac. 947.

202. Where it is clear that an appeal from an order denying a motion for a change of venue was sought to be taken under the new and alternative method, a review thereof upon the merits will not be denied because service of the notice of appeal was not shown, nor that an undertaking for the costs of the transcript was given, nor that there was any notice and request for a transcript, where the record, which consists wholly of the pleadings and affidavits, was written out in long hand by the appellant, and properly certified and authenticated by the trial judge.—*Carr v. Stern*, 17 Cal. App. 401, 120 Pac. 35.

203. Same—Same—Loss of right to.—Right to prosecute an appeal under new and alternative method held to have been lost by failure of appellant to give the notice required, where a judgment-roll is not to be made up.—*Estate of Keating*, 153 Cal. 111, 110 Pac. 109.

204. Same—Same—Presumption as to usual proceedings.—Service of notice of appeal and bond for costs are not required, and where the trial judge certifies the transcript, it is presumed, in the absence of any showing to the contrary, that the clerk gave the attorneys the usual and requisite notice as to the filing of the transcript, and of the presentation thereof to the judge for his approval.—*Carr v. Stern*, 17 Cal. App. 401, 120 Pac. 35.

As to presumptions on appeal generally, see pars. 96-107, this note.

205. Same—Construction—As to question of title of act bearing on.—Construction of act can have no bearing on the question whether the title of the act (Stats. 1907, p. 750) by which section 953a, post, and the succeeding sections were enacted, is in violation of section 24 of article IV of the constitution requiring that their act shall embrace but one subject which shall be embraced in its title. It is not necessary that the title of an act should contain an abstract or catalogue of its contents. The provision must be liberally construed, and all that is necessary is a reasonably intelligent reference to the subject to which the legislation of the act is to be addressed.—*Estate of McPhee*, 154 Cal. 385, 389, 390, 97 Pac. 878.

206. Same—Same—Decrees and orders included.—The provisions of section 941a, post, and the succeeding sections apply to orders and decrees in probate.—*Estate of McPhee*, 154 Cal. 385, 392, 97 Pac. 878.

207. Under these sections the appellant may take his appeal from an order denying a motion for a new trial at any time within sixty days after receiving notice thereof, provided that in any event it be taken within six months.—*Brode v. Goslin*, 158 Cal. 699, 112 Pac. 280.

206. Same—Same—Notice to clerk to prepare transcript must be given within ten days after the filing of the notice of appeal, and where no such notice is given, there is no provision for the transcript and the appeal will be dismissed.—*Estate of Keating*, 158 Cal. 109, 110 Pac. 109.

As to giving of notice jurisdictional, see pars. 186-188, this note.

209. Same—Same—Probate orders included.—Probate orders are, by the express terms of this section, brought within its provisions.—*Estate of McPhee*, 154 Cal. 392, 97 Pac. 878.

210. Same—Constitutionality.—"Due process of law."—The act adding section 953a, post, and the two following sections is not unconstitutional as being violative of section 24 of article IV of the constitution.—*Estate of McPhee*, 154 Cal. 390, 97 Pac. 878. See, also, pars. 240, 287, this note.

211. The method of appeal provided by section 941a, post, and the succeeding sections is not violative of the constitutional provisions requiring "due process of law" in that it does not provide for service of notice of appeal. An appeal is purely a creature of the statute and the right thereto may be given or withheld as the legislature may see fit or may be granted under such terms and conditions as to notice the giving of undertakings as it may see fit to prescribe.—*Estate of McPhee*, 154 Cal. 385, 390, 97 Pac. 878.

212. Same—Time of taking—As to generally.—The provisions of section 941b, post, dealing with the new and alternative method of appeal, are also applicable to an appeal assumed to be taken under the older method, and in order that the time within which an appeal must be taken shall commence to run, appellant must be given notice of the entry of the judgment or order.—*Union Lumber Co. v. Sunset Road Oil Co.*, 17 Cal. App. 462, 120 Pac. 44.

213. Under section 941b, post, which prescribes a new method of appealing by name, the appeal must be taken within sixty days after the notice of entry of judgment, or, if no notice thereof be given, not later than six months after the entry of such judgment. Hence, where the appeal from the judgment was not taken until fifteen months after the entry of said judgment, such appeal must be dismissed.—*Cook v. Suburban Realty Co.*, 20 Cal. App. 538, 129 Pac. 801, 802.

214. Same—Same—In probate matters is not enlarged by sections 941a et seq., post, but such appeals are governed by the provisions of sections 1714 and 1715, post.—*Estate of Dunphy*, 158 Cal. 1, 109 Pac. 627.

215. The enactment of section 941a, post, did not affect the limitation of the time for taking appeals in probate and matters prescribed in section 1715, post, nor

by implication repeal that section.—*Lane v. Tanner*, 156 Cal. 135, 137, 103 Pac. 846.

216. Same—Same—Notice of entry of judgment or order—As to filing.—Notice of entry of judgment or order shall be filed or put of record. The statute does not direct. In the orderly course of procedure, it should be filed even if the statute does not direct it.—*Foss v. Johnstone*, 158 Cal. 119, 110 Pac. 294.

217. In the absence of any evidence of notice to appellant furnished by the record, the burden is upon the respondent to show that a notice of the entry of the judgment or order has been given, and the time thereof. Where, in this case, there appears nothing in the record from which it can be determined whether any notice was ever given of the order of the court denying appellant's motion for a new trial, the appeal therefrom must be treated as having been regularly taken, and in time.—*Union Lumber Co. v. Sunset Road Oil Co.*, 17 Cal. App. 460, 120 Pac. 44.

218. Where an appeal is taken from the judgment within six months after the entry of the judgment, under the new or alternative method provided in sections 941a and 941b, post, and the record does not disclose that any notice of the entry of the judgment has been served, the appeal appears to have been taken in due time; and the appellant is entitled, under section 941c, post, to have a review of the sufficiency of the evidence to support a finding, with the same effect as is provided in case of an appeal taken under section 939, post, of such code, within sixty days after the entry of the judgment.—*Brown v. Coffee*, 17 Cal. App. 381, 121 Pac. 309.

219. The sole purpose of the notice of entry of the judgment or order is to mark the beginning of the period limited for taking an appeal. When such notice is given the appellant could make the transcript show jurisdiction by inserting a copy of it with an admission of service and of the certificate of filing if it is on file. But if none is given and the appeal is taken more than sixty days after the entry, the appellant can make no showing of record on the subject, and can prove that his appeal is timely only by filing with the transcript an affidavit that no notice of entry has been served. In the absence of notice, the statute fixes the arbitrary limit at six months from the time of the entry. Jurisdiction of such appeals taken prior to that time and after sixty days from the entry must therefore depend upon matters not required to be of record. In these circumstances, it seems that the better rule is to require the respondent if he desires to raise the question to support his claim by affidavit or other evidence showing service of the required notice of entry of the order appealed from and the date of such service.—*Foss v. Johnstone*, 158 Cal. 119, 110 Pac. 294.

220. Same—Same—Same—Appeal from new trial order.—Notice not required in case of appeal from new trial order.—*Bell v. Staacke*, 148 Cal. 405, 83 Pac. 245.

221. Same—Same—Same—Burden upon respondent to show service.—In the absence of any evidence of a notice to appellant furnished by the record, the burden is on the respondent to show that notice of the entry of judgment or order was given, and the time thereof; and on his failure to do so, the appeal must be treated as having been regularly taken, and in time.—*Union Lumber Co. v. Sunset Road Oil Co.*, 17 Cal. App. 460, 120 Pac. 44.

222. Where the respondent on appeal from the judgment to the district court of appeal objects to any review or consideration of the evidence on the ground that the appeal had not been taken within sixty days after notice of the entry of the judgment, it is his duty to furnish proof of the service of the notice to that court, which would have prevented a review of the evidence on such appeal. (By the court in bank, on petition for rehearing.)—*Brown v. Coffee*, 17 Cal. App. 381, 121 Pac. 309.

223. Where an appeal from a judgment only is taken under the new or alternative method, sections 941a and 941c, post, the question of the evidence to support the findings can be reviewed, where the appeal was taken "within sixty days after notice of entry of judgment," and there is no evidence in the record of any notice of the rendition of the judgment having been served on the defendant.—*Rossi v. Beaulieu Vineyard*, 20 Cal. App. 770, 130 Pac. 201, 203.

224. Same—Same—Same—Limitation of review.—Where a party wishes to take advantage of the fact that notice of the entry of the judgment was served, for the purpose of preventing a consideration of the evidence on appeal from the judgment taken more than sixty days after its entry, he must show that such notice was served more than sixty days before the taking of such appeal. Otherwise the appeal will be considered as having been taken under sections 941a, 941b and 941c, post. In such a case, by the provisions of sections 941b and 941c, post, the sufficiency of the evidence is reviewable in the same manner as if the appeal had been taken within sixty days of the entry of the judgment under section 939, post.—*Dennis v. Gordon*, 163 Cal. 427, 125 Pac. 1063.

225. Same—Same—Same—Necessity of notice.—Where there is nothing in the record from which the appellate court can determine whether any notice of entry of judgment or order was given, the appeal will be treated as regularly taken, and in time.—*Union Lumber Co. v. Sunset Road Oil Co.*, 17 Cal. App. 462, 120 Pac. 44.

226. Same—Same—Same—Relief of respondent after judgment, not allowed.—If the respondent desires relief after judgment in the district court of appeal from

the consequences of his omission to supply proof of a service of the notice of entry of the judgment, which he offers upon a petition for rehearing in bank, he should have sought that relief in the district court of appeal having original jurisdiction of the appeal, and of all questions essential to its decision; and the court in bank can not sanction such irregular practice. (By the court in bank on petition for rehearing.)—*Brown v. Coffee*, 17 Cal. App. 381, 121 Pac. 309.

227. Same—Same—Right of attorney of record of deceased person to take an appeal is limited to the period prior to the appointment of a personal representative of the decedent and ceases when such appointment is made.—*Delter v. Kiser*, 158 Cal. 259, 110 Cal. 921, 922.

228. Same—The transcript on appeal—Old method of appeal.—Affidavit of appellant that transcript is in all respects true and correct can not take the place of the certificate of the clerk or stipulation of the attorneys, without which the proceedings can not be reviewed on appeal.—*Snipsic Co. v. Riverside Music Co.*, 6 Cal. App. 115, 91 Pac. 747.

As to mode of preparation of transcript on appeal, and the giving of appellate court jurisdiction thereunder, see par. 178, this note.

229. Same—Same—Same—Filing transcript—Change of venue—Appeal from order.—Pendency of appeal from order denying the motion for change of venue, preparation of bill of exceptions thereon and intention of counsel to move the appellate court that the same be incorporated in a transcript on appeal from judgment, does not excuse failure to file transcript on appeal from the judgment within the time prescribed, and appeal from the judgment may be dismissed for failure to file such transcript.—*Union Lumber Co. v. Metropolis Const. Co.*, 13 Cal. App. 584, 586, 110 Pac. 329.

230. Same—Same—Same—Same—Delay inexcusable—Dismissal of appeal.—Where the delay of upwards of two years in the filing of the transcript, after the perfecting of the appeal, was due to the negligent inattention of appellant's attorneys in obtaining a restoration of the record of the order appealed from, under the act of June 16, 1906, such delay is held to warrant dismissal of the appeal.—*Estate of Heywood*, 154 Cal. 315, 97 Pac. 825.

As to dismissal of appeal for delay in filing transcript, see pars. 141-150, this note.

231. Same—Same—Same—Same—Divorce action.—In an action for divorce where the wife shows she is unable to pay the costs of printing the transcript and has an appeal pending from her motion to compel the respondent to pay her money for the same, the appeal from the judgment will not be dismissed for failure to file the transcript pending the determination of the appeal

from the order.—*Robinson v. Robinson*, 158 Cal. App. 117, 110 Pac. 112.

232. Same—Same—Same—Same—Under Rule II.—The forty-day period within which, under the provisions of Rule II, the transcript must be filed, does not commence to run until the settled or authenticated bill or statement has been filed; and this includes any proceeding, looking to the settlement of such a bill, actually inaugurated and pending undisposed of, and not abandoned, regardless of all questions as to whether the proceeding can ultimately avail and the bill be legally settled.—*Dernham v. Bagley*, 151 Cal. 217, 90 Pac. 543.

As to requirement that transcript shall comply with the rules of the supreme court, see Part VIII, this note.

233. Same—Same—Same—Same—Pending settlement of bill or statement.—In order to come within the operation of the rule, the bill or statement, settlement of which is pending undisposed of, must be one that may be used on the appeal.—*Dernham v. Bagley*, 151 Cal. 219, 90 Pac. 543.

234. Same—Same—New and alternative method of appeal—As to generally.—A transcript of the testimony and proceedings prepared under section 953a, post, in lieu of a bill of exceptions must be settled and allowed by the judge and certified by him to be correct, to constitute an available record on appeal.—*Williams v. Lane*, 158 Cal. 40, 109 Pac. 873.

235. The method of preparing and filing a transcript hereunder is independent of the method of perfecting the appeal under the provisions of sections 941 and 941a, et seq., post; and the method provided under section 953a, post, and the two following sections may be adopted, whether the appeal is perfected under the old or the new method; and conversely, whether perfected under the new or old method, the transcript may be prepared and filed under either method, at will.—*Lang v. Lilley & Thurston Co.*, 161 Cal. 296, 119 Pac. 100.

236. Same—Same—Same—Not as to correctness.—The new method of preparing records on appeal, as provided by sections 953a, 953b and 953c, post, does not require or authorize the judge to certify to the correctness of any papers except such as form part of a transcript designed to take the place of a bill of exceptions.—*Knoch v. Halzlip*, 163 Cal. 20, 22, 124 Pac. 997.

237. Same—Same—Same—Evidence—Can not be considered by the appellate court upon appeals taken under section 941a, post, unless contained in a transcript as provided by section 953a, post, or a statement or bill of exceptions properly authenticated.—*Lane v. Tanner*, 156 Cal. 135, 137, 103 Pac. 846.

See pars. 462-464, this note.

238. Same—Same—Same—Notice of entry of judgment.—Upon an appeal from a judgment against the plaintiff in an action

for services taken under the alternative method, where the respondent objected to the transcript because the notice of the entry of the judgment under section 953a, post, is not presented on time, it is held that where the notice given was a question of fact, to be determined by the judge to whom the transcript was given for certification, and if the respondent wished to object to its authentication, he should have presented the matter upon a bill of exceptions.—*Hecker v. Baker*, 19 Cal. App. 667, 668, 127 Pac. 654.

See pars. 216-226, this note.

239. Same—Same—Same—Preparation of transcript—As to generally.—The act of 1907 (Stats. 1907, p. 753) providing, by section 941a, post, and the two following sections, a new and alternative method of perfecting an appeal, is entirely independent of the act (Stats. 1907, p. 750) providing a new and alternative method of preparing a transcript on appeal; and after an appeal has been perfected hereunder, the transcript may be prepared by printing and filing the same under the provisions of the rules of the supreme court, or a typewritten transcript may be prepared in the manner prescribed under sections 953a, et seq., post.—*Lang v. Lilley & Thurston Co.*, 161 Cal. 296, 119 Pac. 100.

240. Same—Same—Same—Constitutionality of method of.—The provisions relating to the preparation of a transcript under the new and alternative method of appeal are not unconstitutional because of the omission to make provision for service of the notice filed with the clerk, that appellant intends to appeal, etc.—*Estate of McPhee*, 154 Cal. 391, 97 Pac. 391, 878.

See, also, pars. 210, 211, 287, this note.

241. Same—Same—Same—Order on motion to change place of trial—Rules of court.—Such a motion being heard, at least in part, on affidavits, to perfect an appeal from the order, attempted under the new and alternative method of appeal by a notice as required by section 941b, post, it is necessary to follow up such a notice by the method prescribed in sections 953a, et seq., post, or by that prescribed by Rule XXIX of the supreme court; and where the appellant did neither, the ordinary practice would be dismissal of the appeal for want of a proper transcript, or an affirmance for the same reason, but jurisdiction having been acquired by the notice, under the notice prescribed by section 941b, post, the order will be affirmed for lack of a record showing error.—*Hibernia Sav. & L. Soc. v. Doran*, 161 Cal. 119, 118 Pac. 526.

242. Same—Same—Exception to sufficiency of sureties—On appeal to superior court.—Where upon appeal from a justices' court to the superior court the respondent excepted to the sufficiency of the sureties upon the appeal bond, and the appellant gave notice of justification of the sureties and of the time set therefor, which was

more than five days after the service of the notice of exception, such delayed notice was ineffectual to confer jurisdiction of the appeal upon the superior court, and upon its dismissal of the appeal a writ of review will not lie to annul its action.—*Randall v. Superior Court*, 19 Cal. App. 184, 124 Pac. 1058.

243. Same—Same—Same—Justification of sureties on appeal bond—Notice of.—Where a notice for the justification of the sureties on an appeal bond and the time set therefor is more than five days after service of the notice of exception, this is beyond the time authorized by statute, and such notice is ineffectual to preserve the rights of the parties upon the appeal.—*Randall v. Superior Court*, 19 Cal. App. 184, 124 Pac. 1058.

244. Notice of appeal—Old method of appeal—In general—As to necessity for service of.—In order to confer jurisdiction upon the appellate court, all parties to the controversy, whose interests would be injuriously affected by a reversal of the judgment, must be served with notice of the appeal.—*Mannix v. Tryon*, 152 Cal. 33, 91 Pac. 983.

As to parties entitled to notice, see notes 13 Ann. Cas. 181; 21 Ann. Cas. 1277.

As to time for filing notice, see note 9 Ann. Cas. 731.

245. Prior to amendment of 1907 the notice of appeal was required to be served as well as filed sixty days after the entry of an order and notice filed but not served within that time was not sufficient to confer jurisdiction upon the appellate court.—*Davey v. Mulroy*, 7 Cal. App. 1, 6, 93 Pac. 297; *Carr v. Stern*, 17 Cal. App. 401, 120 Pac. 35.

246. Prior to the adoption of the new and alternative method of appeal, the plaintiff who appealed from a judgment dismissing his complaint under the McEnerney Act to quiet title, as against certain defendants who appeared therein, was not required to serve notice of appeal upon all the world, but only upon those who appeared from the record to be adverse, that is, those who personally appeared.—*Potrero Nuevo Land Co. v. All Persons*, 155 Cal. 377, 101 Pac. 12.

247. Same—Same—Same—Address.—Not necessary; but if used limits the notice. Thus, where addressed to an attorney of heirs who were petitioners for distribution, an admission of service by such attorney binds only such heirs, and does not bind others represented by the same attorney.—*Estate of Pendergast*, 143 Cal. 137, 76 Pac. 962; also, *Burnett v. Piercy*, 149 Cal. 182, 86 Pac. 603.

248. Same—Same—Same—Admission of service of.—An attorney for several adverse parties to an appeal, may limit his admission of service to one or more, and when this is done such admission of service can not bind the parties omitted therefrom.—*Burnett v. Piercy*, 149 Cal. 182, 86 Pac. 603, following doctrine in *Estate of Pendergast*, 143 Cal. 138, 76 Pac. 962.

249. Same—Same—Same—Death of an adverse party does not obviate the necessity of service of the notice, but such service must be made upon the personal representative of the deceased, and failure to make such service within the statutory time results in the loss of the right of appeal.—*Bell v. San Francisco Sav. Union*, 153 Cal. 70, 94 Pac. 225.

250. The death of an adverse party to such an appeal, terminates the authority of his attorney, and service of the notice of appeal upon such attorney is not effectual, so far as his interests are concerned.—*Bell v. San Francisco Sav. Union*, 153 Cal. 69, 94 Pac. 225.

251. Same—Same—Same—Same—Necessity of service of on personal representative.—If the appellant is unable to procure the appointment of a personal representative and to serve the same within the statutory time, his appeal is lost.—*Bell v. San Francisco Sav. Union*, 153 Cal. 70, 94 Pac. 225.

252. Same—Same—Same—Delay in giving.—Where the notice of appeal was from a judgment and an order denying a new trial, and more than six months had elapsed after entry of the judgment, the appeal therefrom can not be considered.—*Chase v. Holmes*, 19 Cal. App. 670, 127 Pac. 652.

253. Same—Same—Same—Dismissal for failure to serve adverse party.—The question as to whether the party not served is "adverse" within the meaning of section 940, post, is to be determined from an examination of the record itself, and an affidavit dehors such record can not be considered.—*Bell v. San Francisco Sav. Union*, 153 Cal. 73, 94 Pac. 225.

As to dismissal generally, see Part III, this note.

254. The supreme court necessarily determined that a co-defendant was an adverse party, within the meaning of section 940, post, in dismissing an appeal from the judgment, taken by the other co-defendant, on the ground of failure to serve the notice of appeal on his co-defendant.—*Johnson v. Phenix Ins. Co.*, 152 Cal. 197, 92 Pac. 182.

255. While it is essential that all whose interests are adverse to the reversal of the order must be served with notice of appeal, if the judgment may be modified in any manner favorable to the appellant without injuriously affecting the interest of the party not served, the appeal will not be dismissed; but the court will "decide the case with respect to the interests of the other parties, so far as it may be done without injuriously affecting the interests of the party not served."—*Bell v. San Francisco Sav. Union*, 153 Cal. 71, 94 Pac. 225.

256. Same—Same—Same—Same—Burden of proof is upon the respondent, moving to dismiss an appeal for want of service of notice of appeal upon an adverse party, to show from the record that the party not

served was adverse in interest, requiring to be served, and where the record fails to show affirmatively that the party not served was adverse, the motion to dismiss will be denied.—*Niles v. Gonzales*, 152 Cal. 96, 92 Pac. 74.

257. Same—Same—Same—Same—In advance of hearing on merits.—Where the determination of the question as to whether all adverse parties were served with notice of appeal as required necessitates an examination of the record on appeal, the appeal will not be dismissed in advance of the hearing on the merits.—*Quist v. Michael*, 153 Cal. 366, 95 Pac. 658.

258. Same—Same—Same—Effect of failure to give or serve.—Where the defendant gave no notice of appeal, either from the order striking the statement of the case from the files or dismissing the motion for a new trial, conceding the orders to have been the subject of appeal, in the absence of any appeal therefrom, the action of the trial court in making them can not be reviewed on appeal.—*De Mitchell v. Croake*, 30 Cal. App. 643, 129 Pac. 946, 947.

259. Same—Same—Same—Form of, sufficiency of.—Where in the complaint and judgment the name of the defendant is stated to be "Board of Regents of the University of the State of California," and the notices of appeal state that the appeals are taken by the defendant, and its true name is "Regents of the University of California," a motion to dismiss the appeals because of this discrepancy, claiming that there is no appeal on behalf of the party named in the complaint and judgment as the defendant is without merit. The name as given in the complaint and judgment is a misnomer. The true name is that given in the notices of appeal (*Stats.* 1867-68, p. 252). The misnomer in this case is wholly immaterial.—*Webster v. Board of Regents*, 163 Cal. 705, 126 Pac. 974, 975.

260. Same—Same—Same—Mistake in notice as to date of order or judgment appealed from, does not invalidate the appeal where there is a description of the order or judgment referred to in other parts of the notice sufficient to identify it.—*Foss v. Johnstone*, 158 Cal. 119, 110 Pac. 294.

261. Same—Same—Same—Voluntary appearance.—While the voluntary appearance of an adverse party may confer jurisdiction to consider the appeal, such appearance must be within the statutory time to give the notice of appeal; and a voluntary appearance after the lapse of such time is ineffectual for the purpose.—*Bell v. San Francisco Sav. Union*, 153 Cal. 70, 94 Pac. 225.

262. Same—Same—Same—Same—Stipulating appeal has been perfected.—Following *Carey v. Brown*, 58 Cal. 180, and *Valley Lumber Co. v. Struck*, 146 Cal. 268, 80 Pac. 405, it is held that a stipulation that an ap-

peal has been perfected constitutes an appearance by all respondents bound thereby, and precludes dismissal for want of service of notice of appeal upon any of them.—*Burnett v. Piercy*, 149 Cal. 184, 86 Pac. 603. See par. 265, this note.

263. Same—Same—Same—Waiver—Of notice.—In order to vest jurisdiction in the appellate court the notice of appeal must be both served and filed within the time allowed for the taking of the appeal, and if the notice has not been served within the time required by law, the appellate court has no jurisdiction of the case, and jurisdiction can not be conferred by a waiver made after the time for taking the appeal has expired.—*Niles v. Gonzales*, 152 Cal. 93, 92 Pac. 74.

264. The court, in following cases cited, seems to adopt the principle that the notice of appeal itself may be the subject of a distinct waiver in the same way that a summons in an action may be waived; i. e., by appearance in person or by attorney in court.—*Burnett v. Piercy*, 149 Cal. 182, 86 Pac. 603.

265. Same—Same—Same—Same—Stipulation waiving service.—Service of notice of appeal upon all adverse parties, within the time prescribed, is necessary to vest the appellate court with jurisdiction of the cause, and failure to comply with this requirement can not be cured by a written stipulation waiving such service, entered into after the expiration of the statutory time.—*Niles v. Gonzales*, 152 Cal. 92, 92 Pac. 74.

See par. 262, this note.

266. Same—Same—Same—Editorial note—Wide difference between waiver of service of notice and waiver of notice.—"Waiver implies consent and consent may excuse error or omission, but can not confer jurisdiction. Yet, to say that an appeal may be perfected by the mere appearance of a party in the appellate court, by attorney, without any notice of appeal at all, is to confer jurisdiction by consent, and is diametrically opposed to the well settled doctrine . . . that appeals being creatures of statute must be perfected in the manner prescribed."—*Hayne New Trial and Appeal*, p. 1146, rev. ed. § 210.

267. Moreover, it is to be observed, as pointed out elsewhere by the editor of the revised edition of *Hayne on New Trial and Appeal* (§ 210, note 46) "that in all the cases where a stipulation is relied upon, it is to the general effect that the appeals have been duly taken and perfected, following the general character of the stipulation in that the thing required to be done has been done, not that it may be omitted. In this sense only has it ever been held that even service of the notice might be dispensed with."

268. Same—Same—"Adverse party"—Who is—As to generally.—The record and the record only must be looked to to determine

who is an "adverse party."—*O'Rourke v. Finch*, 8 Cal. App. 263, 265, 96 Pac. 784.

269. An "adverse" party within the meaning of this section, means a party whose interest in relation to the subject of the appeal is in conflict with a reversal of the order or the decree appealed from, or the modification sought by the appeal.—*Mannix v. Tryon*, 152 Cal. 33, 91 Pac. 983.

270. An "adverse party" within the meaning of this section is one "whose interest in the subject-matter of the appeal is adverse to or will be affected by the reversal of the judgment or order from which the appeal was taken."—*Bell v. San Francisco Sav. Union*, 153 Cal. 71, 94 Pac. 225.

271. The adverse party upon whom notice of appeal is to be served is the party who appears by the record to be adverse, and the record to be construed for that purpose is the record in the proceedings in which the appeal is taken.—*McKenzie v. Hill*, 9 Cal. App. 78, 80, 98 Pac. 55.

272. Whether a certain person is an "adverse" party to an appeal must be determined by an examination of the relative positions of the party on the record and the affirmations in their pleadings. Every party whose interest in the subject-matter of the appeal is adverse to or will be affected by the reversal or modification of the order of judgment from which the appeal has been taken is an "adverse party," irrespective of the question whether he appears upon the face of the record in the attitude of plaintiff or defendant or intervenor.—*Ford v. Cannon*, 5 Cal. App. 185, 187, 89 Pac. 1071.

273. Same — Same — Same — An "adverse party" within the meaning of section 940, post, is one whose interest in the subject-matter of the appeal is adverse to, or will be affected by, the reversal or modification of the judgment or order from which the appeal has been taken.—*Bell v. San Francisco Sav. Union*, 153 Cal. 64, 71, 94 Pac. 225.

274. Same — Same — Same — Burden of showing party not served is adverse is upon the party who moves to dismiss the appeal on that ground, and where the record fails to show that the party not served is adverse to the action in the lower court, the motion to dismiss will be denied.—*Potrero Neuvo Land Co. v. All Persons*, 155 Cal. 372, 101 Pac. 12.

275. Same — Same — Same — Defaulting parties defendant are not adverse to other defendants when there is no joint relation between them alleged, a judgment against each being in such case several and independent.—*Potrero Neuvo Land Co. v. All Persons*, 155 Cal. 372, 101 Pac. 12.

276. Same—Same—Same—Foreclosure of laborer's lien.—On appeal by the owner from a judgment of foreclosure of liens in favor of laborers employed by a contractor gathering tan bark, where there was a personal judgment for the full amount

against such contractor, the latter is not an adverse party, requiring to be served with notice of appeal.—*Quist v. Sandman*, 154 Cal. 750, 99 Pac. 204.

See par. 283, this note.

277. Same—Same—Same—Foreclosing mechanics' lien.—On an appeal by the owner from a judgment of foreclosure in an action to foreclose a mechanics' lien by a subcontractor against the original contractor and the owner, who had retained in his hands a part of the amount due on the contract, sufficient to satisfy plaintiff's demand, judgment being, besides that of foreclosure of the lien appealed from, against the contractor for the full amount claimed, and also for the docketing of any deficiency that might arise after the sale of the lot and application of its proceeds to the payment of the amount adjudged, it was held that the original contractor was not interested in the reversal of the judgment of foreclosure against the owner, alone appealed from, and was not an "adverse" party within the meaning of this section, requiring to be served with notice of appeal.—*Mannix v. Tryon*, 152 Cal. 33, 91 Pac. 983.

See par. 283, this note.

278. Same — Same — Same — Judgment-debtor who did not participate in proceedings supplementary to execution in which an order was entered against a garnishee, is not an adverse party on appeal by the garnishee from such order.—*McKenzie v. Hill*, 9 Cal. App. 78, 80, 98 Pac. 55.

279. Same—Same—Same—Order denying motion for new trial.—Notice of appeal need be served only on the parties who were adverse to the motion in the court below, and where the record fails to show that a party participated in the proceedings leading up to the settlement of the statement, or gave or received notice of intention to move for a new trial, or appeared upon the hearing of the motion, either in favor or in opposition to the granting of the motion, a motion to dismiss the appeal for failure to serve such party will be denied.—*Niles v. Gonzales*, 152 Cal. 96, 92 Pac. 74.

As to change of rule as to appealability of orders denying new trial, see par. 3, this note, and, post, § 963 and note.

280. Such notice need be served only on the parties who were adverse to the motion in the trial court, and one who was neither a moving party to the motion, nor served with notice of intention of the motion, or otherwise made a party thereto, need not be served with notice of appeal.—*Niles v. Gonzales*, 155 Cal. 360, 100 Pac. 1080.

281. Same—Same—Same—Persons to be served.—Where an action was begun in the justices' court against two defendants who answered separately, and judgment rendered against only one, from which such defendant appealed, his notice of appeal need be served only on the plaintiff below, since the defendant against whom no judgment was rendered was not an adverse

party.—*Jackson v. Superior Court*, 20 Cal. App. 638, 129 Pac. 946.

282. Same—Same—Same—Specific performance of contract to sell and convey real estate.—Where a decree grants a party to the action certain substantial rights of which she might be deprived upon a reversal, upon any conceivable modification of the judgment, she is an adverse party within the meaning of this section, and should be served with notice of appeal from the judgment.—*Niles v. Gonzales*, 152 Cal. 94, 92 Pac. 74.

283. Same—Same—Same—Upon an appeal by owners from judgment foreclosing lien upon property the contractor for whom the lien claimants performed the work and against whom a personal judgment was rendered is not an adverse party so as to require service of the notice of appeal upon him.—*Quist v. Sandman*, 154 Cal. 748, 750, 99 Pac. 204.

See pars. 276, 277, this note.

284. Same—New and alternative method of appeal—Notice of appeal not required to be served on adverse party.—By the terms of this section an appeal is duly perfected upon following the provisions of section 941b, post, and no notice to the adverse party, and no undertaking is required, as in sections 940 and 941, post.—*Carr v. Stern*, 17 Cal. App. 402, 120 Pac. 35. See *Watson v. Dingley*, 14 Cal. App. 88, 111 Pac. 106; *Lang v. Lilley & Thurston Co.*, 161 Cal. 296, 119 Pac. 100.

285. A party to an action, being constructively in court during its pendency, may be required to take notice of an appeal, as a part of the proceedings, without involving a violation of any of his constitutional rights; and having notice in law that notice might be filed within a specified time, he is bound in law to take notice of its actual filing within that time.—*Estate of McPhee*, 154 Cal. 391, 97 Pac. 878.

286. Although there was a notice to the clerk requesting the preparation of a transcript on appeal, being the notice provided for by section 953a, post, this section does not provide for a notice of appeal, and a notice given under it, in the form there prescribed and without other appropriate words, is not a good notice of appeal.—*Marcucci v. Vowinkel*, 164 Cal. 693, 130 Pac. 430, 432.

287. Same—Same—Same—"Due process of law."—The new and alternative method of appeal here provided does not operate to deprive a party of his property without due process of law, merely because it fails to make provision for the service of a notice of appeal upon such person.—*Estate of McPhee*, 154 Cal. 390, 97 Pac. 878.

As to constitutionality of provision for appeal by the new and alternative method, see pars. 210, 211, 240, this note.

288. Same—Same—Same—Province of legislature.—The method of appeal is a

matter within the exclusive province of the legislature to determine, and that branch of the government may prescribe a method for taking an appeal without service of notice, without violating any provision of the constitution.—*Estate of McPhee*, 154 Cal. 391, 97 Pac. 878.

289. Same—Bond or undertaking on appeal—Old method of appeal—In general.—Undertaking on appeal was an indispensable prerequisite necessary to the perfection of an appeal before the adoption of the new and alternative method.—*Carr v. Stern*, 17 Cal. App. 401, 120 Pac. 35.

As to undertaking on appeal generally, see, post, §§ 942, 945, 947 and notes.

290. Giving of a three hundred dollar bond upon appeal from an order denying motion to set aside an order directing execution to issue does not stay proceedings upon the original judgment.—*Weldon v. Rogers*, 154 Cal. 632, 637, 98 Pac. 1070.

291. Same—Same—Same—Amount of, to be fixed by trial court.—Amount of undertaking required by section 942, post, must be fixed by trial court and the supreme court has no jurisdiction to fix the same. If the trial court refuses to fix the amount of the undertaking, the remedy is mandamus.—*Doudell v. Shoo*, 158 Cal. 50, 109 Pac. 615.

See pars. 353, 354, this note.

292. Amount of undertaking required by section 945, post, must be fixed by the trial court and the supreme court has no jurisdiction to fix the same. If the trial court refuses to fix the amount of the undertaking, the remedy is mandamus.—*Doudell v. Shoo*, 158 Cal. 50, 109 Pac. 615.

293. Amount of bond not fixed by court, it fails to effectuate a stay of execution and is without any consideration whatsoever to support the sureties' promise.—*United States Fidelity & G. Co. v. More*, 155 Cal. 415, 417, 101 Pac. 302.

294. Same—Same—Same—Same—Mandamus will lie to compel the trial judge to fix the undertaking as provided in section 945, post.—*Gordan v. Graham*, 153 Cal. 297, 299, 95 Pac. 145.

See par. 355, this note.

295. Same—Same—Same—Same—Inadequacy of the amount will not defeat the appeal.—*Estate of Sutro*, 152 Cal. 255, 92 Pac. 486, 92 Pac. 1027.

296. Same—Same—Same—Same—Judgment and new-trial order—One undertaking, in the sum of three hundred dollars, is sufficient, the effect being that, for all the purposes of the undertaking, the appeals from the judgment and order constitute practically one appeal only; but its recitals must refer to each of the appeals, and show that it is given in consideration of both. If it recites only one, the other appeal will be dismissed, as being unperfected, for want of an undertaking.—*Buchner v. Malloy*, 152 Cal. 486, 92 Pac. 1029.

297. Same—Same—Same—Same—Same—Ambiguity construed.—Where an undertaking recites both appeals, and shows that it is given in consideration of both, and undertakes to pay "all damages and costs which may be awarded on the appeal or on a dismissal thereof," the word "appeal" here used is to be construed as referring to the whole appeal previously mentioned and described, viz., the appeal from both judgment and order, and is sufficient.—*Buchner v. Malloy*, 152 Cal. 486, 92 Pac. 1029.

298. Same—Same—Same—Appeal from money judgment.—Section 942, post, makes provision for an undertaking on appeal solely from a judgment for the payment of money, and is ineffectual on an appeal from a purely negative order giving leave to carry the former judgment into execution, and an ex parte judgment rendered thereon against the sureties who executed it, is void.—*Weldon v. Rogers*, 154 Cal. 635, 98 Pac. 1070.

See pars. 303-305, this note.

299. Same—Same—Same—Same—Judgment on undertaking.—A judgment upon an undertaking, such as is herein prescribed, against an appellant who had not signed or executed such undertaking, and against whom no new proceeding or action had been instituted, and no summons, notice, or other process served upon him, is a judgment without jurisdiction, and not only erroneous, but wholly void.—*Weldon v. Rogers*, 154 Cal. 635, 98 Pac. 1070.

300. Same—Same—Same—Construction of statute.—The provisions of section 954, post, do not apply to an appeal from the justices' to the superior court.—*Bergevin v. Wood*, 11 Cal. App. 643, 649, 105 Pac. 935.

301. Same—Same—Same—Filing of undertaking within five days after service of notice of appeal is essential to the jurisdiction of the appellate court, and being jurisdictional, it does not matter in what way the failure is suggested to the court.—*Continental Building & L. Assoc. v. Beaver*, 6 Cal. App. 116, 91 Pac. 666.

302. Under the new method of perfecting an appeal as provided by the amendments of 1907, it is not necessary in order to perfect an appeal to file an undertaking guaranteeing the payment of damages and costs or to make a deposit with the clerk.—*Russell v. Banks*, 11 Cal. App. 450, 451, 105 Pac. 261.

303. Same—Same—Same—Judgment against sureties.—Section 942, post, provides for an undertaking and for an ex parte judgment thereon against the sureties only upon appeals from a judgment or order directing the payment of money and an order denying a motion to recall an execution can not be considered such an order. Therefore an undertaking given upon an appeal from the order refusing to recall the execution and stipulating that judgment might be taken against the sureties upon motion, etc., and a judgment entered thereon ex parte are void.—*Weldon v. Rog-*

ers, 154 Cal. 632, 634, 635, 98 Pac. 1070.

See pars. 298, 299, this note.

304. Same—Same—Same—Same—Provisions of section 942, post, for entry of judgment against sureties are not applicable to a bond upon appeal from a judgment in claim and delivery or in any case except that of a money judgment.—*United States Fidelity & G. Co. v. More*, 155 Cal. 415, 146, 101 Pac. 302.

305. Same—Same—Same—Same—Payment of judgment entered against the sureties under this section to the original judgment-creditor would estop an assignee of the latter from again claiming payment.—*Hentig v. Johnson*, 12 Cal. App. 423, 425, 107 Pac. 582.

306. Same—Same—Same—Judgment in claim and delivery.—The only bond required to stay execution on appeal from a judgment in the ordinary form in claim and delivery, under section 667, ante, is the statutory bond herein prescribed, the conditions of which are, not that judgment be taken on motion, as authorized by section 942, post, but that the appellant will obey the order of the appellate court on the appeal.—*United States Fidelity & G. Co. v. More*, 155 Cal. 416, 101 Pac. 302.

307. Appeal from judgment in claim and delivery the only bond to stay execution is that provided in this section and a provision in such bond for entry of judgment against the surety on motion is surplusage and of no effect.—*United States Fidelity & G. Co. v. More*, 155 Cal. 415, 416, 101 Pac. 302.

308. Same—Same—Same—Liability of surety—Two notices and two undertakings.—Where at the time of executing the second undertaking there is but one effectual appeal existing the surety will be conclusively presumed to have undertaken for the appeal in force and not for the prior ineffectual one.—*Estate of Sutro*, 152 Cal. 256, 92 Pac. 486, 92 Pac. 1027.

See pars. 318-321, this note.

309. Same—Same—Same—New bond or undertaking.—Provision allowing the filing of a new bond in place of an insufficient one is remedial in its nature and should receive a liberal interpretation with a view to further the determination of appeals upon their merits, and the giving of a new bond before the hearing of the motion to dismiss amply protects the interests of the respondent.—*Pacific Paving Co. v. Verso*, 11 Cal. App. 383, 385, 105 Pac. 136.

As to new bond, on requirement or permission made or given, see notes 10 Ann. Cas. 804; 17 Ann. Cas. 378.

310. An undertaking on appeal, which recites that it is an undertaking on appeal from the judgment, can not be used in support of an appeal from an order denying a motion for a new trial, notwithstanding a recital that the judgment so appealed from was rendered on the date the order was actually made, and the fact that at the time

the undertaking was executed the time to appeal from the judgment had expired, and the only appeal which could affect the judgment was an appeal from the order, and the date of the judgment shows that the surety confused the judgment and the order; nor can the error be cured, under the provisions of this section, by filing a new undertaking.—*Little v. Thatcher*, 151 Cal. 560, 91 Pac. 321.

311. Same—Same—Same—Order dispensing with undertaking must be made within the time fixed by law for filing the same.—*Crowley Launch & Tug Boat Co. v. Superior Court*, 10 Cal. App. 342, 346, 101 Pac. 935.

312. Same—Same—Same—Order refusing to vacate order under section 685, ante.—Proceedings under an order denying a motion of the judgment-debtor to set aside an order granting leave to have execution issue, so far as there may be proceedings under such an order, are stayed on appeal, upon giving the undertaking herein required, but the proceedings under the judgment and execution are not and could not be stayed thereby.—*Weldon v. Rogers*, 154 Cal. 636, 98 Pac. 1070.

313. Same—Same—Same—Recitals in must identify the appeal the undertaking is intended to perfect, and if they fail the error is incurable by filing a new undertaking.—*Little v. Thatcher*, 151 Cal. 560, 91 Pac. 321.

314. Same—Same—Same—Same—Curing defective by filing new bond.—An undertaking which recites that the appeal is from a motion instead of an order denying the motion for new trial, giving the correct date, is not void, but merely imperfect within the intent and meaning of this section, and may be cured by filing a new one in the supreme court as herein provided.—*Buchner v. Malloy*, 152 Cal. 486, 92 Pac. 1029.

315. Same—Same—Same—Sufficiency of.—An undertaking on appeal in the sum of three hundred dollars, obligated to pay damages awarded on appeal or dismissal thereof, and reciting an appeal from both judgment and new trial order, is sufficient.—*Bell v. Staacke*, 159 Cal. 196, 115 Pac. 221.

316. Where bond refers to and sufficiently identifies a judgment appealed from to the district court of appeals but recites that appeal is about to be taken to the supreme court the variance is immaterial and the bond sufficient.—*Pacific Paving Co. v. Verso*, 11 Cal. App. 383, 385, 105 Pac. 136.

317. It is no objection to new bond, filed before hearing on motion to dismiss, that the sureties on the original bond would not be liable if the appeal is supported by the new bond, the very purpose of the section being to allow a sufficient bond to be given to supply the defects of the insufficient one.—*Pacific Paving Co. v. Verso*, 11 Cal. App. 383, 385, 105 Pac. 136.

318. Same—Same—Same—Two notices of appeal.—Where two notices of appeal from the same decree of distribution are given on different dates, and an undertaking on appeal is filed, after the lapse of the statutory time as to the first notice, but not the second, which by its terms accurately describes such second appeal, the fact that this last is the only appeal that could be rendered effective by such undertaking, removes whatever latent ambiguity might have arisen from the failure to specifically state in the undertaking the appeal referred to and recovered thereby, and such undertaking is valid.—*Estate of Sutro*, 152 Cal. 252, 92 Pac. 486, 1027.

See par. 308, this note.

319. Same—Same—Same—Same—Ambiguous reference to appeal.—Where two notices of appeal are given as to the same decree of distribution, identical in all respects except the date, and of different dates, an undertaking on appeal which fails to recite or specifically state which "appeal" is referred to, each being valid and effectual, provided a valid undertaking to sustain it is filed, is of no effect whatever, does not support either appeal, and no other undertaking being filed within the statutory period the appeal is "ineffectual for any purpose."—*Estate of Sutro*, 152 Cal. 252, 92 Pac. 486, 92 Pac. 1027.

320. On rehearing, the attention of the court being called to the effect of the statute of June 3, 1906, extending the time to perform all acts required to be done during the month of June, 1906, to July 10, 1906, and it therefor appearing that the time to file an undertaking covering the first appeal had not expired, the decision of the court was somewhat modified. The principles enunciated in the first opinion, based upon the cases cited, were by no means abandoned, but were held not to apply to a state of facts such as appeared to exist here, where there was but one decree, and the notices of appeal were identical in every respect except the date, specifying identically the same parts of the judgment. It was pointed out that the cases cited were cases in which two or more appeals had been taken, from separate and distinct orders or judgments, as orders on motion for new trial and retaxing costs, and order on motion for new trial and judgment, the separate appeals relating to separate matters, and requiring separate and distinct undertakings. While in the present case, as already noted, there was but a single matter—an appeal from the judgment or decree of distribution—requiring a single record.—*Estate of Sutro*, 152 Cal. 252, 92 Pac. 486, 1027.

321. In such a case, it was held that even though there might have been two separate notices of appeal, and two undertakings each of which might refer to and perfect the appeal commenced by either notice, yet the appeals must be treated as a single one, as though there was but one

notice and one undertaking.—Estate of Sutto, 152 Cal. 258, 92 Pac. 486, 92 Pac. 1027.

322. Same—Same—Same—Waiver of undertaking.—The failure to file an undertaking on appeal from an order denying a new trial can not be cured by the waiver of such undertaking given by an adverse party after the time for appeal has expired.—Niles v. Gonzales, 152 Cal. 93, 92 Pac. 74.

323. Same—New and alternative method of appeal.—As to not being required.—Undertaking on appeal as contemplated by section 940, post, not required in an appeal by the new and alternative method; hence, such an appeal will not be dismissed for an otherwise fatal defect in the undertaking.—Bohn v. Bohn, 159 Cal. 367, 116 Pac. 567.

324. Appeals by new and alternative method, under section 941a, post, and following section, may be perfected without an undertaking on appeal; hence, such an appeal will not be dismissed for an otherwise fatal defect in the undertaking accompanying the same.—Bohn v. Bohn, 159 Cal. 367, 116 Pac. 567.

325. The "new and alternative method" of taking appeals, provided by section 941b, post, dispenses with the necessity of an undertaking.—Union Collection Co. v. Oliver, 162 Cal. 755, 756, 124 Pac. 435.

326. It is not provided by section 953b, post, as it is by section 940, post, that the appeal is ineffectual unless an undertaking, as therein provided, is filed.—Carr v. Stern, 17 Cal. App. 402, 120 Pac. 35.

327. Under this mode of taking an appeal, no undertaking on appeal need be given, and the notice need not be served upon the adverse party.—Lang v. Lilley & Thurston Co., 161 Cal. 296, 119 Pac. 100.

328. Until such time as the exact amount due for the preparation of the transcript can be known, which is necessarily subsequent to final approval by the judge, the undertaking is a security for the same. Thereupon and thereafter the appellant becomes liable for the just fees, and upon failure to pay recourse may be had against him and the sureties.—Gjurich v. Fieg, 160 Cal. 334, 116 Pac. 745.

329. Same—Same—Appellate court obtains jurisdiction of an appeal perfected under section 941b, post, although no undertaking be filed.—John Brickell Co. v. Sutto, 11 Cal. App. 460, 462, 105 Pac. 948.

330. Same—Same—Undertaking for costs on an appeal by an administrator from an order settling his accounts is not required under the new and alternative method of appeal.—Estate of McPhee, 154 Cal. 392, 97 Pac. 878.

V. RECORD AND PROCEEDINGS NOT IN RECORD.

A. APPEAL BY THE OLD METHOD. I. IN GENERAL.

331. Absence of code provision.—In cases as to which there is no provision of the

code requiring the making of a judgment-roll, the appellant may include in his notice to the clerk a request that the documents relating to the order appealed from and corresponding to the judgment-roll be included in the transcript to be made up and prepared by the reporter; and if he does so, the reporter must include them in his transcript to be presented to the judge for approval.—Going v. Guy, 166 Cal. 279, 135 Pac. 1128.

332. In such a case, it is the duty of the judge, if he finds them correct, to approve and certify all the documents properly designated in the notice to the clerk, as well as the stenographic reporter's transcript of his notes taken at the trial or hearing.—Going v. Guy, 166 Cal. 279, 135 Pac. 1128.

333. Decree of distribution—Judgment-roll on appeal.—The judgment-roll on an appeal from a decree of distribution is the petition for distribution, the opposition thereto, if any written opposition is filed, the counter-petitions filed, if any, or any other papers in the nature of pleadings filed at or before the hearing purporting to set forth the claims of the parties who appeared and claimed distribution, with the answers thereto, also the findings of the court, if any, upon the issue formed, any orders or other papers of like character to those mentioned in section 670, ante, and the decree of distribution itself.—Estate of Broome, 169 Cal. 604, 147 Pac. 270.

334. Findings ignoring counter-claim—Presumption of appellate court.—Where the findings and judgment ignore a counter-claim upon facts set forth in the answer, and the evidence is not presented on the appeal, it will be assumed in favor of the judgment that no evidence was offered.—Calkins v. Berliner, 26 Cal. App. 601, 147 Pac. 985.

As to presumptions on appeal generally, see pars. 96-107, this note.

335. Insufficiency of record—Dismissal of appeal.—Where the only record on appeal from the judgment consists of a typewritten transcript of the reporter's notes of the evidence, certified by the trial judge to be correct, together with loose copies of the complaint and answer, attested by the clerk, the record is insufficient, and the attempted appeal will be dismissed.—Dyer Law & Col. Co. v. Salisbury, 17 Cal. App. 394, 119 Pac. 947.

As to dismissal of appeal, see pars. 137-174, this note.

336. Same—Unauthenticated document.—A document purporting to be an account stated, not incorporated in the record, nor authenticated in any manner, but merely exhibited by the plaintiff without identification, can not be considered on appeal in an action on an account stated.—Youmans v. H. S. Clarke Co., 19 Cal. App. 784, 127 Pac. 799.

337. Matters not apparent of record.—An affidavit to support a motion for a new trial can not be considered on appeal in determining the sufficiency of the evidence to support the findings.—*Gallatin v. Corning Irr. Co.*, 163 Cal. 405, 126 Pac. 864, 871.

338. A map which is not in the record at all can not be considered on appeal for any purpose.—*Gallatin v. Corning Irr. Co.*, 163 Cal. 405, 126 Pac. 864, 871.

339. Matters to be shown by record.—**Grounds of objection must be specified.**—An objection to the admission of evidence must specify the grounds on which it is based. In the absence of such specification in the record, a ruling admitting the evidence will not be deemed injurious.—*Hardy v. Schirmer*, 163 Cal. 272, 124 Pac. 993.

As to grounds of objection generally, see pars. 45-65, 436-444, this note.

340. Same—Showing as to order denying motion for new trial, sufficiency of.—The record on appeal from an order denying a motion for a new trial sufficiently shows that the order was made, when a copy of the minute order to that effect is contained in the transcript, properly certified in his certificate attached thereto by the clerk.—*Worley v. Spreckels Bros. Commercial Co.*, 163 Cal. 60, 7 N. C. C. A. 583, 124 Pac. 697.

As to order denying new trial not being now an appealable order, see par. 3, this note, and, post, § 963 and note.

341. Opinion of lower court.—Ordinarily the trial judge's opinion in rendering judgment has no proper place in the record on appeal.—*O'Connell v. Behan*, 19 Cal. App. 111, 124 Pac. 1038.

See par. 357, this note.

342. The written opinion of a trial judge filed in a case, constitutes no part of the record on appeal, and can not be considered for any purpose by an appellate court.—*Goldner v. Spencer*, 163 Cal. 317, 125 Pac. 347.

343. A written opinion of a trial judge, filed in determining a motion for a new trial, constitutes no part of the record on appeal, and can not operate to limit the effect of the order as actually made. Any limitation of the grounds upon which the order is made must, to be effectual, be specified in the order itself.—*Classen v. Thomas*, 164 Cal. 196, 128 Pac. 329, 330.

344. Where the paper sought to be filed as a copy of the order granting a new trial is obviously merely a copy of the signed opinion filed in the lower court by the trial judge in determining the motion for a new trial, and states at considerable length the reasons of the learned judge for his conclusion that a new trial should be granted, and ends with the words, "the motion for a new trial will be granted," it must be held that such paper signed and filed by the trial judge was simply a written opinion, and in no sense an order granting a new trial.—*Classen v. Thomas*, 164 Cal. 196, 128 Pac. 329, 330.

345. Written opinions of the trial judge, notwithstanding these are embodied in the bill of exceptions used on appeal, can not be considered in determining whether or not the findings are sufficiently supported by the evidence.—*Goldner v. Spencer*, 163 Cal. 317, 125 Pac. 347.

346. A written opinion of the trial court appended to respondent's brief forms no part of the record, and can not be used to supply findings or to support either findings or judgment.—*People v. Quong Sing*, 20 Cal. App. 26, 127 Pac. 1052, 1056.

347. On appeal from justices' court.—Where an appeal taken from a justices' court judgment is not perfected by the giving of the undertaking required by section 978, post, the transmission of the papers and pleadings in the cause to the superior court is unwarranted.—*Tompkins v. Superior Court*, 24 Cal. App. 656, 142 Pac. 96.

348. Where another appeal from such judgment is taken and perfected within the time allowed by law therefor, prohibition will not lie to restrain the superior court from proceeding with the trial of the cause on the ground that the last appeal is not accompanied by the record and papers. It will be assumed that prior to the time when the court will try the case the record will be transmitted to the clerk.—*Tompkins v. Superior Court*, 24 Cal. App. 656, 142 Pac. 96.

349. Order granting new trial in criminal cause—Opinion of trial court—No part of record.—Upon an appeal from an order granting a new trial in a criminal prosecution, the opinion of the trial court, rendered at the time of the granting of the motion, which sets forth the reasons impelling the conclusion of the court that the verdict was not justified or sustained by the evidence, is no part of the record and can not be considered in determining the propriety of the order.—*People v. Petros*, 25 Cal. App. 236, 143 Pac. 246.

2. AS TO WHAT PAPERS TO BE INCLUDED.

As to written opinion of lower court not being a part of the record, see pars. 341-346, this note.

350. Affidavit, supplemental, filed after perfecting appeal.—A supplemental affidavit, filed long after the perfecting of the appeal, constitutes no part of the record to which the appellate court is entitled to look in determining the questions presented by the record.—*R. H. Herron Co. v. Whiteside Electric Co.*, 18 Cal. App. 778, 124 Pac. 455.

351. Amendments—In general.—Where a demurrer to a complaint is sustained, and an amended complaint is filed, the latter takes the place of the former; the original complaint forms no part of the record, and can not be considered on appeal.—*Bray v. Lowery*, 163 Cal. 256, 124 Pac. 1004.

See, also, pars. 366 et seq., this note.

352. Copy of order appealed from.—It is the duty of the appellant to furnish the appellate court with a copy of orders appealed from and where the original of those orders had been destroyed it is the duty of the appellant to have the record thereof restored. The orders also destroyed were understood valid and effectual. After proof of their destruction not obtained second day, evidence would be admissible to prove their contents. The respondents therefore could rely on the orders as they stood and were under no absolute necessity to have the record restored in order to preserve their rights. Appellant was endeavoring to overthrow the orders and a restoration of the record thereof was necessary to enable him to do this, and if he failed to do so he must take the consequences of an unreasonable delay in the prosecution of his appeal.—*Estate of Heywood*, 154 Cal. 312, 315, 97 Pac. 825.

353. It is not necessary that orders denying new trial and refusing to vacate a judgment be contained in any bill of exceptions or statement. Copies of the orders appealed from, certified by the clerk, together with a copy of the notice of appeal are all that are requisite to sustain an appeal from such order.—*Brode v. Goslin*, 158 Cal. 699, 112 Pac. 280.

354. Same—Minute-order denying motion.—Where the record contains a copy of the minute-order denying a motion for a new trial, properly certified in his certificate attached to the transcript by the clerk, this is sufficient to show that the order has been made.—*Worley v. Spreckels Bros. Commercial Co.*, 163 Cal. 60, 7 N. C. C. A. 583, 124 Pac. 679.

355. A minute-entry by the clerk, which forms no part of the judgment-roll, a copy of which is brought up in the transcript, can not be considered for any purpose, upon an appeal taken upon the judgment-roll.—*Kritzer v. Tracy Engineering Co.*, 16 Cal. App. 287, 116 Pac. 700.

356. New-trial order.—A notice of motion for relief under section 473, ante, from failure to serve the statement in time, and a minute-order granting such relief, printed in the transcript, constitute no part of the record on appeal; but the granting of the relief is sufficiently presented by the statement itself, showing that, in response to objection to failure of service in time, the moving party presented a showing, by affidavit, of mistake, surprise, and excusable neglect under section 473, ante, counter affidavits, and affidavits in rebuttal, and that such objections were overruled and the statement ordered settled and filed.—*King v. Dugan*, 150 Cal. 260, 88 Pac. 925.

357. Same—Opinion of trial judge as to grounds upon which his order was based, set forth in letter written by him some months afterwards, is not, and could not be made, a part of the record on appeal.—*Weisser v. Southern Pac. R. Co.*, 148 Cal. 428, 83 Pac. 439.

As to opinion of trial judge, not part of record and not considered, see pars. 341-346, this note.

358. Notice of appeal must be included.—Sections 951 and 952, post, apply to records on appeal prepared under sections 953a and 953c, post, as in other cases, and a copy of the notice of appeal is a necessary part of every record on appeal, and should be included in the transcript in all cases.—*Merritt v. City of Los Angeles*, 162 Cal. 47, 120 Pac. 1064.

359. Notice of intention to move for a new trial.—It is not necessary that the notice of intention to move for a new trial should be included in the record on appeal.—*Cross v. Mayo*, 167 Cal. 594, 140 Pac. 283.

360. Notice of intention to move for a new trial, printed elsewhere in the transcript, and stating certain grounds for the motion, but not incorporated in the statement of the case used upon hearing of the motion, forms no part of the record and can not be considered upon hearing of an appeal from an order denying the motion for a new trial.—*Carver v. San Joaquin Cigar Co.*, 16 Cal. App. 761, 118 Pac. 92.

361. Omission of matter from record.—Alleged error in refusing to give instructions requested by the defendant can not be considered on appeal if the transcript does not contain such alleged requests, notwithstanding their omission may have been inadvertent.—*People v. Mueller*, 168 Cal. 521, L. R. A. 1915B, 788, 143 Pac. 748.

362. An order denying a motion for a new trial must be affirmed on appeal where the record does not disclose the grounds upon which the motion was made.—*Davies v. Stark*, 25 Cal. App. 519, 144 Pac. 315.

363. In view of the failure of the record in this case to show that any instructions were given at the request of the prosecution, the claim that the same were erroneously given can not be considered.—*People v. Jan You*, 26 Cal. App. 148, 146 Pac. 63.

364. Where a defendant urges error predicated upon the giving of erroneous instructions. It devolves upon him to show affirmatively that such instructions were not given at his request, and in the absence of such request the appellate court can not indulge in the presumption that the trial court erred.—*People v. Jan You*, 26 Cal. App. 148, 146 Pac. 63.

365. Alleged error in limiting the argument of defendant's counsel to the jury and refusing his request for additional time, when there is nothing in the record which discloses such action on the part of the court, can not be considered on appeal.—*People v. Jan You*, 26 Cal. App. 148, 146 Pac. 63.

366. Orders allowing or refusing amendments to pleadings.—On appeal from the judgment on the judgment-roll alone, such orders are not properly a part of the record on appeal, and in the absence of a bill of exceptions, statement, or other like paper,

an amended answer, appearing in the record, will be presumed to have been with leave of court, or an amendment as of right, and in time allowed for filing such an amendment.—*Segerstrom v. Scott*, 16 Cal. App. 256, 260, 116 Pac. 690.

See, also, par. 351, this note.

367. An order granting leave to a defendant to amend his answer is no part of the judgment-roll, and is not required to be entered thereon; if entered, can not constitute any part of the record which the appellate court can review.—*Segerstrom v. Scott*, 16 Cal. App. 256, 116 Pac. 690.

368. **Order on motion—In general.**—Printing in transcript on appeal from order, the notice of motion, etc., the affidavits in support thereof and the order without attestation or authentication, does not constitute a proper record on appeal. The proper method is by bill of exceptions.—*Muzzy v. McEwen Lumber Co.*, 154 Cal. 685, 686, 98 Pac. 1062.

369. **Same—To strike out.**—To entitle the appellant to a review of an alleged error in the denial of a motion to strike out certain designated portions of an amended complaint, the record should disclose that the motion was made, the grounds thereof, and the ruling of the court thereon, and when none of these facts appear, such alleged error will not be reviewed.—*National Bank v. Mulford*, 17 Cal. App. 556, 120 Pac. 446.

370. **Order denying new trial—Judgment-roll prepared, how.**—While on an appeal from an order denying a new trial it is necessary that it should in some way be made to appear in the record what the grounds of the motion for a new trial were, yet where there is a statement on motion for a new trial or a bill of exceptions, containing specifications of insufficiency of evidence and assignments of errors of law, the presumption is that notice was duly given, and that the specifications and assignments in the statement or bill of exceptions conform to those in the notice and constitute the grounds upon which the court was asked to grant a new trial.—*Cross v. Mayo*, 167 Cal. 594, 140 Pac. 283.

As to orders denying motion for new trials not being now appealable orders, see par. 3, this note, and, post, § 963 and note.

371. **Order refusing to set apart homestead under section 1465, post.**—On such appeal it is necessary to furnish the appellate court with a copy of the order appealed from; and where the record of the order was destroyed in the San Francisco fire of 1906, it was the duty of the appellant, and not of the respondent, to have the record restored under the act of June 16, 1906.—*Estate of Heywood*, 154 Cal. 315, 97 Pac. 825.

372. **Same—Making family allowance to widow.**—A bill of exceptions presented to be used on a motion for a new trial of such orders can not be settled as a bill for

use on appeal therefrom, when presented too late for the latter purpose; the motion being a proper proceeding for the review of the order, the bill of exceptions can not be regarded as a valid paper otherwise than on appeal from the judgment.—*Shipman v. Unangst*, 150 Cal. 425, 88 Pac. 1090.

373. **Order setting aside judgment of dismissal.**—Affidavits not incorporated in any bill of exceptions are not part of the record on appeal from such an order, and can not be considered even if properly authenticated.—*Estate of Dean*, 149 Cal. 487, 495, 87 Pac. 13.

B. APPEAL BY NEW AND ALTERNATIVE METHOD.

As to filing transcript where prepared under provisions of section 953c, post, see pars. 229-233, 473-477, this note.

374. **As to generally—Duty of appellant.**—If a party to an action expects to take his appeal under the alternative method provided by section 953a, post, and have his record prepared according to the procedure affecting that method, then he must see to it that the official phonographic reporter is present at the trial in order that a transcript of the evidence and proceedings may be furnished by the one officer whose duty it is to prepare it.—*Anen v. Conrey*, 22 Cal. App. 409, 134 Pac. 730.

375. Where the record on an appeal is typewritten, and made up in the manner prescribed in section 953a, post, and the appellant fails to comply with the requirements of section 953c, post, to the effect that in filing briefs the parties must print therein, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court, the appellate court is justified in refusing to examine the record.—*O'Rourke v. Skellenger*, 169 Cal. 270, 146 Pac. 633.

376. **Original file not to be sent up.**—It was clearly not intended to authorize the clerk of the trial court to send up to the appellate court his original files in the action, consisting of the pleadings, findings, judgment, and other papers made a part of the judgment-roll by section 670, ante. To do this, would not only deprive the office of the papers and records which the law makes it the duty of the clerk of the superior court to preserve, but would render him unable to enter up the remittitur when received from the appellate court.—*Waterbury v. Temescal Water Co.*, 11 Cal. App. 632, 686, 637, 105 Pac. 940.

377. **Phonographic report of trial must be certified by trial judge as correct or it will not constitute a record available on appeal in lieu of the bill of exceptions.**—*Williams v. Lane*, 158 Cal. 39, 109 Pac. 873. See, also, par. 402, this note.

As to authentication by judge or clerk, see pars. 384-394, this note.

378. **Same—Judge of trial court is required to correct, approve, and certify in**

lieu of a bill of exceptions the stenographic notes of the trial containing the proceedings and evidence which would form no part of the record unless authenticated as the statute requires, and he is not required to certify the pleadings and orders constituting the judgment-roll in the action.—*Christensen Lumber Co. v. Sewell*, 157 Cal. 405, 406, 108 Pac. 276.

379. Printing of judgment-roll.—It is assumed that the judgment-roll need not be printed.—*Dyer Law & Col. Co. v. Salisbury*, 17 Cal. App. 395, 119 Pac. 947.

380. The language of this section, that "said record shall be filed with the clerk of the court to which the appeal is taken and no transcript thereof need be printed" is permissive. It is not only allowable, but desirable, that a printed and duly authenticated copy of the transcript be filed in the supreme court in lieu of the original.—*Seymour v. Oelrichs*, 162 Cal. 318, 324, 122 Pac. 847.

381. Printing parts of record in brief.—The language of section 953c, post, seems to be mandatory, and when the parts relied on are printed as required it becomes a part of the record on appeal.—*San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 16 Cal. App. 236, 116 Pac. 378.

As to briefs generally, see Part II, this note.

382. Same—Legislative intent.—The clear intention of the legislature seems to require something in the nature of a statement or bill of exceptions to be printed in a supplement to briefs of counsel, for the purpose of elucidating the questions relied upon; but the meaning of the language used does not appear to be so self-evident, and some rule of regulating the new procedure is apparently necessary.—*San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 16 Cal. App. 236, 116 Pac. 378.

C. AUTHENTICATION AND CERTIFICATION. I. IN GENERAL.

383. Affidavits following certificate of clerk.—Where there appear in the transcript, following the certificate of the clerk of the record of the bill of exceptions, several affidavits charging that the plaintiff was guilty of misconduct in connection with the jury while the latter, under the order of the court, were engaged in viewing the property of the plaintiff alleged to have been damaged, but the affidavits are not incorporated in a bill of exceptions, they are not authenticated as required by Rule XXIX of this court and therefore can not be regarded as any part of the record or be considered on appeal from an order denying a new trial for any purpose.—*Cook v. Suburban Realty Co.*, 20 Cal. App. 538, 129 Pac. 801, 803.

384. Authentication by judge or clerk.—It is axiomatic that papers not properly authenticated as having been used on a C. C. P.—133

hearing resulting in a judgment or order or decree, can not be considered on appeal, saving those papers and those alone which may be considered as a part of the judgment-roll.—*Estate of Broome*, 169 Cal. 604, 147 Pac. 270.

As to certification by clerk, see pars. 399-401, this note.

As to requirement that judge certify as correct phonographic report, see par. 377, this note.

385. The question whether or not a will is susceptible of a different construction from that put upon it by the decree of distribution can not be considered on an appeal from the decree, where the transcript, apparently prepared under the new method, consists of a number of papers, records and documents, including the order admitting the will to probate, petition for letters of administration with the will annexed, order appointing administrator with the will annexed and stipulation of the parties, having for certification nothing further than the declaration of the clerk that the copies contained in the transcript are true and correct copies of the same "as they appear on file and of record in my office."—*Estate of Broome*, 169 Cal. 604, 147 Pac. 270.

386. A statement of the case on motion for a new trial is insufficient, if the certificate of the judge is placed before the specifications of errors and the particulars wherein it is alleged that the evidence is insufficient to justify the decision, and no reference is made to them in the authentication or in the body of the statement. Under such circumstances the certificate of the judge has no application to matter which does not precede his signature.—*Newmire v. Schacht Consolidated Auto & Truck Co.*, 22 Cal. App. 308, 134 Pac. 336.

387. If, as a matter of fact, the unauthenticated matter constitutes a part of the statement, the respondents should, when attack upon such ground is made by the appellants in their brief, ask for a diminution of the record in order to correct the same. If they fail to do so, the appellate court will assume that the record is what it purports to be, and fails to comply with section 659, ante.—*Newmire v. Schacht Consolidated Auto & Truck Co.*, 22 Cal. App. 308, 134 Pac. 336.

388. Where no questions of fact are tried, and the transcript of the record prepared consists of the papers constituting the judgment-roll, the record is properly prepared and certified by the clerk. The only transcript which the judge is required or authorized to certify is that containing the testimony and other proceedings which are had in the trial of issues of fact.—*Jaques v. Yuba County Supervisors*, 22 Cal. App. 627, 135 Pac. 686.

389. A transcript on appeal from an order granting a motion for a new trial which contains no certificate of the judge that the papers and records included in the

transcript are any or all of those used upon the hearing of the motion, is insufficient under either the old or new method of perfecting and presenting the record on appeal, although the transcript has attached to it the certificate of the clerk that the papers and orders therein contained are true copies of the originals on file in his office.—*Russell v. Chisholm*, 23 Cal. App. 727, 139 Pac. 657.

390. There is no law which permits a bill of exceptions to be authenticated merely by the clerk of the court certifying that the judge has duly settled and allowed it.—*Fowler v. Fowler*, 24 Cal. App. 529, 141 Pac. 1053.

391. The only proper method for authenticating a record of an appealable order is by a bill of exceptions, as required by Rule II of the supreme court.—*Britt v. East Side Hardware Co.*, 25 Cal. App. 231, 143 Pac. 244.

392. When a bill of exceptions is not adopted as a means for presenting the record on an appeal from such orders as those here involved, the party appealing must, in having the record authenticated, comply with the provisions of section 953a, post, under which he must request a transcript of the evidence offered or received, to be settled and signed by the judge, after notice as therein provided.—*Columbia Crude Oil Co. v. Deyo*, 25 Cal. App. 268, 143 Pac. 243.

393. An appeal from an order vacating an order staying execution, taken under the provisions of sections 953a, 953b and 953c, post, can not be considered, where the typewritten transcript is not certified by the judge of the trial court.—*Lewis v. Lapique*, 26 Cal. App. 448, 147 Pac. 221.

394. The evidence taken upon the trial of an action for services performed can not be reviewed upon an appeal taken from the judgment, where the purported statement of the case containing the evidence is not shown by the record to have ever been settled by the trial judge, or to have attached thereto any stipulation authorizing the taking of notice of its contents by the appellate court.—*Yount v. Arakalian Bros. Co.*, 26 Cal. App. 472, 147 Pac. 467.

395. *Same — Mandamus.*—Where there was no phonographic reporter present at the trial, and the cause was tried on a stipulated statement of fact, mandamus does not lie to compel the judge to certify to the correctness of the transcript on an appeal under the alternative method provided by section 953a, post, which transcript has been prepared by the clerk.—*Allen v. Conrey*, 22 Cal. App. 409, 134 Pac. 730.

396. *Incorporation of affidavits in bill of exceptions.*—Rule XXIX requires the incorporation of all affidavits used at the hearing of the motion, and containing matter relied upon as ground for reversal, in a bill of exceptions, and a certificate of the

clerk that the transcript contains full and true copies of the papers on file in his office, and so used, is not a sufficient authentication.—*Muzzy v. McEwen Lumber Co.*, 154 Cal. 687, 98 Pac. 1062.

397. *Withdrawal of transcript for proper authentication.*—Where the record on an appeal from the judgment and an order denying a motion for a new trial was evidently prepared in good faith and in attempted compliance with the new method, but so far as concerned the appeal from the judgment, was not properly authenticated, the supreme court refused to dismiss the appeal from the judgment, but allowed the transcript to be withdrawn for a proper authentication, within a limited time, of the record on the appeal therefrom.—*Knoch v. Haizlip*, 163 Cal. 20, 124 Pac. 997.

2. UNDER APPEAL BY THE NEW AND ALTERNATIVE METHOD.

As to certification of trial judge of phonographic report of the trial, where appeal taken under the new and alternative method, see pars. 151-153, this note.

398. *As to use of typewritten copies in record.*—Papers which under the old method would not properly be a part of such bill, are still to be certified by the clerk or the attorneys, as provided by section 953, post. Such papers include, on an appeal from the judgment, the judgment-roll and the notice of appeal. With respect to these papers, the main effect of the new method seems to be to permit the use of typewritten, instead of printed, copies. The originals of this class of papers should remain on file in the office of the clerk of the superior court, and not be sent up to the reviewing court.—*Knoch v. Haizlip*, 163 Cal. 20, 124 Pac. 997.

399. *Certification by clerk.*—The new method of preparing records on appeal as provided in sections 953a, 953b and 953c, post, does not require or authorize the judge to certify to the correctness of any cases except such as form part of a transcript designed to take the place of a bill of exceptions; but papers which, under the old method, would not properly be a part of the bill of exceptions, are still to be certified by the clerk or the attorney as provided in section 953, post.—*Knoch v. Haizlip*, 163 Cal. 20, 124 Pac. 997.

See, also, pars. 384-394, this note.

As to requirement that trial judge certify as correct phonographic report, see par. 377, this note.

400. There is no duty devolving upon the clerk to certify and attest a transcript in which are incorporated papers not included in the judgment-roll, e. g., the reporter's notes.—*Rose v. Leland*, 17 Cal. App. 309, 119 Pac. 532.

401. *Same—Sufficiency of.*—Where, upon an appeal from an order changing the place of trial of an action, the transcript upon appeal is entitled a "bill of exceptions," in-

cluding affidavits, notice of motion for change of venue, demand for such a change, amended complaint, demurrer thereto, order of court granting the motion, and notice of appeal, which was not settled by the judge as required by Rule XXIX, and no attempt was made to follow the new and alternative method of appeal and the procedure thereunder, but the only authentication of the record is that of the clerk presented in the transcript, the record is wholly insufficient as a basis for the appellate court to review the order appealed from.—*Knox v. Schrag*, 18 Cal. App. 220, 122 Pac. 969.

402. Certified copy of reporter's notes.—In an appeal taken under the provisions of sections 953a, et seq., post, it is not only allowable, but desirable, that a printed and duly certified copy of the original transcript of the reporter's notes, as approved by the judge, should be filed in the supreme court in lieu of the original.—*Seymour v. Oelrichs*, 162 Cal. 318, 122 Pac. 847.

As to certification by judge of reporter's transcript of his notes, see par. 377, this note.

403. Certification of papers by judge.—The new method of preparing records on appeal provided by sections 953a, 953b and 953c, post, does not require or authorize the judge to certify to the correctness of any papers except such as form part of a transcript designed to take the place of a bill of exceptions.—*Knoch v. Haizlip*, 163 Cal. 20, 124 Pac. 997.

404. Defective authentication — Proper procedure is, not to dismiss the appeal, but to affirm the order appealed from.—*Knox v. Schrag*, 18 Cal. App. 220, 122 Pac. 969; *Hibernia Sav. & L. Soc. v. Doran*, 161 Cal. 118, 118 Pac. 526.

405. An order vacating a default judgment, which was heard and determined upon affidavits, must be affirmed where the only record prepared for use upon the appeal is a purported transcript of the judgment-roll, the notice of motion to set aside the judgment, and affidavits used upon the hearing, certified alone by the clerk of the trial court, and for that reason can not be considered by the appellate court at the hearing.—*Credit C. Bureau v. Weary & Alford Co.*, 18 Cal. App. 467, 123 Pac. 540.

406. Original transcript to be transmitted to appellate court.—Different considerations apply to the transcript of testimony, etc., prepared in lieu of a bill of exceptions, and certified by the judge. The statute contemplates that the original, rather than a copy, of such transcript, should be transmitted to the court in which the appeal is to be heard, and the only certification required is that of the judge. Where the order appealed from is not included in a judgment-roll (as, for example, an order granting or denying a motion for new trial), the parties may have inserted in

the transcript any of the pleadings, papers, records and files in the cause, and the same when so incorporated shall be "deemed fully authentic for use on said appeal."—*Knoch v. Haizlip*, 163 Cal. 20, 124 Pac. 997.

D. BILL OF EXCEPTIONS — NECESSITY FOR AND SUFFICIENCY OF.

407. As to necessity of.—Record upon appeal from an order should be presented in a bill of exceptions properly authenticated and shown to contain all the evidence adduced on the hearing in the court below.—*Muzzy v. McEwen Lumber Co.*, 154 Cal. 685, 687, 98 Pac. 1062.

408. It is error upon an appeal taken from a judgment entered by the clerk upon the verdict of the jury in an equity case before the signing and filing of findings of fact and the rendition by the court of any judgment therein, to direct the insertion in the bill of exceptions of the ex parte order made subsequent to such judgment vacating the same, the findings of fact and conclusions of law and the judgment based on such findings, for the same are immaterial to such appeal, and being so, mandamus will not lie to compel the striking of the same from the bill of exceptions.—*Holland v. Superior Court*, 169 Cal. 361, 146 Pac. 878.

409. It is held that, under the record before this court, its review is limited to the single question whether the findings support the conclusions of law and the judgment based thereon; that though the court found for appellant as to preliminary matters in issue, such as the preparation and filing of the petition for acquiring utilities, with the requisite number of signers, yet its findings for respondent upon all of the vital issues in the case constitutes a sufficient basis for its conclusions of law and judgment for the respondent.—*O'Connell v. Behan*, 19 Cal. App. 111, 124 Pac. 1038.

410. Objection is made by respondent to a consideration of the transcript because the notice of the entry of the judgment was not given in time. Being signed in the manner agreed upon, and no objection being made at the time to the delay in the notice of the entry of judgment, it must be presumed, in support of the record, that the question of fact was determined adversely to respondent, and that the presiding judge properly authenticated the transcript as he was authorized to do by the stipulation. It was the duty of respondent, if he desired to object to the authentication of the transcript and have reviewed the action of the court below in relation to the certification, to have presented the matter to this court upon a bill of exceptions, under which only can a question of fact be reviewed. It is not within our province to consider affidavits attached to the record and not embodied in a bill of exceptions.—*Hecker v. Baker*, 19 Cal. App. 667, 127 Pac. 654.

411. On an appeal from an order denying a motion for a new trial, an affidavit filed in the court below in support of the motion and showing the judge's prejudice can not be considered on appeal if not included or referred to in the bill of exceptions.—*Pinto v. Seely*, 22 Cal. App. 318, 135 Pac. 43.

412. The action of the court in relieving the moving party from default in failing to prepare and serve his bill of exceptions should be incorporated in the record on the motion for a new trial, and may be reviewed on appeal from the order made on such motion.—*Kramm v. Stockton Elec. R. R. Co.*, 22 Cal. App. 737, 761, 136 Pac. 523, 534.

413. The party proposing a bill of exceptions is only required to set forth therein a record of so much of the proceedings as will illustrate the error claimed, and it is the duty of the opposite party to propose, if he is able to do so, such amendments as will show that the alleged errors were cured or rendered non-prejudicial. It will not be presumed that, if omitted evidence had been supplied, a different case would be presented, but the presumption will be that the record does show all matters material to a consideration of the points presented.—*Polkinghorn v. Riverside Portland Cement Co.*, 24 Cal. App. 615, 142 Pac. 140.

414. An appeal from an order denying a motion to recall and quash an execution, and from an order denying an application for an injunction restraining the sheriff from further proceedings under the execution, will be dismissed, if in lieu of a bill of exceptions settled by the court and exhibiting the alleged errors of the trial court in the proceedings, the appellant has incorporated in a typewritten copy thereof certain affidavits, telegrams and letters, certified by the clerk, to be true copies of such original documents on file in his office, and it does not appear that these documents were presented to the court or considered upon the hearing of the motions, or, assuming they were so offered and received, that other evidence was not offered and considered.—*Columbia Crude Oil Co. v. Deyo*, 25 Cal. App. 268, 143 Pac. 243.

415. Same.—*Affidavit of plaintiff insufficient as substitute.*—Where, in an action on a fire insurance policy providing that such policy would hold good only so long as the house insured was used as a dwelling-house, and the personal property insured remained therein, the complaint alleged that the buildings, together with the property described in the policy, were destroyed by fire, but contained no statement showing that the buildings were being put to the particular uses limited by the contract, to which complaint the defendant seasonably demurred, but which demurrer was overruled, and the record on appeal consists of the judgment-roll only, an affidavit of the plaintiff, filed in the

appellate court, being no part of the record, can not be considered for the purpose of showing that evidence was introduced in the trial to show that the buildings were being so used at the time of their destruction.—*Balan v. Nat. Union Fire Ins. Co.*, 19 Cal. App. 778, 127 Pac. 829.

416. As to requirements of section 650, ante.—Supreme court does not intimate that section 650, ante, as amended, is other than directory, or that a failure to serve the engrossed bill, when certified, would preclude its use upon appeal.—*Regents of University of California v. Turner*, 159 Cal. 541, 114 Pac. 842.

417. As to sufficiency of bill.—The cases holding that where the appellant presents his record in the form of a bill of exceptions that particular errors need not be specified, apply when the objections and rulings appeal in the bill, and hence need no more particular presentation in order that the court's attention may be readily attracted to the errors claimed.—*First National Bank v. Trognitz*, 14 Cal. App. 176, 111 Pac. 402.

418. Where the transcript on appeal from the judgment and from an order denying a new trial contains a purported bill of exceptions in support of applicant's motion for a new trial which is not authenticated in any manner, but contains an order of court sustaining objections to its settlement on the ground that it was not presented within the time required by law, and shows no exception to such order, such purported bill of exceptions can not be considered for any purpose upon such appeal.—*Brode v. Goslin*, 16 Cal. App. 632, 117 Pac. 778.

419. A bill of exceptions, which was settled within the time required for its use upon an appeal from the judgment, may be considered thereon, notwithstanding that in the first instance it was the intention to use such bill of exceptions upon a motion for a new trial, the proceedings upon which were abandoned. It is held immaterial, in such case, what may be the purposes for which the bill was expected to be used.—*Dresser v. Allen*, 17 Cal. App. 508, 120 Pac. 65.

420. Appeal from order disallowing attorney's fees.—On appeal from such an order, made under the authority of sections 1616 and 1619, post, where the application was made to the superior court "on the files, papers and records in the case," the will and codicils, forming part of such files, papers, and records, were properly included in the bill of exceptions.—*Estate of Hite*, 155 Cal. 459, 101 Pac. 448.

421. Bill of exceptions settled for use on motion for new trial.—If settled within the time required for its use on an appeal from the judgment, it may be considered on such appeal, although intended for use on motion for new trial, which was abandoned. The purposes for which the bill was pre-

pared and expected to be used is immaterial.—*Dresser v. Allen*, 17 Cal. App. 509, 120 Pac. 65.

422. Failure to prepare—Relief under section 473, ante.—Upon appeal from an order refusing to grant relief under section 473, ante, on the ground of mistake, inadvertence and excusable neglect in failing to prepare a bill of exceptions in time to be used upon appeal from an order denying a new trial, the order appealed from is a matter purely within the discretion of the trial court, and this court can not interfere to review the same, where it does not clearly appear that there has been a plain abuse of discretion.—*Blumer v. Mayhew*, 17 Cal. App. 223, 119 Pac. 202.

423. It is held that, upon the showing made in support of the application for relief under section 473, ante, in this case, it not only can not be said that the court failed to exercise a proper discretion, but that it may also rather be said that, had the ruling been otherwise, non-interference by this court would have strained the rule prohibiting interference with an order when it tends to give a hearing upon the merits of the case.—*Blumer v. Mayhew*, 17 Cal. App. 223, 119 Pac. 202.

424. Same—Advice to trial judges—Rule as to review.—Though appellate courts have suggested, by way of advice to trial judges, that all doubts as to the propriety of their rulings upon applications for relief from default under section 473, ante, should be resolved in favor of the moving party, for the reason that it tends to bring about a decision upon the merits, yet, notwithstanding this fact, the rule which prohibits interference by appellate courts with the decision of the trial court thereupon, save and except in case of an abuse of discretion, has never been relaxed.—*Blumer v. Mayhew*, 17 Cal. App. 223, 119 Pac. 202.

425. Same—Attorney's ignorance of statute inexcusable.—The statutory provisions with reference to the procedure to be taken upon an appeal from an order denying a motion for a new trial are of such long standing, so fully set forth in the Code of Civil Procedure, and have been so frequently passed upon and construed by the appellate courts of this state, that ignorance of the time within which a statement or bill of exceptions must be prepared and served can not be deemed the result of mistake or surprise or inadvertence, and the neglect to prepare and serve it within the time prescribed by the code is not excusable.—*Blumer v. Mayhew*, 17 Cal. App. 223, 119 Pac. 202.

426. Method of presentation.—Section 951, post, merely prescribes that the papers used on the hearing in the trial court shall be a part of the record on appeal, but does not present the method. Rule XXIX provides that such papers shall be included in a bill of exceptions.—*Harrison v. Cousins*, 16 Cal. App. 517, 117 Pac. 564.

427. Time for serving bill of exceptions.—Notice of the entry of an order denying a motion to be relieved from a default judgment is not waived from the fact of the presence of counsel in court during the argument of the motion, as such presence does not imply actual knowledge either of the making or of the entry of the order, and the time to serve and present the bill of exceptions on appeal from such order does not begin to run immediately upon such decision.—*Hughes Mfg. & Lumber Co. v. Elliott*, 167 Cal. 494, 140 Pac. 17.

428. Where it is claimed that a bill of exceptions is not presented in time and the bill is settled over such objection, it is the duty of the respondent to have the matter incorporated in the bill, since otherwise it must be presumed that the court acted within its proper authority.—*Hughes Mfg. & Lumber Co. v. Elliott*, 167 Cal. 494, 140 Pac. 17.

429. Orders extending the time for the presentation and service of a proposed bill of exceptions for thirty days beyond that allowed by law, without the consent of the adverse party, are void.—*Kramm v. Stockton Elec. R. Co.*, 22 Cal. App. 737, 761, 136 Pac. 523.

430. Where, however, the adverse party, after such unauthorized extensions, consents, by stipulation, to a further extension of time, he is estopped from claiming a default as against the other party on the ground that the previous orders were void, provided the latter has prepared and served the bill within the time designated in the stipulation.—*Kramm v. Stockton Elec. R. Co.*, 22 Cal. App. 737, 761, 136 Pac. 523.

431. An order of court extending the time for service of the proposed bill after it had been completed, four days beyond the date to which the time had been extended by stipulation, without the consent of the adverse party, is also in excess of the power of the court, but the latter is likewise estopped from objecting to the settlement of the bill on such ground, where he not only accepted the bill, but requested and secured a stipulation extending the time within which to prepare and serve his proposed amendments thereto.—*Kramm v. Stockton Elec. R. Co.*, 22 Cal. App. 737, 761, 136 Pac. 523.

432. It is not an abuse of discretion to relieve a party moving for a new trial from a default in preparing and serving his bill of exceptions within time, where the service is one day late, due to the inadvertence of the stenographer engaged in typewriting the bill in omitting some important matters which were not discovered in time to make the service on the previous day.—*Kramm v. Stockton Elec. R. Co.*, 22 Cal. App. 737, 761, 136 Pac. 523.

433. The settlement of a bill of exceptions is a "proceeding" within section 473, ante, and under that section the release of a party from a proceeding taken against

him through mistake, inadvertence, etc., is a matter largely within the discretion of the trial court, which will not be disturbed on appeal, unless it clearly appears that such discretion has been abused.—*Kramm v. Stockton Elec. R. Co.*, 22 Cal. App. 737, 761, 136 Pac. 523.

434. The service of a bill of exceptions by delivery to the attorneys of the adverse party through the agency of Wells, Fargo & Co.'s express is a valid service.—*Kramm v. Stockton Elec. R. Co.*, 22 Cal. App. 737, 761, 136 Pac. 523.

435. The fact that the person upon which the service is to be made resides or has his office in a different place from that of the person making the service does not require that the service be made by mail, or preclude a personal service, and the person seeking to make the service can avail himself of any agency, such as Wells, Fargo & Co., or the instrumentality of the post-office department, with as much effect as if he had employed any other messenger. The delivery of the notice through such agency renders the service personal, and the proof of such delivery establishes a personal service.—*Kramm v. Stockton Elec. R. Co.*, 22 Cal. App. 737, 761, 136 Pac. 523.

E. DEFECTS AND OBJECTIONS.

430. As to defective record on appeal being presented, inasmuch as the appellate court has obtained jurisdiction of the cause by reason of the notice of appeal given by the appellant to the clerk, the appeal should not be dismissed, but the judgment or order appealed from affirmed.—*Hibernia Sav. & L. Soc. v. Doran*, 161 Cal. 118, 118 Pac. 526.

See pars. 404 and 405, this note.

437. The objection that the record does not disclose that any motion was made to vacate a default and judgment is without merit. A motion being an application viva voce to grant an order, it appears from the order of court that such motion was made. The order reads: "It is ordered that defendant's motion to set aside," etc., "be and the same is hereby granted." Here is a declaration by the court that a motion is made and granted.—*Quan Quock Fong v. Lyons*, 20 Cal. App. 668, 130 Pac. 33, 35.

438. Bill of exceptions which fails to state the particulars in which the evidence introduced at the trial was insufficient to support the judgment, is defective and insufficient under section 648 Code of Civil Procedure, and the appellant is in no position to insist upon the evidence being reviewed by the appellate court for the purpose of determining whether or not the judgment is thereby supported.—*California Portland Cement Co. v. Wentworth Hotel Co.*, 16 Cal. App. 692, 118 Pac. 103.

439. "It is true, as a general proposition, that this court will not review the evidence in a bill of exceptions, unless it specifies the particulars in which the evidence is alleged to be insufficient to sustain the de-

cision."—*San Luis Water Co. v. Estrada*, 117 Cal. 168, 48 Pac. 1075.

440. "No reference to the evidence is required in the specification, except to say that it is insufficient to justify the particular finding called in question. . . . The object of the rule requiring these specifications, is, first, to shorten the statement of the evidence by excluding everything irrelevant to the specified fact; and, second, to notify the opposing party of the particular finding called in question, in order that he may see that the statement fairly and fully presents the evidence bearing upon that particular matter. This object accomplished, the statute is satisfied."—*Swift v. Occidental Min. & Petroleum Co.*, 141 Cal. 161, 74 Pac. 700.

441. Same.—Or statement on appeal of the case, showing the evidence adduced at the trial, not being filed, the finding of facts by the trial court will be conclusive on appeal.—*Bradley Bros. v. Bradley*, 20 Cal. App. 1, 127 Pac. 1044.

442. In the case of such a defect in the record, the conclusions of law of the trial court, following as a matter of law from the facts as found, the judgment will not be disturbed on appeal.—*Bradley Bros. v. Bradley*, 20 Cal. App. 1, 127 Pac. 1044.

443. However, when it affirmatively appears that no such finding could have been properly made in any possible view of the case, the judgment can not be sustained.—*Bradley Bros. v. Bradley*, 20 Cal. App. 1, 127 Pac. 1044.

444. Thus, the rule will not apply to an action which was erroneously determined upon the application of a statute of limitations which, in no view of the case, had any possible bearing upon the issues raised by the pleading.—*Bradley Bros. v. Bradley*, 20 Cal. App. 1, 127 Pac. 1044.

445. Depositions not incorporated in bill of exceptions rulings on admission or exclusion of testimony therein contained can not be reviewed on appeal.—*Oldershaw v. Matteson & Williamson Mfg. Co.*, 19 Cal. App. 179, 125 Pac. 263.

446. Judgment-roll alone appealed on it is defective, where the sufficiency of the findings of the trial court is sought to be attacked, for the reason that the evidence on which the findings are based is not before the appellate court.—*Archer v. Harvey*, 164 Cal. 274, 128 Pac. 410.

447. Judgment-roll and bill of exceptions, appealed on, not purporting to set out the evidence, is defective, and if the findings state that the case was tried and finally heard "upon the pleadings and testimony given at the trial," because of the defect in the record, the appellant can not present and have considered the fact that the evidence was stipulated.—*O'Connell v. Behan*, 19 Cal. App. 111, 124 Pac. 1038.

448. "In the absence of a bill of exceptions showing the evidence offered and received at the trial, we must assume that

the evidence fully supports the findings of the trial court in every essential particular, and therefore upon the record before us, we are limited to a consideration of the single question of whether or not the findings of fact support the conclusions of law adduced therefrom, and the judgment subsequently rendered and entered thereon."—*O'Connell v. Behan*, 19 Cal. App. 111, 124 Pac. 1038.

F. QUESTIONS PRESENTED FOR REVIEW.

449. Amendments to judgment-roll.—Amendment of 1907 to section 670, ante, makes "all orders striking out any pleading in whole or in part" a part of the judgment-roll, yet such amendment does not enlarge the scope of an appeal taken solely from an order denying a motion for a new trial, upon which no question as to the sufficiency of the pleadings or findings can be reviewed; only such matters can be considered as are made grounds of the motion, upon which the trial court may grant or deny the same.—*Stockton Iron Works v. Walters*, 18 Cal. App. 373, 123 Pac. 240.

See par. 461, this note.

450. Excluded depositions not set forth.—Where depositions were offered in evidence and excluded upon objection, but the depositions are not incorporated in the bill of exceptions, and the record shows no error in the ruling, any alleged error in the ruling can not be reviewed.—*Oldershaw v. Matteson & Williamson Co.*, 19 Cal. App. 180, 125 Pac. 263.

451. Findings of fact.—It is the rule generally that, in the absence of a bill of exceptions or a statement of the case showing the evidence adduced at the trial, the findings of fact as made by the lower court are conclusive upon appeal; and if the conclusions of law deduced from the findings of fact necessarily follow as a matter of law, the judgment founded thereon will not ordinarily be disturbed. The rule, however, can not be applied in every case. Ordinarily, a material defect in the findings is fatal to the judgment; and clearly no judgment should be sustained upon the findings alone where it affirmatively appears that no such findings could have been properly made in any possible view of the case.—*Bradley Bros. v. Bradley*, 20 Cal. App. 1, 127 Pac. 1044, 1047.

452. Instructions unincorporated in record on appeal, which were requested and refused, can not be considered by the appellate court, for want of a showing that the requested instructions were not substantially given.—*Patton v. Klemmer*, 15 Cal. App. 459, 115 Pac. 62.

453. New-trial order without application therefor by respondent, contention on part of appellant to that effect is not sustained where the bill of exceptions upon the appeal shows the notice of intention and ground of motion, that the cause came on for hearing with the counsel for both parties present in court; that the cause was submitted, and

that thereafter the court granted the motion and ordered a new trial.—*Hovey v. Thorp*, 17 Cal. App. 677, 121 Pac. 303.

454. An order denying a new trial recited that the motion for a new trial was presented upon all grounds stated in the notice of intention to move for a new trial and upon the statement of the case previously settled. A copy of the notice of intention was printed in the transcript, but was not authenticated by a bill of exceptions, and therefore could not be considered as a part of the record on appeal under the provisions of sections 661, ante, and 951 and 952, post. However, the record contained a bill of exceptions in which the insufficiency of the evidence to sustain the findings was specified, but the order denying the new trial did not clearly state that the grounds upon which the motion was made were those specified in the settled statement. It was held that these orders are to be liberally construed; that the bill of exceptions setting forth the evidence and proceedings taken at the trial was in no wise distinguishable by a statement of the case; that wherever it is necessary for the ends of justice to do so, the appellate court would consider the expressions as synonymous; that the recital in the order that the motion was presented upon the statement of the case previously settled would be deemed sufficient evidence that the objections set forth in the statement were the grounds of the motion; that the misnomer whereby the bill was referred to as the statement would be disregarded, and that therefore the evidence could be considered.—*Dennis v. Gordon*, 163 Cal. 427, 125 Pac. 1063.

455. On appeal from a judgment and order denying a new trial, the sole question to be considered is whether the findings sustain the judgment.—*Brode v. Gosslin*, 16 Cal. App. 632, 117 Pac. 778.

456. Record not containing notice of intention, and not showing the grounds of the motion or the order, neither the order nor the evidence can be reviewed by the appellate court.—*Morcum v. Balersky*, 16 Cal. App. 480, 117 Pac. 560.

457. Upon an appeal from an order denying a new trial, which motion was made upon the ground of newly discovered evidence, there can be no review when the affidavits showing the newly discovered evidence are not referred to and not included in the authenticated bill of exceptions.—*Schroeder v. Mauzy*, 16 Cal. App. 443, 118 Pac. 459.

458. Same—Newly discovered evidence not included in the record on appeal, appellate court can not determine whether the trial court erred in refusing to grant a new trial on the ground of such newly discovered evidence.—*Stockton Iron Works v. Walters*, 18 Cal. App. 373, 123 Pac. 240.

459. Note and unacknowledged mortgage not included in record, the statement on motion for a new trial, an appellate court can not determine from the record on appeal

whether there was a variance, as claimed.—*West v. Mears*, 17 Cal. App. 718, 121 Pac. 700.

460. *Nunc pro tunc* order by trial court pending appeal will not be considered by the appellate court where the record showed that nothing remained for hearing except the motion, that the cause which came on for hearing was the motion, and that the order was in connection therewith, and the application for a new trial together with the grounds therefor sufficiently appear in the record.—*Hovey v. Thorp*, 17 Cal. App. 677, 121 Pac. 303.

461. Order on motion to strike out pleading can not be reviewed where the only reference to the question, as shown by the record, is a paper found in the transcript, appearing to be a copy of a notice that appellant would make such motion, but it is not shown that such motion ever was in fact made or that there ever was any ruling thereon.—*National Bank of Cal. v. Mulford*, 17 Cal. App. 551, 120 Pac. 446.

See par. 449, this note.

462. Sufficiency of evidence—Can not be reviewed by an appellate court in the absence of a bill of exceptions showing the evidence offered and received in the trial court; under such a record the appellate court must assume that the evidence fully sustains the findings of the trial court in every essential particular.—*O'Connell v. Behan*, 19 Cal. App. 111, 124 Pac. 1038.

As to review of sufficiency of evidence, see pars. 462-464, this note.

463. Where, after trial of the issues joined upon the petition for the writ, the judgment was against the petitioner and in favor of the clerk respondent, from which the petitioner appealed upon the judgment-roll and a bill of exceptions which does not purport to set out the evidence, and the findings state that the case was tried and finally heard upon the pleadings "and testimony given at the trial," it must be presumed that the findings speak the truth, and a statement in appellant's brief that the evidence was stipulated must be disregarded; and it must also be presumed that the evidence was sufficient to support the findings, and its insufficiency can not be reviewed.—*O'Connell v. Behan*, 19 Cal. App. 111, 124 Pac. 1038.

464. Where an appeal is on the judgment-roll alone, the evidence not being before the court, its sufficiency to support the findings can not be questioned.—*Archer v. Harvey*, 164 Cal. 274, 128 Pac. 410, 412.

G. STATEMENT AND SPECIFICATION OF ERRORS.

465. As to generally.—Where the statement of a case contains no specification nor attempted specification of the particulars in which it is claimed that the evidence is insufficient to justify the findings and decision, the appellate court can not resort to it, either upon the appeal from the judgment or the order denying a new

trial, for the purpose of determining the sufficiency of the evidence to support the findings.—*Holland v. Canty*, 23 Cal. App. 91, 137 Pac. 276.

466. A statement of the case on motion for a new trial, which does not specify nor attempt to specify the particulars in which the evidence is claimed to be insufficient to justify the findings, can not be considered, either upon the appeal from the order denying a new trial or on the appeal from the judgment, for the purpose of determining the sufficiency of the evidence.—*Hastaran v. Marchand*, 23 Cal. App. 126, 137 Pac. 297.

467. The failure of such statement to specify the particulars in which it is claimed the evidence is insufficient is not cured by the incorporation, elsewhere in the transcript, of two separate documents entitled "Bill of Exceptions," one of which contains several specifications of the insufficiency of the evidence intermingled with argument and the citation of authorities, and the other made up of specifications of errors in law alleged to have occurred during the trial, neither documents being authenticated by the trial judge, nor referred to in the authenticated statement or made a part thereof, nor purporting to set out in narrative form or otherwise the evidence and rulings at the trial, although upon the diminution of the record there was indorsed thereon the certificate of the trial judge that such documents were used on the hearing of the motion for a new trial.—*Hastaran v. Marchand*, 23 Cal. App. 126, 137 Pac. 297.

468. The specifications of the insufficiency of the evidence in a statement of the case or bill of exceptions are not required merely for use upon the hearing of a motion for a new trial, but are intended primarily, if not entirely, for the information of the adverse party and the trial court, to the end that they may be fully advised upon the settlement of the statement or bill of exceptions as to what matters of evidence covering the points in controversy should be included therein.—*Hastaran v. Marchand*, 23 Cal. App. 126, 137 Pac. 297.

469. Where the transcript on appeal discloses that the instructions of the court have not been embodied in the statement of the case, and that no specification of error in the giving of instructions has been made in the statement, the argument of the appellant as to error in such instructions can not be considered by the appellate court.—*Moore v. Gilson*, 23 Cal. App. 159, 137 Pac. 268.

470. No error can be predicated upon the ruling of a trial court in denying a motion for a new trial, when no statement has been settled and allowed. And although the want of a settled statement may be due solely to an error of the court in refusing to allow the same, this can not avail a party aggrieved, on appeal from such order, when upon the record nothing appears to show the alleged errors upon which the motion is

based.—*Keating v. Keating*, 23 Cal. App. 384, 138 Pac. 118.

471. Where the co-respondent and the defendant in a divorce action agree that the defendant shall prepare a statement to be used by both on their respective motions for a new trial, but the plaintiff is not a party to the agreement and is served with the statement in support of the motion of the defendant alone, the co-respondent is not entitled to rely on the statement of the defendant. The failure of the defendant to carry out the agreement is no ground for relief from the co-respondent's default in preparing and serving a statement.—*Keating v. Keating*, 23 Cal. App. 384, 138 Pac. 118.

472. If notice of the denial of an appellant's motion for a new trial is not served, and the record on appeal does not contain the papers specified in section 661, ante, as required by section 952, post, the order denying the motion for new trial must be affirmed.—*Keating v. Keating*, 23 Cal. App. 384, 138 Pac. 118.

H. THE TRANSCRIPT.

1. NEW AND ALTERNATIVE METHOD OF APPEAL.

473. **Statutory provisions.**—Transcript of proceedings, etc., as authorized by section 941b, post, will not be filed when the appeal, except as to such questions as may be reviewed on an appeal from the judgment upon the judgment-roll alone where the judgment-roll is presented in a proper and separate form distinct from the transcript of the proceedings, unless such transcript conforms to the requirements of rule of the supreme court.—*Reclamation Dist. No. 70 v. Sherman*, 11 Cal. App. 403, 105 Pac. 277.

474. Section 953a, post, does not provide at all for a notice of appeal. The purpose of that section, in connection with sections 953b and 953c, post, is to provide a method of preparing the record or transcript to be filed in the proper appellate court in support of the appeal. None of the proceedings there prescribed are jurisdictional to the appeal.—*Smith v. Jaccard*, 2 Cal. App. 280, 287, 128 Pac. 1023, 1026.

475. **Same—Transcript allowed and certified** as provided by section 953a, post, becomes part of the judgment-roll only in the same sense that a bill of exceptions was made a part thereof by section 670, ante, prior to its amendment in 1907, that is, to serve as part of the record under sections 950, 953a, post. There is no express authority for an appellant being relieved from printing his transcript on appealing in any case except one in which the transcript has been settled and allowed by the trial court in accordance with this section, and this is true whether it consists of the judgment-roll only or a record made up under the alternative method in lieu of a bill of exceptions.—*Waterbury v. Temescal Water Co.*, 11 Cal. App. 632, 637, 105 Pac. 940.

476. **Same—Same—Transmitting and filing transcript — Provision directory.**

Neither in the statute nor in the rules of the court is any penalty prescribed for the failure of the reporter to file a transcript of the proceedings within twenty days, as provided by section 953a, post. Such provision as to a time for filing the transcript is merely directory, and the failure of the reporter to file such transcript within the time allowed is not jurisdictional.—*Smith v. Jaccard*, 20 Cal. App. 280, 128 Pac. 1023, 1024.

477. **Same—When transcript unnecessary.**

When an appeal is properly taken either by the method provided by sections 940 and 941, post, or by that provided by sections 941a, 941b and 941c, post, the appellate court to which it is taken has jurisdiction of the appeal, even if no transcript on appeal is ever found to support it. It may dismiss such appeal for delay in filing the transcript, but such dismissal will be a dismissal for want of diligence for prosecuting it, and not a dismissal for lack of jurisdiction of the appeal.—*Smith v. Jaccard*, 20 Cal. App. 280, 128 Pac. 1026.

2. OLD METHOD OF APPEAL.

478. **As to time of serving and filing transcript.**

A proceeding is pending for the settlement of a bill of exceptions, within the meaning of Rule XI of the supreme court relating to the time of filing the transcript on appeal from a judgment, where an appeal has been taken from an order relieving a party moving for a new trial from his omission to serve his notice of intention within the time prescribed by law, regardless of the ultimate success or failure of the proceeding.—*Union Collection Co. v. Oliver*, 23 Cal. App. 318, 137 Pac. 1082.

479. A delay of fifteen months in filing the transcript does not warrant a dismissal of the appeal, if during that time there has been pending a motion for a new trial, and incidental thereto, the settlement of a proposed bill of exceptions.—*Baker v. Eilers Music Co.* 24 Cal. App. 348, 141 Pac. 395.

480. A motion to dismiss an appeal from a judgment upon the ground of failure to serve and file the transcript within the time prescribed by Rule II of the superior court is premature if made before the expiration of forty days from the time of the filing by stipulation of a substituted bond on appeal.—*Hofer v. Grundy*, 24 Cal. App. 686, 142 Pac. 102.

481. **Stipulating correctness of transcript —Plea of diminution of record—Estoppel.**

Where the appellant seeks the general verdict of the jury, and the judgment based thereon, by showing that error was committed as to one of the issues involved, the respondent may, notwithstanding the fact that he has stipulated as to the correctness of the transcript on appeal, under plea of diminution of record, complete the judgment-roll by adding thereto special

verdicts which were omitted from the transcript stipulated as to, and which show that the judgment is sustainable regardless of the alleged error.—*California Wine Assn. v. Commercial Union Fire Ins. Co.*, 159 Cal. 49, 112 Pac. 858.

482. Subdivision 2 of section 670, ante, embraces special verdicts which, themselves, absolutely control the general verdict.—*California Wine Assn. v. Commercial Union Fire Ins. Co.*, 159 Cal. 49, 52, 112 Pac. 858. See *Suydam v. Williamson*, 61 U. S. 427, 51 L. ed. 978; *Frank v. Grimes*, 105 Ind. 346, 4 N. E. 414.

483. Stipulation by the respondent as to the correctness of the transcript filed on appeal, does not preclude him from objecting to the sufficiency of the statement to support a motion for a new trial.—*Carver v. San Joaquin Cigar Co.*, 16 Cal. App. 761, 118 Pac. 92.

484. Respondent on an appeal is not estopped by any stipulation or conduct in connection with the settlement of the bill of exceptions, from completing the judgment-roll by adding thereto the special interrogatories submitted to the jury, and the finding of the jury thereon.—*California Wine Assoc. v. Commercial Union Fire Ins. Co.*, 59 Cal. 49, 112 Pac. 858.

VI. REVIEW ON APPEAL. A. IN GENERAL.

485. **Abandonment of appeal or of point**—As to generally.—Alleging errors in the admission or exclusion of evidence, which are not argued by the appellant, his brief merely stating that "we think the court erred" in making the respective rulings, will not be considered on appeal.—*Perry v. Ayers*, 159 Cal. 414, 114 Pac. 46.

486. **Same—Same—Errors not discussed in brief.**—Alleged errors in the admission of evidence, which are referred to but not discussed in the appellant's brief, deserve scant notice on appeal.—*Dore v. Southern Pac. Co.*, 163 Cal. 182, 124 Pac. 817.

As to points not argued, see pars. 133-136, this note.

487. Appellate court is justified in treating the appeal as abandoned, except upon the single point that they should have been given leave to amend, upon which the appeal is not tenable.—*Sanguinetti v. Vallecita Min. Co.*, 16 Cal. App. 781, 117 Pac. 1037.

488. Where objections to the admissibility of evidence are not noticed in the brief of the appellant, they will be regarded as waived.—*Irvine & Muir Lumber Co. v. Holmes*, 26 Cal. App. 453, 147 Pac. 229.

489. **Affirmance, reversal, or modification.**—It is only in extreme cases that the action of the trial court, in granting or denying relief, can be reversed on appeal.—*Estate of Simmons*, 168 Cal. 390, 143 Pac. 697.

As to modifications on appeal, see par. 500, this note.

As to reversal of judgment based on finding foreign to issues raised, see par. 713, this note.

490. The affirmance of a judgment on appeal does not preclude the lower court from thereafter granting a new trial on the ground of insufficiency of the evidence, notwithstanding this point was presented to the appellate court.—*Bond v. United Railroads*, 169 Cal. 273, 146 Pac. 688.

491. A judgment entered by the trial court pursuant to the mandate of the supreme court on appeal from the original judgment, as well as the original judgment itself, is vacated and set aside upon the subsequent affirmance upon the appeal of the order granting a new trial, notwithstanding the entry of the judgment pursuant to the mandate was made subsequently to the order.—*Miller & Lux v. Enterprise Canal etc., Co.*, 169 Cal. 415, 147 Pac. 567.

492. The supreme court has no power to grant a writ of supersedeas to stay the enforcement of a final judgment pending the determination of an appeal from an order striking from the files the notice of intention to move for a new trial where the pending appeal in the meanwhile has been disposed of by reversing the order, since such reversal remands the proceeding for a new trial to the jurisdiction of the superior court, and any steps looking to a stay of execution on the judgment must be sought in that court.—*Bond v. United Railroads*, 169 Cal. 632, 147 Pac. 465.

493. On this appeal from a judgment of conviction of the crime of rape, it is held that no error appears from the fragmentary record, which consists merely of the minute entries of the trial kept by the clerk and the judgment of conviction.—*People v. Taggart*, 25 Cal. App. 628, 144 Pac. 1197.

494. The power of the district court of appeal on an appeal which involves as its only issue a disagreement between the judgment and the findings in the case, is not limited to a modification of the judgment to conform to the findings, but it has the power to reverse the judgment and remand the case for a new trial.—*Machado v. Machado*, 26 Cal. App. 16, 145 Pac. 738.

495. An appellate court will not disturb the finding of the trial court where there is substantial evidence warranting a clear and satisfactory conviction to that effect.—*Brunner v. Title Insurance & Trust Co.*, 26 Cal. App. 35, 145 Pac. 741.

496. A judgment will not be reversed merely because it was rendered for an excessive amount where the party in whose favor the judgment was given consents to a modification thereof.—*Conlin v. Emanuel Lewis Investment Co.*, 26 Cal. App. 388, 147 Pac. 472.

497. Where the defendant in an action to enforce a trust gives a deed to stay execu-

tion of the judgment rendered against him and deposits it with the clerk of the court pursuant to section 944, post, the deed becomes a nullity in the hands of the clerk upon the reversal of the judgment.—*United States Oil & Land Co. v. Bell*, 219 Fed. 785.

498. Same—Reversal in part.—The practice of reversing a judgment in part only is well settled, and should be followed where the error found to have been committed has affected the determination of but one or more of a greater number of distinct and severable issues or causes of action.—*Gray v. Cotton*, 166 Cal. 130, 134 Pac. 1145.

499. Failure to serve motion for new trial.—The failure to serve a motion for a new trial on necessary parties amounts to a jurisdictional defect, and is available at any time. It is not waived by the parties failing to present the point in the lower court.—*Marshall & Stearns Co. v. Deneen Building Co.*, 169 Cal. 216, 146 Pac. 684.

500. Modification of judgment.—Where, upon the second appeal from the judgment in favor of the plaintiff in an action for damages for death, it is determined that the only error committed was in the admission of certain evidence on the subject of damages, and no claim was made on the first appeal that the verdict was excessive but the judgment was reversed solely because of the erroneous admission in evidence of a certain municipal ordinance, the court has power to modify the judgment instead of ordering a new trial, by providing that the plaintiff remit the difference between the verdicts returned in the two trials.—*Simoneau v. Pacific Elec. R. Co.*, 166 Cal. 264, 49 L. R. A. (N. S.) 737, 136 Pac. 544. See, also, pars. 710, 711, this note.

As to affirmance and reversal on appeal, see pars. 489-498, this note.

501. Parties entitled to allege error—As to generally.—Where there was no attempt of the other defendants denying the lease to limit such prior judgment to the original lessee, they are in no position to make such limitation upon appeal.—*Delger v. Jacobs*, 19 Cal. App. 197, 125 Pac. 258.

502. Same—Error in judgment as to co-defendant.—Where the trial court's findings were against both defendants, but judgment was rendered against only one, the fact that the defendant, against whom no judgment was rendered, was entitled to a judgment for his costs in no defense to the validity of the judgment against the other defendant, where it is clear from the facts that he alone is liable. Any error in this respect, being harmless, should be disregarded as provided by section 475, ante.—*Madary v. City of Fresno*, 20 Cal. App. 91, 128 Pac. 340, 344.

503. Same—Estoppel to allege error.—A party can not complain on appeal of the admission of evidence which he himself has offered. If the evidence was not admissible, such party waived his right to object by

offering it himself.—*Gjurich v. Fieg*, 164 Cal. 429, 129 Pac. 464, 466.

504. In an action for money received, defendants are not at liberty to complain on appeal of action by the trial court which was entirely in accord with their own requests.—*Gray v. Ellis*, 164 Cal. 481, 129 Pac. 791, 793.

505. Where the defendant persisted, in the face of the objection of want of notice, in presenting his motion, he can not claim that the court erred in passing upon the motion which he had thus pressed upon it for determination.—*Bohn v. Bohn*, 164 Cal. 532, 129 Pac. 981, 984.

506. Same—Intervener.—An intervener is not entitled to complain that the judgment for the plaintiff is ineffectual or imperfect in its relation to other parties. It is sufficient that the judgment as to him is in plain terms and sufficiently explicit to enable plaintiff to exact performance from him thereunder.—*Gray v. Bonnell*, 19 Cal. App. 243, 125 Pac. 355.

507. Presumptions and intendments on appeal.—Where only one count of the complaint is sufficient to support a judgment, it will be presumed, on appeal, that it was based solely on that count.—*Watson v. Lawson*, 166 Cal. 235, 135 Pac. 961.

508. In examining the sufficiency of the evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the findings as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion, and every substantial conflict in the testimony is to be resolved in favor of the finding.—*Bancroft-Whitney Co. v. McHugh*, 166 Cal. 140, 134 Pac. 1157.

509. On appeal the presumptions of law are all in favor of the action of the court below; if error is claimed, the record must contain sufficient legal evidence of it, or the appellate court will disregard it.—*Estate of Gamble*, 166 Cal. 253, 135 Pac. 970.

510. On an appeal from a judgment, taken upon the judgment-roll accompanied by a bill of exceptions which contains no specifications nor attempted specifications of the particulars in which the evidence is insufficient to support the findings, it must be assumed that there was ample evidence to support them.—*Kinard v. Kaelin*, 22 Cal. App. 383, 134 Pac. 370.

511. Where an order of the trial court striking out parts of the plaintiff's amended answer to the defendant's cross-complaint is not included in the judgment-roll as required by section 670, ante, such order must be sustained if it can be supported upon any just ground appearing in the record.—*Kinard v. Kaelin*, 22 Cal. App. 383, 134 Pac. 370.

512. On an appeal from a judgment on the judgment-roll, alone, it must be conclusively presumed that a finding of the

trial court as to the date when the defendant repudiated a trust was justified by the evidence.—*Pavlovich v. Pavlovich*, 22 Cal. App. 500, 135 Pac. 303.

513. In the absence of an efficient statement of the case or a bill of exceptions, an appellate court must assume that the evidence adduced at the trial fully supports the findings, and justified the denial of a new trial.—*Hastaran v. Marchand*, 23 Cal. App. 126, 137 Pac. 297.

514. On appeal from a judgment it will be presumed that the trial court ruled upon a demurrer to the complaint, if the record fails to show that the court did not rule thereon.—*Murdough v. Murdough*, 23 Cal. App. 179, 137 Pac. 267.

515. When a special demurrer is filed, and the record fails to disclose that the court ruled upon it, but does show that defendant filed an answer and cross-complaint, an appellate court is warranted in presuming that defendant waived his special demurrer.—*Murdough v. Murdough*, 23 Cal. App. 179, 180, 137 Pac. 267, and cases cited.

516. Where a complaint embraces two counts, one of which states sufficient facts to constitute a cause of action, it is good as against a general demurrer, and an appellate court will not reverse a judgment for the plaintiff, even if the other count is defective; for the sake of upholding it, the judgment will be presumed to be based upon the count against which there is no valid objection.—*Union Collection Co. v. Oliver*, 23 Cal. App. 318, 137 Pac. 1032.

517. Not only are all intendments on appeal in favor of the regularity of the action of the trial court, but the findings of fact made by the trial court are to receive such a construction as will uphold rather than defeat its judgment thereon.—*Pacific States Co. v. Arnold*, 23 Cal. App. 672, 139 Pac. 239.

518. As error is not presumed, and all intendments are in favor of the action of the lower court, it follows that affidavits in behalf of the successful party are deemed to establish not only the facts directly stated therein, but also all facts which may reasonably be inferred or presumed from the direct and positive statements.—*Smillie v. Smillie*, 24 Cal. App. 829, 141 Pac. 829.

519. Questions reviewable on appeal.—The party objecting to evidence can not complain on appeal that the court, in admitting it, gave an erroneous reason therefor.—*Ray v. Borgfeldt*, 169 Cal. 253, 146 Pac. 679.

520. It is too late to make the contention, for the first time on appeal, that the trial court abused its discretion in refusing leave to amend the complaint after demurrer sustained, where nothing appears in the record to show such an abuse.—*Morrison v. Land*, 169 Cal. 580, 147 Pac. 259.

521. Where a supplemental complaint is filed in an action to recover rents, for the

purpose of recovering rent which has accrued after the commencement of the action, and the defendants answer such pleading, and go to trial without objection, they can not raise the objection to such pleading for the first time after judgment.—*Sinnige v. Oswald*, 170 Cal. 55, 148 Pac. 203.

522. Same—Points raised for the first time in a petition for rehearing or for transfer will not be considered.—*Cain v. Franch*, 25 Cal. App. 499, 144 Pac. 302.

See, also, pars. 46, 57, 109-111, this note.

523. Scope and extent of review.—In general.—Upon an appeal duly perfected pursuant to the provision of section 941b, post, any question may be reviewed which could be reviewed upon an appeal taken, pursuant to the provisions of section 939, post, within sixty days of the rendition of the judgment. (See § 941c, post). The claim that the evidence is not such as to sustain the findings of the trial court must therefore be considered.—*Fraser v. Sheldon*, 164 Cal. 165, 128 Pac. 33, 34.

As to stipulation of counsel, conferring jurisdiction upon an appellate court to pass on questions not raised below, see note. Ann. Cas. 1912A, 1037.

524. Where neither the complaint nor the findings support the judgment, such defect is one that may be reviewed on an appeal from the judgment.—*Van Buskirk v. Kuhns*, 164 Cal. 472, 129 Pac. 587, 588.

525. Where the order of the lower court sustaining a demurrer was general in its terms, it will be sustained where it can be ascertained that the demurrer was well taken upon any of the grounds assigned therefore.—*MacMullen v. Kelly*, 19 Cal. App. 400, 127 Pac. 819.

526. Where the judgment must be reversed and the cause sent back for a new trial, because of the error of the trial court in striking out the equitable defense pleaded by the answer of the defendant, it is neither necessary nor proper for the supreme court to review the evidence and express an opinion as to its sufficiency to support the judgment in so far as it relates to the damages awarded to the plaintiff.—*Knight v. Black*, 19 Cal. App. 510, 126 Pac. 512, 516.

527. Notwithstanding the fact that the lower court based its ruling in granting a new trial as to all of the defendants solely upon the insufficiency of the evidence to support the verdict against two of the defendants, the order appealed from must be affirmed in whole or in part if it can be justified upon any of the grounds which were made the basis of the motion for a new trial.—*Clark v. Torchiana*, 19 Cal. App. 786, sub nom. *Clark v. Van Torchiana*, 127 Pac. 831, 833.

528. An order denying a motion to dissolve a writ of attachment will be affirmed on appeal, where the grounds upon which the motion was made are not disclosed by

the record. An appellate court can not assume error in the ruling of the trial court; error must affirmatively appear from the record, otherwise the judgment will be affirmed.—*Costa v. Raza*, 23 Cal. App. 754, 139 Pac. 899.

529. If a demurrer is well taken on any ground, the order sustaining it will be affirmed, regardless of the reasons which the court may have assigned therefor.—*Koch v. Speedwell Motor Car Co.*, 24 Cal. App. 123, 140 Pac. 598.

530. An appellate court will not reverse a judgment for error of the trial court in ruling upon the admissibility of expert evidence as to value, unless it has abused its discretion.—*People v. Youtz*, 26 Cal. App. 436, 147 Pac. 222.

531. **Same—As to order respecting default judgment.**—While it has been said in some cases that the discretion of an appellate court as to disturbing an order of the lower court is better exercised when it tends to bring about a decision of the case upon its merits, the rule itself (not to disturb an order setting aside, or refusing to set aside, a default except in clear cases of an abuse of discretion by the whole court) has never been relaxed. This observation has been in the nature of advice to the superior court and not for the purpose of compelling it to decide in that mode. Unless the record clearly shows that the court has abused its discretion, its order, whether it be to grant or deny the application, will be affirmed.—*Lang v. Lilley & Thurston Co.*, 164 Cal. 294, 128 Pac. 1026, 1027.

532. The defaulting defendants in condemnation proceedings should not be heard here to question the disposition of the fund. A defaulting defendant undoubtedly has the right of appeal, but even then his attack must be confined to the consideration of jurisdiction or of the sufficiency of the pleadings.—*Reed Orchard Co. v. Superior Court*, 19 Cal. App. 648, 128 Pac. 9, 16.

533. **Same—Appeal from order denying new trial.**—Upon appeal from an order denying a new trial, the sufficiency of the evidence to support the finding can not be reviewed, where there is nothing in the bill of exceptions specifying the particulars in which the evidence is insufficient, as required by section 648, ante.—*Layne v. Johnson*, 19 Cal. App. 95, 124 Pac. 860.

As to orders denying a new trial not now being an appealable order, see par. 3, this note; also, post, § 963 and note.

534. On appeal from an order denying a new trial, objections of the complaint urged under the demurrer can not be reviewed, since such objections can be considered only upon an appeal from the judgment.—*Cook v. Suburban Realty Co.*, 20 Cal. App. 538, 129 Pac. 801, 802.

535. **Same—Appeal from order granting new trial.**—The question whether the findings are supported by the evidence may be

reviewed on appeal from an order granting a new trial, even though the attempted appeal from the judgment was futile.—*Suisun Lumber Co. v. Fairfield School Dist.*, 19 Cal. App. 587, 127 Pac. 349.

536. On an appeal from an order granting a motion for a new trial especially on the ground of newly discovered evidence, the appellate court is not confined to a review of the action of the trial court in granting the new trial on that ground, but will affirm the order if upon an examination of the entire record it appears that a new trial should have been granted for any ground upon which the motion was based.—*Cahill v. Stone Co.*, 167 Cal. 126, 138 Pac. 712.

537. **Same—Appeal from order relieving from default.**—An order relieving a party moving for a new trial from his failure to present his bill of exceptions for settlement within the time required by law, is not appealable, but the order may be reviewed on appeal from the order denying the new trial, where the proceedings are incorporated in the record.—*Kramm v. Stockton Elec. R. Co.*, 22 Cal. App. 737, 761, 136 Pac. 523.

538. **Same—Errors of law occurring at the trial.**—Errors of law appearing either in a proper statement of the case or bill of exceptions may be reviewed upon an appeal from the judgment, regardless of whether or not an appeal has been perfected from an order denying a new trial.—*Hastaran v. Marchand*, 32 Cal. App. 126, 137 Pac. 297.

539. Where upon an appeal from a decree denying a divorce the only reference in support of the contention of the appellant plaintiff that the court erred in ruling that no inquiry could be made as to acts of the respondent and occurrences prior to a certain date, is a ruling denying the respondent the privilege of introducing certain evidence tendered, such ruling, even if erroneous, can not be attacked on the appeal.—*Donnelly v. Donnelly*, 26 Cal. App. 577, 147 Pac. 582.

540. **Same—Insufficiency of record to entitle objection to review.**—Where the only reference in the record is a notice in the transcript that appellant would make such a motion, and it does not appear that it was ever made, or any ruling thereon, an alleged error in denying a motion to strike out designated portions of an amended complaint can not be reviewed.—*National Bank v. Mulford*, 17 Cal. App. 556, 120 Pac. 446.

As to record on appeal, generally, see Part V, this note.

541. **Same—Judgment by default.**—Where a defendant fails to answer, the only question that can arise upon an appeal is a legal one, and the appellate court is limited in its examination in such a case to the judgment-roll, i. e., the papers designated in subdivision 1 of section 670, ante.—*Crackel v. Crackel*, 17 Cal. App. 603, 121 Pac. 295.

542. Same—Review of evidence and findings.—Where an appeal is taken from a judgment within sixty days after its rendition and entry, the sufficiency of the evidence to support the findings may be reviewed as effectually as upon an appeal from an order refusing a new trial, whether the appeal is taken under section 940, post, or under the new method prescribed by sections 941a, 941b and 941c, post.—*Cortellou v. Imperial Land Co.*, 166 Cal. 14, 134 Pac. 981.

543. Where there is a substantial conflict in the evidence, the decision of the trial court as to the fact is conclusive on appeal.—*National Lumber Co. v. Ripple*, 166 Cal. 506, 137 Pac. 236.

544. The rule that findings must be interpreted so as to support the judgment, if reasonably possible, is herein controlled by the rule that findings must be interpreted on appeal so as to be within the issues.—*McLellan Co. v. East San Mateo Land Co.*, 166 Cal. 736, 137 Pac. 1145.

545. Same—Subsequent orders and proceedings.—The filing, with the sanction of the court, of an amendment claiming a defect of parties plaintiff, raised an issue upon which defendant was entitled to rely in its motion for nonsuit. It also cured any error that might have been theretofore committed in admitting evidence tending to show that the ownership of the automobile was in the partnership.—*Burr v. United Railroads of San Francisco*, 163 Cal. 663, 126 Pac. 873, 874.

546. Same—Theory of decision of lower court upheld, if possible.—Where the court has not limited in any way the effect of the order for a new trial, an appellate court is compelled to view it by the light of the settled rule in this state, and hold that, if it can be upheld upon any ground embraced in the notice of the intention, it is the duty of such appellate court to sustain it.—*Shea-Bocqueraz Co. v. Hartman*, 20 Cal. App. 534, 129 Pac. 807, 808.

547. Where the court made an order granting a new trial in general language, without in any manner or degree qualifying or restricting the scope thereof, such order will not be reversed merely because appellant claims that there was no necessity for a new trial, for the reason that the court erred only in failing in its judgment to allow interest thereon.—*Shea-Bocqueraz Co. v. Hartman*, 20 Cal. App. 534, 129 Pac. 807.

548. Same—Same—Order granting new trial.—It is only in rare instances and upon very strong grounds that the supreme court will set aside an order granting a new trial. Even though the order declares in terms that the motion is granted for one or more reasons only, the appellate court is not precluded from considering any other assignment upon which the motion should have been granted. This rule is subject to the one limitation that the trial court

may limit its order granting the motion so as to exclude, as a ground for its action, the insufficiency of the evidence, but such exclusion, to be effectual, must be declared in the order itself.—*Briggs v. Hall*, 20 Cal. App. 372, 129 Pac. 288.

See, also, par. 535, this note.

549. Variance.—Any variance between the pleading and proof must be taken advantage of by exception at the trial; it can not be presented for the first time on appeal.—*Mercantile Trust Co. v. Doe*, 26 Cal. App. 246, 146 Pac. 692.

As to variance generally, see pars. 49, 62, this note.

As to variance immaterial when, see par. 580, this note.

B. DISCRETION OF LOWER COURT.

550. As to rule.—The rule is well settled that where the trial court has discretionary power in proceedings before it, its exercise will not be disturbed, unless a clear abuse of discretion is made to appear; and even when the correctness of the ruling may be doubted, the appellate court will not substitute its own opinion, and thereby divest the trial court of the discretionary power reposed in it.—*Smith v. Riverside Groves & Water Co.*, 19 Cal. App. 165, 124 Pac. 870.

551. Filing transcript on appeal—Diligence.—The determination of the question as to whether or not there has been due diligence in the matter of filing the transcript on appeal is one largely lying in the discretion of the trial court, with which the appellate court will not interfere unless it appears that the court in its action has abused its discretion. Especially will an appellate court abide by the action of the trial court when it tends to a determination of the appeal upon its merits.—*Smith v. Jaccard*, 20 Cal. App. 280, 128 Pac. 1023, 1024.

552. In granting new trial.—The granting of a new trial for want of evidence to support the verdict is usually a matter almost entirely within the discretion of the trial court; and its order will not be reversed, unless an abuse of discretion appears.—*Estate of Everts*, 163 Cal. 449, 125 Pac. 1058.

553. The matter of dismissal of proceedings on motion for a new trial, on the ground of lack of diligence in the prosecution thereof, is one which is addressed to the sound discretion of the court; and unless an abuse of this discretion is shown, an order made granting or denying such a motion will not be disturbed on appeal.—*McConnell v. Imperial Water Co.*, 20 Cal. App. 8, 127 Pac. 1036, 1037, following doctrine in *Galbraith v. Lowe*, 142 Cal. 295, 75 Pac. 831.

554. Same—For insufficiency of evidence.—An action was brought to recover commissions for finding a purchaser for certain mining property. The defendant in answer declared that the contract conferring the

power to sell had been altered by the insertion of other property not intended to be sold. At the trial it was stipulated that the whole case should be left to the decision of an expert to be chosen by the court, whose opinion as to the alteration should be conclusive upon judgment for plaintiff, the trial court upon motion granted a new trial. It was held on appeal that such a discretion would not be disturbed.—*Conwell v. Varian*, 21 Cal. App. 521, 130 Pac. 23, 25.

555. Where a new trial is granted on the ground that the evidence is insufficient to support the findings, it is well settled that the order will stand unless it is made clearly to appear that the trial court, in granting it, has abused its discretion.—*Conwell v. Varian*, 20 Cal. App. 521, 130 Pac. 23, 25.

556. Same.—For newly discovered evidence.—The matter of granting a new trial upon the ground of newly discovered evidence is with the trial court; and it is for that court to say whether or not the proffered evidence is such as would affect the decision of the court, if introduced.—*Jones v. Lewis*, 19 Cal. App. 575, 126 Pac. 853, 854.

557. Where a motion for a new trial was made upon newly discovered evidence, under the rule that it should be of such a character as to render a different result probable upon a new trial, such question is one to be determined by the trial court in the exercise of a discretionary power, which will not be interfered with except when manifest abuse is apparent, which does not appear when it can not be said that "it is clear that the proposed evidence would render a different result probable."—*Lamb v. Wilke*, 19 Cal. App. 286, 125 Pac. 757.

558. Same.—Weight of evidence.—The weight of the evidence and the credibility of the witnesses are ordinarily questions solely for determination by the trial judge, in passing upon a motion for a new trial, and his decision upon these matters will not be disturbed on appeal, although the evidence sustaining the verdict is weak and unsatisfactory.—*People v. Maruyama*, 19 Cal. App. 290, 125 Pac. 924.

C. HARMLESS ERROR.

559. As to generally.—Where the plaintiff, on cross-examination of a witness, brings out a fact or permits a juror to bring it out, he can not complain on appeal that the questions erroneously assumed the truth of the fact.—*Ray v. Borgfeldt*, 169 Cal. 253, 146 Pac. 679.

560. The practice of deciding a case without in terms declaring upon reserved rulings touching the admissibility of evidence is one to be reprobated and deplored, and where substantial injustice to a litigant results the error is of sufficient gravity to call for a reversal.—*Stanwood v. Carson*, 169 Cal. 640, 147 Pac. 562.

561. The failure to thus rule in an action to secure a decree declaring certain street improvement proceedings to be void is not reversible error, where the evidence objected to is record evidence and the objections founded upon the contention that for various omissions and irregularities the same was inadmissible and void, thereby involving the consideration of questions of law.—*Stanwood v. Carson*, 169 Cal. 640, 147 Pac. 562.

562. It is only when a judgment rests for its validity upon a finding which is not supported, or which negatives a fact admitted by the pleadings, that injury is worked and a reversal must follow.—*Thayer v. Tyler*, 169 Cal. 671, 147 Pac. 979.

563. Where in an action upon a written contract of guaranty the findings upon the question of fraud in its procurement are clear, full and explicit, and are in themselves sufficient to support the judgment, uncertainty in other findings becomes immaterial.—*American Nat. Bank v. Donnellan*, 170 Cal. 9, 148 Pac. 188.

564. Alleged contradictoriness in the findings in such an action as to whether the indebtedness covered by the guaranty was an individual indebtedness or that of a corporation through which the individual conducted his business is not material, in view of the finding that the guaranty was procured by fraud.—*American Nat. Bank v. Donnellan*, 170 Cal. 9, 148 Pac. 188.

565. Where in an action to recover damages for the breach of an alleged contract to sell land the findings are sufficient to sustain the judgment, the failure to find on other issues becomes immaterial.—*McRae v. Ross*, 170 Cal. 74, 148 Pac. 215.

566. Errors are harmless which consist in technical inaccuracies in the pleadings, and findings that do not affect the merits.—*Carrington v. Smithers*, 26 Cal. App. 460, 147 Pac. 225.

567. A judgment will not be reversed on the ground of failure to find on a particular issue where the want of such a finding is not prejudicial to the defendant.—*Beggs v. Smith*, 26 Cal. App. 532, 147 Pac. 585.

568. A mere inaccuracy.—A mere inaccuracy between the amount found by the trial court to be due a contractor for extras and the amount so claimed by him is without prejudice to him.—*Tubbs v. Delillo*, 19 Cal. App. 612, 127 Pac. 515.

569. Inaccuracies in the trial court's findings in describing the condition and size of the bed of the stream at and about the headgate will be deemed unimportant, where the judgment requires the bed of the creek to be kept in such condition that it will never take any except unusual flood waters, and specifies the width and depth at which the channel of the creek is to be maintained for that purpose.—*Gallatin v. Corning Irr. Co.*, 163 Cal. 605, 126 Pac. 864.

570. Admission of evidence.—As to generally.—Where a mortgageor, to whom a mortgagee had advanced but a portion of the money, sued the assignee of the mortgage to determine the extent of the adverse claim, it was harmless error to allow the mortgageor to show that he had been compelled to borrow money elsewhere by reason of the mortgagee's failure to advance the full amount of the mortgage.—*Mentry v. Broadway Bank & Trust Co.*, 20 Cal. App. 388, 129 Pac. 470.

571. The fact that a witness was permitted by the court to testify that he and his co-defendants were partners in the enterprise is not prejudicial error, in view of the fact that it was shown that they were jointly interested in the enterprise and expressly authorized the witness, as their agent, to make the contract. The agency of the witness was thus established, and the joint and several liability of the defendants therefor.—*McDougall v. Eaton*, 20 Cal. App. 164, 128 Pac. 415, 416.

572. Same—Facts otherwise established.—In an action to recover the purchase-price of machinery installed, objections were made to the introduction of certain evidence as to the declarations of servants sent by plaintiff's assignors to repair defects, the effect of which declarations was that the machine had been improperly installed, and could not be put in condition. Conceding the error of the court in permitting the introduction of such testimony, since evidence is so complete and convincing to the effect that these declarations were true in fact, and that plaintiff's assignors did not comply with the contract, no prejudicial error could result under the circumstances of the case by reason of the admission of such declarations.—*Sherman v. Ayers*, 20 Cal. App. 733, 130 Pac. 163, 164.

573. Same—Prejudicial effect too general.—In an action for money due for the hire of certain pack mules, whether the written conditions of the amount due afterwards executed by a manager or superintendent of defendant were binding upon defendant is of little consequence, in the face of the fact that the liability and non-payment of the amount due was clearly established by other competent evidence.—*Robinson v. Four Metals Smelting & Min. Co.*, 20 Cal. App. 645, 129 Pac. 968.

574. Same—Rulings on questions propounded to witnesses.—Objection to a question on cross-examination put to defendant by plaintiff seems to have been based upon the fact that counsel was reading from what purported to be a deposition made by defendant, but not signed by her. The matter, even if the trial court erred, is too unimportant to justify a new trial, especially as the court informed counsel that he might fully cross-examine the defendant about her testimony, and only prevented him from reading in the guise of a question a series of questions and answers from an unsigned

deposition until he had first examined her as to the facts covered by the deposition, after which the court said the deposition might be used in impeachment.—*Naylor v. Ashton*, 20 Cal. App. 544, 130 Pac. 181, 183.

See pars. 588-597, this note.

575. Error favoring prevailing party.—A person in favor of whom a judgment is rendered can not, on appeal, attack it on the ground that the court founded its conclusion on insufficient premises.—*Sewell v. Price*, 164 Cal. 265, 128 Pac. 407, 409.

576. Error in pleadings—Complaint.—A defendant will not be heard to complain on appeal for the first time that a complaint did not state facts sufficient to justify the relief prayed for in the complaint but which was not granted in the court below.—*Parker v. Herndon*, 19 Cal. App. 451, 126 Pac. 183.

577. Same—Same—Waiver of.—The objection upon appeal that the complaint also purported to state a cause of action for specific performance of an interest in the unsold claims, and that it is insufficient to justify such relief, if well founded, is answered by the fact appearing in the record, that plaintiff, at the trial, in open court, voluntarily waived and abandoned all right to the unsold portion of the property, and asked judgment only for one-sixth of the proceeds of the property sold. No demurrer having been interposed nor judgment rendered for specific performance, appellant will not be heard to object that the complaint did not entitle plaintiff to relief prayed for, but not granted.—*Parker v. Herndon*, 19 Cal. App. 451, 126 Pac. 183.

578. Same—Ruling on demurrer.—Where the court upon a conflict of evidence found in favor of plaintiff on one of two points pleaded in the complaint, this makes the ruling of the court upon the demurrer to such complaint, so far as it attacks, specially or otherwise, the allegations as to the supposed defect in the title, immaterial.—*Smith v. Jaccard*, 20 Cal. App. 280, 128 Pac. 1023, 1025.

579. Where an action was brought in one county, but was subsequently transferred to another, and the defendant, upon the trial in the second county, elected to answer upon the merits without a determination of the issues of law under his demurrer filed in the first county, he will be deemed to have waived his demurrer, and can not be prejudiced by the unauthorized act of the court in the first county in overruling the demurrer.—*McDougall v. Eaton*, 20 Cal. App. 164, 128 Pac. 415.

580. Same—Variance immaterial, when.—Where, in an action by a purchaser of real estate to recover a deposit made thereon, there is an allegation that the agreement to sell was made on the twenty-fourth day of February, 1910, but the denial in the answer only raised an issue as to the amount for which the sale was made, the

fact that the proof shows that the agreement was really made on the fourth day of February, 1910, will constitute an immaterial variance.—*Smith v. Jaccard*, 20 Cal. App. 280, 128 Pac. 1023, 1026.

As to variance, see par. 549, this note.

581. Exclusion of evidence.—Prejudicial effect too general.—Since the interest of a purchaser under execution is inferior to that of the assignee of the fund in the hands of the referee to whom notice of such assignment was given, the exclusion of evidence regarding such purchaser's title was harmless.—*Widenmann v. Weniger*, 164 Cal. 667, 130 Pac. 421, 425.

582. Findings.—Upon immaterial issue.—The findings upon an immaterial issue, even if erroneous, are not binding upon the parties and do not warrant a reversal of judgment.—*Forestier v. Johnson*, 164 Cal. 24, 127 Pac. 156.

583. In an action to enforce the specific performance of an agreement to convey real property, a finding to the effect that all the interest on certain payments had been made up to a specified time, although erroneous, was rendered immaterial, where it appeared that a sufficient amount had been tendered by plaintiff to cover the total amount of interest and the remaining principal due.—*Peck v. Coyle*, 19 Cal. App. 390, 125 Pac. 1073.

584. Judgment or order.—Even though there be a discrepancy between the computation of the respondent's claim and the judgment, it is not necessary to reverse the judgment for this reason where from all the items of cost as shown the correct amount can be calculated, and the error corrected by a modification of the judgment.—*Callan v. Empire State Surety Co.*, 20 Cal. App. 483, 129 Pac. 978, 979.

585. Motion for nonsuit specified as the grounds therefor the insufficiency of the complaint, in that it did not appear therefrom that the assessment required as a prerequisite to the bringing of the suit had been made. Subdivision 5, section 581, ante, provides that an action may be dismissed "upon the motion of the defendant, when upon trial the plaintiff fails to prove a sufficient case for the jury." Conceding the form in which the motion was made failed to comply strictly with the provisions of the statute, in that it did not specify failure of proof rather than insufficiency of the complaint to state a cause of action, nevertheless, the want of proof is disclosed by the record, from which it is apparent that no facts existed which could enable plaintiff to amend his complaint or supply the evidence entitling him to recover. Hence, had the motion been denied, judgment upon the merits must necessarily have followed for defendant. This being the case, plaintiff was not prejudiced by the judgment of dismissal. See section 475, ante.—*Hunt v. Sharkey*, 20 Cal. App. 690, 130 Pac. 21, 22. C. C. P.—134

586. Order overruling demurrer.—In an action by a building contractor for breach of contract, whether right or wrong, the order overruling the demurrer to the complaint for uncertainty, in that it was not averred whether the contract sued upon was written or oral, was entirely without prejudice, for the reason that the contract was pleaded in the cross-complaint and was received in evidence without objection as the basis of the contractor's demand.—*Tubbs v. Delillo*, 19 Cal. App. 612, 127 Pac. 514.

587. Presumption as to effect of error.—A presumption is in favor of the action of the trial court, and where the record, does not show upon what an alleged error is based and all the circumstances in regard to it, the action of the court will be presumed to be correct.—*Wagner v. United Railroads of San Francisco*, 19 Cal. App. 396, 126 Pac. 186.

As to presumptions on appeal, see paras. 96-107, 204, 334, this note.

588. Sustaining objection to question to witness.—Error, if any, in sustaining objection to a question to a witness is not prejudicial where the matter involved in the question is not relied upon by the plaintiff in his complaint.—*Hayes v. Western Fuel Co.*, 19 Cal. App. 634, 127 Pac. 518.

See par. 574, this note.

589. There was no prejudicial error in sustaining the objection to the question asked plaintiff on cross-examination whether he did not pay two hundred and fifty dollars of the third payment to a third person instead of to the contractor. That he did so was fully shown by all the evidence, the only question being whether he did so under such circumstances as to make it, in fact, a payment to the contractor. This the court found on sufficient testimony to be the fact.—*Wolf v. Aetna Indemnity Co.*, 163 Cal. 597, 126 Pac. 470, 475.

590. Where a witness was asked whether or not, after his father's will was read, he had a conversation with a beneficiary of the will wherein such beneficiary stated that he was satisfied with his father's will, to which question an objection was sustained, the exclusion of such evidence is harmless, where such beneficiary has conveyed to another all his interest in the estate, thereby divesting himself of any right to contest such will.—*Snowball v. Snowball*, 164 Cal. 476, 129 Pac. 784, 785.

591. Where a witness was asked whether she had ever heard H. P. "say anything to her husband about doing anything for J. P.," to which question an objection was sustained, the ruling, if erroneous, was harmless, since it appears that the witness subsequently testified that she had never heard any conversation between G. P. and his wife "in regard to doing anything for J. P."—*Estate of Packer*, 164 Cal. 525, 129 Pac. 778, 781.

592. In an action for money had and received, the court did not err in sustaining

an objection to a question addressed to the plaintiff on his cross-examination, designed to ascertain the amount of money realized by him from the use of the property. While such questions would have been proper if addressed to the defendant's own witness, it was not proper upon cross-examination of the plaintiff.—*Bray v. Lowery*, 163 Cal. 256, 124 Pac. 1004.

593. Same—Evidence otherwise admitted.—Error, if any, in sustaining an objection to a question to a witness, is not prejudicial where such ground was entirely covered by the witness in answer to other questions.—*Hayes v. Western Fuel Co.*, 19 Cal. App. 634, 127 Pac. 518.

594. Any error committed by a court in refusing to admit evidence of facts, which were subsequently proved, is not prejudicial.—*Wagner v. United Railroads of San Francisco*, 19 Cal. App. 316, 126 Pac. 186.

595. Where defendant was not allowed to testify as to the circumstances under which a receipt was given, but afterward he was allowed to testify as to all of the circumstances without objection, any error in the ruling of the court was without prejudice.—*Callahan v. Marshall*, 163 Cal. 552, 126 Pac. 358.

596. Where questions regarding the hostility of persons charged with exerting undue influence over testator toward the contestants of such will were not permitted to be answered, such ruling, if erroneous, was harmless, where such questions were fully covered by others permitted to be answered.—*Estate of Packer*, 164 Cal. 525, 129 Pac. 778, 781.

597. Where a question to a witness can be answered by an examination of other parts of the testimony, or by calculation from facts already known, the exclusion of such question, if erroneous, was harmless. (On rehearing.)—*Doudell v. Shoo*, 20 Cal. App. 424, 129 Pac. 478, 489.

598. Trial of cause—Statement by court.—Where the court stated that in its recollection a certain finding was made in a former action, such statement was not prejudicial to the defendant where the finding was subsequently found to be as stated and admitted in evidence.—*Gjurich v. Fieg*, 164 Cal. 429, 129 Pac. 464, 466.

599. Same—As to instruction.—An instruction in an action for assault and battery practically in the language of section 3294, Civil Code, that the jury might award exemplary damages if the defendant was guilty of "oppression, fraud, or malice," will not be deemed materially erroneous by reason of the inclusion of the word "fraud," notwithstanding there was no showing of fraud in the evidence.—*Hardy v. Schirmer*, 163 Cal. 272, 124 Pac. 993.

600. Same—As to finding of court.—Where a finding was assailed as contrary to the evidence, but the court, notwithstand-

ing the finding, gave to the appellant the relief which he asked, he is not in any way injured by the error, if error there was, in finding against him on this point (see, ante, § 475).—*Pugh v. Moxley*, 164 Cal. 374, 128 Pac. 1037, 1039.

601. Where a finding on a certain issue would not have authorized a judgment more favorable to appellants, the absence of such finding affords no ground for reversal.—*Sewell v. Price*, 164 Cal. 265, 128 Pac. 407, 409.

602. Same—Error cured by verdict.—Where the statute of limitations is material only in case of a finding of compensation due, in an action for compensation for services rendered, instructions as to the applicability of the statute were immaterial where the jury found that there was no liability on defendant's part to pay for plaintiff's services.—*Gjurich v. Fieg*, 164 Cal. 429, 129 Pac. 464, 466.

D. INTERLOCUTORY, COLLATERAL, AND SUPPLEMENTARY PROCEEDINGS.

As to scope of review, on appeal from final judgment, of interlocutory appealable order, decision, etc., not theretofore appealed from, see Ann. Cas. 1913A, 816.

603. On appeal from final judgment—Order denying motion for nonsuit.—If the trial court erred in denying a motion for a nonsuit or in refusing to strike out certain testimony, its action may be reviewed on appeal from the judgment, if properly presented by the record.—*Leavens v. Pinkham & McKevitt*, 164 Cal. 242, 128 Pac. 399, 400.

604. The order denying defendants' motion for a nonsuit is not an appealable order. Such an order, however, can be reviewed on an appeal from the judgment.—*Fraser v. Sheldon*, 164 Cal. 165, 128 Pac. 33, 34.

605. Questions on interlocutory proceeding.—The question as to whether or not the plaintiff was entitled to a writ of attachment under the provisions of the amendment of 1911 (Stats. 1911, p. 1319, § 10) to section 1197, post, where the record on appeal does not show that such a writ was ever issued, is not involved and can not be considered.—*Fresno Planing Mill Co. v. Manning*, 20 Cal. App. 766, 130 Pac. 196.

606. Where, in addition to a motion to strike out the answer of the defendants, the plaintiff interposed a demurrer thereto, which assailed the sufficiency of the facts pleaded as a special defense in abatement of the action, it was unnecessary to pass upon the demurrer, for the reason, presumably, that the granting of the motion to strike out in effect disposed of the points raised by the demurrer. No question, therefore, of the technical sufficiency of the plea in abatement as against the demurrer, was involved on appeal.—*Fresno Planing Mill Co. v. Manning*, 20 Cal. App. 766, 130 Pac. 196.

E. PRESUMPTIONS ON APPEAL.

As to presumptions on appeal generally, see pars. 96-107, 334, 587, this note.

As to presumptions as to usual proceedings on taking an appeal by the new and alternative method, see par. 204, this note.

607. As to generally.—Where, in an action to quiet title, a supplemental complaint is filed without objection thereto or to the presentation and determination of the plaintiff's cause of action as therein stated, it will be presumed on appeal that the action was begun with the supplemental complaint, and that the cause of action is as stated therein.—*Montgomery & Mullen Lumber Co. v. Quimby*, 164 Cal. 250, 128 Pac. 402.

608. As to evidence.—In reviewing the evidence on an appeal from a judgment entered upon granting a motion for a nonsuit, all reasonable inferences must be resolved in favor of the plaintiff, and the construction of the evidence most favorable to the plaintiff must be given.—*Union Const. Co. v. Western Union Tel. Co.*, 163 Cal. 298, 125 Pac. 242.

609. If, on any material point, the testimony is in conflict, it must be assumed that the jury resolved the conflict in favor of the prevailing party.—*Gjurich v. Fleg*, 164 Cal. 429, 129 Pac. 464, 465.

610. As to instructions.—Where the record does not contain the evidence, nor any portion thereof, it must be assumed that the instructions given were applicable to the proofs, and that those refused were properly disallowed.—*Cook v. Suburban Realty Co.*, 20 Cal. App. 538, 129 Pac. 801, 804.

611. As to judgment.—In general.—In an action by a purchaser to rescind a contract and recover money paid, if the appeal had been taken on the judgment-roll alone, the court would assume in support of the judgment that the court imposed upon the purchaser the conditions authorized by section 3408, Civil Code, but where the appeal was taken upon a bill of exceptions disclosing all the matters and proceedings affecting the case, a judgment for the purchaser could not be sustained in the absence of an order imposing upon the plaintiff the condition that he restore to the defendant everything that he had received under the contract.—*Hayt v. Bentel* (Cal. App.), 126 Pac. 370, not officially reported.

612. In an action to set aside a conveyance from husband to wife as a fraud on creditors, where the court found that an undivided half interest was fraudulently transferred, and the wife attacked this judgment on the ground that the effect thereof would be to invalidate her homestead, it will be presumed on appeal in support of the judgment that the homestead is claimed by the husband and wife jointly, especially since there is an express

adjudication of the validity of the homestead.—*Sewell v. Price*, 164 Cal. 265, 128 Pac. 407, 409.

613. Same.—As to notice of entry on appeal.—While the notice of appeal from the judgment was not filed within sixty days from the date of entry of the judgment, it was filed within six months after said date, and the appeal was one perfected under the provisions of section 941b, post. It was duly taken within the time prescribed in said section, if no notice of the entry of said judgment had been served on appellants more than sixty days prior to such filing of the notice of appeal, the section providing substantially that such notice of appeal must be filed within sixty days after notice of entry of judgment has been served on the attorneys of record of the adverse party, and must, in any event, be filed not later than six months after such entry. If no notice of entry of judgment is so served, the party may file his notice of appeal at any time within six months from the date of such entry. The record here does not show that any notice of entry of judgment was served on appellants, and it must be assumed, in the absence of a showing to the contrary, that no such notice was served.—*Fraser v. Sheldon*, 164 Cal. 165, 128 Pac. 33, 34.

614. Authority to fill in amount in appeal-bond.—Where an undertaking was filled in as to the amount by one authorized to do so, and the trial court found such undertaking sufficient, it will be presumed on appeal, in the absence of other evidence, that the evidence presented to the court below established this authority.—*Title Ins. & Trust Co. v. California Devel. Co.*, 164 Cal. 58, 127 Pac. 502.

615. Facts not shown by record.—In the absence of the evidence before an appellate court, where the findings of facts are substantially the same as alleged in the complaint, and the latter sufficiently sets forth grounds of contest of a will, the findings will be held sufficient to support the judgment.—*Estate of Olson*, 19 Cal. App. 579, 126 Pac. 171.

616. In the absence of any clear showing made it must be assumed that the general finding of the trial court was clearly supported by the evidence.—*Semi-Tropic Spiritualists' Assn. v. Johnson*, 163 Cal. 639, 126 Pac. 488, 490.

617. Same.—Objection to form of verdict.—Where, in an application for a writ of supersedeas to prevent the occupancy of certain lands by a railroad company pending appeal, no allegation to the contrary was made in the petition, it must be assumed that no objection was made to the form of the verdict rendered by the jury.—*Reed Orchard Co. v. Superior Court*, 19 Cal. App. 648, 128 Pac. 9, 16.

618. Findings of court or referee.—Findings are to be liberally construed, in order

to support the judgment if possible.—*Parker v. Herndon*, 19 Cal. App. 451, 126 Pac. 183.

619. The findings of the trial court are to receive such a construction as will uphold rather than defeat its judgment thereon; and whenever, from the facts found by it, other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court, and upon an appeal from that judgment an appellate court will not draw from those facts any inference of fact contrary to that which may have been drawn by the trial court, for the purpose of rendering such judgment.—*Rossi v. Beaulieu Vineyard*, 20 Cal. App. 770, 130 Pac. 201, 205.

620. Although no proof was made as to the laws of a sister state, nevertheless the presumption that they are the same as those of this state is overcome by the fact that during the progress of the trial the trial judge presiding therein in open court stated: "I take judicial notice of the laws of Colorado. All the laws of Colorado, whatever they are in the published books—it is so stipulated." Neither party present in court expressed any dissent therefrom, and under the circumstances their silence must be deemed equivalent to an assent. Having so stipulated, it must be presumed on appeal that the trial judge found some provision of law in the Colorado record introduced in evidence upon which to justify his conclusion.—*Fox v. Mick*, 20 Cal. App. 599, 129 Pac. 972, 973.

621. It is the duty of an appellate court to give the findings and conclusions of law a construction in support of the judgment, if it can reasonably be done without violating the plain import of the language used. It will be impossible to give the language used a reasonable construction which would justify a holding that the terms "ever since the fourteenth day of April, 1902," meant any period prior thereto. If the court had intended to place its findings in part on proof of user or dedication prior to that date, it would have been a very simple matter to accomplish it by framing a finding accordingly.—*People v. Quong Sing*, 20 Cal. App. 26, 127 Pac. 1052, 1056.

622. An attorney sued defendant to recover damages sustained because of the breach of a contract made by defendant to pay plaintiff the sum of one thousand five hundred dollars for legal services. An answer was filed, trial had, and judgment rendered in favor of the plaintiff for one thousand dollars. Thereafter the plaintiff made a motion for a different judgment on the findings of fact, claiming that he was entitled to judgment for the sum of one thousand five hundred dollars. Attached to his complaint was a copy of the written contract made by defendant, in which she agreed to pay plaintiff one thousand five hundred dollars. His complaint contained no allegation as to non-payment of dam-

ages, and the court made no finding as to whether any payment had been so made. The appeal being on the judgment-roll, and the court having found as a fact that the amount of plaintiff's damages was one thousand dollars, it must be concluded that evidence was heard which would support that finding.—*Newmire v. Ford*, 20 Cal. App. 337, 128 Pac. 952.

623. Same—Validity of bond given by municipality.—In an action on a bond given for the protection of materialmen and laborers on a contract made by a company for doing certain street work in a city, the complaint failed to allege that the bond had been given under statutory authority (section 6½ of the Vrooman Act, Stats. 1885, p. 147, as amended 1899, Stats. 1899, p. 23), but it was held that inasmuch as the municipality was only authorized to act under permission of the statutory authority, and further that the bond in its terms was phrased according to the statutory requirement, it would be presumed on appeal that the contract was so made and the bond given in connection therewith accordingly.—*Republic Iron & Steel Co. v. Patillo*, 19 Cal. App. 316, 125 Pac. 923.

624. On motion to dismiss.—On a motion to dismiss an action, in so far as affidavits presented by the respective parties are conflicting, it must be presumed on appeal that the court below found the facts to be as asserted by the moving and prevailing party, so as to sustain its order.—*Witter v. Phelps*, 163 Cal. 655, 126 Pac. 593.

625. Order granting or refusing new trial.—Where the defendant offered no amendments to the proposed statement in support of the motion for a new trial, upon being settled and allowed by the trial judge, it must be assumed that it constitutes a correct statement of the evidence upon which the court, in the first instance, rendered its decision, and upon which is subsequently made the order granting a new trial herein.—*McCann v. McCann*, 20 Cal. App. 564, 129 Pac. 966, 967.

626. Order denying motion for new trial made upon expressed grounds which if correct would have justified perhaps the dismissal rather than the overruling of the motion, the fact remains that the motion was denied and the appellate court will assume that the order was made upon the merits.—*Bolin v. Spreckels Sugar Co.*, 155 Cal. 612, 616, 102 Pac. 937.

F. QUESTIONS OF FACT ON APPEAL—VERDICT AND FINDINGS.

627. As to generally.—A finding, entirely outside of the issues, must be disregarded by an appellate court, except when the issue, though not formally raised by the pleadings, was tried without objection.—*Crescent Lumber Co. v. Larson*, 166 Cal. 163, 135 Pac. 502.

628. The sufficiency of the pleadings or findings to support the conclusions of law

or the judgment based thereon can not be considered upon an appeal from an order denying a new trial.—*Hoover v. Wolfe*, 167 Cal. 337, 139 Pac. 794.

629. An appellate court is always reluctant to review evidence, the primary duty of weighing which rests with a jury.—*Poggi v. Scott*, 167 Cal. 372, 51 L. R. A. (N. S.) 925, 139 Pac. 815.

630. It is not the province of the supreme court to weigh conflicting evidence; in such cases the decision of the trial court is conclusive where there is substantial evidence in its favor.—*Shannon v. Tooker*, 167 Cal. 484, 140 Pac. 10.

631. As it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, the supreme court can not control its finding or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy.—*Blanc v. Connor*, 167 Cal. 719, 141 Pac. 217.

632. Courts are very slow to overturn findings of fact made by a jury, and a fortiori those made by a court acting without a jury, even when contrary statements which are uncontradicted appear in the testimony of witnesses.—*Blanc v. Connor*, 167 Cal. 719, 141 Pac. 217.

633. It is only when a judgment rests upon some particular finding for its validity and support that the lack of sufficient evidence to support the finding, or the contradictoriness between two findings, treating the same essential matter, will necessitate a reversal of the case.—*American Nat. Bank v. Donnellan*, 170 Cal. 9, 148 Pac. 188.

634. In this action to quiet title wherein the plaintiffs plead the narrow ground that they are the owners by adverse possession, the evidence fails to show that continuous adverse possession without interruption which the law requires to constitute title by prescription as to one of the plaintiffs, for that reason it is necessary to reverse the judgment; also the record does not show the respective interests claimed or possessed by the two plaintiffs, and because of that fact a decision can not be made which will limit the judgment to the interest of the other plaintiff alone.—*Warring v. Southern Pacific Branch R. Co.*, 176 Cal. 89, 148 Pac. 524.

635. The trial court had the right to give full credit to the evidence adduced upon behalf of the defendant and but little, if any, credence to the evidence produced upon behalf of the plaintiff, and its decision thus arrived at will not be reviewed on appeal.—*Larson v. Larson*, 22 Cal. App. 331, 134 Pac. 342.

636. It is within the legal right of those to whom the decision of questions of fact is committed by law to believe a part only of a witness's testimony and reject other portions of it; and, if the part which has

evidently been accepted is sufficient to sustain or support the conclusion upon the ultimate facts, such conclusion can not on appeal be disturbed merely because of seeming inconsistencies or apparent weaknesses in certain portions of such testimony.—*Lynch v. Lynch*, 22 Cal. App. 653, 135 Pac. 1101.

637. On appeal, if there appears to be substantial and reliable evidence which is sufficient to uphold the findings, any contradictory evidence which may have been introduced into the record, or any inconsistencies in the testimony of individual witnesses which may have been disclosed, lose their importance or significance in the determination of the controversy; the presumption being that the trial court or the jury, as the case may be, regarded the contradictory evidence as possessing no weight or persuasive force, and reconciled to its own satisfaction the inconsistencies or discrepancies which might have been made to appear in the testimony of certain witnesses produced by the side in favor of which the findings have gone.—*Lynch v. Lynch*, 22 Cal. App. 653, 135 Pac. 1101.

638. Where to the circumstance of inadequacy of consideration is added the circumstance that the parties to the transaction stand in a confidential relation toward each other, or are so connected in blood as that the presumption arises that such a relation exists between them, a case for the invalidation of the transaction is, in the eyes of a court of equity, well nigh complete; but, like any other question of fact, the trial court's decision thereon is conclusive upon a court of review, unless it can justly be said by such court to be erroneous as a matter of law.—*Lynch v. Lynch*, 22 Cal. App. 653, 135 Pac. 1101.

639. If from the consideration of the evidence on appeal it appears that there was any substantial evidence introduced in support of the findings of the court below, this is all that can be inquired into, for the question as to whether the preponderance of the proof may lie is one which addresses itself to the trial court only.—*Weill v. Danziger*, 22 Cal. App. 688, 136 Pac. 308.

640. The supreme court has the power to interfere with a finding that is supported by substantial evidence or to set it aside when it appears "reasonably certain" that such finding or verdict is wrong, but it is in no position to exercise the power justly or to be assured that the finding or verdict is wrong where it is supported by substantial testimony that is not inherently improbable. This arises from the circumstance that the appellate court is deprived of those important aids to the attainment of a correct conclusion, which the jury and the court below find in the appearance and general bearing of the witnesses.—*Dunaway v. Anderson*, 22 Cal. App. 691, 136 Pac. 309.

641. The question is not one of the existence of the power or authority, but rather of the only feasible and practicable method

of exercising that power.—*Dunaway v. Anderson*, 22 Cal. App. 691, 136 Pac. 309.

642. The power to determine questions of fact is vested exclusively in the trial court in civil cases, and its determination is controlling when substantial evidence exists to support its finding.—*McGerry v. Marsicano*, 23 Cal. App. 55, 137 Pac. 40.

643. A failure to find on a material issue demands a reversal of the case, and a judgment based upon findings which do not determine all the material issues is a decision against law.—*Emirzian v. Asato*, 23 Cal. App. 251, 137 Pac. 1072.

644. Where upon some of the main points the evidence is conflicting, and nothing appears upon the face of the testimony from which the findings must have been reached indicating the improbability of its verity, an appellate court, upon a review of the case, must abide by the decision of the trial court upon the ultimate result arrived at by it from such testimony.—*Nahl v. Alta Irr. Dist.*, 23 Cal. App. 333, 137 Pac. 1080.

645. The verdict of the jury on conflicting evidence will not be reviewed on appeal, although a contrary verdict would have been supported by abundant proof. The jury's verdict as to such matters is final and conclusive.—*Webber v. Smith*, 24 Cal. App. 51, 140 Pac. 37.

646. In the consideration of an appeal from an order made upon affidavits, involving the decision of a question of fact, this court is bound by the same rule that controls it where oral testimony is presented for review; if there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered as established.—*Smille v. Smille*, 24 Cal. App. 420, 141 Pac. 829.

647. Where two witnesses introduced by the same side disagree even upon important points of a controversy, the effect thereof is to produce a conflict in the evidence, and in such case the conclusion of the jury upon such conflict is as conclusive upon the courts of review as if the conflict had been produced by the testimony of two witnesses, introduced the one by one side and the other by the opposing side of the controversy.—*People v. Hoosier*, 24 Cal. App. 746, 142 Pac. 514.

648. Only the ultimate facts can be considered on an appeal from the judgment.—*Breeze v. International Banking Corp.*, 25 Cal. App. 437, 143 Pac. 1066.

649. As to inconsistencies, etc.—Inconsistencies and contradictions in the testimony are matters solely for the consideration of the jury and trial court.—*Mills v. Jackson*, 19 Cal. App. 695, 127 Pac. 655.

650. Conflict of evidence.—The amount of credit to be given to the positive testimony of any witness is solely a question for the trial tribunal, except perhaps where the testimony, in the light of the undisputed facts, is inherently so improbable and

impossible of belief as, in effect, to constitute no evidence at all.—*Crow v. Crow*, 168 Cal. 607, 143 Pac. 689.

651. The sufficiency of the evidence to sustain the findings may be considered on an appeal from a judgment taken under the provisions of section 941b, post, notwithstanding the appeal was taken more than sixty days after the entry of the judgment, where it is not made to appear that any notice of the entry had been served on the appellant.—*Blair v. Brownstone Oil & Refining Co.*, 168 Cal. 632, 143 Pac. 1022.

652. The supreme court has power and it is its duty under the recent amendment of section 4½ of article VI of the constitution, whereby such section is made applicable in civil as well as criminal cases, to review conflicting evidence for the purpose of ascertaining whether or not an error "has resulted in a miscarriage of justice," and the further duty is imposed to disregard a manifest error when, upon such examination, the court shall not "be of the opinion that the error complained of has resulted in a miscarriage of justice."—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

653. Such amendment applies to pending appeals, although they may have been submitted prior to its adoption.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

654. The determination of a trial court upon conflicting evidence will not be disturbed on appeal.—*Thayer v. Tyler*, 169 Cal. 671, 147 Pac. 979.

655. An order granting a new trial in an action to recover possession of land and damages for its detention will not be disturbed on appeal, where the facts forming the basis of the answer are all disputed, and one of the grounds upon which the court granted the motion was the insufficiency of the evidence to support the verdict.—*Empire Investment Co. v. Mort*, 169 Cal. 732, 147 Pac. 960.

656. The question of negligence is one of fact for the jury, and its finding can not be overturned where the evidence is conflicting or where, although the evidence is without conflict, different inferences may reasonably be drawn therefrom.—*Anderson v. Los Angeles Transfer Co.*, 170 Cal. 66, 148 Pac. 212.

657. An appellate court can not interfere with a finding of the trial court where there is substantial evidence to sustain it.—*Hecker v. Morley*, 170 Cal. 88, 148 Pac. 516.

658. Where the evidence is substantially conflicting, it is not the province of an appellate court to weigh the same, or determine whether or not witnesses have sworn falsely. If there is any evidence upon which the trial court could have made the findings, or a jury could have found a verdict, the action of the court below must be upheld.—*Lummer v. Unruh*, 25 Cal. App. 97, 142 Pac. 914.

659. In this action to recover a sum due on an account stated, the finding of the trial court upon conflicting evidence as to the agreement as to the correctness of the amount is conclusive upon the appellate court.—*Hartfield v. Alderete*, 26 Cal. App. 604, 147 Pac. 991.

660. Where there is a substantial conflict in the evidence upon the question of the amount of compensation which the plaintiff ought to receive for the injuries sustained by him, the established rule as to the conflict of evidence upon material issues is to be applied upon appeal from the order granting the new trial the same as though the new trial had been granted on the behest of the defendant.—*Taylor v. Northern Elec. R. Co.*, 26 Cal. App. 765, 148 Pac. 543.

661. **Findings of court or referee—Answers of witness.**—Any uncertainty as to the meaning of the answers of a witness is a matter to be resolved by the trial court, and upon appeal the appellate court must accept as correct such reasonable interpretation as will support the finding of the trial court.—*Oppenheimer v. Radke & Co.*, 20 Cal. App. 518, 129 Pac. 798, 799.

662. **Same—Based on conflicting evidence.**—A finding in an action on an award that the matter had never been submitted to the arbitrators will not be disturbed on appeal, when the evidence on that issue is conflicting.—*Meloy v. Imperial Land Co.*, 163 Cal. 99, 124 Pac. 712.

663. In an action to quiet title, involving the determination of the location of a common boundary line, findings in favor of the defendant as to establishment and location of the line on the ground and the subsequent acquiescence of the parties in the line as so established for a long period of years, and also as to the acquisition of a title by adverse possession, will not be disturbed, when the evidence upon such issues is conflicting.—*Rimpau v. Baldwin*, 163 Cal. 225, 124 Pac. 1002.

664. **Same—Conclusiveness of.**—Where there is substantial evidence to support a finding it can not be set aside on appeal.—*Gallatin v. Corning Irr. Co.*, 163 Cal. 405, 126 Pac. 864, 870.

665. Where there is conflicting evidence on a question of fact, the findings of the trial court will not be disturbed by appeal.—*Callahan v. Marshall*, 163 Cal. 552, 126 Pac. 358.

666. A finding based on conflicting evidence will not be disturbed on appeal.—*Wolf v. Aetna Indemnity Co.*, 163 Cal. 597, 126 Pac. 470.

667. The conclusion of the trial court must be upheld under the familiar rule protecting from review on appeal findings based on conflicting evidence.—*Home Real Estate Co. v. Los Angeles Pac. Co.*, 163 Cal. 710, 126 Pac. 972, 973.

668. A finding based on conflicting evidence is conclusive on appeal.—*Olaine v. McGraw*, 164 Cal. 424, 129 Pac. 460, 461.

669. In an action by the heirs at law of an aged uncle to set aside a deed made by him to the defendant while he was of unsound mind and acting under the undue influence of the defendant, in which the findings and judgment were for the plaintiffs, it is held that there is competent evidence to sustain each and every finding against the validity of the deed, notwithstanding conflicting evidence to the contrary. It was the province of the trial court to weigh the conflicting testimony; and the appellate court can not substitute its judgment upon the evidence for that of the trial court.—*Lamb v. Wilke*, 19 Cal. App. 286, 125 Pac. 757.

670. Where there is a conflict in the evidence, an appellate court will not interfere with the findings of the trial court.—*Boyer v. Gilhaus*, 19 Cal. App. 320, 125 Pac. 916.

671. Where there is a substantial conflict in the evidence, the findings will not be disturbed on appeal.—*Parker v. Herndon*, 19 Cal. App. 451, 126 Pac. 183.

672. The finding of the trial court based upon conflicting evidence is conclusive on appeal.—*Blanck v. Commonwealth Amusement Corp.*, 19 Cal. App. 720, 127 Pac. 805, 807.

673. Since, in the case of conflicting evidence, the trial court must weigh the evidence carefully and determine for itself the just conclusion to be drawn therefrom, it will be presumed on appeal that such duty was performed, and unless, upon an examination of the entire record, such conclusion is unwarranted, the appellate court will accept and be governed by it.—*Henley v. Pacific Fruit Cooling & Vaporizing Co.*, 19 Cal. App. 728, 127 Pac. 800.

674. In the presence of a substantial conflict upon all of the issues in the case, the findings of the trial court are conclusive upon appeal and can not be disturbed.—*Root v. Greadwohl*, 20 Cal. App. 139, 128 Pac. 418, 419.

675. A finding based on conflicting evidence is conclusive on appeal.—*McDougall v. Eaton*, 20 Cal. App. 164, 128 Pac. 415.

676. Where there was some evidence to sustain the findings of the court, under the familiar rule that a state of conflict in the evidence presents a condition not subject to review by an appellate court, such appellate court has no function to perform in determining upon which side the weight of evidence rested.—*Lundeen v. Nowlin*, 20 Cal. App. 415, 129 Pac. 474, 475.

677. Findings of fact are taken as true when the evidence is not before the appellate court.—*Agnew v. Nelson*, 27 Cal. App. 39, 148 Pac. 819.

678. **Same—Construction of findings.**—The findings of fact made by the trial court are to receive such a construction as will uphold, rather than defeat, its judgment thereon.—*Beggs v. Smith*, 26 Cal. App. 532, 147 Pac. 585.

679. Findings will be so construed as to uphold, rather than to defeat, the judgment, and when from facts found other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court.—*Randisi v. Simone*, 26 Cal. App. 661, 147 Pac. 1176.

680. **Same—Decision on motion for new trial.**—A claim that the findings do not support the judgment might properly be made on appeal from the judgment, but is not involved, and can not be considered on an appeal from an order denying a new trial.—*Foster v. Butler*, 164 Cal. 623, 130 Pac. 6, 7.

681. Where there has been heard conflicting testimony, an appellate court can not, in reviewing the ruling made upon a motion for a new trial, disturb the order. It is only where the evidence held establishes an uncontradicted statement of facts in favor of one or the other of the parties to an action that a question of law is presented which an appellate court may consider.—*McCann v. McCann*, 20 Cal. App. 567, 129 Pac. 965.

682. **Same—Effect in equitable action.**—The plaintiff is not to be held barred from his remedy for the wrong alleged to have been done him, on the ground that he had been guilty of laches, unless his delay in bringing action had been of such length and under such circumstances that it would be inequitable to enter into an inquiry as to the validity of his claim or to allow such remedy. Whether such is the situation is a question in the first instance for the trial court, and, if its conclusion thereon can reasonably be held to find sufficient support in the evidence, an appellate court should not interfere therewith.—*Suhr v. Lauterbach*, 164 Cal. 591, 130 Pac. 2, 4.

683. **Same—Negligence, in personal-injury cause.**—In an action to recover damages for personal injuries alleged to have been sustained by the negligence of the defendant in improperly filling an excavation made by the defendant, at the junction of two streets, after removing its pipe line therefrom, leaving the ground wet and soft, so that the wheel of plaintiff's wagon sank therein, and overthrew her from her wagon and frightened her horse to her serious injury, where there is conflicting evidence as to whether the wheel sank in that excavation, or at some other place in the street, by this difference a question of fact was presented to be solved by the jury, and its verdict for plaintiff can not be disturbed.—*Scharpf v. Union Oil Co.*, 19 Cal. App. 100, 124 Pac. 864.

684. **Same—Ownership of property.**—While there may have been evidence and proof of circumstances inconsistent with the testimony of plaintiff and her husband, nevertheless it was for the trial court to weigh and determine the same, and its finding based thereon will not be disturbed. Though, in a case of this nature, a finding that property is the separate estate of the wife should be based upon clear and con-

vincing evidence, the question as to whether or not the evidence offered is clear and convincing is for the trial court.—*Oldershaw v. Matteson & Williamson Co.*, 19 Cal. App. 180, 125 Pac. 263.

685. In a proceeding taken by a surviving husband, under section 1723, post, to determine his interest in community real estate held in the name of the deceased wife, and bought with community funds, in which his claim was contested by a sister of the deceased wife, as being her separate estate, in the interest of the heirs, and the court found and adjudged that the property was community property and was bought in the wife's name with community funds, and was not given by the husband to the wife, and adjudged that the entire property vested in the surviving husband, it is held upon appeal that whether or not the conveyance was a gift to the wife was a question of fact to be determined by the trial court, upon the evidence, and its conclusion, if not manifestly without sufficient support, should not be disturbed upon appeal.—*In re Carlin*, 19 Cal. App. 168, 124 Pac. 868.

686. **Same—Sufficiency of evidence to support.**—So far as the findings of fact made by the trial court are to be considered, if there is any evidence in the record to sustain them they must, upon review, be held to be fully supported.—*Channel Commercial Co. v. Hourihan*, 20 Cal. App. 647, 129 Pac. 947, 949.

687. **Probative force of evidence.**—An appellate court can have no concern as to whether the preponderance of evidence tended to sustain plaintiff's contentions, are those of the defendant. That was a matter solely for the determination of the trial court, and its conclusions thereon must be treated as final.—*Channel Commercial Co. v. Hourihan*, 20 Cal. App. 647, 129 Pac. 947, 949.

688. **Questions of fact—Recitals in affidavit for change of venue.**—Where, on appeal from an order denying a change of venue, the matter was submitted upon affidavits, the rule in such case for the guidance of an appellate court is the same as where oral testimony is permitted; therefore, the facts recited in the affidavits of the prevailing party must be accepted as established, and if therefrom a rational inference can be drawn in consonance with the order of the whole court, such order must be affirmed.—*Marston v. Watson*, 20 Cal. App. 465, 129 Pac. 611, 612.

689. Where, at the time the order denying a motion for a change of venue was made, and for four months prior thereto, the defendant was keeping house upon the ranch known as the "Ring Watson ranch" in Napa county; that at no time since that period did she "live" outside of Napa county; that she actually occupied said premises as her home and place of abode during said time, and that about two weeks prior to the commencement of the action

she declared that she had leased the ranch from her mother; that she had taken up her abode there, and intended giving the running of the ranch her personal attention; that she was making her home there; and she expected to develop the ranch and put it on a paying basis—it is not only a rational, but probably the only rational conclusion that the trial judge could reach that defendant had established her home in Napa county and intended to remain there indefinitely; hence such conclusion and the order denying the change of venue will not be disturbed on appeal.—*Marston v. Watson*, 20 Cal. App. 465, 129 Pac. 611, 612.

690. Verdict—In general.—On appeal the verdict of a jury on a question of fact finding favor of the plaintiff will be conclusive, even though the preponderance of the testimony be in favor of the defendant.—*Hall v. Clark*, 163 Cal. 392, 125 Pac. 1047.

691. Where the evidence was in substantial conflict, conclusion of the trial court will not be disturbed on appeal.—*Walker v. Price*, 163 Cal. 617, 126 Pac. 482, 483.

692. The findings of a jury based on conflicting evidence are conclusive on appeal.—*Perkins v. Blauth*, 163 Cal. 782, 127 Pac. 50.

693. Where the evidence on a subject is conflicting and there is sufficient evidence to prove the fact, the decision of the trial court is conclusive on appeal.—*Gallatin v. Corning Irr. Co.*, 163 Cal. 405, 126 Pac. 864, 869.

694. Where a verdict is attacked for insufficiency of evidence, the power of an appellate court begins and ends with the inquiry whether there is substantial evidence, contradicted or uncontradicted, which, in and of itself, would support the conclusion reached by the jury.—*Gjurich v. Fieg*, 164 Cal. 429, 129 Pac. 464, 465.

695. Same—Based on conflicting evidence.—A verdict based on conflicting evidence is conclusive on appeal.—*Cooke v. Mesmer*, 164 Cal. 332, 128 Pac. 917, 919.

696. All conflicts in evidence are for the jury to determine, and the verdict must be sustained by an appellate court if there is sufficient evidence, considered in connection with such inference as may reasonably be drawn therefrom to sustain it, regardless of the evidence tending to a contrary conclusion.—*Leavens v. Pinkham & McKevitt*, 164 Cal. 242, 128 Pac. 399, 400.

697. The question whether the defendant was absent from the state, or had concealed himself to avoid service of process, was, like any other fact in issue, for the trial court to determine from the evidence introduced; and where there is a substantial conflict in the evidence touching the issue, the conclusion of the trial court will not be disturbed.—*Wilson v. Leo*, 19 Cal. App. 793, 127 Pac. 1043.

698. A verdict based on conflicting evidence will not be disturbed on appeal.—

Black v. Riley, 20 Cal. App. 199, 128 Pac. 764, 765.

699. Where the result of the wide variance between testimony produced in support of the respective positions of the parties is only to create a substantial conflict in the evidence, upon the question of the weight or preponderance of the evidence, the appellate court must submit to the decision of the trial court.—*Doudell v. Shoo*, 20 Cal. App. 424, 129 Pac. 478, 487.

VII. DETERMINATION AND DISPOSITION OF CAUSE.

700. Absence of ground for reversal.—Where by the terms of the will of her deceased husband defendant widow was to have only a life estate, and she was made a trustee to convey title to the children, each of whom, with herself, conveyed the property in controversy to the plaintiff, the deeds of which were placed in escrow to be recorded after her death, but, for a certain reason, they were taken out of escrow by the widow and delivered to the plaintiff, who gave her a home for life, and it appears that her life estate has terminated by her death pending the appeal, it is held that no sufficient ground appears for the reversal of the judgment based upon the findings as made.—*Hynes v. All Persons, etc.*, 19 Cal. App. 184, 125 Pac. 253.

701. Same—Appeal from part of judgment.—In a proceeding under section 1664, post, providing for the ascertaining of heirship in advance of distribution, the petition presented two issues, only one of which was decided favorably to the petitioner, and the appeal from the judgment referred only to the second issue involved, and a reversal was secured, it was held that since the issue presented on appeal was distinct and separable from the other issue involved, the latter was finally determined by the judgment of the court rendered below, and that part of the judgment was final and conclusive, and not in any way affected by the reversal of the other part of the judgment.—*Whalen v. Smith*, 163 Cal. 360, 125 Pac. 904.

702. As a general rule, an appeal from a distinct and independent part of a judgment does not bring up the other parts for review in the appellate court, and a reversal of the part appealed from does not affect the portion not dependent thereon, but they will stand as final adjudications.—*Whalen v. Smith*, 163 Cal. 360, 125 Pac. 904.

703. Ordinarily, an appeal taken under Civil Code, section 940, providing for an appeal from a specific part of a judgment, would leave the part not appealed from unaffected, and it follows that such unaffected parts must be deemed final, being a final judgment of the facts and rights which they determine, but where the part appealed from is so interwoven and connected with the remainder, or so dependent thereon that the appeal from a part of it affects the other parts, or involves a consideration of the

whole, and is merely an appeal from the whole, if a reversal is ordered, it should extend to the entire judgment.—*Whalen v. Smith*, 163 Cal. 360, 125 Pac. 904.

704. Same — Dissenting opinion.—The power of the supreme court to reverse the whole of a judgment, when a part only has been appealed from, has been upheld in a dissenting opinion by Mr. Justice Henshaw. *Whalen v. Smith*, 163 Cal. 360, 125 Pac. 904.

705. Amount of recovery.—Where, from a reading and understanding of the evidence, it clearly appears, and practically without conflict, that the trespass complained of resulted in actual damage to the plaintiffs in a sum in excess of five hundred dollars, and the jury's verdict was for but five hundred dollars, if plaintiff's proven damages exceed that amount no question of punitive damages can arise on the record.—*Clark v. Van Torchiana*, 19 Cal. App. 786, 127 Pac. 831, 833.

706. Dismissal of appeal.—Notwithstanding error in the refusal to grant a temporary injunction restraining a sale of land for delinquent assessments in a street widening proceeding, an order to that effect will not be reversed on appeal when it appears that the sale has taken place since the making of the order. Upon such a showing the appeal from the order will be dismissed.—*Wright v. Board of Public Works*, 163 Cal. 628, 125 Pac. 353.

As to dismissal of appeal, see Parts III, this note.

As to dismissal of appeal in mandamus proceedings when question involved has become immaterial, see note Ann. Cas. 1912C, 247.

707. Erroneous reasons disregarded.—Appellate court is not bound by the opinion of the trial court as to the effect or obligation of certain facts found, or as to the law relating thereto, nor by the method of reasoning by which the trial court reached its final conclusion, but if upon considering all the facts and the law the appellate court is satisfied that the final conclusion of the trial court is right, the judgment will be upheld and the erroneous reasoning of the trial court will be disregarded.—*McKee v. Title Insurance & T. Co.*, 159 Cal. 206, 113 Pac. 140.

708. Judgment of remittitur.—Where the judgment and order denying a motion for a new trial is reversed, it is necessary to try the case again in the superior court, and it is error to grant a motion for judgment upon the judgment-roll and the opinion of the supreme court, without a retrial of the case. In the present case, the reversal was because of error in a ruling of the court as to the validity of a deed offered in evidence by the plaintiff in support of his allegation of ownership, and it was therefore necessary for the plaintiff to present evidence in the place of that erroneously admitted, and to give him judgment without such evidence is to give judgment without any evidence

whatever.—*Davis v. Les Mesnager*, 155 Cal. 520, 101 Pac. 910.

709. Manifest lack of merit in the appeal, and it appears that counsel for the appellant knew the appeal was without merit, damages will be assessed.—*Bell v. Camm*, 10 Cal. App. 388, 391, 102 Pac. 225.

710. Modification of judgment.—Where an error may be remedied and adjusted by the appellate court so as to render it harmless, as by ordering a deduction of a certain amount from the judgment, the judgment will be ordered affirmed upon respondent consenting to the proper modification.—*Clapp v. Vatcher*, 9 Cal. App. 462, 468, 99 Pac. 549.

As to modification of judgment, see par. 500, this note.

711. Where operation of a judgment predicated on erroneous finding is clearly ascertainable and the proceedings as disclosed by the record are in other respects correct, a new trial will not be directed if the judgment can be modified by the remission of the excess above what it should be and such remission be consented to.—*Curran v. Hubbard*, 14 Cal. App. 733, 114 Pac. 81.

712. Restitution — Rules governing.—A party is generally entitled, upon reversal on appeal, to restitution of the things lost by reason of the judgment, and the court will endeavor, when justice requires it, to place him as nearly in the position occupied by him before judgment as possible. If a separate action is brought, the defendant must account for the property received under the judgment, and the rule as to his liability is that usually applicable to a trustee, and he will not be chargeable for more than he received, nor responsible for losses, when he has acted in good faith with such skill, prudence, and diligence, as an ordinarily prudent man would have exercised in the conduct of his own business.—*Ward v. Sherman*, 155 Cal. 291, 100 Pac. 864.

713. Reversal — Judgment based on finding foreign to issue raised.—No judgment in any given case could be sustained if it was based upon a conclusion of law which in turn rested upon a single finding of fact which was obviously foreign to the issues raised by the pleadings.—*Bradley Bros. v. Bradley*, 20 Cal. App. 1, 127 Pac. 1044, 1047.

As to affirmance and reversal generally, see pars. 489-497, this note.

714. Same—Effect of reversal.—The effect of a reversal of the order appointing a receiver when such reversal is upon the appeal of a single defendant, whose only interest, so far as the record shows, is its claim that it has some right or interest in the premises described in the deed of trust, which interest or right is subsequent and subordinate to the lien created by said deed, would be that such party would have the right to have such encumbrance or bonds paid out of the proceeds of any foreclosure sale in preference to the costs and expenses occasioned by the receivership.—*Title Ins. &*

Trust Co. v. California Devel. Co., 164 Cal. 58, 127 Pac. 502.

As to effect of reversal, see notes 28 Am. Dec. 368; 96 Am. St. Rep. 124.

As to effect of a reversal of joint judgment when the appeal was not by all the parties concerned, see note 10 Ann. Cas. 80.

715. Upon the reversal of an appeal from the judgment and from an order denying a new trial, there must be a new trial of all of the issues raised by the pleading; and a motion of the appellant for judgment in the superior court, without such new trial, was untenable, and was properly denied.—Stein v. Leeman, 161 Cal. 502, 119 Pac. 663.

716. Same — Same — Defendant must account for property received under the judgment which has been reversed and the rule governing the extent of his liability is that applicable to a trustee which is that he ought to conduct the business of the trust in the same manner as an ordinarily prudent man of business would conduct his own. He will not be chargeable with more than he has received nor held responsible for losses which may arise when he has acted in good faith and with common skill, prudence, and diligence.—Ward v. Sherman, 155 Cal. 287, 291, 100 Pac. 864.

717. Reversal as to one or more joint tort-feasors.—It was the common-law rule that the reversal of a joint judgment against several joint tort-feasors for error against one defendant necessitated a reversal of the judgment as to all of the defendants. This rule has been materially modified, if not entirely superseded, by statute in this state; and now it is the rule that, if a verdict and a judgment be given against several defendants who have been sued jointly, the verdict and judgment, if found to be erroneous as to any one of the defendants, may be vacated as to that one only, and continue in full force and effect as to the remaining defendants.—Clark v. Torchiana, 19 Cal. App. 786, sub nom. Clark v. Van Torchiana, 127 Pac. 831, 833, following doctrine in Nichols v. Dunphy, 58 Cal. 605; Cole v. Roebling Construction Co., 156 Cal. 443, 105 Pac. 255; Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 Pac. 513.

718. Rules of decision.—Where the supreme court believes that the order under review was properly made, it would be their duty to affirm it, even if that court had itself, in another case, reversed an order similar in all respects.—Bohn v. Bohn, 164 Cal. 532, 129 Pac. 981, 984.

719. An order by the supreme court refusing to transfer a cause after judgment in the district court of appeal, does not adopt the opinion of the appellate court so as to give it, in the supreme court, the authoritative effect which one of its own decisions would have.—Bohn v. Bohn, 164 Cal. 532, 129 Pac. 981, 984.

720. Status of cause in lower court after reversal.—A demurrer to a complaint was interposed for want of facts sufficient to constitute a cause of action, for uncertainty, and because the action was barred by the statute of limitation; this demurrer was sustained, but on an appeal from the order the reversal was secured and the case sent back with instructions to overrule the demurrer and allow the defendant to answer. Subsequently at the trial an objection was sustained to the admission of testimony on the ground that the complaint did not state facts sufficient to constitute a cause of action, and judgment was rendered for the defendant. On an appeal from this judgment it was held that the former order of reversal constituted an adjudication that the complaint stated facts sufficient to constitute a cause of action, although the only question discussed on the former appeal was whether or not the action was barred by the statute of limitation.—Neale v. Morrow, 163 Cal. 445, 125 Pac. 1053.

See pars. 714-716, this note.

VIII. RULES OF SUPREME COURT.

721. As to duty of furnishing and promulgating a rule regulating the presentation of points by counsel in their briefs in accordance with the provision of this section upon the subject is vested by the constitution in the supreme court, and not the district courts of appeal.—San Joaquin & Kings River Canal & Irr. Co. v. Stevenson, 16 Cal. App. 236, 116 Pac. 378.

722. Absence of rule of court—Contents of brief.—In the absence of a rule of court it would involve too harsh a penalty to dismiss an appeal for failure to comply with the requirement as to the printing of "such portions of the record" in appellant's brief as he "desires to call to the attention of the court," where the brief contains some evidence and correctly refers to the transcript for the remainder, so as to impose little extra labor on the court in deciding whether error was committed.—San Joaquin & Kings River Canal & Irr. Co. v. Stevenson, 16 Cal. App. 236, 116 Pac. 378.

723. Rule II—In general.—The interpretation and application of Rule II are given elsewhere in this note, as shown by the cross-references following.

As to compulsory dismissal where printed transcript not filed in time, see par. 154, this note.

As to construction of rule, requirements as to filing, under subdivision 4, see par. 151, this note.

As to filing transcript under Rule II and pending settlement of bill or statement, see pars. 232, 233, this note.

As to motion to dismiss for failure to file transcript within time required by this rule, see par. 40, this note.

As to motion to dismiss under subdivisions 1 and 4, see par. 22, this note.

As to not being applicable under appeal by new and alternative method of appeal, see pars. 160, 161, this note.

As to relations of Rule II, see pars. 151, 154, this note.

As to when motion to dismiss on ground of failure to file transcript is premature, see par. 480, this note.

As to when period of limitation in which to file transcript begins to run in appeal by old method, see par. 232, this note.

724. Rule III—In general.—As to application of Rule III on motion to dismiss appeal, see par. 141, this note.

725. Rule IV—In general.—As to certification of facts by clerk setting forth facts, on motion to dismiss for failure to file transcript in time, see pars. 154, 155, this note.

726. Rule V—In general.—As to Rule V not being applicable to an appeal by new and alternative method, see pars. 160, 161, this note.

727. Rule VII—In general.—As to non-conformity of transcript with rule being ground of motion to dismiss, where appeal by new and alternative method, motion denied when, see pars. 165, 166, this note.

728. Rule VIII—In general.—As to non-conformity of transcript with rule being ground of motion to dismiss, where appeal by new and alternative method, motion denied when, see pars. 165, 166, this note.

729. Rule XI—In general.—As to when proceedings are pending for settlement of bill of exceptions, within provisions of above rule, see par. 478, this note.

730. Rule XV—Dismissal of appeal for failure to file transcript.—The purpose of the rule is to enable the appellant to remedy a defect or omission and present his appeal upon the merits, and should be liber-

ally construed to effect its object.—*Poole v. Grand Circle W. O. W.*, 17 Cal. App. 230, 119 Pac. 201.

As to construction of rule, as to object, see pars. 142, 143, this note.

As to nature of motion to dismiss under the rule, being an objection to the transcript, see par. 150, this note.

As to no dismissal where transcript furnished within seven days after notice of motion, see par. 147, this note.

731. Same—New and alternative method of appeal, rule does not apply.—Filing of the transcript when prepared under the provisions of section 953c, post, is not governed by rules II and V of the supreme court.—*Estate of Keating*, 158 Cal. 109, 110 Pac. 108.

732. Rule XXIX—In general.—The interpretation and application of Rule XXIX is treated elsewhere in this note, as indicated by the cross-references which follow.

As to affidavits not incorporated in bill of exceptions not being authenticated as required by this rule, see pars. 383, 396, this note.

As to insufficiency of certification under rule, where new and alternative method of appeal not followed, see par. 401, this note.

As prescribing mode of presentation of papers used on hearing in trial court, the new and alternative method of appeal not prescribing, see par. 426, this note.

733. Transcript on appeal not conforming to rules of court.—Rules of supreme court for the government in many particulars in the appellate practice of the court are as much a part of the system of procedure as the rules promulgated for the same purpose by the legislature and they are, therefore, as much the necessary learning of the practicing lawyer as either the rules of procedure and practice established by the legislature, or the practice of substantive law.—*Reclamation District No. 70 v. Sherman*, 11 Cal. App. 399, 404, 105 Pac. 277.

§ 937. ORDERS MADE OUT OF COURT, WITHOUT NOTICE, MAY BE REVIEWED BY THE JUDGE. An order made out of court, without notice to the adverse party, may be vacated or modified, without notice, by the judge who made it; or may be vacated or modified on notice, in the manner in which other motions are made.

History: Enacted March 11, 1872, re-enactment of § 334 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 171, held unconstitutional, see history, § 5 ante.

ORDER MADE OUT OF COURT—WITHOUT NOTICE.

1. Amended complaint—Filing with leave of court—Striking without notice—Error.
- 2-5. Construction of section—Not to apply to injunction granted ex parte.
6. Decree discharging administrator.

7. Distribution of estate—Vacation of—"Order made out of court."

8. Order allowing claim against estate.

9. Order granting leave to file cross-complaint.

10. Order for publication—Power of court to set aside.

See, ante, § 936 and note.

As to setting aside order for publication of summons, as ex parte order made out of court, see, ante, § 473 and note.

1. Amended complaint—Filing with leave of court—Striking without notice—Error.—In a case in which a plaintiff filed a complaint in claim and delivery and thereafter on notice of motion for permission, with leave of the court, filed an amended complaint changing the cause to one in conversion, and praying for damages therefor, and the court thereafter, and of its own motion, without notice to the plaintiff, struck the amended complaint from the files and ordered the cause to be submitted upon the original complaint and answers thereto, the action of the lower court in this regard was clearly erroneous. The question whether or not the order of the court in permitting the amended complaint to be filed in the first instance was wrong or not, does not enter as an element in settling the question. When the amended complaint was filed, in pursuance of the permission granted by the court, the original complaint in claim and delivery ceased to be the complaint in the cause, and the action became one strictly in conversion, the amended complaint superceding the original and thereby completely disposing of it. The ruling of the court, embodied in the order permitting the amended complaint to be filed, was the judgment or conclusion of the court upon the matter before it, and was one affecting the rights of the parties, and the judgment thereunder subject to review on appeal from the final judgment in the cause, under the provisions of section 956, post.—*Ross v. Flynn*, — Cal. App. —, 189 Pac. 293, following the doctrine laid down in *Kelly v. McKibben*, 54 Cal. 192, 195; *In re Rose*, 80 Cal. 166, 170, 22 Pac. 86; *In re Smith*, 98 Cal. 636, 641, 33 Pac. 744; *Miles v. Woodward*, 115 Cal. 308, 316, 46 Pac. 1076; *Estudillo v. Security Loan & T. Co.*, 149 Cal. 556, 87 Pac. 19.

2. Construction of section—Not to apply to injunction granted ex parte, where application to dissolve such injunction was based on affidavits. In such case notice is required to be given under section 532, ante. It is only when application to dissolve injunction is based on showing made when it was granted that this section applies.—*Hefflon v. Bowers*, 72 Cal. 270, 271, 272, 273, 275, 276, 13 Pac. 690, distinguishing *Borland v. Thornton*, 12 Cal. 440, where application was based on showing made by plaintiff, and in which it was stated that while it was competent for judge to vacate or modify injunction without notice, it was not better practice, and should never be done, except when from urgency of case it

was necessary to guard against serious loss, and except where injunction has been improvidently granted on complaint disclosing no grounds whatever for equitable relief.

3. Practice Act section 334 construed not to effect provision authorizing appeal from order granting or dissolving an injunction—such right being in addition to that provided by section.—*Sullivan v. Triunfo G. & S. M. Co.*, 33 Cal. 385, 390, 391.

4. Construed not to be affected by provision in section 118 of Practice Act that if injunction be granted without notice, defendant, at any time before trial, can apply, on reasonable notice, to dissolve or modify it—such latter action being in addition to provisions of section 334 Practice Act.—*Borland v. Thornton*, 12 Cal. 440, 448.

5. Injunction, made ex parte, was properly modified without notice to plaintiff, on application of defendant.—*Fremont v. Merced M. Co.*, 9 Cal. 18, 19.

6. Decree discharging administrator, made inadvertently and ex parte, may be set aside by court.—*Wiggin v. Superior Court*, 68 Cal. 398, 401, 9 Pac. 646.

7. Distribution of estate—Vacation of—"Order made out of court."—A decree of final discharge of an administratrix in the distribution of the estate is not an order made out of court, and does not authorize a judge to vacate or set it aside, without notice to the adverse party, under the provisions of the above section.—*Nason v. Superior Court*, 39 Cal. App. 448, 179 Pac. 454.

8. Order allowing claim against estate of deceased person, made out of court and without notice, may be set aside without notice of motion to set aside.—*Estate of Sullenberger*, 72 Cal. 549, 552, 14 Pac. 513.

9. Order granting leave to file cross-complaint, made on ex parte application, without notice to plaintiffs by judge, and not by court, may be set aside without notice.—*Alpers v. Bliss*, 145 Cal. 565, 571, 572, 79 Pac. 171. See *Coburn v. Pacific L. & M. Co.*, 46 Cal. 31.

10. Order for publication—Power of court to set aside.—An order for service of process by publication can be set aside when it has been inadvertently made, or under a mistake, or upon a showing that it has been fraudulently procured, but not otherwise; there is no authority authorizing the court to set aside without notice such ex parte orders made out of court, even under the provisions of the above section.—*Klokke Investment Co. v. Superior Court*, 39 Cal. App. 717, 179 Pac. 728, applying the doctrine in *Wiggin v. Superior Court*, 68 Cal. 402, 9 Pac. 648.

§ 938. PARTY AGGRIEVED MAY APPEAL. NAMES OF PARTIES.

Any party aggrieved may appeal in the cases prescribed in this title. The

party appealing is known as the appellant, and the adverse party as the respondent.

History: Enacted March 11, 1872, re-enactment of § 335 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 171, held unconstitutional, see history, § 5 ante.

PARTIES AGGRIEVED MAY APPEAL.

1. 5. Aggrieved party may appeal.
- 6-12. Same — As to who is "aggrieved party"—In general.
13. Same—Same — Acceptance of benefits—Estoppel.
14. Same—Same—Accounting of administrator—Personal creditor of administrator—Not aggrieved party.
15. Same—Same—"Adverse party."
16. Same—Same—Appearance of appellant in lower court.
17. Same—Same—Consolidation of corporations.
18. Same—Same—Distribution of estate of decedant — Creditors of another estate — Not aggrieved parties and can not appeal.
19. Same — Same — Joint appeals where interests are diverse.
20. Same—Same—Same — Construed with section 17, ante.
21. Same—Same—Judgment in action under section 10, Bank Commissioner's Act.
22. Same—Same—Same—Repeal of law.
23. Same — Same — Legatees of specific legacies.
24. Same — Same — Order appointing receiver.
25. Same—Same—Order denying intervention in land-contest.
26. Same—Same—Order for family allowance—Creditor is held to be aggrieved.
27. Same—Same—State controller.
28. Same—Same—State superintendent of banks.
29. Same—Same—Where the findings are against both parties.
- 30, 31. Same — Determination of question on motion to dismiss.
32. Same—Right remedial—Doubtful case.
33. Administration—Person claiming right to administer upon estate of deceased person.
34. Board of supervisors — Which levied taxes in pursuance of judgment.
- 35-37. Claimants to estate — Who have not controverted findings.
38. Same—Party whose right to estate depends upon character of property.
- 39, 40. Defendant — Against whom no judgment was rendered.
41. Same—As to judgment dismissing action.
42. Same—In foreclosure proceedings.
43. Same — Same — Failure of defendant claiming lien to appear.
44. Cross-complaint—Plaintiff and defendant, who are defendants in cross-complaint filed by another defendant, may unite on appeal.
- 45, 46. Executors — Are parties aggrieved by order.
47. Same—Partial distribution.
48. Executrix of deceased administrator—To whom succeeding administrator had been directed to pay.
49. Foreclosure of mechanics' lien—Right of appeal—"Party aggrieved."
50. Guardian of ward.
51. Homestead—Order setting it apart—Devises under will are parties aggrieved.
52. Same—Executor is party aggrieved.
- 53, 54. Interveners in action.
55. Mortgage of deceased devisee.
56. Notice of appeal—Parties to be served with.
57. Order for payment of claim—Administrator is party aggrieved.
- 58, 59. Parties to record only.
- 60, 61. Same—One who is not party to record.
- 62, 63. Same—Persons not parties to action.
64. Same — Writ of possession — One not party to record.
65. Person interested in fund in hands of receiver.
66. Plaintiff granted all relief prayed for.
67. Plaintiff who had no right to bring suit.
68. Probate of will—Binding effect of—"Party aggrieved."
69. Public administrator—Is not aggrieved party.
70. Purchaser at sale—Under interlocutory decree of partition.
- 71, 72. Purchaser of property of an estate.
73. Purchaser of property at judicial sale.
74. Special administrator — Is party aggrieved by order.
- 75, 76. Surety—Has no right of appeal.
- 77, 78. Sureties on replevin bond — Are aggrieved by decision.
- 79, 80. Trustees under will — But who claim no rights.

81. Water-rights—Judgment defining—Who may appeal.

82. Writ of assistance—Ex parte application.

See, post, § 966 and note.

As to satisfaction of judgment destroying right of appeal, see, ante, § 936 and note.

As to necessity of entry of judgment to entitle party to appeal, see, post, § 939 and note.

1. **Aggrieved party may appeal.**—The heirs of a deceased incompetent person are entitled to appeal from an order settling the account of the guardian of the incompetent, notwithstanding that there is an administrator appointed for the estate of the incompetent.—*Estate of Clanton*, 171 Cal. 381, 153 Pac. 459.

2. Any party aggrieved by a judgment or decree may appeal therefrom, including parties who are subsequently brought into the action, as well as those by or against whom it was originally instituted, and in legal acceptance a party is aggrieved by a judgment or decree when it operates upon his rights of property, or bears directly upon his interest.—*Postal Telegraph Cable Co. v. Superior Court*, 22 Cal. App. 770, 136 Pac. 538.

3. The state is a party aggrieved and may appeal from a judgment in its favor in an action brought against it to condemn land, notwithstanding that the state in its answer denied any ownership in the land, and declared that it belonged to the United States.—*Pacific Power Co. v. California*, 31 Cal. App. 719, 162 Pac. 641.

4. Any person having an interest recognized by law in the subject-matter of the judgment, which interest is injuriously affected by the judgment, is a party aggrieved and entitled to be heard upon appeal.—*Mono County Irr. Co. v. State*, 31 Cal. App. 719, 162 Pac. 641.

5. In an action brought by a public service corporation against the state of California to condemn for public use school lands alleged to be owned by the state and situated within the boundaries of a national forest reservation, the state is not a party aggrieved by a judgment rendered in its favor for damages, where the state in its answer, at the trial, and at all times contended that it had no interest in the lands, but that the same belonged to the United States, and its only object in presenting the appeal was to protect the interest of the United States.—*Mono County Irr. Co. v. State*, 31 Cal. App. 719, 162 Pac. 641.

As to a person not a party or privy to the proceedings below, see note 5 Ann. Cas. 630.

As to who may appeal as an interested or injured party, see note 119 Am. St. Rep. 740.

6. **Same—As to who is "party aggrieved"**—In general.—As to the estate or the executor or administrator thereof, as an ag-

grieved party on appeal from award of costs against the latter in his personal capacity.—See, post, § 1509 and note.

As to who are parties aggrieved entitled to appeal, see note 39 Am. Dec. 723.

7. Test is, would the party have had thing or right in controversy if erroneous judgment had not been given.—*Adams v. Wood*, 8 Cal. 306, 315, 317.

8. Questions as to the interests of appellants, and how affected, whether adversely or not, are to be considered in connection with the merits and not on motion to dismiss the appeal.—*Estate of Sutro*, 152 Cal. 257, 92 Pac. 486, 92 Pac. 1027.

9. Any person having an interest recognized by law in the subject-matter of the judgment, which interest is injuriously affected by the judgment, is a party aggrieved and entitled to be heard upon appeal.—In re Colton's Estate, 164 Cal. 1, 127 Pac. 643.

10. A simple test as to who is the aggrieved party is, "Would the party have had the thing if the erroneous judgment had not been given? If the answer be yea, then the person is the aggrieved party."—*Schino v. Cinquini*, 7 Cal. App. 244, 247, 94 Pac. 83.

11. Where, upon a trial affecting several pieces of property, plaintiff admitted that he could show no title except to one piece, he is not a party aggrieved by the judgment so far as it relates to the other pieces.—*Flannigan v. Towle*, 8 Cal. App. 229, 230, 96 Pac. 507.

12. If it be conceded that the separate answer of the lessee contained a cause of action for affirmative relief, and that the court erred in sustaining an objection to evidence offered in support of its averments, the appellants, who do not include the lessee, are not aggrieved parties, and the error can not be reviewed at their instance.—*Deiger v. Jacobs*, 19 Cal. App. 197, 125 Pac. 258.

13. **Same—Same—Acceptance of benefits—Estoppel.**—In an action to rescind an exchange of lands on the ground of fraud, where the judgment ordered a restoration to each of the parties of the property formerly owned by him, but refused to allow other claims, and ordered plaintiff's cost bill struck out, the fact that plaintiff accepted from defendant the deed to his property and tendered to defendant the deed to the property received does not estop plaintiff from appealing from the minor portions of the judgment.—*Coffman v. Bushard*, 164 Cal. 663, 130 Pac. 425, 426.

14. **Same—Same—Accounting of administrator—Personal creditor of administrator—Not aggrieved party.**—Where an administrator of the estate of a decedent assumes the perils and carries on the business of the decedant, one who deals with such administrator while so conducting the business does so with full knowledge of his situation

as a creditor; becomes a personal creditor of the administrator and not of the estate of the decedant, and consequently is not a "party aggrieved" by errors, if any, in the administrator's accounting with the estate, under the provisions of the above section.—Estate of De Rome, 175 Cal. 399, 165 Pac. 919, following the doctrine in Estate of Piper, 147 Cal. 606, 82 Pac. 246; Estate of Walden, 168 Cal. 759, 145 Pac. 100.

15. Same—Same—"Adverse party."—Held to be "every party whose interest in the subject-matter of the appeal is adverse to or will be affected by the reversal or modification of the judgment or order from which the appeal is taken."—Estate of Young, 149 Cal. 175, 85 Pac. 145.

As to adverse party, see, ante, § 936, note pars. 157, 273-283; post, § 940, note pars. 8-50.

16. Same—Same—Appearance of appellant in lower court.—The right of a person claiming to be entitled to distribution of the estate of a deceased person, as devisee, legatee, or heir, to prosecute an appeal from a decree of distribution of such estate, and to have a bill of exceptions thereon, embodying the matters pertinent to such an appeal, is not affected by the fact that he did not appear in person in the trial court in advocacy or opposition to the matter pending.—Estate of Benner, 155 Cal. 154, 99 Pac. 715.

17. Same—Same—Consolidation of corporations.—Where a defendant corporation has appealed, it is immaterial whether another defendant corporation, with which the first has been consolidated and to whose rights and interests it has succeeded, has the right of appeal or not, inasmuch as its rights are fully protected by the appeal of the first named corporation.—Isom v. Rex Crude Oil Co., 147 Cal. 665, 82 Pac. 319.

18. Same—Same—Distribution of estate of decedant—Creditors of another estate—Not aggrieved parties and can not appeal.—The executor and creditors of the estate of a person who was a beneficiary in another estate, are not parties aggrieved by and can not appeal from the decree distributing such other estate, where the claims were neither presented therein nor litigated on the hearing for distribution.—Estate of Carr, 175 Cal. 387, 165 Pac. 958.

See pars. 23, 35, this note.

19. Same—Same—Joint appeals where interests are diverse.—Where the parties to the appeal merely assert different and distinct interests in the event of a reversal, and all such interests are alike defeated if the order or judgment is affirmed, objections to such joint appeal are untenable.—Estate of Sutro, 152 Cal. 255, 92 Pac. 486, 92 Pac. 1027.

20. Same—Same—Same—Construed with section 17, ante.—Any number of parties claiming to be aggrieved by the same order or judgment may join in an appeal therefrom, and may support such appeal by a

single undertaking, although the appellants may assert different and distinct interests.—Estate of Sutro, 152 Cal. 255, 92 Pac. 486, 92 Pac. 1027.

21. Same—Same—Judgment in action under section 10, Bank Commissioner's Act.—In absence of provision denying right, such right exists under authority of section 939, post.—People v. Bank of San Luis Obispo, 152 Cal. 266, 92 Pac. 481.

22. Same—Same—Same—Repeal of law.—Repeal of banking act of 1903 authorizing attorney-general to bring action to adjudge bank insolvent, etc., did not destroy the right of a bank to a hearing on appeal from order denying a new trial after adverse judgment, and which prior to the repeal became final by affirmance.—People v. Bank of San Luis Obispo, 159 Cal. 65, 112 Pac. 866.

23. Same—Same—Legatees of specific legacies, made a charge upon specific property, have no such interest in the residue thereof as authorizes them to prosecute an appeal from a judgment affecting such residue.—Estate of Campbell, 149 Cal. 721, 87 Pac. 573.

See pars. 18, 35, this note.

24. Same—Same—Order appointing receiver.—In an action, one of the main objects of which was to acquire real estate held by one of the defendants and to have his deeds thereto delivered up and canceled, such defendant is a party aggrieved by an order appointing a receiver to take charge of the property, even though the order only authorized the receiver to bring an action therefor, and therefore has the right of appeal and also to a stay of execution upon the order.—Windsor Pottery Works v. Superior Court of Alameda County, 13 Cal. App. 360, 362, 109 Pac. 843.

25. Same—Same—Order denying intervention in land-contest, by one claiming to be a settler thereon, is final and terminates the litigation as to him, and he has an immediate right of appeal.—Dollenmayer v. Pryor, 150 Cal. 3, 87 Pac. 616.

26. Same—Same—Order for family allowance—Creditor is held to be aggrieved by such an order, erroneously made, and to have the right of appeal therefrom.—Estate of Fretwell, 152 Cal. 574, 93 Pac. 283.

27. Same—Same—State controller.—Where an appeal is taken by the state controller from a judgment in a controversy as to whether a street-railroad company, operating its lines in more than one county, should be assessed by the state board of equalization and pay its taxes to the state controller, or pay its taxes to the county tax-collectors, in which it is decreed that payment should be made to the county officials, and it is shown that the amount the state would receive by the method adjudged would exceed the amount that would be paid to the state controller by the assessment of the state board, it was held

that the appellant was not aggrieved by such judgment, and the appeal was dismissed.—*United Railroads v. Colgan*, 153 Cal. 55, 94 Pac. 245.

28. Same—Same—State superintendent of banks is a proper party to the action herein, and has an interest in the judgment which entitles him to appeal.—*Mercantile Trust Co. v. Miller*, 166 Cal. 563, 137 Pac. 913.

29. Same—Same—Where the findings are against both parties to an action to quiet title to a placer mining claim, and plaintiffs appeal from judgment and new trial order, but defendants do not appeal, they are in no position to attack the findings and conclusions of law respecting the land claimed by them.—*Garibaldi v. Grillo*, 17 Cal. App. 541, 120 Pac. 425.

30. Same—Determination of question on motion to dismiss.—Whether judgment is prejudicial to rights of appellant or whether it is competent for court to determine effect of this judgment in subsequent proceeding, are questions involving merits and can not be determined on motion to dismiss appeal on ground that defendant was not aggrieved party because judgment was in his favor.—*Nevills v. Shortridge*, 129 Cal. 575, 576, 62 Pac. 120.

31. Motion to dismiss appeal on ground that appellant is not party aggrieved by order and decree appealed from, which involves inquiry as to merits of case, will be denied.—*Estate of Williams*, 4 Cal. Unrep. 511, 36 Pac. 6.

32. Same—Right remedial — Doubtful case.—Right of appeal is remedial in its character, and, in doubtful cases, right should always be granted, and where plaintiff was entitled to judgment without any reservations or exceptions, either refusing or granting his prayer to quiet title, reservation in judgment, which, in effect, renders judgment in his favor a nullity, necessarily injures him, and he is aggrieved thereby so as to be entitled to an appeal.—*Quint v. McMullen*, 103 Cal. 381, 383, 37 Pac. 381.

33. Administration — Person claiming right to administer upon estate of deceased person is entitled to appeal from order appointing public administrator as administrator of estate of such deceased person.—*Estate of Damke*, 133 Cal. 433, 434, 65 Pac. 888.

As to administrator, executor, or trustees as party aggrieved by decision as to rights of distributees or beneficiaries inter esse, see note 13 L. R. A. 745.

34. Board of supervisors—Which levied taxes in pursuance of judgment, can not be said to be aggrieved so as to thereafter be entitled to appeal from such judgment—judgment having been satisfied.—*San Diego School Dist. v. Board of Supervisors*, 97 Cal. 438, 439, 32 Pac. 517.

35. Claimants to estate—Who have not controverted finding that they were not

kin to deceased, were not parties aggrieved in ruling respecting rights of person to whom estate has been granted, or those of any other claimants.—*Blythe v. Ayres*, 102 Cal. 254, 260, 36 Pac. 522.

See pars. 18, 23, this note.

36. Will-contestants, who are not heirs at law of testator, or related to him, are not parties aggrieved entitled to appeal from order denying new trial.—*Estate of Antoldi*, 7 Cal. Unrep. 211, 81 Pac. 278.

37. After determination that petitioner was not a widow of deceased, she was no longer interested in estate so as to be entitled to appeal from decree distributing portions of estate to other persons.—In re *Blythe*, 108 Cal. 124, 125, 41 Pac. 33.

38. Same—Parties whose right to estate depends upon character of property, as community or otherwise, are not parties aggrieved so as to be entitled to appeal on ground that court had no jurisdiction to enter decree distributing estate, where they have not excepted to findings as to character of such property as not being sustained by evidence.—*Estate of Piper*, 147 Cal. 606, 82 Pac. 246.

39. Defendant—Against whom no judgment was rendered in action for personal injury is not party aggrieved by order granting new trial as to co-defendant.—*Rankin v. Central Pac. R. Co.*, 73 Cal. 96, 15 Pac. 57.

40. Appeal by defendant who is not named in judgment is ineffectual for any purpose, he not being aggrieved by judgment against co-defendant.—*Spencer v. Troutt*, 133 Cal. 605, 65 Pac. 1083.

41. Same—As to judgment dismissing action which provides that such dismissal is not bar to another action is an aggrieved party.—*Nevills v. Shortridge*, 129 Cal. 575, 576, 62 Pac. 120.

42. Same—In foreclosure proceedings, conceded to be party aggrieved by order directing receiver, appointed for purpose of managing its business, but without power to collect debts, from paying over to judgment-creditor of defendant debts collected.—*California Title Ins. & T. Co. v. Piedmont Cable Co.*, 117 Cal. 237, 239, 49 Pac. 1.

43. Same—Same—Failure of defendant claiming lien to appear.—Where defendant in mortgage foreclosure who claimed judgment-lien on premises failed to appear at trial and offered no proof, finding that all allegations of answer were untrue shows that such defendant has no interest in action and hence is not an aggrieved party entitled to appeal.—*Foster v. Bowles*, 138 Cal. 449, 451, 71 Pac. 495.

44. Cross-complaint—Plaintiff and defendant, who are defendants in cross-complaint filed by another defendant, may unite on appeal from judgment against them on cross-complaint.—*Downing v. Rademacher*, 136 Cal. 673, 674, 69 Pac. 415.

45. **Executors—Are parties aggrieved by order of probate court requiring them in pursuance to terms of will to redeem certain lands from foreclosure sale, and hence are entitled to appeal from such order.**—Estate of Heydenfeldt, 117 Cal. 551, 552, 49 Pac. 713.

46. **Executor has no interest in distribution of estate further than to be protected if he shall dispose of property in accordance with its terms, and hence is not aggrieved party entitled to appeal from such decree.**—Estate of Williams, 122 Cal. 76, 77, 54 Pac. 386.

47. **Same—Partial distribution.**—Executrix is party aggrieved by order for partial distribution to legatees under will where question presented is sufficiency of assets to pay legacies without loss to creditors.—Estate of Murphy, 145 Cal. 464, 465, 78 Pac. 960.

48. **Executrix of deceased administrator—To whom succeeding administrator had been directed to pay certain sum as counsel fees for services of attorney rendered to him as administrator was not aggrieved party from order directing payment of such sum without interest.**—Estate of Blythe, 103 Cal. 350, 351, 37 Pac. 392.

49. **Foreclosure of mechanics' lien—Right of appeal—"Party aggrieved."**—In an action to foreclose a materialman's lien the owner of the property at the time when the materials were furnished and the claim of lien filed, who subsequently conveyed all his interest in the property, and against whom no judgment for costs was rendered, is not a "party aggrieved" who has a right to appeal from the judgment under the provisions of the above section.—Bellingham Bay Lumber Co. v. Western Amusement Co., 35 Cal. App. 509, 170 Pac. 631, distinguishing Martin v. Porter, 84 Cal. 476, 24 Pac. 109.

50. **Guardian of ward in judgment against ward is not entitled to appeal in his own name, although he may appeal as guardian (Temple, J., con. op.).**—Estate of Callaghan, 119 Cal. 571, 576, 39 L. R. A. 639, 51 Pac. 860.

51. **Homestead—Order setting it apart—Devisees under will are parties aggrieved by order setting apart from property of deceased a homestead for use of surviving wife during period of administration and until final distribution of estate.**—Estate of Levy, 141 Cal. 646, 647, 99 Am. St. Rep. 92, 75 Pac. 301.

52. **Same—Executor is party aggrieved by order setting apart homestead for use of surviving wife during period of administration and until final distribution of estate.**—Estate of Levy, 141 Cal. 646, 647, 99 Am. St. Rep. 92, 75 Pac. 301.

53. **Interveners in action, where judgment has been rendered against defendant, are entitled to appeal from such judgment though defendant did not appeal, since court**

by granting leave to intervene determined that they had an interest in matter in litigation.—People v. Perris Irr. Dist., 132 Cal. 289, 290, 64 Pac. 399, 773.

54. **Interveners in special proceeding during time person was acting as receiver, did not constitute them parties to action generally, or to another special and collateral proceeding in action, so as to entitle them to appeal from judgment in such action.**—Elliott v. Superior Court, 144 Cal. 501, 507, 77 Pac. 1109.

55. **Mortgage of deceased devisee who is not party to decree of distribution is not entitled to appeal therefrom.**—Estate of Crooks, 125 Cal. 459, 462, 58 Pac. 89.

56. **Notice of appeal—Parties to be served with.**—In a case in which some of the persons named as defendants in the complaint had never been served with summons in the action and never had appeared therein, they were not, therefor, necessary parties to be served with a notice of appeal and the fact that the notice of appeal was not addressed to and they were not served therewith does not affect the sufficiency of the notice even if service of such notice were requisite upon any of the defendants not served with summons and not appealing.—Blake & Bli-gger Co. v. Chappell, 44 Cal. App. 657, 186 Pac. 823, following Clark v. Moohr, 125 Cal. 540, 58 Pac. 176.

57. **Order for payment of claim—Administrator is party aggrieved by premature order directing payment of claim, where such order is made before amount of distributable estate is ascertained, whether such claim is preferred or not.**—Estate of Smith, 117 Cal. 505, 507, 49 Pac. 456.

58. **Parties to record only can appeal.**—Elliott v. Superior Court, 144 Cal. 501, 507, 77 Pac. 1109.

59. **A person must have been party to action or proceeding in court below to be entitled to appeal from decision therein, but this does not mean that he must have been an original party when action was first instituted, but he must have made himself party afterwards by some appropriate action, and record must show that he was such party.**—Estate of McDermott, 127 Cal. 450, 452, 59 Pac. 783. See Estate of Ryer, 110 Cal. 556, 42 Pac. 1082.

As to appeal by one of several joint defendants, see note 79 Am. Dec. 667.

60. **Same—One who is not party to record can not as rule appeal in his own name. Such person may sometimes appeal, but in some way his interest must be made to appear in record and he be made party to ruling appealed from.**—Estate of Crooks, 125 Cal. 459, 462, 58 Pac. 89.

61. **Where it appears from record that appellant is party aggrieved by order he is entitled to appeal though he has never previously appeared in case.**—Estate of Meade, 5 Cal. Unrep. 678, 49 Pac. 5.

62. Same—Persons not parties to action did not become such by consenting to order settling account of receiver in such action.—*Elliott v. Superior Court*, 144 Cal. 501, 507, 77 Pac. 1109.

63. Persons not parties of record do not become such by assent to agreement made for purpose of making contract between parties effective and binding so far as it affected their interest in property and not for purpose of placing themselves within jurisdiction of court.—*Elliott v. Superior Court*, 144 Cal. 501, 507, 77 Pac. 1109.

64. Same—Writ of possession—One not party to record.—Appeal lies from order denying his motion to vacate or modify order for writ of possession by one not party to action, and mandamus will lie to compel judge of trial court to fix amount of undertaking to stay execution.—*Green v. Hibbard*, 95 Cal. 38, 41, 30 Pac. 202.

65. Person interested in fund in hands of receiver, out of which court has directed receiver to pay himself certain compensation, may appeal from order fixing such compensation and directing such payment.—*Grant v. Los Angeles Pac. R. Co.*, 116 Cal. 71, 47 Pac. 872.

66. Plaintiff granted all relief prayed for is not party aggrieved so as to be entitled to appeal (*Paterson, J.*, concurring).—*Cooper v. Cooper*, 88 Cal. 45, 49, 25 Pac. 1062.

67. Plaintiff who had no right to bring suit and was not interested in controversy is not party aggrieved by judgment.—*Williams v. Savings & L. Soc.*, 133 Cal. 360, 65 Pac. 822.

68. Probate of will—Binding effect of—"Party aggrieved."—The probate of a will is a proceeding in rem, binding on all persons interested in the will who, being constructively notified to appear at the probate proceedings, might have come in, and who, had they come in, would have been heard for or against the will, it follows that any such person, whether present and participating in the hearing or not, is a party aggrieved under the provisions of the above section and has an unquestioned right as an heir at law and party aggrieved to appeal from the decree admitting the will to probate.—*Pearson v. Elliott*, 176 Cal. 632, 169 Pac. 364, following the doctrine in *Estate of Crooks*, 125 Cal. 459, 58 Pac. 89; *Estate of McDermott*, 127 Cal. 450, 59 Pac. 783; *Estate of Colton*, 164 Cal. 5, 127 Pac. 643.

69. Public administrator—Is not aggrieved party in regard to an order of distribution, and can not appeal therefrom.—*Estate of Jones*, 118 Cal. 499, 503, 62 Am. St. Rep. 251, 50 Pac. 766. See *Bates v. Ryberg*, 40 Cal. 463; *Estate of Wright*, 49 Cal. 550; *Estate of Marrey*, 65 Cal. 287, 3 Pac. 896.

70. Purchaser at sale—Under interlocutory decree of partition is party to confirmation of sale, and may appeal from that part of decree as to which he is party aggrieved.

—*Hammond v. Cailleaud*, 111 Cal. 206, 214, 52 Am. St. Rep. 167, 43 Pac. 607; *Dunn v. Dunn*, 137 Cal. 51, 56, 69 Pac. 847.

71. Purchaser of property of an estate, who has filed objections to confirmation of sales of such estate, is party aggrieved by action of court—he not being required to be interested in estate.—*Estate of Pearsons*, 98 Cal. 603, 605, 33 Pac. 451.

72. Purchaser of land sold by an administratrix is entitled to appeal from order directing resale of such property, though not an actual party below—he being party aggrieved.—*Estate of Boland*, 55 Cal. 310, 311.

73. Purchaser of property at judicial sale is entitled to appeal from order refusing to confirm sale, or to hear evidence in regard thereto.—*Estate of Leonis*, 138 Cal. 194, 197, 71 Pac. 171.

74. Special administrator—Is party aggrieved by order settling his account and directing him to pay balance in his hands to another person as special administrator.—*Estate of Heaton*, 139 Cal. 237, 238, 73 Pac. 186.

75. Surety—Has no right of appeal, merely as such, from judgment against principle.—*Estate of McDermott*, 127 Cal. 450, 452, 59 Pac. 783.

76. Order granting leave to intervene in action made on petition filed after judgment in such action by sureties, does not render such sureties parties to action so as to entitle them to appeal from judgment against principal.—*Estate of McDermott*, 127 Cal. 450, 452, 59 Pac. 783.

77. Sureties on replevin bond—Are aggrieved by decision rendered against their principal, since they are concluded by such judgment.—*Coburn v. Smart*, 53 Cal. 742, 745.

78. Sureties on replevin bond, who have sought to intervene and been refused, are parties in technical sense, so as to entitle them to prosecute an appeal from judgment against their principal.—*Coburn v. Smart*, 53 Cal. 742, 745. See *People v. Grant*, 45 Cal. 97.

79. Trustees under will—But who claim no rights under it and have presented no claim against estate, are not aggrieved persons entitled to appeal from decree distributing funds to heir.—*Estate of Burdick*, 112 Cal. 387, 396, 44 Pac. 734.

80. Trustees under will are not parties aggrieved by order directing payment by them of fees for guardian ad litem for minor heirs in proceeding to construe will under which they acted.—*Goldtree v. Thompson*, 83 Cal. 420, 422, 23 Pac. 383. See *Adams v. Wood*, 8 Cal. 306, 315; *Bates v. Ryberg*, 40 Cal. 465; *Estate of Wright*, 49 Cal. 550; *Rosenberg v. Frank*, 58 Cal. 387, 420.

81. Water-rights—Judgment defining—Who may appeal.—In the case of an action

to establish the rights of the plaintiff to the use of the water of a specified spring, where a judgment declaring his rights in and to a portion of the water, the same being all that he claimed to be entitled to, an addition to the judgment decreeing that the defendant may take and use upon his own land any water from said spring in excess of the amount awarded by the judgment to the plaintiff in the action, the plaintiff is not an "aggrieved party" and for that reason can not prosecute an appeal from the latter portion of the judgment

affecting interests to which he lays no claim.—*Custis v. Gehely*, 177 Cal. 455, 170 Pac. 1109.

82. Writ of assistance—Ex parte application.—Motion for writ of assistance, made on ex parte application against defendant, is not operative against any other person than defendant; and hence evidence on which it is based can not affect parties to order, and they are not aggrieved so as to be entitled to appeal, and an appeal by persons not made parties to the motion will be dismissed.—*Miller v. Bate*, 56 Cal. 135, 136.

§ 939. WITHIN WHAT TIME APPEAL MAY BE TAKEN. An appeal may be taken from any judgment or order of a superior court from which an appeal lies under any provision of this code, or of any other code, or under any other statute, within sixty days from the entry of said judgment or order. No appeal, however, shall be dismissed on the ground that it was taken after the rendition of such judgment or order and before formal entry.

[If proceedings for new trial are pending.] If proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining such motion for a new trial, or other termination in the trial court of the proceedings upon such motion.

History: Enacted March 11, 1872, re-enactment of § 336 Practice Act as amended 1859, Stats. and Amdts. 1859, p. 139; amendment approved April 12, 1880; Code Amdts. 1880 (C. C. P. pt.), p. 61; March 3, 1897, Stats. and Amdts. 1897, p. 55; February 14, 1899, Stats. and Amdts. 1899, p. 7; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 172, held unconstitutional, see history, § 5 ante; amendment approved February 28, 1907, Stats. and Amdts. 1907, p. 60, Kerr's Stats. and Amdts. 1906-7, p. 469; April 24, 1915, Stats. and Amdts. 1915, p. 205. In effect August 8, 1915.

APPEAL—TIME WITHIN WHICH MUST BE TAKEN.

- 1-5. As to time in which to take an appeal.
6. Same—Default judgment.
- 7, 8. Same—Time begins to run, when.
9. Same—When taken within time.
- 10-12. Amendment of judgment—Time runs from.
- 13, 14. Appeal from judgment — Before entry.
15. Same—Same—Although taken after judgment has been rendered.
16. Same — Same — Entry of judgment nunc pro tunc.
17. Same—Same—Party against whom no judgment has been rendered.
18. Same—Same—Stipulation as to entry.
19. Same—Same—Transcript must show that judgment has been entered.
20. Same—Motion for new trial pending —Jurisdiction of trial court.
21. Same—Sixty-day period—Applicable to both methods of appeal.

- 22-30. Same—Taken after time to appeal has expired.
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33. Constitutionality—"Due process."
34. Construction of section—As authorizing appeal from order dissolving attachment.
35. Same—Amendment of 1897—As not retroactive.
- 36-39. Same—Amendment of 1915—As to time within which appeal may be taken from judgment.
40. Same—Final judgment.
41. Same — Provision that exception to decision on ground that it is not supported by evidence, can not be reviewed.
- 42, 43. Same — "Verdict or decision"—As used in above section.
44. Death of plaintiff — Before expiration of time within which to appeal.
- 45, 46. Decree of distribution—Of estate of deceased person.
- 47, 48. Default — Order refusing leave to answer after judgment by default.

49. Discharge of debtor—Order discharging judgment-debtor from imprisonment.
50. Estate of deceased person—Admitting will to probate—Time for taking appeal from—Motion for new trial pending.
51. Expiration of time to appeal—Service of notice of intention to move for new trial—Effect on right of appeal.
52. Extension of time to appeal—Pending new trial proceedings.
53. Final judgment—Appeal from—Time when limitation begins to run.
54. Injunction—Order dissolving.
55. Interlocutory decree.
56. Interlocutory judgment—In action for partition.
57. Intervention—Appeal from order dismissing complaint in.
58. Judgment of inferior court—Appeal from.
59. Mandatory provisions—Statutes limiting time of appeal are jurisdictional and mandatory.
60. Mortgage—Order of sale of mortgaged premises to satisfy amount falling due since rendering decree.
61. Motion for new trial—Appeal from judgment—When to be taken.
62. Same—As to limitations of section to proceedings regularly initiated.
63. Same—Filed after expiration of sixty days from entry of judgment—No new trial proceedings pending.
- 64, 65. New trial—Appeal from order denying motion for.
66. Same—Both bond and notice must be given and filed within sixty days.
- 67-69. Notice of appeal—In general.
80. Same—In will contest—New trial action pending—Time within which notice to be filed.
- 81-87. Notice of entry of judgment—Necessity for to set running limitation of appeal.
- 88-90. Same—Written notice necessary.
91. Notice of intention—Failure to sign—Defect not jurisdictional.
92. Same—Signature by attorney other than one of record—Waiver of objection.
93. Order admitting will to probate—New trial pending—Time for taking appeal.
94. Order denying motion to recall execution—Time of appeal—Dismissal.
95. Order denying new trial—Time of appeal—Effect of statute—Construction.
96. Same—Same—Pendency of proceedings for new trial—Effect of.
- 97-99. Same—Same—Subsequent appeal from judgment—Review of new trial order.
100. Practice—Dismissal.
101. Probate of will—Order denying.
102. Same—Revocation of.
103. Receiver—Order approving account of.
104. Same—Order settling account of receiver, and directing plaintiff to pay receiver his compensation.
- 105-107. Rendition of judgment—Means either announcement from bench entered.
108. Statement on motion for new trial—Striking out.
109. Sufficiency of evidence—Absence of motion for new trial—Review of, on appeal.
110. Same—Can not be considered on appeal from judgment, when.
111. Same—Same—Though within sixty days after its final entry.
112. Same—Same—Though evidence and specifications are set forth.
113. Same—Same—Such appeal must be considered and determined on judgment-roll alone.
114. Same—Account of administrator.
115. Same—Bill of exceptions can not be used, when.
116. Same—Bill of exceptions may be looked into, for what purpose.
117. Same—Election contests, judgments in, are governed by what.
118. Same—Exception to entry of judgment against executors on ground that no claim had been presented.
119. Same—Exception that judgment is not sustained by evidence.
120. Same—Filing of undertaking.
121. Same—Homestead—Report of appraisers.
122. Same—Motion—Evidence used on hearing motion to strike out complaint.
123. Same—New trial.
124. Same—Nonsuit.
125. Same—Refusal to admit and take into consideration proper evidence.
- 126, 127. Same—Time to appeal—Begins to run from time of actual entry.
128. Same—Judgment is entered, when.
129. Same—Ministerial act of clerk in compiling judgment-roll.
130. Same—Notice of rendition of judgment is not required.
131. Same—Order granting new trial does not extend running of limitation of time to appeal from judgment.

132. Service before entry—Filing after entry.

133. Time for appeal—Can not be enlarged by supreme court.

134. Undertaking—Need not be given within time limited.

135. Vacating sale—Appeal from an order.

136. Writ of assistance—Order vacating.

See, ante, § 936 and note.

1. **As to time in which to take an appeal.**—Where in fact a final judgment was entered although it was styled an interlocutory judgment or decree, the appellate court may consider the appeal, only from the fact that it was really a final judgment, for the statute does not permit an appeal from an interlocutory judgment except in the cases specified herein.—*Fay v. Fay*, 165 Cal. 469, 132 Pac. 1040.

2. An appeal from a judgment, taken more than six months after entry, can not be considered.—*Moyer v. De Witt*, 166 Cal. 780, 135 Pac. 1126; *Stanwood v. Carson*, 169 Cal. 640, 147 Pac. 562.

See, also, par. 22-30, this note.

3. An appeal from a judgment must be dismissed on the ground that it was not taken within the time allowed by law, where the notice of appeal was not filed until two days after the expiration of the thirty-day period immediately following the expiration of the three-month period allowed by the statute for the determination of the motion for new trial.—*Lancel v. Postlethwaite*, 172 Cal. 326, 156 Pac. 486.

4. On an appeal from a judgment taken within sixty days, the sufficiency of the evidence may be considered as well as the alleged errors of law occurring at the trial.—*Vore v. Ephraim*, 173 Cal. 245, 159 Pac. 719.

5. An appeal taken from a judgment entered on motion against the surety on an undertaking on appeal is too late, and must be dismissed, where the notice of appeal was not filed within sixty days after the entry of the judgment, regardless of the fact that such notice was filed within thirty days after the termination in the trial court of proceedings on motion for new trial.—*Gray v. Cotton*, 174 Cal. 256, 162 Pac. 1019.

6. **Same—Default judgment.**—An appeal taken from a judgment entered upon default six months prior to the date of the taking of the appeal is abortive.—*Snyder v. Miller*, 29 Cal. App. 566, 157 Pac. 22.

7. **Same—Time begins to run when.**—The time to appeal begins to run from the date of the entry of judgment.—*Bates v. Ransome-Crummey Co.*, 42 Cal. App. 699, 184 Pac. 39.

See pars. 53, 126, this note.

8. Notice of entry of judgment necessary to set running the sixty-day period or other period of limitation within the statu-

tory period of limitation.—*Hartfield v. Alderete*, 25 Cal. App. 732, 145 Pac. 146.

9. **Same—When taken within time.**—Where a judgment was entered in the superior court on December 16, and an order denying a motion for new trial was entered on February 10 of the following year an appeal from the judgment taken on March 13, following denial of the motion for new trial was one day too late, under the provisions of the above section, limiting the time for appeal to thirty days after the entry in the trial court of the order denying a motion for a new trial.—*Spotton v. Superior Court*, 177 Cal. 719, 171 Pac. 801.

10. **Amendment of judgment—Time runs from.**—Where defendant could not have taken appeal from judgment as rendered he was entitled to take appeal within statutory time after amendment of judgment; thus where name of defendant was omitted from judgment, he was entitled to appeal within statutory time after insertion of his name.—*Spencer v. Troutt*, 133 Cal. 605, 65 Pac. 1083.

11. Appeal from judgment taken within six months from entry of amended judgment is in time, though taken more than six months after original judgment had been entered. The date of amendment is true date of entry.—*Hayes v. Silver Creek & P. L. & W. Co.*, 136 Cal. 238, 239, 68 Pac. 704.

12. Appeal from an amended judgment in probate proceedings may be taken within sixty days, though sixty days have elapsed since original judgment was entered.—*Estate of Potter*, 141 Cal. 350, 351, 74 Pac. 986.

13. **Appeal from judgment—Before entry of judgment is premature, and will be dismissed.**—*Thomas v. Anderson*, 55 Cal. 43, 45; *Schroder v. Schmidt*, 71 Cal. 399, 13 Pac. 302; *Tyrrell v. Baldwin*, 72 Cal. 192, 193, 13 Pac. 475; *Home of Inebriates v. Kaplan*, 84 Cal. 486, 488, 24 Pac. 119; *People ex rel. Love v. Center*, 66 Cal. 551, 567, 5 Pac. 263, 6 Pac. 481; *Kimple v. Conway*, 69 Cal. 71, 10 Pac. 189; *Brady v. Burke*, 90 Cal. 1, 5, 27 Pac. 52; *McHugh v. Adkins*, 117 Cal. 228, 49 Pac. 2; *Bell v. Staacke*, 137 Cal. 307, 70 Pac. 171; *Estate of More*, 143 Cal. 493, 495, 77 Pac. 407.

As to filing after entry saving from being premature, see par. 132, this note.

14. Appeal taken from final judgment before its entry is premature, as time within which an appeal may be taken from final judgment does not begin to run until entry of judgment.—*More v. Miller*, 6 Cal. Unrep. 78, 53 Pac. 1077, 6 Cal. Unrep. 110, 54 Pac. 263.

15. **Same—Same—Although taken after judgment has been rendered.**—*Thomas v. Anderson*, 55 Cal. 43, 45; *McHugh v. Adkins*, 117 Cal. 228, 49 Pac. 2.

16. **Same—Same—Entry of judgment nunc pro tunc as of former date does not affect time in which to appeal, and hence an appeal taken before actual entry is premature,**

though after date of such nunc pro tunc entry.—*Coon v. Grand Lodge*, 76 Cal. 354, 18 Pac. 384.

17. **Same—Same—Party against whom no judgment has been rendered** is not entitled to appeal from judgment, nor from order refusing to set aside judgment by default, as an appeal by him is premature.—*Scotland v. East Branch M. Co.*, 56 Cal. 625, 626.

18. **Same—Same—Stipulation as to entry**.—Recital in notice of appeal and acknowledgment of service thereof, and use of word "entered" in making objection to decree of distribution in bill of exceptions do not amount to stipulation that decree had been entered so as to authorize appeal.—*Estate of More*, 143 Cal. 493, 495, 77 Pac. 407.

19. **Same—Same—Transcript must show that judgment has been entered**, or appeal from judgment of nonsuit will be dismissed.—*Granger v. Richards*, 126 Cal. 635, 636, 59 Pac. 118.

20. **Same—Motion for new trial pending—Jurisdiction of trial court**.—An appeal taken from a judgment does not operate to divest the trial court of power to entertain and determine a motion for a new trial in the matter in which the judgment was given, regardless of whether or not separate appeal from the order is expressly authorized by statute.—*Estate of Waters*, 181 Cal. 584, 185 Pac. 951.

21. **Same—Sixty-day period—Applicable to both methods of appeal**.—The provision in the first sentence of the above section, to the effect that an exception to a decision upon the ground that it is not supported by the evidence may be considered upon an appeal from the judgment, when such appeal is taken within sixty days from the entry thereof, applies alike to appeals taken under the old and also under the new and alternative method of appeal.—*Fisher v. Oliver*, 174 Cal. 781, 164 Pac. 800.

22. **Same—Taken after time to appeal had expired** can not be considered, and must be dismissed.—*Gray v. Palmer*, 28 Cal. 416, 417, 419; *Bates v. Gage*, 49 Cal. 126, 128; *Voll v. Hollis*, 60 Cal. 569, 572; *Gray v. Winder*, 77 Cal. 525, 526, 20 Pac. 47; *Mattingly v. Pennie*, 105 Cal. 514, 524, 45 Am. St. Rep. 87, 39 Pac. 200; *Henry v. Merguire*, 111 Cal. 1, 2, 43 Pac. 387; *Sutter v. Tisdale*, 128 Cal. 180, 60 Pac. 757; *Hunter v. Milam*, 133 Cal. 601, 602, 65 Pac. 1079; *Moyer v. De Witt*, 166 Cal. 780, 135 Pac. 1126; *Stanwood v. Carson*, 169 Cal. 640, 147 Pac. 562.

As to when time begins to run, see pars. 7-9, this note.

23. Appeal from judgment not taken within statutory time can not be considered.—*Contra Costa Co. v. Soto*, 138 Cal. 57, 59, 70 Pac. 1019.

24. Appeal from judgment can not be entertained when taken more than two years after rendition of judgment.—*Houser & H.*

M. Co. v. Hargrove, 129 Cal. 90, 91, 61 Pac. 660.

25. Appeal from judgment taken more than one year after its entry must be dismissed.—*United States v. Crooks*, 116 Cal. 43, 44, 47 Pac. 370.

26. Appeal from order not perfected until after lapse of one year from rendition of judgment is ineffectual, and must be dismissed.—*Cox v. Odell*, 1 Cal. App. 682, 82 Pac. 1086.

27. Appeal from judgment not taken within six months must be dismissed.—*Calkins v. Howard*, 2 Cal. App. 233, 83 Pac. 280.

28. Where notice of appeal was not given within six months after entry of judgment, appeal can not be considered.—*McGorray v. Stockton Sav. & L. Soc.*, 131 Cal. 321, 325, 63 Pac. 479; *McDonald v. Lee*, 132 Cal. 252, 253, 64 Pac. 250.

29. Judgment is not open to review on appeal not taken within six months after its entry.—*Begbie v. Begbie*, 128 Cal. 154, 155, 49 L. R. A. 141, 60 Pac. 667.

30. Appeal from judgment not having been taken within six months after its entry can not be considered.—*Moore v. Douglass*, 132 Cal. 399, 400, 64 Pac. 705.

31. **Bankruptcy—A judgment granting discharge in bankruptcy proceedings** may be appealed from within twelve months.—*Kohlman v. Wright*, 6 Cal. 239, 231. See *Sullivan v. Washington Mfg. Co.*, 139 Cal. 257, 259, 72 Pac. 992.

32. Order granting or refusing to grant application of insolvent for final discharge discussed as to whether it comes within the provisions of this subdivision so that an appeal must be taken within sixty days.—*Sullivan v. Washburn Mfg. Co.*, 139 Cal. 257, 259, 72 Pac. 992. See *Kohlman v. Wright*, 6 Cal. 230.

33. **Constitutionality—"Due process."**—The section is not unconstitutional as a denial of due process in making no provision for a new trial motion after time for appeal from judgment has expired.—*Bates v. Ransome-Crummey Co.*, 42 Cal. App. 699, 184 Pac. 39.

34. **Construction of section—As authorizing appeal from order dissolving attachment within sixty days** whether appellant takes steps to preserve lien of attachment or not.—*Flagg v. Puterbaugh*, 101 Cal. 583, 584, 36 Pac. 95.

35. **Same—Amendment of 1897—As not retroactive**.—The amendment of 1897, limiting time in which to appeal from judgment to six months, was not retroactive, and does not govern appeals from judgments entered before it took effect.—*Pignaz v. Burnett*, 119 Cal. 157, 159, 51 Pac. 48; *Melde v. Reynolds*, 120 Cal. 234, 236, 52 Pac. 491.

36. **Same—Amended of 1915—As to time within which appeal may be taken from**

judgment.—The time within which an appeal may be taken from a judgment was extended, as provided in above section, as amended in the year 1915, to enable a party to have reviewed on such appeal the failure or refusal of the trial court to grant his motion for a new trial, amendments of our laws in other respects made at the same time having the effect of abolishing the right of appeal from an order denying a new trial which theretofore existed.—*Lancel v. Postlethwaite*, 172 Cal. 326, 156 Pac. 486.

37. Proceedings on a motion for a new trial are "terminated in the trial court" within the meaning of above section, where the last day of the three months within which an order determining the motion for a new trial could legally have been made fell upon a Saturday, as the provision of section 12, ante, that in computing time the "last day" is to be excluded when such day is a "holiday," contemplates that the whole of such day be a holiday, and not a portion thereof, which Saturday is declared to be by section 10, ante.—*Lancel v. Postlethwaite*, 172 Cal. 326, 156 Pac. 486.

38. This section as amended in 1915 does not enlarge the right of a party to appeal in cases other than those specified in section 963, post.—*Hester v. McMullan*, 29 Cal. App. 664, 157 Pac. 521.

39. An order granting a motion for a nonsuit although not followed by a formal order of dismissal is a final judgment within the meaning of this section.—*Commins v. Guaranty Oil Co.*, 29 Cal. App. 139, 154 Pac. 882.

40. **Same—Final judgment** is one which finally disposes of rights of all of parties to action.—*Nolan v. Smith*, 137 Cal. 360, 361, 70 Pac. 166. See *Stockton Combined Harvester & Agricultural Works v. Glenn's Falls Ins. Co.*, 98 Cal. 557, 577, 33 Pac. 633.

41. **Same—Provision that exception to decision on ground that it is not supported by evidence, can not be reviewed unless appeal is taken within sixty days after rendition of judgment, does not change time within which appeal must be taken, but is limitation on matters which may be considered on appeal.**—*McHugh v. Adkins*, 117 Cal. 228, 49 Pac. 2.

42. **Same—"Verdict or decision"—As used in above section, refers to statement of fact found and conclusions of law mentioned in section 633, ante, exclusive of intermediate orders and decisions which may be reviewed on appeal from final judgment, and as to which no written findings are required.**—*Clifford v. Allman*, 84 Cal. 528, 532, 24 Pac. 292.

43. **Compare:** *Convey v. Hale*, 49 Cal. 555.

44. **Death of plaintiff—Before expiration of time within which to appeal, and failure of administrator to be appointed upon whom notice of appeal could be served, did not prevent running of limitation of time within**

which to appeal.—*Williams v. Long*, 130 Cal. 58, 59, 30 Am. St. Rep. 68, 62 Pac. 264.

45. **Decree of distribution—Of estate of deceased person was not entered until entered at length in minute-book of court so as to authorize appeal, and hence appeal taken before such entry is premature.**—*Estate of Pearsons*, 119 Cal. 27, 28, 50 Pac. 929.

46. **Appeal from decree of distribution, or from final discharge of administratrix, taken more than sixty days after their entry, must be dismissed.**—*Estate of Campbell*, 141 Cal. 72, 73, 74 Pac. 550.

47. **Default—Order refusing leave to answer after judgment by default is not final judgment or an order made after final judgment, and hence an appeal not taken within sixty days from date of such order must be dismissed.**—*Doyle v. Republic L. I. Co.*, 125 Cal. 15, 16, 57 Pac. 667. See *Harper v. Hildreth*, 99 Cal. 265, 33 Pac. 1103.

48. **Order refusing to set aside and vacate judgment must be appealed within sixty days from entry of order.**—*McCourtney v. Fortune*, 42 Cal. 387, 390.

49. **Discharge of debtor—Order discharging judgment-debtor from imprisonment is special order after judgment, though made by another court, which was authorized to take jurisdiction of such proceedings, and hence appeal must be taken within sixty days.**—*Wells F. & Co. v. Anthony*, 35 Cal. 696, 698.

50. **Estate of deceased person—Admitting will to probate—Time for taking appeal from—Motion for new trial pending.**—Under the provisions of the above section where an appeal from a judgment or appealable order to be taken to the superior court within sixty days from the date of the entry of the judgment or order, but providing that in case of proceedings for a new trial pending, the time for appeal shall not expire until thirty days after entry in the trial court of the order determining the motion for new trial, or other termination in the trial court of the proceedings, upon such motion, the filing of a notice of intention to move for a new trial, within the legal time allowed therefor, stays a "proceeding on motion for a new trial" which remains "pending" until finally disposed of by the court or by operation of law; consequently allowing order admitting a will to probate was entered on November 7, and a notice of intention to move for new trial was filed on November 20, that proceeding remained pending until February 10 of the following year when it was denied by operation of law, and an appeal from the order admitting the will to probate which was taken on March 8 of the latter year, was in time, although no further steps had been taken in the proceedings for a new trial for three months after the service of the notice of intention.—*Estate of Bergland*, 177 Cal. 227, 170 Pac. 400.

51. Expiration of time to appeal—Service of notice of intention to move for new trial—Effect on right of appeal.—The provisions of the above section and of sections 659, ante, and 941b, post, do not authorize a party whose right of appeal from a judgment has expired, to revive that right of appeal by subsequently giving notice of intention to move for a new trial.—*Pacific Light & Power Co. v. Kauffman*, 39 Cal. App. 499, 179 Pac. 452.

52. Extension of time to appeal—Pending new trial proceedings.—Under the provisions of the above section the sixty-day limit of time for appealing from a judgment can not be extended, except by the pendency of proceedings on motion for a new trial, as therein provided.—*Leake v. City of Venice*, 43 Cal. App. 568, 185 Pac. 424.

53. Final judgment—Appeal from—Time when limitation begins to run.—Under the provisions of the above section and section 941b, post, an appeal from a final judgment must be taken within sixty days from the entry of judgment, but in those cases in which a motion for a new trial is pending, the time for appeal from the judgment does not expire until thirty days after entry in the trial court of the order determining such motion for a new trial, or there is other termination in the trial court of the proceedings upon such motion.—*Whiting-Mead Commercial Co. v. Bayside Land Co.*, 178 Cal. 93, 172 Pac. 598.

As to when limitation begins to run on time to appeal, see pars. 7, 8, this note.

54. Injunction—Order dissolving injunction can not be reviewed on appeal where appeal from order was not taken until more than sixty days had elapsed.—*Barham v. Hostetter*, 67 Cal. 272, 273, 7 Pac. 689. See *McCourtney v. Fortune*, 42 Cal. 387.

55. Interlocutory decree, that certain heirs were not entitled to any relief in an action to have distributee of an estate declared trustee, in their favor, became final and conclusive as to rights of parties before it when not appealed from within sixty days.—*Quirk v. Rooney*, 130 Cal. 505, 509, 62 Pac. 825. See *Lorenz v. Jacobs*, 53 Cal. 24.

56. Interlocutory judgment—In action for partition must be appealed from within sixty days after order is made and entered in minutes of court or filed with clerk; and hence where appeal is not taken within such time it will be dismissed.—*Regan v. McMahon*, 43 Cal. 625, 626; *Watson v. Sutro*, 77 Cal. 609, 20 Pac. 88; *Bartlett v. Mackey*, 130 Cal. 181, 62 Pac. 482; *Dore v. Klumpke*, 140 Cal. 356, 73 Pac. 1064.

57. Intervention—Appeal from order dismissing complaint in intervention for want of interest taken more than one year after rendition of such order, is not in time, since time for appeal begins from date of such order and not from time of rendition of

judgment between original parties.—*More v. Miller*, 6 Cal. Unrep. 78, 110, 53 Pac. 1077.

58. Judgment of inferior court—Appeal from judgment of county court, rendered on appeal from justices' court, taken more than ninety days after rendition of judgment does not give supreme court jurisdiction.—*Dooling v. Moore*, 20 Cal. 142, 143.

59. Mandatory provisions—Statutes limiting time of appeal are jurisdictional and mandatory, and in absence of express authorization in statute itself, court has no power to extend time for taking appeal or to relieve appellant from effect of misfortune, accident, surprise, or mistake, and no such authorization is found in statutes of this state.—*Williams v. Long*, 130 Cal. 58, 59, 30 Am. St. Rep. 68, 62 Pac. 64.

60. Mortgage—Order of sale of mortgaged premises to satisfy amount fallen due since rendering decree of foreclosure, being an order after judgment, must be appealed within sixty days.—*Byrne v. Hoag*, 126 Cal. 283, 287, 58 Pac. 688.

61. Motion for new trial—Appeal from judgment—When to be taken.—Under the provisions of the above section where proceedings on motion for a new trial are initiated by a proper notice, the time for taking an appeal from the judgment expires thirty days after entry in the trial court of the order determining such motion.—*Nave v. Taugher*, — Cal. App. —, 193 Pac. 508.

62. Same—As to limitations of section to proceedings regularly initiated.—The provisions of the above section as to the time for appeal when new trial motion is pending, are limited to cases where new trial proceedings have been regularly initiated.—*In re Nutts Estate*, 180 Cal. 419, 181 Pac. 661.

63. Same—Filed after expiration of sixty days from entry of judgment—No new trial proceedings pending.—Under the provisions of the above section extending the time for appeal from judgment "if proceedings on motion for a new trial are pending" has no application in a case in which no motion for a new trial has been made and no proceedings on that motion are pending, and where the notice of appeal is not given within sixty days from the date of the entry of the judgment, and within which an appeal may be taken from such judgment, in the absence of new trial proceedings, the right to appeal from the judgment is forever lost.—*Ransome-Crummey Co. v. Beggs*, 185 Cal. 279, 196 Pac. 487, approving and following the doctrine in *Pacific Light & Power Corp. v. Kauffman*, 39 Cal. App. 499, 179 Pac. 452; *Bates v. Ransome-Crummey Co.*, 42 Cal. App. 699, 184 Pac. 39.

64. New trial—Appeal from order denying motion for, taken within sixty days after order was made, is within time prescribed, and hence will not be dismissed.—*Schroder v. Schmidt*, 71 Cal. 399, 400, 12 Pac. 302.

As to amendment of 1915 rendering orders denying motions for new trial non-appellable orders, see, ante, § 936, note par. 3; also, post, § 963 and note.

65. Order granting or refusing new trial, appeal from not taken within sixty days after order is made and entered in minutes of court, will be dismissed, as court has no jurisdiction to hear appeal.—*Esray v. Southern Pac. Co.*, 4 Cal. Unrep. 402, 35 Pac. 310; *McDonald v. Lee*, 132 Cal. 252, 253, 64 Pac. 250. See *Peck v. Courtis*, 31 Cal. 207, 208; *Brown v. Green*, 65 Cal. 221, 3 Pac. 811.

66. **Same—Both bond and notice must be given and filed within sixty days** to constitute valid appeal from order denying new trial.—*Holcomb v. Sawyer*, 51 Cal. 417.

67. **Notice of appeal—in general.**—A notice of appeal, filed two days before the expiration of six months from the entry of the judgment, is not too late under section 941b, post, when no notice of entry of judgment has actually been served upon the attorneys of the appellant, notwithstanding the previous service by the appellant of his notice of appeal upon the attorneys for the respondent.—*Title Ins. & Trust Co. v. California Development Co.*, 168 Cal. 397, 143 Pac. 723.

68. A party who serves a notice that the appeals from an entered judgment thereby gives convincing evidence that he has knowledge of the entry of the judgment, and knowledge for some purposes is synonymous with notice. However, section 941b, post does not provide that an appeal must be taken within sixty days after notice of the entry of the judgment or order, but that the sixty days for taking an appeal run from and after "notice of entry . . . has been served upon the attorneys of record"; and this implies that the notice contemplated is necessarily a notice in writing which may be served in the ordinary manner of serving a writing.—*Title Ins. & Trust Co. v. California Development Co.*, 168 Cal. 397, 143 Pac. 723.

69. A written notice given by an intervenor in an action, and addressed to the clerk of the court and to all the parties, directing them to take notice of an appeal from certain parts of the judgment rendered on a named date and thereafter entered, and served upon the attorneys for the other appellants more than sixty days prior to the filing of their notice of appeal, is sufficient notice that judgment has been entered.—*Title Ins. & Trust Co. v. California Development Co.*, 168 Cal. 397, 143 Pac. 723.

70. It is immaterial that such notice was not intended, primarily, for the purpose of shortening the time within which the party served might appeal. Section 941b, post, gives him sixty days after he has been served with notice of the entry of the judgment, and the purpose of the enactment is that the full period of six months shall be allowed, unless knowledge of entry is brought home to the party by service of

a notice in writing stating the fact of such entry. If he is served with such notice, this purpose is fulfilled.—*Title Ins. & Trust Co. v. California Development Co.*, 168 Cal. 397, 143 Pac. 723.

71. But in order to escape the necessity of serving notice of appeal and giving an undertaking, the appellant must file his notice of appeal within the time limited by section 941b, post. If he allows that time to go by, but is still within the time allowed under the old method (section 939), he must serve his notice and give his undertaking, as he was required to do when that method was the only one in force.—*Title Ins. & Trust Co. v. California Development Co.*, 168 Cal. 397, 143 Pac. 723.

72. The right to rely on such notice is not restricted to the party giving it.—*Title Ins. & Trust Co. v. California Development Co.*, 168 Cal. 397, 143 Pac. 723.

73. Where an attorney gives notice of an appeal from a judgment, without authority from his client, the subsequent ratification of his act by the client, after the expiration of the time limited by law for taking the appeal, is no defense to a dismissal of the appeal.—*Title Ins. & Trust Co. v. California Development Co.*, 168 Cal. 397, 143 Pac. 723.

74. A notice of appeal served upon the party substituted without notice is without legal efficacy, and the appeal will be dismissed.—*Higgins v. Kay*, 168 Cal. 468, 143 Pac. 710.

75. Service of such notice on disclaiming defendants is unnecessary, where the judgment appealed from is absolutely silent as to them.—*Fearon v. Fodera*, 169 Cal. 370, Ann. Cas. 1916D, 312, 148 Pac. 200.

76. An appeal from an order denying a new trial in an action for slander of title will not be dismissed for failure to serve the notice of appeal upon the co-defendants of the appellants.—*Fearon v. Fodera*, 169 Cal. 370, Ann. Cas. 1916D, 312, 148 Pac. 200.

77. An appeal from a judgment in an action for damages for slander of title will not be dismissed for failure of the appealing defendants to serve the notice of appeal upon a defaulting co-defendant who has not appealed from the judgment taken and rendered against him by default, and whose interest can not in anywise be affected by a reversal of the judgment appealed from.—*Fearon v. Fodera*, 169 Cal. 370, Ann. Cas. 1916D, 312, 148 Pac. 200.

78. A notice of appeal from a judgment and order denying a motion for a new trial which recites that "Notice is hereby given that T. D. P., through his attorneys, P. M. & P., appeals to the appellate court of the state of California from that order of the superior court denying a motion for a new trial and also from the judgment therein," signed by attorneys for appellant and served upon the attorney for respondent, is a sufficient notice of appeal under section 940, post.—*Coburn v. Parrett*, 25 Cal. App. 749, 145 Pac. 540.

79. A notice of appeal taken under the new or alternative method filed with the clerk thirty-one days after the filing of the judgment, is sufficient.—*Martin v. Becker*, 49 Cal. App. 142, 146 Pac. 665.

80. **Same—In will contest—New trial action pending—Time within which notice to be filed.**—Under the provisions of the above section, in a will contest a motion for a new trial having been made and overruled, under the provisions of the above section, a person wishing to appeal from the judgment of the court will have thirty days from the day on which the judgment denying the motion for a new trial was entered within which to take his appeal in accordance with the provisions of section 940, post, and where such appellant presents a bill of exceptions to the judge within the time required by law, he is, as a matter of right, entitled to have the bill of exceptions settled for use on such appeal from the judgment or order.—*Estate of O'Neill*, 183 Cal. 558, sub nom. *Hardiman v. Church*, 191 Pac. 1006.

81. **Notice of entry of judgment—Necessity for to set running limitation of appeal.**—When a party has once been served with notice of entry of judgment, he must, in order to avail himself of the new method, file his notice of appeal within sixty days after such service.—*Title Ins. Co. v. California Development Co.*, 168 Cal. 397, 143 Pac. 723.

82. Before a respondent may invoke the limitation of sixty days contemplated by section 941b, post, as the time within which, after notice of the entry of judgment, an appeal may be taken, there must be a formal notice of such entry actually served upon the attorney of record of the appellant.—*McDonald v. McDonald*, 168 Cal. 433, 143 Pac. 726.

83. The filing by a defendant against whom an interlocutory decree of divorce has been rendered of a bill of exceptions to be used on appeal therefrom does not waive the giving of the formal notice of the entry of judgment, required to be given by section 941b, post, in order to set in motion the limitation of sixty days after such notice within which the appeal may be taken.—*McDonald v. McDonald*, 168 Cal. 433, 143 Pac. 726.

84. In the absence of the giving of a formal notice of the entry of an interlocutory judgment for divorce, the supreme court has jurisdiction of an appeal therefrom taken by the "new method" within six months after its entry.—*McDonald v. McDonald*, 168 Cal. 433, 143 Pac. 726.

85. An appeal taken under the alternative method within six months after the entry of judgment is within time, where no notice of such entry is served upon the appellant.—*Hartfield v. Alderete*, 25 Cal. App. 732, 145 Pac. 146.

86. It is the service of the notice which starts the running of the sixty-day period

provided by section 941b, post, and not the fact that the appellant may have had actual notice of the entry of the judgment.—*Hartfield v. Alderete*, 25 Cal. App. 732, 145 Pac. 146.

87. An appeal taken under the alternative method will not be dismissed upon the ground that notice thereof and request for a transcript was not filed within ten days after notice to the appellant of the entry of judgment, where no written notice of such entry was ever served upon the appellant, although after such entry and prior to the taking of any steps to appeal, the appellant filed a bond for the purpose of staying execution of the judgment.—*Hartfield v. Alderete*, 25 Cal. App. 732, 145 Pac. 146.

88. **Same—Written notice necessary.**—The notice of the entry of judgment contemplated by section 953a, post, while not so stated, must nevertheless, under section 1010, post, be a written notice.—*Hartfield v. Alderete*, 25 Cal. App. 732, 145 Pac. 146, modified in 26 Cal. App. 604, 147 Pac. 991.

89. Under the provision in section 953a, post, with reference to notice of entry of judgment, actual notice established by satisfactory evidence of record will start the statute in motion without the service of a formal written notice.—*Hartfield v. Alderete*, 26 Cal. App. 604, 147 Pac. 991.

90. The decision rendered on the motion to dismiss this appeal (19 Cal. App. Dec. 603, 145 Pac. 146) to the effect that an appeal taken under the alternative method will not be dismissed upon the ground that notice of appeal and request for a transcript were not filed within ten days after notice to the appellant of the entry of judgment, where there is nothing in the record showing that he ever had notice of entry of judgment, or ever waived notice by any act done by him prior to the filing of his notice of appeal (except to file a stay bond), is held to be the law of the case on the hearing of this appeal on its merits.—*Hartfield v. Alderete*, 26 Cal. App. 604, 147 Pac. 991.

91. **Notice of intention—Failure to sign—Defect not jurisdictional.**—While the law requires that notices of intention shall be signed, failure to observe this requirement does not establish a defect of jurisdiction, any more than in the case of a complaint filed without signature, the omission of a signature to a complaint does not make the pleading a nullity.—*Leake v. City of Venice*, 43 Cal. App. 568, 185 Pac. 424, following doctrine in *Canadian Bank v. Leale*, 14 Cal. App. 307, 111 Pac. 759.

92. **Same—Signature by attorney other than one of record—Waiver of objection.**—In a case in which the attorneys for a successful party are served with copies of a notice of intention to move for a new trial, and an acknowledgment of receipt therefor is given on the original, without seasonable objection, they can not later be heard to deny the validity of such notice for the reason that it is not signed by the attorney of

record, but by another attorney who has been requested by the attorney of record and the defendants to become an attorney of record who, however, through inadvertence in signing the notice, signed his own name alone.—*Leake v. City of Venice*, 43 Cal. App. 568, 185 Pac. 424, following doctrine in *Livermore v. Webb*, 56 Cal. 489.

93. Order admitting will to probate—New trial pending—Time for taking appeal.—Under the provisions of the above section, as amended in 1915, the time for appeal from the judgment does not expire until thirty days after entry in the trial court of the order determining a motion for a new trial, "or other termination in the trial court of the proceedings" upon such motion and the provisions of the above section are applicable in the matter of an appeal from an order admitting a will to probate.—*Estate of Seller*, 174 Cal. 498, 164 Pac. 401.

94. Order denying motion to recall execution—Time of appeal—Dismissal.—On an appeal taken from an order denying a motion to recall and vacate an execution, taken more than sixty days after the order was made and entered in the minutes of the court, must be dismissed, under the provisions of the above section.—*Godsil v. San Joaquin County Buildings Trade Council*, 34 Cal. App. 53, 166 Pac. 1035, following the doctrine in *McCourtney v. Fortune*, 42 Cal. 387; *Harper v. Hildreth*, 99 Cal. 265, 33 Pac. 1103; *Doyle v. Republic Life Ins. Co.*, 125 Cal. 15, 57 Pac. 687.

95. Order denying new trial—Time for appeal—Effect of statute—Construction.—It was the clear intention of the legislature by the amendment of 1915, in taking away the right of appeal from an order denying a motion for a new trial, to provide for a review of all matters that might be considered, on such an appeal or an appeal from the final judgment and the plain purpose of the above section, as so amended, is to give to the party an opportunity for such a review in any and every case in lieu of the review previously afforded.—*Wilcox v. Hardisty*, 177 Cal. 572, 171 Pac. 947.

96. Same—Same—Pendency of proceedings for new trial—Effect of.—In a case in which there had been no appeal from the judgment at the time of the amendment to the above section in 1915, abolishing the right to appeal from an order denying a new trial, and the time for appeal from a judgment, under the law as it existed up to that time, had long since lapsed, where there had been initiated in due time and there was pending until after the change in the law by such amendment a proceeding on motion for a new trial, an appeal from the judgment taken within thirty days after an order denying a new trial, was taken in time.—*Wilcox v. Hardisty*, 177 Cal. 572, 171 Pac. 947.

97. Same—Same—Subsequent appeal from judgment—Review of new trial order.—Under the law as it formerly stood, and the

old method of appeal a party against whom judgment was rendered could file a motion for a new trial and before its determination could take an appeal from the judgment. That appeal might be taken separately at any time within the time prescribed by the provisions of the above section and he might thereafter appeal from the order denying a new trial within like time after its rendition, but he should in order to bring the merits of the motion for a new trial before the appellate court, file a second appeal from the judgment; but having filed, in the first instance, a valid appeal from the judgment, the plaintiff would be precluded from taking a second appeal while the first was pending and undetermined.—*Nathan v. Porter*, 36 Cal. App. 356, 172 Pac. 170, following the doctrine in *Hill v. Flinnigan*, 54 Cal. 311; *Brown v. Plummer*, 70 Cal. 337, 11 Pac. 631; *Thompkins v. Montgomery*, 116 Cal. 121, 47 Pac. 1006.

98. Under the provisions of the code as it now stands an order denying a new trial is not an appealable order; the appeal must be taken from the final judgment, and the appellate court will thereon review the order denying a new trial.—See, ante, § 929, par. 3; post, § 963 and note.

99. Prior to the amendment of the above section in 1915, the pendency of proceedings on a motion for a new trial did not extend the time to appeal from a judgment.—*Ackerman v. Schultz*, 178 Cal. 190, 172 Pac. 609.

100. Practice—Dismissal.—Appeal will not be dismissed where notice of appeal was not given until after time to appeal had expired, there being no appeal to dismiss.—*Estate of Walkerly*, 4 Cal. Unrep. 819, 37 Pac. 893.

101. Probate of will—Order denying.—Appeal from order refusing probate of will is properly taken within sixty days after entry of order, and not within sixty days after rendition of judgment.—*Estate of Fay*, 145 Cal. 82, 87, 78 Pac. 340.

As to notice of appeal and new trial proceedings pending, see par. 80, this note.

102. Same—Revocation of.—Appeal from order denying revocation of probate of will taken more than sixty days after its entry is too late, and must be dismissed.—*Estate of Nelson*, 132 Cal. 182, 194, 64 Pac. 294.

103. Receiver—Order approving account of.—Where notice of appeal from an order was not served within sixty days after entry of order, it was too late, even if such order was appealable.—*Illinois T. & S. Bank v. Pacific R. Co.*, 99 Cal. 407, 411, 33 Pac. 1132.

104. Same—Order settling account of receiver, and directing plaintiff to pay receiver his compensation is final judgment, and right to appeal from it must be exercised within six months.—*Los Angeles v. Los Angeles C. W. Co.*, 134 Cal. 121, 122, 66 Pac. 198.

105. Rendition of judgment — Means either announcement from bench entered in minutes or filing of findings, if there are findings, or both.—Estate of Rose, 3 Cal. Unrep. 50, 20 Pac. 712; Wood v. Etiwanda W. Co., 122 Cal. 152, 156, 54 Pac. 726.

106. Rendition of judgment is when order for judgment is made an entered, and judgment signed by judge and filed in cause, and nothing remains to be done but mere ministerial duty of copying it into record.—Gray v. Palmer, 28 Cal. 416, 417, 419.

107. "Rendition of judgment" takes place when findings are filed and judgment ordered for defendant, and not at time of entry.—Painter v. Painter, 113 Cal. 371, 375, 45 Pac. 689. See Estate of Rose, 3 Cal. Unrep. 50, 20 Pac. 712.

108. Statement on motion for new trial—Striking out.—Appeal from an order striking statement on motion for new trial from files, not taken within sixty days from its date, must be dismissed, it being special order made after judgment. — Symons v. Bunnell, 101 Cal. 223, 35 Pac. 770.

109. Sufficiency of evidence—Absence of motion for new trial—Review of, on appeal.—Under the amendments of 1915 to the above section and to section 956, post, an appellate court has authority to consider the sufficiency of the evidence to support the verdict of the jury or the findings of the court in every case where the evidence is properly included in the record on appeal, either by a bill of exceptions or by a record prepared as prescribed in section 953a, post, and without regard to the question of there having been made and disposed of a motion for a new trial.—Smith v. Lightson, 182 Cal. 41, 186 Pac. 769.

110. Same—Can not be considered on appeal from judgment when taken more than sixty days after its rendition.—Clark v. Gridley, 49 Cal. 105, 108; Bettis v. Townsend, 61 Cal. 333, 334; Weyl v. Sonoma Valley R. Co., 69 Cal. 202, 203, 10 Pac. 510; Mogk v. Peterson, 75 Cal. 496, 497, 17 Pac. 446; McGrath v. Hyde, 81 Cal. 68, 22 Pac. 293; Turner v. Reynolds, 81 Cal. 214, 215, 22 Pac. 546; Schurtz v. Romer, 81 Cal. 244, 246, 22 Pac. 657; Miller v. Wade, 87 Cal. 410, 412, 25 Pac. 487; Curran v. Kennedy, 89 Cal. 98, 100, 26 Pac. 641; Forni v. Yoell, 99 Cal. 173, 178, 33 Pac. 887; Nelmes v. Wilson, 4 Cal. Unrep. 267, 34 Pac. 341; Steen v. Hendy, 4 Cal. Unrep. 916, 38 Pac. 718; Secord v. Quigley, 106 Cal. 149, 150, 39 Pac. 623; Brooks v. San Francisco & N. P. R. Co., 110 Cal. 173, 174, 42 Pac. 570; Fatjo v. Swasey, 111 Cal. 628, 635, 44 Pac. 225; Painter v. Painter, 113 Cal. 371, 374, 45 Pac. 689; Packard v. Craig, 114 Cal. 95, 45 Pac. 1033; California Imp. Co. v. Baroteau, 116 Cal. 136, 137, 47 Pac. 1018; Rhoads v. Gray, 5 Cal. Unrep. 664, 48 Pac. 971; Wood v. Etiwanda W. Co., 122 Cal. 152, 54 Pac. 726; McRae v. Argonaut Land & Devel. Co., 6 Cal. Unrep. 145, 54 Pac. 743; Reed v. Johnson, 127 Cal. 538, 540, 59 Pac. 986; Wall v. Mines, 128 Cal. 136, 141, 60 Pac.

682; Wise v. Ballou, 129 Cal. 44, 46, 61 Pac. 574; Coonan v. Loewenthal, 129 Cal. 197, 201, 61 Pac. 940; Ryland v. Heney, 130 Cal. 426, 429, 62 Pac. 616; McDonald v. Hayes, 132 Cal. 490, 496, 64 Pac. 850; People ex rel. Sanders v. Jones, 7 Cal. Unrep. 64, 76 Pac. 1063; Gilbert v. Kelly, 138 Cal. 689, 690, 72 Pac. 344; Dodge v. Carter, 140 Cal. 663, 664, 74 Pac. 292; Baum v. Roper, 145 Cal. 116, 117, 78 Pac. 466; Estate of Dellow, 1 Cal. App. 529, 82 Pac. 558; Wolf v. King, 1 Cal. App. 749, 82 Pac. 1055.

111. Same—Same—Though within sixty days after its final entry.—Schurtz v. Romer, 81 Cal. 244, 246, 22 Pac. 657; Nelmes v. Wilson, 4 Cal. Unrep. 267, 34 Pac. 341; Painter v. Painter, 113 Cal. 371, 374, 45 Pac. 689; Wood v. Etiwanda Water Co., 122 Cal. 152, 156, 54 Pac. 726.

112. Same—Same—Though evidence and specifications are set forth in statement.—Wall v. Mines, 128 Cal. 136, 141, 60 Pac. 682.

113. Same—Same—Such appeal must be considered and determined on judgment-roll alone.—Reed v. Johnson, 127 Cal. 538, 540, 59 Pac. 986.

114. Same—Account of administrator.—Order allowing account of administrator is not judgment, and hence evidence on which it is based can be reviewed, though appeal was taken more than sixty days after its rendition, but within sixty days from its entry.—Estate of Levinson, 108 Cal. 450, 454, 41 Pac. 482, 42 Pac. 479; Estate of Rose, 80 Cal. 166, 168, 169, 22 Pac. 86, reversing Estate of Rose, 2 Cal. Unrep. 50, 20 Pac. 712.

115. Same—Bill of exceptions can not be used on appeal from judgment when appeal is taken more than sixty days after entry of judgment.—Sather Banking Co. v. Briggs, 138 Cal. 724, 726, 72 Pac. 352.

116. Same—Bill of exceptions may be looked into to determine sufficiency of evidence on an appeal from judgment which is taken within sixty days after its rendition, though no motion for new trial has been filed.—Perkins v. Cooper, 3 Cal. Unrep. 279, 24 Pac. 377. See Balch v. Jones, 61 Cal. 234, 236; Estate of Crowey, 71 Cal. 300, 302, 12 Pac. 230.

117. Same—Election contests, judgments in, are governed by provision providing that evidence will not be considered if appeal is not taken within sixty days from rendition of judgment.—McCarthy v. Wilson, 146 Cal. 323, 325, 82 Pac. 243. See Packard v. Craig, 114 Cal. 95, 98, 45 Pac. 1033.

118. Same—Exception to entry of judgment against executors on ground that no claim had been presented to them, may be reviewed on appeal, though such appeal was not taken within sixty days after rendition of judgment—it not being exception to finding.—Falkner v. Hendy, 107 Cal. 49, 52, 40 Pac. 21, 386.

119. Same—Exception that judgment is not sustained by evidence is not within rule

of this section, where it is by implication provided that exception to decision or verdict that it is not supported by evidence may be reviewed on appeal from judgment, if appeal be taken within sixty days after rendition of judgment.—*Steen v. Hendy*, 107 Cal. 49, 40 Pac. 21.

120. Same—Filing of undertaking perfects an appeal, but is not part of taking in statutory sense, and hence fact that undertaking on appeal was not filed within sixty days after rendition of judgment does not prevent consideration of evidence where notice of appeal was served and filed within such time.—*Perkins v. Cooper*, 3 Cal. Unrep. 279, 24 Pac. 377.

121. Same—Homestead—Report of appraisers.—Evidence can be reviewed on appeal from judgment confirming report of appraisers setting aside homestead, where appeal was taken within sixty days.—*Estate of Crowley*, 71 Cal. 300, 302, 12 Pac. 230.

122. Same—Motion—Evidence used on hearing motion to strike out complaint may be reviewed on appeal from judgment taken more than sixty days after rendition of judgment—It being an intermediate order, and hence not verdict or decision as used in this section.—*Clifford v. Allman*, 84 Cal. 528, 531, 24 Pac. 292.

123. Same—New trial.—Sufficiency of evidence can not be considered where appeal was not taken within sixty days after motion for new trial was denied.—*Turner v. Reynolds*, 81 Cal. 214, 215, 22 Pac. 546; *Wise v. Ballou*, 129 Cal. 45, 46, 61 Pac. 574.

124. Same—Nonsuit.—Order on motion for nonsuit is decision within this section, and hence sufficiency of evidence to sustain it will not be considered unless appeal is taken within sixty days.—*Miller v. Wade*, 87 Cal. 410, 412, 25 Pac. 487.

125. Same—Refusal to admit and take into consideration proper evidence, and taking into consideration other evidence which should not have been admitted can be considered on appeal, though appeal was taken more than sixty days after rendition of judgment.—*McCarthy v. Wilson*, 146 Cal. 323, 325, 82 Pac. 243. See *Packard v. Craig*, 114 Cal. 95, 98, 45 Pac. 1033.

126. Same—Time to appeal—Begins to run from time of actual entry of judgment.—*Coon v. Grand Lodge*, 76 Cal. 354, 18 Pac. 384. See *In matter Fifteenth Avenue Extension*, 54 Cal. 179.

See pars. 1-8, 53, this note.

127. Time in which to appeal from an order granting nonsuit commenced to run from the entry of judgment therein, and where minute-entry of clerk is not sufficient to amount to judgment under section 581, ante, time to appeal does not begin to run until entry of formal judgment of nonsuit, and hence appeal taken within six months after entry of such formal judgment is in time.—*Ferris v. Baker*, 127 Cal. 520, 523, 59 Pac. 937.

128. Same—Judgment is entered when it is actually entered in judgment-book, and rendered when it is ordered by court.—*Thomas v. Anderson*, 55 Cal. 43, 45; *Schurtz v. Romer*, 81 Cal. 244, 246, 22 Pac. 657.

129. Same—Ministerial act of clerk in compiling judgment-roll is not act which sets in motion limitation, but it is entry of judgment itself.—*Dore v. Klumpke*, 140 Cal. 356, 357, 73 Pac. 1064.

130. Same—Notice of rendition of judgment is not required, and appeal taken within sixty days after notice of rendition of judgment is ineffectual where more than sixty days have elapsed since rendition of judgment.—*Fatjo v. Swasey*, 111 Cal. 628, 635, 44 Pac. 225.

131. Same—Order granting new trial does not extend running of limitation of time to appeal from judgment until reversal of order, so as to authorize an appeal more than one year after entry of judgment, especially as appeal from order granting new trial operated to suspend functions of such order.—*Henry v. Merguire*, 111 Cal. 1, 2, 43 Pac. 387.

132. Service before entry—Filing after entry.—Appeal being taken by filing and serving notice of appeal, appeal is not premature where notice was filed on day judgment was entered, though served day before.—*Tyrrell v. Baldwin*, 72 Cal. 192, 193, 13 Pac. 475.

As to appeal before entry being premature, see pars. 17-19, this note.

133. Time for appeal—Can not be enlarged by supreme court.—*Doolling v. Moore*, 20 Cal. 142, 143.

As to computation of time within which to appeal, see note 49 L. R. A. 226.

134. Undertaking—Need not be given within time limited.—Section 337 of Practice Act construed with section 848 of that act which required undertaking on appeal to be given within five days of service of notice to render it necessary that undertaking be given within time prescribed in order to perfect appeal as well as giving of notice.—*Elliott v. Chapman*, 15 Cal. 383, 384.

135. Vacating sale—Appeal from an order vacating sale of real estate of deceased person taken before such order had been entered in record is premature.—*Estate of Devincenzi*, 131 Cal. 452, 453, 63 Pac. 723.

136. Writ of assistance—Order vacating writ of assistance formerly granted, and ordering restoration of possession of property, might have been appealed from within sixty days after it was entered, under this section.—*Kimple v. Superior Court*, 66 Cal. 136, 137, 4 Pac. 1149.

As to time to appeal from judgments and orders in probate proceedings, see, post, § 1715 and note.

As to what judgments and orders are appealable, see, post, § 963 and note.

§ 940. APPEAL, HOW TAKEN. An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof.

History: Enacted March 11, 1872; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 336; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 173, held unconstitutional, see history, § 5 ante; amendment approved May 20, 1921, Stats. and Amdts. 1921, p. 193. In effect July 29, 1921.

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- See, ante, § 936 and note.

I. NOTICE OF APPEAL.

1. **Adverse party—Must be served with notice of appeal.**—Brown v. Green, 65 Cal. 221, 3 Pac. 811; Lancaster v. Maxwell, 103 Cal. 67, 68, 36 Pac. 951, 37 Pac. 207; Estate of Walkerley, 5 Cal. Unrep. 5, 40 Pac. 13.
2. **Same—Failure to serve one who claims to be adverse party with notice of appeal will not justify dismissal of appeal when determination of motion to dismiss involves examination of entire record, and incidentally of merit, and motion is not made until after parties had filed their briefs.**—Hibernia Sav. & L. Soc. v. Behnke, 118 Cal. 498, 50 Pac. 666.
3. **Same—Jurisdictional.**—Where adverse party was not served with notice of appeal, court had no jurisdiction to hear appeal even as between other parties.—Estate of Scott, 124 Cal. 671, 674, 57 Pac. 654.
4. **Same—Motion for dismissal of appeal on ground that notice of appeal was not served on all adverse parties is not precluded by fact that case has been previously submitted to court for decision.**—Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 224, 229, 39 Pac. 758.
5. **Same—Same—Made by whom.**—Adverse parties who have not been served with notice of appeal may move for dismissal of appeal on such ground, though they are not parties to record.—Bullock v. Taylor, 112 Cal. 147, 155, 44 Pac. 457.
6. **Same—Waiver of service of notice of appeal is ineffective where notice of appeal is not directed to such party.**—Hibernia Sav. & L. Soc. v. Lewis, 111 Cal. 519, 521, 44 Pac. 175.
7. **Same—Same—Voluntary appearance.**—While adverse party must necessarily be before court on appeal it is immaterial whether his presence is by voluntary appearance or whether he has been brought there by hostile notice from appellant.—Hibernia Sav. & L. Soc. v. Lewis, 111 Cal. 519, 521, 44 Pac. 175.
8. **"Adverse party"—As to generally.**—An "adverse party" is every party whose interest in subject-matter of appeal is adverse to or will be affected by reversal or modification of judgment or order from which appeal has been taken.—Senter v. De Bernal, 38 Cal. 637, 640; Randall v. Hunter, 69 Cal. 80, 82, 10 Pac. 130; Millikin v. Houghton, 75 C. C. P.—136

Cal. 539, 540, 17 Pac. 641; Harper v. Hildreth, 99 Cal. 265, 267, 33 Pac. 1103; Lancaster v. Maxwell, 103 Cal. 67, 68, 36 Pac. 951, 37 Pac. 207; Bullock v. Taylor, 112 Cal. 147, 149, 44 Pac. 457; United States v. Crooks, 116 Cal. 43, 45, 47 Pac. 870; Kenney v. Parks, 120 Cal. 22, 24, 52 Pac. 40; Vincent v. Collins, 122 Cal. 387, 389, 55 Pac. 129; Mohr v. Byrne, 132 Cal. 250, 251, 64 Pac. 257; Johnson v. Phenix Ins. Co., 146 Cal. 571, 575, 80 Pac. 719.

As to **aggrieved party**, see, ante, § 938, note pars. 1-32.

9. **Adverse party is party whose interest in relation to subject of appeal is in conflict with reversal of order or decree appealed from or modification sought by appeal.**—Green v. Berge, 105 Cal. 52, 56, 45 Am. St. Rep. 25, 38 Pac. 539.

10. **That judgment or order may be used as evidence in some collateral action or proceeding or that its reversal may have remote and consequential effect to prejudice of one who is not party thereto does not entitle such person to be made party on appeal.**—Estate of Ryer, 110 Cal. 556, 560, 42 Pac. 1082.

11. **Same—Immaterial whether party be plaintiff, defendant, or intervener as shown by face of record.**—Senter v. De Bernal, 38 Cal. 637, 640; Lancaster v. Maxwell, 103 Cal. 67, 68, 36 Pac. 951, 37 Pac. 207.

12. **Same—Record only can be examined for purpose of ascertaining who are adverse parties to be served with notice of appeal.**—In re Bullard, 114 Cal. 462, 463, 46 Pac. 297; Kenney v. Parks, 120 Cal. 22, 24, 52 Pac. 40; Mohr v. Byrne, 132 Cal. 250, 251, 64 Pac. 257.—See Bullock v. Taylor, 112 Cal. 147, 149, 44 Pac. 457.

13. **Same—Question determined by record.**—Adverse party on whom notice of appeal is to be served is party who appears by record to be adverse. Rule that notice of appeal must be served on all parties that would be affected by reversal of order and judgment appealed from is to be construed with other rule that only record can be examined for purpose of determining who are adverse parties.—In re Ryer, 110 Cal. 556, 560, 42 Pac. 1082.

14. **Whether party to action is adverse to appellant must be determined by their relative position on record and averments of pleadings rather than from manner in which they manifest their issues at trial, or from any presumption to be drawn from their relation to each other or to subject-matter of action in matters outside action.**—Harper v. Hildreth, 99 Cal. 265, 268, 33 Pac. 1103.

15. **Record which is to be considered for purpose of determining who are adverse parties to be served with notice of appeal is record of proceedings on which appeal is taken.**—In re Bullard, 114 Cal. 462, 463, 46 Pac. 297.

16. **Mere fact that person is interested in estate and his name and interests are disclosed on face of record, does not neces-**

sarily render him party to cause.—*Estate v. McDougald*, 143 Cal. 476, 479, 77 Pac. 443.

17. Adverse parties—Examples of who are—Administrator of mortgageor, who is required by judgment foreclosing mortgage to pay any deficiency over amount derived from sale of mortgaged premises, and to whom claim had been presented, is an adverse party in action to foreclose mortgage, and must be served with notice of appeal on appeal from judgment of foreclosure by purchaser of mortgaged premises.—*Barnhart v. Edwards*, 111 Cal. 428, 430, 44 Pac. 160.

18. Same—All parties defendant on appeal by plaintiff should be served with notice of appeal from order quashing execution as to all defendants, though motion to quash was made by only two defendants.—*Millikin v. Houghton*, 75 Cal. 539, 540, 17 Pac. 641.

19. Same—All parties interested in land involved in partition proceedings are adverse parties to an appeal from whole of judgment in proceedings, whether they are plaintiffs or co-defendants with appealing defendant.—*Senter v. De Bernal*, 38 Cal. 637, 640.

20. Same—Assignee in insolvency of mortgageor is an adverse party to an appeal by mortgageor, from order directing sale of mortgaged premises in one parcel, and from order refusing to set aside sale and order land resold in two parcels, and on failure to serve such assignee with notice of appeal it will be dismissed.—*Vincent v. Collins*, 122 Cal. 387, 389, 55 Pac. 129.

21. Same—Assignee of purchaser under mortgage foreclosure, who had intervened after decree of sale has been vacated for purpose of allowing amendment to complaint, making grantee of mortgageor party, is an adverse party who must be served with notice.—*Miller v. Richards*, 83 Cal. 563, 564, 23 Pac. 936.

22. Same — Claimant against estate whose claim is contested by an heir need not be served with notice of appeal from settlement of account allowing such claim where it does not appear that claimant was in any respect party to proceedings from which such appeal was taken.—*Estate of Bullard*, 114 Cal. 462, 463, 46 Pac. 297.

23. Same—Co-defendants.—Where such decree may be modified without in any manner affecting co-defendant of appellant, failure to serve such co-defendant with notice of appeal will not render appeal defective.—*Latham v. Los Angeles*, 83 Cal. 564, 565, 23 Pac. 1116.

24. Notice of appeal by one of several co-defendants should be served not only on plaintiff but also on non-appealing co-defendants—they having an interest in judgment to be effected by reversal.—*Millikin v. Houghton*, 75 Cal. 539, 540, 17 Pac. 641.

25. When in action to enforce lien on real estate judgment has been rendered against several defendants, if effect of appeal from judgment is to establish that there was, in fact, no lien on which judgment could be rendered, reversal of judgment will not injuriously affect other defendants, and therefore appeal will not be dismissed for failure to serve them with notice of appeal.—*Warren v. Ferguson*, 108 Cal. 535, 536, 41 Pac. 417.

26. In action to recover note against one defendant and asking that another defendant be directed to pay said judgment out of moneys owing to first defendant, such defendant is not adverse party to appeal taken by second defendant from judgment directing her to pay amount of judgment.—*Mohr v. Byrne*, 132 Cal. 250, 251, 64 Pac. 257.

27. Same—Co-defendants in ejectment as to whom action was dismissed are not adverse parties to appeal by other defendants from order dismissing action as to appealing defendants, hence notice of appeal need not be served upon them.—*Hinkel v. Donohue*, 88 Cal. 597, 598, 26 Pac. 374.

28. Same—Co-defendant in whose favor judgment had been rendered against plaintiff for costs is not adverse party who must be served with notice of appeal by other defendant on judgment against him in favor of plaintiff.—*Green v. Berge*, 105 Cal. 52, 56, 45 Am. St. Rep. 25, 38 Pac. 639.

29. Same — Co-defendants not served with summons, and not appearing in action, need not be served with notice of appeal.—*Merced Bank v. Rosenthal*, 99 Cal. 39, 42, 31 Pac. 849, 33 Pac. 732; *Clarke v. Mohr*, 125 Cal. 540, 543, 58 Pac. 176; *Peck v. Agnew*, 126 Cal. 607, 610, 59 Pac. 125; *Nason v. John*, 1 Cal. App. 538, 82 Pac. 566.

30. Same—Co-defendants—Merits of appeal will not be gone into on motion to dismiss for purpose of determining whether modification or reversal of appeal would effect co-defendant of appellant, who was not served with notice of appeal.—*Latham v. Los Angeles*, 83 Cal. 564, 565, 23 Pac. 1116.

31. Same—Co-defendants to whom no reference is made in judgment, in an action on contract of guaranty executed by defendant, is not an adverse party to an appeal by his co-defendant, there having been no trial or determination of claim against him or of his defense thereto.—*French v. McCarthy*, 110 Cal. 12, 13, 42 Pac. 302.

32. Same—Co-defendants who were petitioners for highway are adverse parties to appeal from judgment condemning right of way across land of appellant, which judgment also condemned right of way across their own land, and should be served with notice of appeal, since they are interested in having judgment sustained for condemnation of whole distance, if in not having it reversed as to land of appellant.—*Butte Co. v. Boydstun*, 68 Cal. 189, 190, 8 Pac. 835.

33. **Same**—Creditors of estate who have not objected to an order directing payment of dividend on claims reported, are adverse parties who must be served with notice of appeal from such order.—*Estate of McDonald*, 143 Cal. 476, 479, 77 Pac. 443.

34. **Same**—Defaulting co-defendants is not adverse party so as to require service of notice of appeal on him.—*McKeany v. Black* (Cal. Oct. 7, 1896), 46 Pac. 381. See *Randall v. Hunter*, 69 Cal. 80, 82, 10 Pac. 130; *French v. McCarthy*, 110 Cal. 12, 13, 42 Pac. 302.

35. Though defendant has not appeared in action, but has been properly made party to it, notice of appeal must be served on him if he is adverse party.—*Johnson v. Phenix Ins. Co.*, 146 Cal. 571, 576, 80 Pac. 719; distinguishing *Clarke v. Mohr*, 125 Cal. 540, 58 Pac. 176, where parties did not appear to have been parties to record.

36. Defaulting defendants are not adverse parties to other defendants where there is no joint relation alleged between defendants and judgment against each is several and independent.—*Kenney v. Parks*, 120 Cal. 22, 24, 52 Pac. 40.

37. Defaulting defendants whose right would be injuriously affected by appeal by other defaulting defendants must be served with notice of appeal.—*Bowering v. Adams*, 126 Cal. 655, 656, 59 Pac. 134.

38. **Same**—Defaulting defendants in action to quiet title are not adverse parties to answering defendants, since judgment in favor of plaintiff, quieting her title and giving her right of possession to lands described, as against defaulting defendant, could not be affected by its reversal at instance of defendants who have appealed.—*Kenney v. Parks*, 120 Cal. 22, 24, 52 Pac. 40.

39. **Same**—Defaulting defendants in action to reform deed can not be said to be injured by reversal of judgment reforming such deed on appeal by other defendant.—*Kenney v. Parks*, 120 Cal. 22, 24, 52 Pac. 40.

40. **Same**—Distributee of estate.—Appeal for decree of distribution taken with appeal from order settling account of executor will not be dismissed for failure to serve one of distributees with notice of appeal, where appeal from order settling account was served on executor and reversal of such order necessarily affected decree of distribution.—*Estate of Delaney*, 110 Cal. 563, 567, 42 Pac. 981.

41. **Same**—Fictitious defendants who were not served with process and who did not appear need not be served with notice of appeal.—*Benson v. Bunting*, 127 Cal. 532, 538, 78 Am. St. Rep. 81, 59 Pac. 991.

42. **Same**—Foreclosure of mortgage—Defaulting defendant.—Defendants who by default have admitted that their claim to mortgaged premises was inferior to that of plaintiff, are not adverse parties in appeal by mortgagee from judgment in favor

of plaintiff foreclosing mortgage.—*Boob v. Hall*, 107 Cal. 160, 161, 40 Pac. 117.

43. **Same**—Insolvent—In insolvency proceedings is an adverse party to an appeal taken from judgment on demurrer filed by intervening creditors against the petition of creditor to have such insolvent declared insolvent, since if the judgment is reversed judgment against such insolvent will be entered instead of one in his favor.—In matter *Castle Dome Min. & S. Co.*, 79 Cal. 246, 249, 21 Pac. 746.

44. **Same**—Same—Creditors named in a debtor's schedule who have not filed their claims, or appeared in insolvency proceedings, are not parties on whom notice of appeal from the order adjudicating the petitioner to be an insolvent taken by one creditor need be served.—In matter *Chope*, 112 Cal. 630, 632, 44 Pac. 1066. See *Chinette v. Conklin*, 105 Cal. 465, 38 Pac. 1107.

45. **Same**—Legatees and devisees under a will are adverse parties who must be served with notice of appeal from an order admitting will to probate.—*Estate of Scott*, 124 Cal. 671, 674, 57 Pac. 654.

46. **Same**—Mechanics' lien claimant in mortgage foreclosure proceedings to whom proceeds of mortgaged premises were directed to be paid after payment of amount of mortgage is adverse party who must be served with notice of appeal.—*Hibernia Sav. & L. Soc. v. Lewis*, 111 Cal. 519, 521, 44 Pac. 175.

47. **Same**—Mechanics' lien foreclosure—Contractor is adverse party in appeal on judgment foreclosing mechanics' lien for materials furnished to contractor, which judgment directed sale of premises and any deficiency to be entered against such contractor.—*Lancaster v. Maxwell*, 103 Cal. 67, 68, 36 Pac. 951, 37 Pac. 207.

48. **Same**—Mortgagee in action by mortgagee on insurance policy in whose favor judgment against an insurance company is rendered directing that portion of amount recovered should be paid, is an adverse party to appeal by insurance company.—*Johnson v. Phenix Ins. Co.*, 146 Cal. 571, 576, 80 Pac. 719.

49. **Same**—Mortgagee and co-defendant who constructed building on mortgaged premises are adverse parties to an appeal by mortgagee from decision adjudging mechanics' lien claimants priority in payment from proceeds of sale of mortgaged premises where decree provided for deficiency judgment, as in such case liability for deficiency judgment might be affected by reversal of judgment.—*Pacific Mut. L. Ins. Co. v. Fisher*, 106 Cal. 224, 230, 39 Pac. 758.

50. Mortgagee and co-defendant who constructed building on mortgaged premises are not adverse parties to be served with notice of appeal on an appeal by mortgagee from judgment awarding mechanics' lien against such property.—*Pacific Mut. L. Ins. Co. v. Fisher*, 106 Cal. 224, 231, 39 Pac. 758.

51. Same—Parties appearing at contest of will only need be served with notice of appeal from order admitting will to probate to give jurisdiction of appeal.—Estate of Scott, 124 Cal. 671, 674, 57 Pac. 654.

52. Same—Parties to motion for new trial are only necessary parties to appeal from order denying it.—Herriman v. Menzies, 115 Cal. 16, 25, 56 Am. St. Rep. 82, 35 L. R. A. 318, 44 Pac. 660, 46 Pac. 730. See Watson v. Sutro, 77 Cal. 609, 612, 20 Pac. 88; In re Ryer, 110 Cal. 556, 560, 42 Pac. 1082; Barnhart v. Edwards, 111 Cal. 428, 431, 44 Pac. 160; Johnson v. Phenix Ins. Co., 146 Cal. 571, 575, 80 Pac. 719.

53. Hence notice of appeal need not be served on co-defendant who was not party to motion for new trial.—Barnhart v. Edwards, 111 Cal. 428, 431, 44 Pac. 160; Johnson v. Phenix Ins. Co., 146 Cal. 571, 575, 80 Pac. 719.

54. Same—Partner in action for dissolution of partnership and to determine rights of partners to land claimed by defendant partner to which other persons claimed interest, is adverse party to an appeal from order dismissing action as to such other parties and to land, and must be served with notice of appeal from such order.—Harper v. Hildreth, 99 Cal. 265, 268, 33 Pac. 1103.

55. Same—Partner in whose favor motion for nonsuit was granted are adverse parties on appeal by other partner from judgment, on ground of error in granting motion of nonsuit, and must be served with notice of appeal.—Bullock v. Taylor, 142 Cal. 147, 149, 44 Pac. 157.

56. Same—Partner not served with summons in action against partnership to foreclose mortgage given by one of partners and his wife is not an adverse party, and hence notice of appeal from judgment foreclosing mortgage need not be served on him.—Merced Bank v. Rosenthal, 99 Cal. 39, 42, 31 Pac. 849, 33 Pac. 732.

57. Same—Partner who has suffered default judgment to be taken against him in an action on partnership note is not an adverse party who must be served with notice of appeal taken by his partner from judgment against him on trial.—Randall v. Hunter, 69 Cal. 80, 82, 10 Pac. 130.

58. Same—Persons sought to be made parties defendant by substitution are adverse parties on appeal from judgment by default taken after motion to substitute such persons had been denied—only object of appeal being to reverse ruling of court denying motion to substitute parties as defendants.—Toy v. San Francisco & S. R. R. Co., 75 Cal. 542, 543, 17 Pac. 700.

59. Same—Petitioner to have guardian appointed for incompetent is not an adverse party, but notice of appeal must be served where she has consented to denial of her petition asking that she be appointed guardian and that others be appointed

guardian in her stead.—Estate of Sullivan, 143 Cal. 462, 465, 77 Pac. 153.

60. Same—Purchaser of property from executor is adverse party to appeal by heir from order confirming such sale and must be served with notice thereof.—Estate of Bell, 125 Cal. 539, 58 Pac. 153.

61. Same—Receiver in insolvency proceedings is not adverse party and need not be served with notice of appeal from order adjudicating petitioner to be insolvent taken by one of creditors, and hence service on insolvent is sufficient.—In matter Choze, 112 Cal. 630, 632, 44 Pac. 1066.

As to parties on appeal, see note 7 L. R. A. 231.

62. Alternative or new method of appeal—As to generally.—Where the appeal from a judgment is taken within sixty days after rendition and entry, the sufficiency of the evidence may be reviewed as effectually as upon an appeal from the order refusing a new trial. And this is so whether the appeal is taken under this section or under the method prescribed by sections 941a, 941b, and 941c, post.—Cortel-you v. Imperial Land Co., 166 Cal. 14, 134 Pac. 981.

As to alternative or new method of appeal, see, post, §§ 941a-941c, 953a-953c and notes.

63. Same—As to notice under section 941b.—Under section 941b, post, the filing of a notice of appeal, stating all that is specifically mentioned in the section as parts of such notice, will constitute a valid appeal as to all the other parties to the action, if there is sufficient in the notice to identify the appellant; it is unnecessary to name all the adverse parties as such in the notice, and the mere mention of some of them as adverse parties does not vitiate the appeal as to the others.—Southern Pac. Co. v. Superior Court, 167 Cal. 250, 139 Pac. 69.

64. Same—Same—Notice must be served on whom.—An attempt to appeal under this section is ineffectual and invalid unless the notice was served on all the parties to the action. It was the extreme technicality prevailing under this section and the frequent dismissal of appeals resulting therefrom that caused the enactment of sections 941a, 941b, and 941c, post. This section does not prescribe the form of notice except that in an appeal from a judgment or order it must be "a notice stating the appeal from the same, or some specific part thereof." No formal address was required.—Southern Pac. Co. v. Superior Court, 167 Cal. 250, 139 Pac. 69.

65. Same—Construction of—As to intent.—Sections 941a, 941b, and 941c, post, providing an alternative mode of practice for taking an appeal, evince an intent to establish a more liberal rule than formerly prevailed and to regard substance rather than form.—Southern Pac. Co. v. Superior Court, 167 Cal. 250, 139 Pac. 69.

66. The main design of section 941b, post, in providing that the notice of appeal need not be served upon any of the parties, or their attorneys, but "when filed within the time herein specified" it shall, without further action," transfer the cause to the higher court for determination, is to compel the prevailing parties to look to the files to ascertain whether or not an appeal has been taken and to avoid the necessity previously imposed upon the appellant of determining which of the parties were adverse parties to him upon his proposed appeal, and of finding them and serving upon them the required notice, at the peril of losing his appeal if he made a mistake in his endeavor to do so. The expression of certain things to be stated in the notice implies that other things are not regarded as essential.—*Southern Pac. Co. v. Superior Court*, 167 Cal. 250, 139 Pac. 69.

67. Under the new method of appeal, the mere filing of the notice of appeal, in a proper manner, operates ipso facto to perfect the appeal, and a failure to serve the notice or give a cost bond, or an error in attempting to do so, which might have been fatal to the appeal under the old method, may be treated as a matter of no legal consequence.—*Jaques v. Yuba County Supervisors*, 22 Cal. App. 627, 135 Pac. 686.

68. **Appeal from specific part of judgment—Review.**—Where the appeal is from a specific part of the judgment only the appellate court will ordinarily review only the part appealed from, leaving all the other parts of the judgment in full force. Such an appeal confers no jurisdiction to review any part of the judgment except that to which the appeal is directed.—*Ganahl Lumber Co. v. Weinsveig*, 168 Cal. 664, 143 Pac. 1025.

69. **Appeal is taken, when notice of appeal is served and filed.**—*Perkins v. Cooper*, 3 Cal. Unrep. 279, 24 Pac. 377.

70. **Construction of section—In general.**—An order appointing an executor or administrator is one of such character that its effect is stayed by the taking of an appeal, and the filing of a three-hundred-dollar bond under section 941, post.—*Estate of Stough*, 173 Cal. 638, 161 Pac. 1.

71. **Construction of notice of appeal—In general.**—A liberal rule of construction must be applied to notices of appeal in order to effectuate the rights of the parties to an appeal.—*Hopkins v. Sanderson*, 29 Cal. App. 666, 159 Pac. 1064.

72. Where judgment for the full amount claimed is recovered against one defendant, and for a portion only of the claim against two other defendants, the first defendant is not an adverse party requiring notice of an appeal by the two defendants.—*Wilson v. Shea*, 29 Cal. App. 788, 157 Pac. 543.

73. **Dismissal of appeal—As to heirs not served** will not affect right to appeal from

decree of distribution, as right of each distributee is several and independent of right of others.—*Estate of Pendergast*, 143 Cal. 135, 139, 76 Pac. 962.

As to right of county clerk to require payment of fees before filing notice of appeal, see *Kerr's Cyc. Pol. Code*, 2d ed., § 4332 and note.

74. **Filing of notice of appeal—Is indispensable** in order to give appellate court jurisdiction of case.—*Bonds v. Hickman*, 29 Cal. 460, 463.

As to amendment of notice of appeal, see, ante, § 473 and note.

75. **Same—Filed too late, when.**—A notice of an appeal filed about eighty days after order became effective comes too late and will be dismissed.—*Taber v. Bailey*, 22 Cal. App. 617, 135 Pac. 976.

76. **Same—Stipulation by parties that notice of appeal has been filed** is binding on them, so far as appellate court is concerned.—*Bonds v. Hickman*, 29 Cal. 460, 463.

77. **Same—Time of filing.**—Rule of Practice Act section 337 is changed by this section so as not to require filing of notice of appeal before service, but notice of appeal may be served and undertaking filed before notice of appeal is filed.—*Hewes v. Carville Mfg. Co.*, 62 Cal. 516, 517; *Robinson v. Templar Lodge*, 114 Cal. 41, 45 Pac. 998. See *Boyd v. Burrell*, 60 Cal. 280, 281.

78. **Same—Same—No particular time after service of notice of appeal** is prescribed in which such notice must be filed.—*San Francisco L. & C. Co. v. State*, 141 Cal. 354, 357, 74 Pac. 1047. See *Galloway v. Rouse*, 63 Cal. 280; *Noonan v. Nunan*, 76 Cal. 44, 18 Pac. 98; *Robinson v. Templar Lodge*, 114 Cal. 41, 45 Pac. 998.

79. **Filing notice of appeal eleven days after service of notice** is not too late where it was filed within six months after entry of judgment.—*San Francisco L. & C. Co. v. State*, 141 Cal. 354, 357, 74 Pac. 1047.

80. Where notice of appeal and undertaking were filed within three days after service of notice, appeal was effectual.—*Galloway v. Rouse*, 63 Cal. 280.

81. **Same—Waiver of filing of notice of appeal by stipulation of parties** is not equivalent to filing of notice for consent; though it may waive error, it can not confer jurisdiction.—*Bonds v. Hickman*, 29 Cal. 460, 463.

82. **Form of notice—Sufficiency of.**—A notice of appeal stating that the plaintiff appeals "from the judgment of nonsuit and dismissal therein entered in said superior court on the eighteenth day of January, 1912," is not subject to the objection that the appeal is thereby taken from the ruling granting the nonsuit, and not from the final judgment, where the judgment was in fact rendered on such date, although not entered in the minutes until February 10, 1912.

—Wilson v. Union Iron Works Drydock, 167 Cal. 539, 140 Pac. 250.

As to insufficiency of notice of appeal, see, par. 83.

As to sufficiency and form of notice on appeal, see pars. 108-119, this note.

83. Insufficiency of notice.—A notice of appeal from a judgment which states that a plaintiff "desires and intends to appeal" from the judgment, and that he "has appealed therefrom," and which closes by requesting that a transcript of the testimony, etc., be made up and prepared, is not a sufficient notice of appeal.—Oxford v. Imperial Southside Water Co., 34 Cal. App. 1, 166 Pac. 1023, applying the rule laid down in Estate of Faber, 168 Cal. 491, 143 Pac. 737.

As to form and sufficiency of notice of appeal, see par. 82, this note.

84. Joint notice.—May be given when.—Plaintiff and defendant who are joint defendants in cross-complaint may give joint notice of appeal.—Downing v. Rademacher, 136 Cal. 673, 674, 69 Pac. 415.

85. Notice of entry of judgment.—Deprived of right to how.—In order to deprive an appellant of his right to written notice of the entry of an order or judgment, there must be facts of record clearly indicating a waiver of such notice.—Hughes Mfg. & Lumber Co. v. Elliott, 167 Cal. 494, 140 Pac. 17.

86. Same.—Incorrect date of entry given.—Effect of.—The giving of an incorrect date of the entry of judgment in the notice of an appeal therefrom does not invalidate the appeal, where it is made to appear that but one such judgment was entered in the case.—Wilson v. Union Iron Works Drydock, 167 Cal. 539, 140 Pac. 250.

87. Notice of intention to move for new trial.—Failure to serve adverse party with notice of intention to move for new trial is not reason for dismissal of appeal on ground that court has not acquired jurisdiction to hear it.—Johnson v. Phenix Ins. Co., 146 Cal. 571, 575, 80 Pac. 719. See *In re Ryer*, 110 Cal. 556, 559, 42 Pac. 1082.

88. Want of service of notice of intention to move for new trial is not ground to dismiss appeal from order denying new trial.—Sutter Co. v. Tisdale, 128 Cal. 180, 60 Pac. 757.

89. Whether other parties should have been made parties to motion for new trial is not involved on section to dismiss appeal.—Watson v. Sutro, 77 Cal. 609, 612, 20 Pac. 88.

90. One notice is sufficient for taking appeal from judgment and order subsequent to judgment.—People v. Center, 61 Cal. 190, 195.

91. Notice of appeal from order from payment of alimony is none the less sufficient because notice of judgment between same parties in same case is embraced in same paper.—Sharon v. Sharon, 68 Cal. 326, 328, 329, 9 Pac. 187.

92. Notice of appeal from order directing payment of alimony and from judgment in divorce proceedings is not rendered insufficient by containing paragraph stating that on appeal from judgment court will be asked to review and set aside order for payment of alimony heretofore entered—such paragraph being surplusage.—Sharon v. Sharon, 68 Cal. 326, 328, 329, 9 Pac. 187.

93. Same.—Including notice of appeal from judgment in notice of appeal from order denying new trial has no effect, either as original appeal or to impair one pending from judgment.—Woodside v. Hewel, 107 Cal. 141, 143, 40 Pac. 103.

94. Second notice of appeal.—Is not authorized though sureties on first undertaking failed to justify, such failure not rendering appeal ineffectual or taking from supreme court its jurisdiction of cause.—Tompkins v. Montgomery, 116 Cal. 120, 123, 47 Pac. 1006.

95. Service of notice.—Attorney of record of respondent must be served where he has appeared by attorney.—Abrahms v. Stokes, 39 Cal. 150, 151; Whittle v. Renner, 55 Cal. 395; Jones v. McGarvey, 6 Cal. Unrep. 277, 56 Pac. 896; Estate of Nelson, 128 Cal. 242, 244, 60 Pac. 772.

As to service of all papers, except process and papers to bring party into contempt, to be made on attorney of record, see, post, § 1015 and note.

As to extension of time after filing notice of appeal, by reason of service by mail, see, post, § 1013 and note.

As to service of notice of appeal and proof of service, see, post, § 1011 and note.

As to service of notice of appeal by mail, see, post, §§ 1013, 1015 and notes.

As to sufficiency of service of notice of appeal on attorney for adverse parties, see, post, § 1011 and note.

96. Same.—Same.—Personal service on party.—Notice of appeal is not process requiring personal service for purpose of bringing respondent before court, but is declaration of intention to take further proceedings in the pending cause.—Estate of Nelson, 128 Cal. 242, 244, 60 Pac. 772.

97. Same.—Service on defendant personally when he has appeared by attorney is insufficient.—Jones v. McGarvey, 6 Cal. Unrep. 277, 56 Pac. 896.

98. Same.—Service on attorney after death of party is ineffective to constitute appeal.—Pedlar v. Stroud, 116 Cal. 461, 462, 48 Pac. 371. See *Moyle v. Landers*, 78 Cal. 99, 107, 12 Am. St. Rep. 22, 20 Pac. 241.

99. Appeal will be dismissed unless conduct of respondents' representative should estop them from relying on such defective service.—Moyle v. Landers, 78 Cal. 99, 107, 12 Am. St. Rep. 22, 20 Pac. 241.

100. Service of notice of appeal on attorney of administrator after his death is of

no avall.—Estate of Turner, 139 Cal. 85, 86, 72 Pac. 718.

101. Same—In partition.—Service of notice of appeal, in partition proceedings on attorney of record of party is good though such party died before service of such notice.—Lacoste v. Eastland, 117 Cal. 673, 680, 49 Pac. 1040.

102. Same—In case attorney appeared solely for purpose of motion to vacate judgment where affidavit showed motion was really for relief on ground of excusable neglect, he may be served with notice of appeal, and such service is sufficient appearance, although termed special, being in fact general.—Thompson v. Alford, 128 Cal. 227, 229, 60 Pac. 686.

103. Same—Joining in appeal is notice.—Joint appeal by city and private corporation in which no undertaking was filed, will be dismissed as to such corporation, but not as to city, as by joining with city in giving notice of appeal purposes of notice were fully accomplished and the situation is equivalent to appeal by city and notice of appeal duly served on corporation.—Meyers v. San Diego, 130 Cal. 60, 61, 62 Pac. 211.

104. Same—"Order of service is immaterial" is equivalent of "whether service precedes or follows filing of notice is immaterial."—Boyd v. Burrell, 60 Cal. 280, 281. See Hewes v. Carville Mfg. Co., 62 Cal. 516, 517; Robinson v. Templar Lodge, 114 Cal. 41, 45 Pac. 998.

As to time for service of notice of appeal, see, ante, § 939 and note.

105. Same—Proof of service.—Affidavit stating that service of notice of appeal had been made by mail and that respondent's attorney had admitted receiving such notice held sufficient proof of service as against inference in affidavit of respondent's attorney that he had not received such notice.—Brandenstein v. Johnson, 134 Cal. 102, 103, 66 Pac. 86.

106. Signature—Presumption of authority.—An attorney signing notice of appeal will be presumed to have authority from appellant, and appeal will not be dismissed on ground that it was prosecuted against will of appellant unless he himself objects to prosecution of appeal, and affidavit for purpose of determining whether appellant desires appeal to be dismissed will not be considered.—Woodbury v. Nevada S. R. Co., 120 Cal. 367, 369, 52 Pac. 730.

As to presumption of attorney's authority, see, post, § 1021 and note.

107. Same—Attorney of record must sign.—Notice of appeal signed by attorneys who were not attorneys of record or of counsel for appellants is insufficient.—Whittier v. Renner, 55 Cal. 395; Prescott v. Salthouse, 53 Cal. 221; Ellis v. Bennet, 2 Cal. Unrep. 302, 3 Pac. 801; Harrigan v. Bolte, (Cal. Oct. 9, 1885), 8 Pac. 184.

108. Sufficiency and form—In general.—Object of notice of appeal is to impart

requisite information to opposite party of his opponent's intention to appeal, and what specific judgment or order is appealed from, and if notice is sufficiently explicit in these particulars it should be declared sufficient.—Weyl v. Sonoma Valley R. Co., 69 Cal. 202, 203, 10 Pac. 510.

As to form and sufficiency of notice of appeal, see pars. 82, 83, this note.

109. Notice of appeal to constitute appeal from judgment should, at least state that appeal is taken from judgment or use other language which can be so construed.—Meley v. Boulon, 104 Cal. 262, 263, sub nom. Merley v. Boulon, 37 Pac. 931.

110. Same—Address.—Notice of appeal is not required to be addressed to persons who constitute adverse party, and hence notice of appeal directed to address of adverse party is sufficient.—Estate of Nelson, 128 Cal. 242, 243, 60 Pac. 772.

111. Notice of appeal addressed to petitioners for decree of distribution, though served on attorney for other heirs, does not bring such heirs within jurisdiction of appellate court.—Estate of Pendergast, 143 Cal. 135, 138, 76 Pac. 962.

112. Mistake of scrivener in directing notice of appeal to attorneys for executor, instead of attorneys for executors, does not affect sufficiency of notice, as it could be amended under section 473, ante.—Estate of Nelson, 128 Cal. 242, 244, 60 Pac. 772.

113. Same—Description of judgment or order.—Notice of appeal in form must sufficiently indicate order or judgment from which appeal is taken.—Estate of Nelson, 128 Cal. 242, 244, 60 Pac. 772.

114. Notice of appeal stating that plaintiff appeals from judgment made and entered in said action is sufficient where there is but one judgment in action.—Jones v. Iverson, 131 Cal. 101, 102, 63 Pac. 135.

115. Notice that plaintiff appeals from order denying motion for new trial and from order denying motion to set aside decision and judgment, followed by description of judgment, and concluding "and from the whole thereof," is not sufficient as notice of appeal from judgment.—Meley v. Boulon, 104 Cal. 262, 263, sub nom. Merley v. Boulon, 37 Pac. 931.

116. Notice of appeal stating that it is taken from order and decree appointing public administrator as administrator of estate of deceased is sufficient where there was only one order or decree on day mentioned or any other day making such appointment.—Estate of Damke, 133 Cal. 433, 434, 65 Pac. 888.

117. Same—Same—Mistake in giving dates of entry of judgment and order denying new trial will not render notice of appeal insufficient where it correctly states title of cause, and it appears from record that there has been but one judgment or order of court appealed from entered in

cause.—*Weyl v. Sonoma Valley R. Co.*, 69 Cal. 202, 204, 10 Pac. 510.

118. Mistake in date of entry of judgment in notice of appeal will not invalidate notice where there was but one judgment in case.—*Swasey v. Adair*, 83 Cal. 136, 137, 23 Pac. 284.

119. Same—Description of order denying new trial.—Notice of appeal stating that it is appeal from order overruling and denying plaintiff's motion for granting rehearing held to be sufficient notice of appeal from denial of motion for new trial.—*Kimple v. Conway*, 69 Cal. 71, 72, 10 Pac. 189.

120. Waiver of notice—Stipulation by attorney for plaintiff in action consolidated with action from judgment in which appeal was taken, that pleadings in such consolidated action might be omitted in transcript, and that judgment in such action will be determined by decision on appeal taken, amounts to appearance on appeal so as to render service of notice of appeal on such attorney unnecessary.—*Valley Lumber Co. v. Struck*, 146 Cal. 266, 80 Pac. 408.

As to effect of appearance as waiver of notice of appeal, see note 63 Am. Dec. 85.

II. UNDERTAKING ON APPEAL

See, also, post, §§ 942, 943, 945 and notes.

121. Alternative method of appeal—Notice of, unaccompanied with undertaking—Making up transcript.—In a case in which an appeal was taken under section 941b, post, without filing the undertaking required by the above section this was held to give the appellate court jurisdiction, and that after the jurisdiction thus vested in the appellate court, the appellant might elect to prepare his transcript under the provisions of section 950, post, instead of adopting the alternative method permitted by section 953a, post, without affecting the validity of his appeal.—*Baker v. Slocum*, — Cal. App. —, 192 Pac. 551, following doctrine in *Lang v. Lilley & Thurston Co.*, 161 Cal. 295, 119 Pac. 100.

122. Deposit of money in lieu of undertaking on appeal, which was not made within five days after notice of appeal was served and filed, renders appeal ineffectual, and appellant will be refused hearing.—*Stratton v. Graham*, 68 Cal. 168, 169, 8 Pac. 710.

123. Same—Substituting undertaking.—Permission to file undertaking on appeal and withdraw money deposited to secure stay of proceedings can not be granted by supreme court.—*Weibold v. Rauer*, 95 Cal. 418, 419, 30 Pac. 555.

124. Failure to file any undertaking on appeal.—May be taken advantage of under motion to dismiss appeal on ground of insufficiency of undertaking where undertaking filed was so defective as to not constitute any undertaking.—*Wadleigh v. Pheps*, 147 Cal. 135, 81 Pac. 418, 420.

125. Where no undertaking on appeal in due form was on file in lower court, appeal will be dismissed without prejudice to another appeal.—*Winder v. Hendrick*, 54 Cal. 275, 276, 277.

126. Where appeal is ineffectual from failure to file undertaking for costs, motion to dismiss appeal will be denied, but court will refuse to hear party who claims to have appealed.—*Biagi v. Howes*, 63 Cal. 384, 385.

127. Filing undertaking—Effect of.—Filing of undertaking, while it perfects an appeal, is not part of taking in statutory sense, and hence fact that undertaking was not given within sixty days from rendition of judgment does not prevent consideration of evidence.—*Perkins v. Cooper*, 3 Cal. Unrep. 279, 24 Pac. 377.

128. Same—What constitutes—Delivery of undertaking on appeal to deputy clerk after close of office does not constitute filing of such undertaking until placed on record by such deputy, and hence where paper was not placed on record until next day after expiration of five days from giving of notice of appeal, it was too late and appeal will be dismissed.—*Hoyt v. Stark*, 134 Cal. 178, 179, 86 Am. St. Rep. 246, 66 Pac. 223.

129. Motion to dismiss—What considered.—On motion to dismiss appeal on ground of want of undertaking nature of order appealed from is not involved and court is limited to determine whether steps taken for appeal are in compliance with statute prescribing mode of taking appeal.—*Estate of Kasson*, 135 Cal. 1, 2, 66 Pac. 871.

130. Necessity of—As to generally.—Appeal will be dismissed where no undertaking on appeal is filed.—*Ellis v. Bennet*, 2 Cal. Unrep. 302, 3 Pac. 801; *Perkins v. Cooper*, 87 Cal. 241, 243, 25 Pac. 411; *Robinson v. Templar Lodge*, 114 Cal. 41, 45 Pac. 998; *Meyer v. San Diego*, 130 Cal. 60, 61, 62 Pac. 211; *Pacific Mut. L. Ins. Co. v. Edgar*, 132 Cal. 197, 198, 64 Pac. 260; *Zane v. De Onativia*, 135 Cal. 440, 441, 67 Pac. 685.

131. Where no undertaking on appeal is filed, appeal will be dismissed without prejudice to another appeal.—*Robinson v. Templar Lodge*, 114 Cal. 41, 45 Pac. 998.

132. Same—City is not required to file undertaking on appeal.—*Meyer v. San Diego*, 130 Cal. 60, 61, 62 Pac. 211.

As to necessity of undertaking on appeal by city, see, post, § 1058 and note.

133. Same—County officer need not give undertaking where county is real party in interest under section 1058, post, though no order dispensing with undertaking, as provided by section 946, post, is secured.—*Lamberson v. Jeffers*, 116 Cal. 492, 494, 48 Pac. 485.

134. Same—School district or board of education must give undertaking on appeal—It not being municipality within section 1058, post.—*Mitchell v. Board of Education*, 137 Cal. 372, 375, 70 Pac. 180.

135. Same—State is not required to file undertaking on appeal.—San Francisco L. & C. Co. v. State, 141 Cal. 354, 357, 74 Pac. 1047.

136. Place of filing—On change of venue.—Where undertaking and notice of appeal from order granting change of venue was filed with clerk of county to which action was transferred, instead of with clerk of county where order was made, appeal will be dismissed.—Mansfield v. O'Keefe, 133 Cal. 362, 363, 65 Pac. 825.

137. Reference to orders appealed from—On appeal from judgment and order denying new trial undertaking must refer to each of appeals as distinctly as if they were from separate orders requiring undertaking for each.—Granger v. Robinson, 114 Cal. 631, 632, 46 Pac. 604; Corcoran v. Desmond, 71 Cal. 100, 102, 11 Pac. 815.

138. Signing—Time for by sureties before notice of appeal was given does not render undertaking fatally defective.—Stackpole v. Hermann, 126 Cal. 465, 466, 58 Pac. 935.

139. Statute requiring undertaking to be filed within five days after service of notice of appeal does not require that undertaking shall not be signed by sureties until after appeal is taken or limited in time between two acts, but it is not effective until it is filed.—Clarke v. Mohr, 125 Cal. 540, 543, 58 Pac. 176.

140. Same—Signing by sureties before making of order, and therefore before right of appeal existed, renders undertaking on appeal from order denying new trial without consideration and void.—Clarke v. Mohr, 125 Cal. 540, 542, 58 Pac. 176; Stackpole v. Hermann, 126 Cal. 465, 466, 58 Pac. 935.

141. Single undertaking on several appeals—Which does not distinctly refer to either of appeals is insufficient, and appeals will be dismissed.—Estate of Heydenfeldt, 119 Cal. 346, 348, 349, 51 Pac. 543.

142. Where undertaking on appeal from three orders or from two orders and judgment did not refer separately to either of appeals, it amounted to no undertaking at all.—McCormick v. Belvin, 96 Cal. 182, 183, 31 Pac. 16.

143. Undertaking on appeal from judgment is distinct from undertaking on appeal from order denying new trial, and though both may be included in same instrument, validity of each is to be determined by reference to appeal for which it is given.—Clarke v. Mohr, 125 Cal. 540, 542, 58 Pac. 176.

144. Undertaking on appeal reciting that whereas appellants have appealed from judgment entered in action and also from order denying motion to set aside judgment, therefore, in consideration of premises and of such appeal, appellants will pay all damages awarded against them on appeal, is insufficient in not referring especially to either matter appealed from.—Carter v.

Butte Creek G. M. & P. Co., 131 Cal. 350, 351, 63 Pac. 667.

145. Several appeals in same transcript should be accompanied by undertaking on appeal for each one of appeals, and each appeal should be recited in undertaking, except where there is in same notice and transcript appeal from judgment with appeal from order denying new trial.—Sharon v. Sharon, 68 Cal. 326, 332, 9 Pac. 187.

146. If appeal is from judgment or any order other than order denying new trial, or if notice of appeal is from more than one order, separate undertaking must be given on each of appeals, and this rule is not varied by fact that one or more of orders included in appeal is not appealable.—Estate of Kasson, 135 Cal. 1, 2, 66 Pac. 871.

147. Same—On appeal from final judgment and from order denying motion for new trial is sufficient.—Chester v. Bakersfield T. H. Assoc., 64 Cal. 42, 27 Pac. 1104; Sharon v. Sharon, 68 Cal. 326, 9 Pac. 187; Corcoran v. Desmond, 71 Cal. 100, 102, 11 Pac. 815; Williams v. Dennison, 86 Cal. 430, 25 Pac. 244; Centerville & K. I. D. Co. v. Bachtold, 109 Cal. 111, 41 Pac. 813; Estate of Ryer, 110 Cal. 556, 42 Pac. 1082; Granger v. Robinson, 114 Cal. 631, 46 Pac. 604; Martin v. DeOrnelas, 139 Cal. 41, 44, 72 Pac. 440; White v. Stevenson, 139 Cal. 531, 532, 73 Pac. 421.

148. Where undertaking on appeal made no reference to appeal from order denying motion for new trial, such appeal will be dismissed.—Corcoran v. Desmond, 71 Cal. 100, 11 Pac. 815; Home & L. Assoc. v. Wilkins, 71 Cal. 626, 12 Pac. 799; Berniaud v. Beecher, 74 Cal. 617, 16 Pac. 510; Wood v. Pendola, 77 Cal. 82, 19 Pac. 133; Schurts v. Romer, 81 Cal. 244, 245, 22 Pac. 657; Crew v. Diller, 86 Cal. 555, 25 Pac. 66; Pacific Paving Co. v. Bolton, 89 Cal. 155, 26 Pac. 650; Forni v. Yoell, 95 Cal. 442, 30 Pac. 578; Duncan v. Times-Mirror Co., 109 Cal. 602, 603, 42 Pac. 147; Granger v. Robinson, 114 Cal. 631, 632, 46 Pac. 604; Rhoads v. Gray, 5 Cal. Unrep. 664, 48 Pac. 971; Dodge v. Kimple, 121 Cal. 580, 581, 54 Pac. 94; McRae v. Argonaut Land & Devel. Co., 6 Cal. Unrep. 145, 54 Pac. 743.

149. Undertaking for costs filed on appeal from order dismissing motion for new trial, which does not refer to appeal from judgment which was taken subsequently, can not be treated as undertaking for costs on such subsequent appeal.—Blagi v. Howes, 63 Cal. 384, 385.

150. Same—On appeal from judgment and orders not appealable.—Single undertaking on appeal, which refers only to appeal, is not defective because notice of appeal recites several appeals where all appeals but one from judgment are from orders which are not appealable, and which can be reviewed on appeal from judgment.—Wadleigh v. Phelps, 147 Cal. 135, 81 Pac. 418, 420.

151. Same—On appeal from judgment and order refusing to set aside writ of assistance, undertaking limited to appeal from judgment, and which makes no reference to appeal from order refusing to set aside writ of assistance, is insufficient to sustain appeal from such order.—*Pignaz v. Burnett*, 121 Cal. 292, 293, 35 Pac. 632.

152. Same—On appeal from order denying motion to dismiss action and appeal from order denying new trial, undertaking which does not state appeal has been taken from both orders is insufficient.—*Fleld v. Andrada* (Cal. July 16, 1894), 37 Pac. 180.

153. Same—On appeal from two orders, undertaking which recites only one appeal, without distinguishing which of two appeals was referred to, does not amount to any undertaking at all.—*Home & L. Assoc. v. Wilkins*, 71 Cal. 626, 12 Pac. 799. See *People v. Center*, 61 Cal. 191.

154. Same—On appeal from judgment dismissing action and also from order made after judgment single undertaking in sum of three hundred dollars is insufficient.—*Gardiner v. California G. I. Co.*, 129 Cal. 528, 62 Pac. 110.

155. Same—On appeal from orders granting nonsuit and default, and from judgment given and entered therein, single undertaking is not sufficient and appeals will be dismissed.—*Estate of Kasson*, 135 Cal. 1, 2, 66 Pac. 871.

156. Stay of execution—Sufficiency for.—An undertaking on appeal in the sum of three hundred dollars is not sufficient to stay execution of the judgment which forecloses a trust deed for a large sum, on the theory that the judgment, from the nature of the case, directs the sale of personal as well as real property "as an entirety and in one parcel," and a writ of supersedeas will not be granted to stay proceedings upon the judgment pending the appeal. —*Southern Pac. Co. v. Superior Court*, 167 Cal. 250, 139 Pac. 69.

157. Stipulation—That appellant has in due time given and filed good and sufficient undertaking on appeal waives failure to give such undertaking where stipulation was made before time to appeal had expired.—*Forni v. Yoell*, 95 Cal. 442, 30 Pac. 578, distinguishing *Perkins v. Cooper*, 87 Cal. 240, 25 Pac. 411.

158. Same—Waiving filing of undertaking on appeal must be made within time for filing; otherwise appeal is lost.—*Perkins v. Cooper*, 87 Cal. 241, 244, 25 Pac. 411.

159. Time for filing—In general.—Failure to file undertaking within five days after service of notice of appeal renders appeal ineffectual. —*Boyd v. Burrel*, 60 Cal. 280, 281; *Biagi v. Howes*, 63 Cal. 384, 385; *Estate of Skerrett*, 80 Cal. 62, 63, 22 Pac. 85; *Reay v. Butler* (Cal. Jan. 17, 1891), 25 Pac. 685; *Hoyt v. Stark*, 134 Cal. 178, 182, 86 Am. St. Rep. 246, 66 Pac. 223; *Rose v. Mesmer*,

134 Cal. 459, 460, 66 Pac. 594; *Buhman v. Nickels & Brown Bros.*, 1 Cal. App. 266, 82 Pac. 85, 86.

160. And appeal will be dismissed.—*Rose v. Mesmer*, 134 Cal. 459, 460, 66 Pac. 594; *Hoyt v. Stark*, 134 Cal. 178, 182, 86 Am. St. Rep. 246, 66 Pac. 223.

As to denial of motion to dismiss appeal where appeal became ineffectual by reason of failure to file undertaking within time prescribed, see, post, § 954 and note.

As to necessity of filing undertaking within time within which to appeal, see, ante, § 939 and note.

161. Undertaking on appeal not filed within five days after service of notice of appeal is too late and appeal is defective.—*Rauer's Law & Collection Co. v. Standley*, 3 Cal. App. 44, 84 Pac. 214.

162. Compare: *Reay v. Butler* (Cal. Jan. 17, 1891), 25 Pac. 685, holding that where no undertaking on appeal is filed within five days after service of notice of appeal there is no appeal before court which can be considered or dismissed. Following *Bellegarde v. San Francisco B.*, 80 Cal. 61, 22 Pac. 57, and overruling *Reay v. Butler* (Cal. Dec. 19, 1890), 25 Pac. 350, which dismissed appeal for such reason.

163. Where undertaking on appeal was not filed within five days after service of notice of appeal, motion to dismiss will be denied—appeal being ineffectual for any purpose.—*Reed v. Kimball*, 52 Cal. 325, 326.

164. Construing sections 337 and 348 of Practice Act, held that undertaking must be given within time prescribed for appeal in order to perfect same.—*Elliott v. Chapman*, 15 Cal. 383, 384.

165. Though such undertaking was filed within five days after filing notice of appeal.—*Boyd v. Burrel*, 60 Cal. 280, 281.

166. Same—After time expired.—Undertaking on appeal reciting that whereas defendant has appealed to supreme court, etc., that in consideration of premises and of such appeal, etc., is insufficient as undertaking on appeal, notice of which was given on following day, where previous notice had been given and lapsed by reason of failure to file undertaking, undertaking filed clearly relating to such former notice. —*Hibernia Sav. & L. Soc. v. Freese*, 127 Cal. 70, 71, 59 Pac. 769.

167. Same—Extension of time for filing undertaking on appeal by superior court is authorized and hence an appeal will not be dismissed where undertaking was filed within such extended time though not within time prescribed by statute.—*Schloesser v. Owen*, 134 Cal. 546, 66 Pac. 720.

168. Extension of time within which to file undertaking on appeal is authorized by section 1054, post, on good cause shown.—*Wadsworth v. Wadsworth*, 74 Cal. 104, 105, 15 Pac. 447.

169. Order of judge extending time within which to file undertaking on appeal which was not filed within five days after notice of appeal was served is unavailing to extend time.—*Rauer's L. & C. Co. v. Standley*, 3 Cal. App. 44, 84 Pac. 214.

170. *Same*—Former rule.—Order extending time in which undertaking on appeal may be filed held inoperative—requirement of the statute being mandatory.—*Elliott v. Chapman*, 15 Cal. 383, 384.

171. Provision in Practice Act section 348, requiring undertaking on appeal to be filed within five days after notice of appeal is served and filed, is mandatory, and hence appeal will be dismissed where undertaking was not filed within such time, though such failure was excusable.—*Elliott v. Chapman*, 15 Cal. 383, 384.

172. *Same*—Filing undertaking before notice of appeal is filed is not premature where undertaking was filed within five days after service of notice of appeal.—*Hewes v. Carville Mfg. Co.*, 62 Cal. 516, 517.

173. *Same*—Conflict of evidence.—Where affidavits are conflicting as to whether undertaking on appeal was filed before notice of appeal was served, appeal will not be dismissed.—*Coonan v. Loewenthal*, 122 Cal. 72, 73, 54 Pac. 388.

174. *Same*—Service of notice of appeal on adverse party within five days prior to filing of an undertaking on appeal will not prevent such undertaking from being filed too late, where notice of appeal had been served on attorneys for such party more than five days before filing of such undertaking.—*Rose v. Mesmer*, 134 Cal. 459, 460, 66 Pac. 594.

175. *Same*—Undertaking filed before service of notice of appeal is ineffectual for

any purpose.—*Aram v. Shallenberger*, 42 Cal. 275, 278; *Little v. Jacks*, 68 Cal. 343, 344, 345, 8 Pac. 856, 9 Pac. 264, 11 Pac. 128.

176. *Same*—Where fifth day was Sunday an undertaking filed on next day was in time.—*Robinson v. Templar Lodge*, 114 Cal. 41, 42, 45 Pac. 998.

177. *Same*—Several appeals.—If undertaking and transcript, belonging to each of appeals from judgment and from order subsequent to judgment, are not filed in the due time, respondent is entitled to dismissal of such appeal.—*People v. Center*, 61 Cal. 190, 195.

178. *Same*—Where service of notice of appeal is made by mail, time for filing undertaking begins to run from time of deposit in post-office, and where such undertaking is not filed within five days from such deposit, appeal is ineffectual.—*Brown v. Green*, 65 Cal. 221, 222, 38 Pac. 811.

179. Undertaking to stay execution—Executed under provisions of section 942, post, is not undertaking required by this section, which must be filed within five days after service of notice of appeal, to render appeal effectual.—*Duffy v. Greenebaum*, 72 Cal. 157, 159, 12 Pac. 74, 13 Pac. 323.

180. Undertaking on appeal, which must be filed within five days after service of notice as required by this section, is the three-hundred-dollar undertaking mentioned in section 941, post.—*Hill v. Finnigan*, 54 Cal. 493, 494. See *Schacht v. Odell*, 52 Cal. 447, 449.

As to sufficiency of undertaking, see, post, § 941 and note.

As to waiver of undertaking on appeal, see, post, § 948 and note.

§ 941. SAME. WHERE PERSON WITH RIGHT TO APPEAL DIES. APPEAL BY ATTORNEY OF RECORD. In the event of the death of any person having at his death a right of appeal the attorney of record representing the decedent in the court in which the judgment was rendered may appeal therefrom at any time before the appointment of an executor or an administrator of the estate of the decedent.

History: Enacted March 11, 1872, founded upon § 348 Practice Act; amendment approved May 20, 1921, Stats. and Amdts. 1921, p. 193. In effect July 29, 1921.

As to undertaking on appeal generally, see, ante, § 940, note Part II; post, §§ 942, 943, 945, 978 978a, and notes.

§ 941a. SAME. ALTERNATIVE METHOD OF APPEAL. [Repealed.]

History: Enactment approved March 20, 1907, Stats. and Amdts. 1907, p. 753, Kerr's Stats. and Amdts. 1906-7, p. 470; repeal approved May 20, 1921, Stats. and Amdts. 1921, p. 194. In effect July 29, 1921.

NEW AND ALTERNATIVE METHOD OF APPEAL.

1. Editorial note.

2. As to purpose of provisions.

3. As to procedure to procure.

4. *Same*—Service of notice—Undertaking.

5, 6. *Same*—*Same*—As to when undertaking required.

7, 8. Same—Certificate to transcript of testimony.

9. Service of notice of appeal.

10. Sufficiency of undertaking.

11, 12. Undertaking not required, when.

As to independent character of sections of the code, see, post, § 941b, note par. 4.

As to new and alternative method of appeal, see, also, post, §§ 953a-953c and notes.

1. Editorial note: There were formerly two separate provisions in our Code of Civil Procedure respecting appeals by the new and alternative method, the respective sections being sections 941a-941c and 953a-953c. The legislature of 1921 repealed sections 941a-941c, but throughout this edition of the Code of Civil Procedure the cases decided under these sections are retained for any possible benefit and usefulness they may serve by way of illustration of reasoning or otherwise.

2. As to purpose of provisions.—The purpose of the provisions creating the alternative method was to simplify the procedure on appeal, and to do away with the difficulties and uncertainties that had frequently arisen over questions of the proper service of notice of appeal, and the sufficiency of the undertaking required by sections 940 and 941. Experience had shown that the three-hundred-dollar undertaking exacted of an appellant was of little or no real benefit to the respondent. The new method was designed to enable appellants to dispense with this undertaking altogether. It was never contemplated that an appeal perfected under the new method should be less effectual or operative for any purpose than the appeal for which it was an alternative.—*Estate of Stough*, 173 Cal. 638, 161 Pac. 1.

3. As to procedure to procure.—An appellant can not take advantage of the new and more liberal procedure of the new sections as to appeal unless the appeal has been taken within the time specified. If he has given his notice after the time allowed by the alternative method, but within that specified by section 939, ante, he must comply with section 940, ante, requiring the serving (as well as the filing) of his notice of appeal and the giving of an undertaking.—*Theisen v. Matthal*, 165 Cal. 249, 131 Pac. 747.

See, also, post, § 942 and note.

4. Same—Service of notice—Undertaking.—An appeal by the alternative method as provided in the above section and sections 941b and 941c, post, as they existed before their repeal, it was sufficient to file the notice of appeal without serving it upon the respondent or his attorney, and without filing any undertaking on appeal.—*Pioneer Truck Co. v. Hawley*, 39 Cal. App. 481, 179 Pac. 447.

5. Same—Same—As to when undertaking required.—On an appeal under those sections an undertaking was necessary for the purpose of obtaining a stay of proceedings, only; it was to be secured in accordance with the provisions of section 949, post.—*Pioneer Truck Co. v. Hawley*, 39 Cal. App. 481, 179 Pac. 447.

6. No undertaking on appeal is required where the appeal is taken under the new and alternative method, and the fact that a bill of exceptions is prepared instead of a reporter's transcript is immaterial upon the point.—*Nezek v. Cole*, 43 Cal. App. 130, 184 Pac. 523.

7. Same—Certification to transcript of testimony.—The trial judge can certify to a transcript of the testimony only when it has been prepared by the official stenographic reporter present at the trial as required by section 953a, post.—*Bush v. Allen*, 172 Cal. 102, 155 Pac. 466.

8. A transcript of the testimony certified to by the clerk alone can not be considered on an appeal taken under this section.—*Bush v. Allen*, 172 Cal. 102, 155 Pac. 466.

9. Service of notice of appeal.—Under an appeal taken under this section and sections 941b and 941c, post, neither a service of the notice of appeal nor an undertaking is necessary.—*Estate of Stough*, 173 Cal. 638, 161 Pac. 1.

10. Sufficiency of undertaking.—On an appeal taken under the provisions of the above section and sections 941b, and 941c, post, any question as to the validity of the undertaking given on appeal as a stay-bond must be regarded, for the reason that under these sections no undertaking is essential to the taking on maintenance of an appeal.—*Chung Sing v. Southern Pac. Co.*, 178 Cal. 261, 172 Pac. 1103, following the doctrine in *Theisen v. Matthal*, 165 Cal. 252, 131 Pac. 747; *Estate of Stough*, 173 Cal. 640, 161 Pac. 1.

11. Undertaking not required, when.—If the appeal be regarded as taken under the "new and alternative method" any defects in the undertaking must be disregarded because no undertaking is required thereunder. An appeal will not be dismissed where the appellant has complied with all the requirements of the new method even though he supposed he was proceeding under the old, and may have made an ineffectual attempt to take some of the steps necessary before the enactment of the new provisions.—*Theisen v. Matthal*, 165 Cal. 249, 131 Pac. 747.

12. Under the alternative method of appeal no undertaking is required, and, therefore, the want of one will not justify a dismissal of the appeal if the steps taken to perfect it comply with the rules laid down in the two following sections.—*Title Ins. & Trust Co. v. California Devel. Co.*, 168 Cal. 397, 143 Pac. 723.

§ 941b. NOTICE OF APPEAL, WHAT TO CONTAIN. [Repealed.]

History: Enactment approved March 20, 1907, Stats. and Amdts. 1907, p. 753; Kerr's Stats. and Amdts. 1906-7, p. 470; amendment approved April 24, 1915, Stats. and Amdts. 1915, p. 204; repeal approved May 20, 1921, Stats. and Amdts. 1921, p. 194. In effect July 29, 1921.

NOTICE OF APPEAL—WHAT TO CONTAIN.

1. Appeal from final judgment—Time of taking—Pendency of proceedings for a new trial.
- 2, 3. Construction of section—As to purpose.
4. Same—Sections independent.
- 5-10. Notice of appeal—As to sufficiency of.
 11. Same—Amendment of—Inclusion of extraneous matter.
 12. Same—Form of—Sufficiency.
 13. Same—Jurisdictional.
- 14-17. Service of.
- 18-21. Same—Time for filing of.
 22. Notice of entry of judgment—Appeal notice—When sufficient.
 23. Time to appeal—"Or other termination"—Construction of.
 24. Same—Notice of decision—Appeal before receiving.

As to undertaking on appeal by new and alternative method, see, ante, § 941a and note; also § 941 and cross references.

1. Appeal from final judgment—Time of taking—Pendency of proceedings for a new trial.—Under the provisions of the above section and section 939, ante, an appeal from a final judgment must be taken within sixty days from the entry of such judgment, except in those cases in which proceedings on motion for a new trial are pending, the time in which an appeal from the judgment must be taken does not expire until thirty days after entry in the trial court of the order determining such motion for a new trial, or the proceedings thereon are otherwise terminated in the trial court.—*Whiting-Mead Commercial Co. v. Bayside Land Co.*, 178 Cal. 93, 172 Pac. 598.

2. Construction of section—As to purpose.—This section shows a design to avoid the technicalities involved under section 940, ante. The main design is to compel the prevailing parties to look to the files to ascertain whether or not an appeal has been taken, and to avoid the necessity previously imposed upon the appellant of determining which were adverse parties upon his proposed appeal, and of finding them and serving them the required notice at the peril of losing his appeal if he made a mistake. It is not required that the adverse parties shall be named as such in the notice and we hold it unnecessary to do so.—*Southern Pac. Co. v. Superior Court*, 167 Cal. 250, 139 Pac. 69.

3. While it is true that provisions conferring the right of appeal and prescribing

the procedure are remedial and should not be unduly hampered with constructive restrictions which will cast doubt upon the jurisdiction of the appellate court, it is equally true that where the language of the statute conferring that right is so plain and unequivocal as that its meaning, intent and purpose are in no particular or manner rendered obscure or doubtful, the courts will require a substantially strict compliance with the mode so prescribed.—*Johnson v. Superior Court*, 28 Cal. App. 613, 153 Pac. 404.

4. Same—Sections independent.—The notice of appeal is not connected with sections 953a, 953b, 953c, and these sections are entirely independent of sections 941a, 941b, 941c.—*Chapuis v. Pesante*, 41 Cal. App. 688, 183 Pac. 247.

5. Notice of appeal—As to sufficiency of.—A notice of appeal in the following form: "Notice is hereby given, pursuant to section 953a, post, to all persons concerned that the undersigned desires to appeal, and does hereby appeal to the supreme court from the order," etc., is sufficient under this section. The fact that it is so drawn as to serve the double office of a notice of appeal and a notice to the clerk under section 953a, post, does not destroy its effect as a notice of appeal, nor is the statement that it is given "pursuant to section 953a" fatal to its sufficiency as a notice of appeal.—*Estate of Faber*, 168 Cal. 491, 143 Pac. 737.

6. No notice of appeal is required other than the notice of appeal filed with the clerk.—*Martin v. Becker*, 169 Cal. 301, Ann. Cas. 1916D, 171, 146 Pac. 665.

7. A failure to address the notice of appeal to all of the adverse parties or any of them does not affect the validity of the appeal.—*Title Ins. & Trust Co. v. California Devel. Co.*, 171 Cal. 173, 152 Pac. 542.

8. The decisions holding that the notice hereunder must be in writing and that actual notice is not sufficient are not applicable to section 953a, post.—*French v. Macnider*, 28 Cal. App. 67, 151 Pac. 371.

9. A notice of appeal, though defective in not being several in form, may, under the liberal practice now prevailing, be regarded as sufficient.—*Sweet v. Richvale Land Co.*, 29 Cal. App. 111, 154 Pac. 608.

10. In an action against five defendants composing a board of trustees of a high school district, an appeal from the judgment will not be dismissed upon the alleged insufficiency of the notice of appeal which in the title merely describes the defendants as "Charles L. Sanderson et al., De-

fendants" (without naming each defendant), but in the body of the notice states "that the defendants above named desire to appeal and do hereby appeal . . . from the whole of that certain order . . . and from the whole of the judgment of the aforesaid superior court, etc."—*Hopkins v. Sanderson*, 29 Cal. App. 666, 159 Pac. 1064.

11. Same—Amendment of—Inclusion of extraneous matter.—Where the notice of appeal strictly conforms to the requirements of the above section it was not error to deny a request for its amendment so as to include something entirely disconnected.—*Chapuis v. Pesante*, 41 Cal. App. 688, 183 Pac. 247.

12. Same—Form of—Sufficiency.—Under the above section as it stood before its repeal the notice of intention of a party to appeal from a judgment was required to state that the person giving the same "does hereby appeal" from the judgment or order and a notice of appeal and request for a transcript under section 953a, post, stating that the plaintiff "has appealed" did not constitute a good notice under the section.—*Eddy v. Hunter*, — Cal. App. —, 189 Pac. 291, following the doctrine in *Lent v. California Fruit Growers' Assoc.*, 161 Cal. 719, 121 Pac. 1002; *Bolling v. Alton*, 162 Cal. 297, 122 Pac. 461; *Marcucci v. Vowinkel*, 164 Cal. 693, 130 Pac. 430; *Michelson v. City of Sacramento*, 173 Cal. 108, 159 Pac. 431.

13. Same—Jurisdictional.—The filing of a notice of intention to appeal and the giving of the bond required under the new and alternative method of appeal is jurisdictional, and the failure to give such notice could not be overcome by proof of waiver by the adverse party.—*Eddy v. Hunter*, — Cal. App. —, 189 Pac. 291.

14. Same—Service of.—Actual service of a written notice of the entry of a judgment, order, or decree is essential to start running the sixty-day period allowed within which to appeal.—*Huntington Park Imp. Co. v. Park Land Co.*, 165 Cal. 429, 132 Pac. 760.

15. In order to escape the necessity of serving notice of appeal and giving an undertaking the appellant must file his notice of appeal within the time fixed herein. If he allows that time to go by, and is still within the time allowed under the old method (§939, ante) he must serve his notice and give his undertaking as required when that was the only method of appeal.—*Title Ins. & Trust Co. v. California Devel. Co.*, 168 Cal. 397, 143 Pac. 723.

16. Before a respondent may invoke the limitation of sixty days contemplated by this section as the time within which, after notice of the entry of judgment, an appeal may be taken, there must be a formal notice of such entry actually served upon the attorney of record.—*McDonald v. McDonald*, 168 Cal. 433, 143 Pac. 726.

17. Where the appeal is taken more than sixty days after the entry of judgment, and it does not appear that any notice of the entry of judgment was served the court on appeal may examine whether or not the evidence sustains the findings.—*Blair v. Brownstone Oil & Ref. Co.*, 168 Cal. 632, 143 Pac. 1022.

18. Same—Time for filing of.—A notice of appeal taken under the new or alternative method filed with the clerk thirty-one days after the filing of the judgment, is sufficient.—*Martin v. Becker*, 169 Cal. 301, Ann. Cas. 1916D, 171, 146 Pac. 665.

19. Statutes limiting the time of appeal are jurisdictional and mandatory, and in the absence of an express authorization in the statute itself, a court has no power to extend the time for taking an appeal, or to relieve an appellant from the effect of misfortune, accident, surprise or mistake.—*Lancel v. Postlethwaite*, 172 Cal. 326, 156 Pac. 486.

20. An appeal taken from a judgment within six months after entry is within the time prescribed by above section, in the absence of any showing of service of written notice of entry of judgment upon the appellant.—*Magee, Jr., v. Magee, Sr.*, 174 Cal. 276, 162 Pac. 1023.

21. When an appeal from a judgment is not taken within sixty days after its entry, its consideration is necessarily confined to an examination of the judgment-roll.—*Healy v. Obear*, 29 Cal. App. 696, 157 Pac. 569.

22. Notice of entry of judgment—Appeal notice—When sufficient.—Prior to the repeal of the above section as the same stood before its amendment in 1915, where the notice of entry of judgment was not given, the filing of a notice of appeal in proper form, with the clerk of the court, within six months after the date of the entry of judgment, operated to perfect the appeal and transfer the cause to the higher court for determination.—*Blake v. Bilger Co. v. Chappell*, 44 Cal. App. 657, 186 Pac. 823, following doctrine in *Southern Pac. Co. v. Superior Court*, 167 Cal. 250, 139 Pac. 69; *Title Ins. & T. Co. v. California Devel. Co.*, 171 Cal. 173, 152 Pac. 542.

23. Time to appeal—"Or other termination"—Construction of.—The provisions of the above section as it stood prior to its repeal by which, if proceedings on motion for a new trial were pending, the time in which to give notice of appeal did not expire until thirty days after entry in the trial court of an order determining the motion "or other termination of the proceedings"; the matter above quoted has reference to the provisions of section 660, ante, making the court's failure to decide a motion within three months after the verdict of the jury, or service on the moving party of notice of decision equivalent to a denial of the motion.—*Moore v. Strayer*, 175 Cal. 171, 165 Pac. 530.

24. Same—Notice of decision—Appeal before receiving.—The fact that a notice of intention to appeal is filed before notice of decision of the court entered is immaterial for the reason that the statute re-

lates to the power of the court, and not merely to the rights of the appealing parties.—*Moore v. Strayer*, 175 Cal. 171, 165 Pac. 530.

§ 941c. EFFECT OF APPEAL. [Repealed.]

History: Enactment approved March 20, 1907, Stats. and Amdts. 1907, p. 754, Kerr's Stats. and Amdts. 1906-7, p. 471; repeal approved May 20, 1921, Stats. and Amdts. 1921, p. 194. In effect July 29, 1921.

1. Effect of appeal—Construction.—Where this section speaks of appeals taken pursuant to sections 939, 940, and 941, ante, it refers to appeal supported by the necessary undertaking. It is the force and effect of such appeals that are imported into appeals taken by the new method.—*Estate of Stough*, 173 Cal. 638, 161 Pac. 1.

2. Changes in the law affecting procedure apply to cases pending and conditions existing at the time the statutes take

effect, where no substantial remedies are impaired. This rule applies in the case of a statutory amendment pending appellate proceedings.—*Slye v. Hunt*, 29 Cal. App. 117, 154 Pac. 607.

As to independent character of sections of the code, see, ante, § 941b and note.

As to undertaking on appeal by the new and alternative method, see, ante, § 941a and note.

§ 942. UNDERTAKING ON APPEAL FROM A MONEY JUDGMENT. If the appeal be from a judgment or order directing the payment of money, it does not stay the execution of the judgment or order unless a written undertaking be executed on the part of the appellant, by two or more sureties, to the effect that they are bound in double the amount named in the judgment or order; that if the judgment or order appealed from or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment [or] order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the appellant does not make such payment within thirty days after the filing of the remittitur from the supreme court in the court from which the appeal is taken, judgment may be entered on motion of the respondent in his favor against the sureties for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal. If the judgment or order appealed from be for a greater amount than two thousand dollars, and the sureties do not state in their affidavits of justification accompanying the undertaking that they are each worth the sum specified in the undertaking, the stipulation may be that the judgment to be entered against the sureties shall be for such amounts only as in their affidavits they may state that they are severally worth, and judgment may be entered against the sureties by the court from which the appeal is taken, pursuant to the stipulations herein designated. When the judgment or order appealed from is made payable in a specified kind of money or currency, the judgment entered against the sureties upon the undertaking must be made payable in the same kind of money or currency.

History: Enacted March 11, 1872, substantial re-enactment of § 349 Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 336.

MONEY-JUDGMENT—UNDERTAKING ON APPEAL FROM.

1-4. Appeal by new method—Construction.

5. Construction of section—As to generally.

6, 7. Same—As not including costs.

8. Dissolution of partnership and ordering sale of property.
 9. Divorce—Order allowing maintenance and suit-money—Undertaking on appeal.
 10. Effect of premature appeal.
 - 11, 12. Execution of judgment—May be stayed by stay-bond on appeal.
 13. Same—As to reason.
 14. Same—Dismissal of appeal from judgment does not affect stay of execution.
 15. Filing—Time for.
 - 16, 20. Judgment referred to in this section—Is decree passing on matter directly.
 21. Same—Administrator—Order appointing.
 22. Same—Alimony and counsel fees—Judgment directing payment.
 23. Same—Costs—Judgment for.
 24. Same—Cost-bill—Order denying motion to strike out.
 25. Same—Decree directing sale of part of mortgaged premises and appointing receiver to receive rents and profits.
 26. Same—Decree of distribution.
 27. Same—Deficiency judgment—Mechanics' lien.
 28. Same—Same—Mortgage—Judgment for deficiency.
 29. Same—Same—Partnership.
 - 30, 31. Same—Same—Special lien.
 32. Same—Election contest of corporation office.
 33. Same—Execution—Order denying motion to set aside.
 34. Same—Family allowance.
 35. Same—Foreclosure—Judgment of.
 36. Same—Partition—Decree of.
 37. Same—Personal judgment in addition to decree directing sale of property.
 38. Same—Unlawful detainer.
 39. Same—Where fund over which litigation arose had never been in possession of appellants.
 40. Interlineation of date of entry of order.
 41. Joint undertaking.
 - 42, 43. Judgment upon bond—Stipulation regarding—Motion respecting unrelated matter.
 - 44-46. Liability of sureties.
 47. New undertaking on appeal—Can not be required in absence of statute.
 48. Obligees—In general.
 49. Same—Omission of name of obligee.
 50. Obligation of sureties—To pay judgment.
 51. Same—Affirmance as to one appellant.
 52. Same—Assignee of judgment can not recover on undertaking.
 - 53, 54. Same—Constitutionality of provision authorizing judgment on motion.
 - 55, 56. Same—Entry of judgment against sureties is not special proceeding.
 57. Same—Judgment against one surety.
 58. Same—Notice of motion for judgment against sureties.
 59. Same—Same—Service of original notice and affidavit.
 60. Same—Reversal of judgment against sureties because prematurely entered.
 - 61-65. Same—When no bond under this section is required.
 66. Several undertaking—In general.
 67. Signing by appellant—As to requirement of.
 68. Stay of execution—Amount of bond to secure.
 69. Sufficiency of undertaking.
 70. Same—"About to appeal."
 71. Same—Date of judgment incorrectly stated.
 72. Same—"Either of them."
 73. Same—Must conform to notice of appeal.
 74. Same—Provision for payment of costs and damages on dismissal.
 75. Same—Same—Condition in undertaking to stay execution.
 76. Same—Specification of item of judgment.
 77. Sureties—As parties.
 78. Same—Attorney for appellant.
 79. Same—Surety company.
 80. Undertaking for stay of proceedings under judgment—Entirely distinct.
 81. Same—Liability of sureties—Costs.
 - 82, 84. Waiver of insufficiency.
1. Appeal by new method—Construction.—The filing of a notice of appeal under the alternative method in cases where a stay-bond is not required by this and the three following sections, is operative to the same extent as the filing and service of notice followed by the giving of the three-hundred-dollar undertaking under the old method.—Estate of Stough, 173 Cal. 638, 161 Pac. 1.
 2. Upon an appeal taken under the new and alternative method provided by sections 941a, 941b, and 941c, ante, enacted in 1907, from an order appointing the executor of a will, the filing with the clerk of the notice of appeal stays all proceedings on the order, without the necessity of the giving of the three-hundred-dollar undertaking, or any stay-bond.—Estate of Stough, 173 Cal. 638, 161 Pac. 1.
 3. The provisions of above section, and sections 943, 944, and 945, post, as to stay of proceedings upon the perfecting of an appeal apply only where the appellant had money or other property in his possession or under his control which has been ad-

judged by the lower court to belong to the respondent, or where the appellant has been directed to do some act for the benefit of the respondent.—*Halsted v. First Savings Bank*, 173 Cal. 605, 160 Pac. 1075.

4. An adjudication of a conditional liability which might or might not become a fixed or absolute obligation is not a judgment for the direct payment of money within the meaning of this section requiring the execution of an undertaking to stay the judgment pending appeal.—*Colusa & H. R. Co. v. Superior Court*, 31 Cal. App. 746, 161 Pac. 1011.

5. Construction of section.—As to generally.—Provisions of undertaking on appeal, which are required by this section to be in undertaking to stay execution, do not render such undertaking an undertaking on appeal so as to dispense with that undertaking.—*Duffy v. Greenebaum*, 72 Cal. 157, 159, 160, 12 Pac. 74, 13 Pac. 323.

6. Same.—As not including costs.—The costs taxed against a defendant are merely incidental to the judgment, and as to a stay of execution inseparably connected with it, a judgment for costs is not the judgment directing the payment of money contemplated by the above section; the judgment referred to in the above section and in sections 943, 944, and 945, post, is the judgment or decree passing upon the matter directly involved in the litigation.—*McCallion v. Hibernia Sav. & L. Soc.*, 98 Cal. 442, 33 Pac. 329.

7. The words "in double the amount named in the judgment" in the above section, must be taken as referring to the amount adjudged to be due the prevailing party upon the claim involved in the action and for which a recovery is awarded, not as including the incidental recovery on account of costs of the action, which are awarded only upon claim made and ascertainment of the amount had subsequently to the giving of the judgment.—*Whitaker v. Title Ins. & Trust Co.*, 179 Cal. 111, 175 Pac. 460.

8. Dissolution of partnership and ordering sale of property.—The execution of a judgment dissolving a partnership and directing a sale by a duly appointed receiver of both real and personal property is stayed by filing the bond herein provided, and a writ of supersedeas will issue to restrain the sale during appeal.—*Zappettini v. Buckles*, 167 Cal. 27, 138 Pac. 696.

9. Divorce.—Order allowing maintenance and suit-money.—Undertaking on appeal.—In an action brought by a wife against her husband to obtain maintenance without divorce where the court made an order allowing the wife a sum for maintenance and suit money from which order an appeal was taken, an undertaking to stay execution pending appeal is not without consideration.—*Millar v. Millar*, — Cal. App. —, 197 Pac. 311, following the doctrine in *McAneny v. Superior Court*, 150 Cal. 6, 87 Pac. 1020.

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10. Effect of premature appeal.—Undertaking given to make appeal effectual is not rendered void by fact that appeal was not secured because it was premature, since sureties on such undertaking agreed to be liable if appeal be dismissed, and since respondent must be to some expense, to have even void appeal disposed of, there is consideration for undertaking.—*Estate of Kennedy*, 129 Cal. 384, 385, 62 Pac. 64.

11. Execution of judgment.—May be stayed by stay-bond on appeal from order denying motion for new trial.—*Fulton v. Hanna*, 40 Cal. 278, 280; *Baldwin v. Superior Court*, 125 Cal. 584, 58 Pac. 185; *Holland v. McDade*, 125 Cal. 353, 354, 58 Pac. 9; *Starr v. Kreuzberger*, 131 Cal. 41, 43, 63 Pac. 134.

12. Though no appeal has been taken from judgment.—*Baldwin v. Superior Court*, 125 Cal. 584, 58 Pac. 185.

13. Same.—As to reason.—Since reversal on appeal from order remanding cause for retrial as effectually vacates judgment as reversal of judgment on direct appeal therefrom.—*Fulton v. Hanna*, 40 Cal. 278, 280.

14. Same.—Dismissal of appeal from judgment does not affect stay of execution effected by undertaking given on appeal from order denying new trial.—*Fulton v. Hanna*, 40 Cal. 278, 280; *Thompkins v. Montgomery*, 116 Cal. 120, 123, 47 Pac. 1006; *Starr v. Kreuzberger*, 131 Cal. 41, 43, 63 Pac. 134.

15. Filing.—Time for.—Stay-bond may be made and filed at any time before execution is satisfied by sale under it.—*Hill v. Finnigan*, 54 Cal. 493, 494.

16. Judgment referred to in this section.—Is decree passing on matter directly involved in litigation. In all other cases proceedings are held in abeyance by virtue of statute itself.—*McCallion v. Hibernia Sav. & L. Soc.*, 98 Cal. 442, 445, 33 Pac. 329.

17. Applicable to judgment which directs payment by defendant of specific amount of money and which can be directly enforced by writ of execution.—*Kreling v. Kreling*, 116 Cal. 458, 460, 48 Pac. 383.

18. Applies to judgments which require same process for their enforcement.—*Foster v. Superior Court*, 115 Cal. 279, 282, 47 Pac. 58.

19. Applies only to appellants who are required to perform directions of judgment, and order appealed from.—*Estate of Schedel*, 69 Cal. 241, 243, 10 Pac. 334; *Born v. Horstmann*, 80 Cal. 452, 453, 5 L. R. A. 577, 22 Pac. 169, 338; *Pennie v. Superior Court*, 89 Cal. 31, 32, 33, 26 Pac. 617; *Estate of Woods*, 94 Cal. 566, 567, 29 Pac. 1108; *McCallion v. Hibernia Sav. & L. Soc.*, 98 Cal. 442, 444, 33 Pac. 329; *Foster v. Superior Court*, 115 Cal. 279, 282, 47 Pac. 58.

20. Refers solely to judgment in personam for certain sum of money, and provides that upon affirmance of appeal, sureties must pay whole amount or have

personal judgment entered against them therefor.—*Boob v. Hall*, 105 Cal. 413, 414, 38 Pac. 977.

21. Same—Administrator—Order appointing is stayed by undertaking under section 941, ante.—*Estate of Woods*, 94 Cal. 566, 567, 29 Pac. 1108.

22. Same—Alimony and counsel fees—Judgment directing payment of alimony and counsel fees was properly stayed by undertaking under this section in twice amount of lump sum and double amount of monthly payments for period of three years.—*Sharon v. Sharon*, 67 Cal. 185, 222, 7 Pac. 456, 635, 8 Pac. 709.

23. Same—Costs—Judgment for is not judgment directing payment of money, contemplated by this section, but is stayed by reason of undertaking for costs on appeal.—*McCallion v. Hibernia Sav. & L. Soc.*, 98 Cal. 442, 445, 33 Pac. 329.

24. Same—Cost-bill—Order denying motion to strike out cost-bill is not order directing payment of money within purview of this section, since it was in effect denial of motion to modify judgment, and any execution must have been issued on judgment to which such motion was directed and not on order denying motion, and hence bond to stay execution, given under this section, being given without statutory effect, judgment against sureties can not be entered.—*Reay v. Butler*, 118 Cal. 113, 114, 50 Pac. 375.

25. Same—Decree directing sale of part of mortgaged premises and appointing receiver to receive rents and profits of such lands pending litigation, requires stay-bond under this section where mortgagor's administrator is in possession by tenant, though such tenant has paid rent and profits to receiver.—*Bank of Woodland v. Stephens*, 137 Cal. 458, 460, 70 Pac. 293.

26. Same—Decree of distribution appealed from by legatee is not within this section.—*Estate of Schedel*, 69 Cal. 241, 243, 10 Pac. 334.

27. Same—Deficiency judgment—Mechanics' lien.—Judgment in foreclosure of mechanics' lien, directing sale of property and entry of deficiency judgment thereafter, can not be stayed by undertaking under this section, since no execution can be issued on such judgment until sale of property, though personal judgment was entered against defendant.—*Central L. & M. Co. v. Center*, 107 Cal. 193, 195, 40 Pac. 334.

28. Same—Same—Mortgage—Judgment for deficiency in mortgage foreclosure need not be stayed by bond under this section.—*Boob v. Hall*, 105 Cal. 413, 414, 38 Pac. 977.

29. Same—Same—Partnership.—Judgment directing sale of real property of partner, and in case of deficiency personal judgment to be entered against one of partners, would not amount to money judgment until after judgment for such defi-

ciency has been entered.—*Painter v. Painter*, 98 Cal. 625, 626, 33 Pac. 483.

30. Same—Same—Special lien.—Construed to have no application to judgment which may be satisfied in either of two or more modes, or which can not be enforced against defendant until after plaintiff has exhausted another remedy, and where he is personally liable for only deficiency in proceeds of certain property which is primarily chargeable therefor. If judgment directs sale of real property, defendant is liable only in case of deficiency; the provisions of section 945, post, control.—*Kreling v. Kreling*, 116 Cal. 458, 460, 48 Pac. 333.

31. Judgment directing that plaintiff have and recover from defendants certain sum of money and declaring this sum to be lien on land described, directing that land be sold and proceeds applied to judgment, and in case of deficiency directing clerk to docket judgment for unpaid balance, is not governed by this section, and hence undertaking to stay proceedings as provided in this section is not required.—*Owens v. Pomona L. & W. Co.*, 124 Cal. 331, 333, 334, 57 Pac. 71.

32. Same—Election contest of corporation officer.—Judgment on contest of election for directors of railroad company needs no stay-bond.—*Foster v. Superior Court*, 115 Cal. 279, 282, 47 Pac. 58.

33. Same—Execution—Order denying motion to set aside.—Stay of execution on judgment for payment of money under this section is only allowed on appeal from judgment upon giving undertaking in double amount as required by section, and hence does not apply to an appeal from order made after judgment denying motion to set aside execution.—*Carit v. Williams*, 67 Cal. 580, 581, 8 Pac. 93.

34. Same—Family allowance.—Order directing payment of money for family allowance may be stayed without bond under this section.—*Pennie v. Superior Court*, 89 Cal. 31, 32, 26 Pac. 617.

35. Same—Foreclosure—Judgment of, directing a judgment in certain sum, and that steamship, apparel, and furniture are liable for payment of said sum, and directing same to be sold, and out of proceeds payment of amount found due to plaintiff, is not judgment directing payment of money within this section.—*Olsen v. Birch*, 1 Cal. App. 99, 81 Pac. 656, 657. See *Central L. & M. Co. v. Center*, 107 Cal. 193, 40 Pac. 334; *Kreling v. Kreling*, 116 Cal. 458, 460, 48 Pac. 333.

36. Same—Partition—Decree of needs no stay-bond under this section.—*Born v. Horstmann*, 80 Cal. 452, 453, 5 L. R. A. 577, 22 Pac. 169, 338; *Estate of Kennedy*, 129 Cal. 384, 387, 62 Pac. 64.

37. Same—Personal judgment in addition to decree directing sale of property is made in action by vendor against vendee in order to stay proceedings on personal judgment, bond must be executed under

this section.—*Englund v. Lewis*, 25 Cal. 337, 354.

38. Same—Unlawful detainer.—Judgment in unlawful detainer directing payment of specified sum of money, execution of such judgment can not be stayed unless bond be given as provided by this section, and hence appeal from order made after judgment vacating order for satisfaction of judgment does not authorize supersedeas.—*Bateman v. Superior Court*, 139 Cal. 141, 143, 72 Pac. 922.

39. Same—Where fund over which litigation arose had never been in possession of appellants, but was in custody of court, no bond to stay execution under this section was required.—*McCaillon v. Hibernia Sav. & L. Soc.*, 98 Cal. 442, 444, 33 Pac. 329.

40. Interlineation of date of entry of order denying new trial in undertaking on appeal, executed prior to such order, is such an alteration of contract as to discharge sureties.—*Clarke v. Mohr*, 125 Cal. 540, 542, 58 Pac. 176.

41. Joint undertaking.—Plaintiff and defendant who were defendants in cross-complaint filed by another defendant may unite in undertaking on appeal from order against them on such cross-complaint.—*Downing v. Rademacher*, 136 Cal. 673, 674, 69 Pac. 415.

42. Judgment upon bond—Stipulation regarding—Motion respecting unrelated matter.—In a case in which a bond executed under the provisions of the above section contains certain conditions therein named will not comply with within time therein specified, judgment may be entered in the action on motion of the plaintiff and respondent in the appeal, and without notice to the sureties against such sureties and each of them; a surety so consenting to the entry of judgment against him upon such specified conditions and within the specified time, can not delay the entry of such judgment by a mere motion based upon the ground that some unrelated facts have arisen which would make the entry of such judgment inequitable.—*Duerr v. Sloan*, — Cal. App. —, 195 Pac. 475.

43. Thus in a case in which a judgment had been secured against the defendant and such defendant filed notice of appeal from the judgment and also a cost and stay-bond under the provisions of the above section, and while the appeal was pending the defendant died and executors of her estate were duly appointed while such appeal was pending and such executors, by their request, were duly substituted in said appeal, the judgment being thereafter affirmed by the court of appeal and remittitur duly filed in the superior court and motion thereafter made for judgment upon the stay-bond on the appeal, such judgment can not be delayed by a motion based upon the sole ground that the judgment-plaintiff had failed to present a claim to

the executors of the estate of the deceased judgment-defendant.—*Duerr v. Sloan*, — Cal. App. —, 195 Pac. 475.

44. Liability of sureties.—The surety on an undertaking given on appeal to stay execution of a judgment for the return of certain personal property, or its value, and for the sum of four thousand six hundred and eighty-seven dollars and sixty-three cents with costs, is liable upon the affirmation of the judgment upon appeal, notwithstanding an amount in cash in excess of the total amount of the money-judgment was paid over by the appellant together with all the other remaining property described in the judgment which had not been sold by the appellant pending the appeal.—*Hammond v. United States Fidelity & Guaranty Co.*, 29 Cal. App. 464, 156 Pac. 1023.

45. An undertaking on appeal from a judgment for the return of personal property, or its value, and for a certain sum of money, is not void, because the amount is fixed by the parties, instead of by the court; the sureties are bound by the statements in their contract and can not question the truth of such recitals.—*Hammond v. United States Fidelity & Guaranty Co.*, 29 Cal. App. 464, 155 Pac. 1023.

46. When the party in whose favor the undertaking was executed had had the benefit of a stay of execution, the sureties could not be heard to say that the undertaking was void because all the forms of the statute, through their omission, were not complied with.—*Hammond v. United States Fidelity & Guaranty Co.*, 29 Cal. App. 464, 155 Pac. 1023.

47. New undertaking on appeal—Can not be required in absence of statute authorizing it where surety on appeal-bond has disposed of his property pending appeal.—*Macomber v. Conradt*, 4 Cal. Unrep. 723, 37 Pac. 382.

48. Obligor—in general.—Undertaking on appeal properly runs to plaintiffs, though one of them died before judgment, since while nominally it ran to plaintiff it really was to his executors, and in this case was by decree of distribution assigned to other plaintiff.—*Todhunter v. Klemmer*, 134 Cal. 60, 63, 66 Pac. 75.

49. Same—Omission of name of obligee in undertaking on appeal is immaterial. Proper construction of undertaking to pay all costs and damages which may be awarded against appellant renders sureties liable thereon to respondent.—*Downing v. Rademacher*, 136 Cal. 673, 674, 69 Pac. 415.

50. Obligation of sureties—To pay judgment in case of debtor's default is absolute and extends until judgment shall have been actually paid. Any performance by defendant that will discharge judgment against him will operate as discharge against them, but so long as plaintiff has right to enforce judgment against defendant, he is entitled

to enforce their obligation, and hence fact that plaintiff entered satisfaction of judgment by mistake will not prevent him from having such satisfaction set aside and judgment entered against sureties.—*Hitchcock v. Caruthers*, 100 Cal. 100, 103, 34 Pac. 627.

51. **Same—Affirmance as to one appellant.**—Sureties on joint appeal by two defendants are liable on their bond to stay execution on affirmance of judgment as to one of defendants, though judgment is reversed as to other, and hence judgment was properly rendered against them on bond.—*Wood v. Oxford*, 56 Cal. 157, 158.

52. **Same—Assignee of judgment can not recover on undertaking** given to stay proceedings where he is not also assignee of undertaking.—*Chilstrom v. Eppinger*, 127 Cal. 326, 78 Am. St. Rep. 46, 59 Pac. 696.

53. **Same—Constitutionality of provision authorizing judgment on motion against sureties**, where they have subscribed undertaking provided in this section, affirmed.—*Ladd v. Parnell*, 57 Cal. 232, 233; *Meredith v. Santa Clara M. Assoc.*, 60 Cal. 617, 619.

54. **Sureties on signing undertaking to stay execution under this section**, submitted themselves to jurisdiction of court, and waived any constitutional or statutory right to object to such jurisdiction or enforcement of such security.—*Meredith v. Santa Clara M. Assoc.*, 60 Cal. 617, 619.

55. **Same—Entry of judgment against sureties is not special proceeding**, but part of procedure in original action authorized by this section, and is in consequence of judgment rendered against appellant.—*Hawley v. Gray Bros. A. S. P. Co.*, 127 Cal. 560, 561, 60 Pac. 437.

56. **Stipulation by sureties that upon affirmance of judgment, appealed from, if appellant does not pay sum within sixty days after filing remittitur, judgment may be entered against them for amount of such judgment**, makes such sureties parties in original action and proceedings against them are all taken in that action.—*Hawley v. Gray Bros. A. S. P. Co.*, 127 Cal. 560, 561, 60 Pac. 437.

57. **Same—Judgment against one surety on bond executed for stay of execution under this section is not authorized**; course pointed out by this statute must be strictly followed, and hence judgment against one surety was erroneous, no reason appearing why other was not bound, except that he could not be found and served with notice.—*Hansen v. Martin*, 63 Cal. 282, 285.

58. **Same—Notice of motion for judgment against sureties on filing remittitur is not required** since sureties stipulated in undertaking that judgment may be entered without such.—*Meredith v. Santa Clara M. Assoc.*, 60 Cal. 617, 619; *Mowry v. Heney*, 3 Cal. Unrep. 277, 24 Pac. 301.

59. **Same—Same—Service of original notice and affidavit on application for judg-**

ment against sureties on undertaking on appeal on return of remittitur does not render judgment against such sureties invalid.—*Wood v. Oxford*, 56 Cal. 157, 158.

60. **Same—Reversal of judgment against sureties because prematurely entered** does not discharge them from their liability on undertaking, and hence subsequent judgment may be entered against them.—*Hawley v. Gray Bros. A. S. P. Co.*, 127 Cal. 560, 561, 60 Pac. 437.

61. **Same—When no bond under this section is required.**—Sureties on such bond are not liable thereunder, it being without consideration.—*McCaillon v. Hibernia Sav. & L. Soc.*, 98 Cal. 442, 443, 33 Pac. 329. See *Powers v. Crane*, 67 Cal. 65, 66.

62. **Judgment against sureties on bond executed under this section** should have been denied where bond required should have been executed under section 945, post.—*Central L. & M. Co. v. Center*, 107 Cal. 193, 196, 40 Pac. 334.

63. **Hence stay-bond is without consideration and no recovery can be had against sureties.**—*Estate of Kennedy*, 129 Cal. 384, 387, 62 Pac. 64.

64. **Where bond on appeal has no validity as statutory bond**, motion for judgment thereon should be denied, even if it can be shown to be supported by consideration and to be good as common-law bond.—*Central L. & M. Co. v. Center*, 107 Cal. 193, 196, 40 Pac. 334. See *Powers v. Chabot*, 93 Cal. 266, 28 Pac. 1070; *McCaillon v. Hibernia Sav. & L. Soc.*, 98 Cal. 442, 33 Pac. 329.

65. **Agreement by sureties in undertaking that judgment might be entered against them in case order recited in such undertaking should be affirmed**, can not render them liable, since bond rests on statute alone, and if bond is ineffectual as stay because made in case not provided by statute, consent of sureties to summary judgment against them is likewise ineffectual.—*Reay v. Butler*, 118 Cal. 113, 115, 50 Pac. 375.

66. **Several undertaking—In general.**—Undertaking on appeal given on part of one appellant is sufficient to sustain appeal on part of such appellant though other appellant joining in notice of appeal fails to join in such undertaking.—*Zane v. De Onativia*, 135 Cal. 440, 441, 67 Pac. 685.

67. **Signing by appellant—As to requirement of.**—Undertaking on appeal is an independent contract on part of sureties in which it is not necessary that appellant should unite—statute providing that it shall be executed on part of appellant; not by him but by sureties.—*Curtis v. Richards*, 9 Cal. 34, 39.

As to signature and acknowledgment of appeal bond, see note 51 Am. Dec. 723.

68. **Stay of execution—Amount of bond to secure.**—Under the provisions of the above section, on an appeal from a judg-

ment or order directing the payment of money, it is not necessary that the bond should cover the amount awarded as costs, in order to effectuate a stay of the proceedings pending the appeal, because the words "in double the amount named in the judgment," must be regarded as referring to the amount adjudged to be due the prevailing party upon the claim involved in the action and for which recovery is awarded, and not as including the incidental recovery on account of the costs of the action, awarded only upon claim made, and ascertainment of amount had subsequently to the giving of the judgment.—Whitaker v. Title Ins. & Trust Co., 179 Cal. 111, 175 Pac. 460.

As to stay of proceedings in lower court,
see, post, § 949 and note.

69. Sufficiency of undertaking. Undertaking on appeal by one defendant from order denying new trial which recites that sureties undertake on part of appellants that appellants will pay all costs and damages, is insufficient since standing on strict letters of their contracts sureties could not be liable for anything as costs and damages and could only be awarded against one appealing defendant. — *Zane v. De Onativia*, 135 Cal. 440, 442, 67 Pac. 685.

As to dismissal for insufficiency of undertaking, see, post, § 954, and note.

As to sufficiency of appeal-bond, signed under an agreement that others shall sign subsequently, see note 45 L. R. A. 333.

70. Same—"About to appeal."—Undertaking on appeal reciting that plaintiff is to appeal from certain order does not render undertaking defective since undertaking is necessary to render appeal effectual, and hence objection that language should have been "whereas plaintiff has appealed" can not be maintained. —*Kaltschmidt v. Weber*, 139 Cal. 76, 77, 72 Pac. 632.

71. Same—Date of judgment incorrectly stated in undertaking on appeal does not render it insufficient where judgment is otherwise correctly described so that sureties on undertaking would be bound by it.—Swasey v. Adair, 83 Cal. 136, 137, 23 Pac. 284.

72. Same—"Either of them."—Undertaking on appeal which stated that appellant would pay all costs awarded against him on appeal is sufficient undertaking on appeal from judgment and order denying new trial without use of words "or either of them."—*Martin v. De Ornelas*, 139 Cal. 41, 44. 72 Pac. 440.

73. Same—Must conform to notice of appeal and where notice of appeal is from whole judgment and undertaking reciting appeal from judgment for costs, appeal will be dismissed.—Stockton School Dist. v. Goodell, 6 Cal. Unrep. 277, 56 Pac. 885.

74. Same — Provision for payment of costs and damages on dismissal.—Under-

taking on appeal which does not contain agreement on part of sureties that appellant will pay costs and damages on dismissal of appeal, is fatally defective and appeal will be dismissed.—*Duncan v. Times-Mirror Co.*, 109 Cal. 602, 603, 42 Pac. 147; *Anderson v. Anderson*, 123 Cal. 445, 447, 56 Pac. 61; *Estate of Fay*, 126 Cal. 457, 458, 58 Pac. 936; *Jarman v. Rea*, 129 Cal. 157, 158, 61 Pac. 790.

75. Same — Same — Condition in undertaking to stay execution for payment of damages and costs on dismissal of appeal will not obviate failure of undertaking on appeal to contain such condition, though both undertakings are included in one instrument.—*Duncan v. Times-Mirror Co.*, 109 Cal. 602, 603, 42 Pac. 147.

76. Same—Specification of item of judgment.—Undertaking on appeal which is properly entitled in case, and states correctly date of rendition and entry of judgment, is sufficient to bind sureties, and specification of one item or incident of judgment can not invalidate undertaking. —*Wadleigh v. Phelps*, 147 Cal. 135, 81 Pac. 418, 420.

As to single undertaking on two or more appeals, see, ante, § 940, and note.

77. Sureties — As parties. — Sureties by entering into undertaking, though brought under jurisdiction of court, are not thereby made actors in the litigation or entitled to any part in its conduct, and party to whom they have given undertaking is not required to give them notice of steps in procedure to be taken against defendant, but they are bound equally with him by any order which may be made between real parties in action.—*Hitchcock v. Caruthers*, 100 Cal. 100, 103, 34 Pac. 627.

As to effect of giving stay-bond, see, post, § 946 and note.

As to liability of sureties on appeal-bonds, see note 38 Am. St. Rep. 702.

As to liability of sureties on defective undertakings, on appeal, see note 67 Am. St. Rep. 197.

78. Same—Attorney for appellant.—Dismissal of appeal will not be granted because one of attorneys for appellant became surety on undertaking on appeal in violation of rule of superior court.—*De Jarnatt v. Marquez*, 127 Cal. 558, 560, 78 Am. St. Rep. 90, 60 Pac. 45.

79. Same—Surety company.—Act of 1885, p. 114, providing that surety company alone may be sole and sufficient surety on undertaking on appeal, held unconstitutional as an attempt to amend this section by special act.—*Cramer v. Tittle*, 2 Cal. Unrep. 715, 11 Pac. 852.

80. Undertaking for stay of proceedings under judgment — Entirely distinct from bond for three hundred dollars to cover costs on appeal, and fact that it is found in same paper with latter does not change its character as separate and independent

undertaking.—*Corcoran v. Desmond*, 71 Cal. 100, 104, 11 Pac. 815.

As to stay of proceedings by undertaking filed in accordance with this section, see, post, § 949 and note.

As to the sufficiency of undertaking to stay execution, see § 942, this note.

81. Same.—Liability of sureties.—Costs.—In a case where a court enters a judgment against the sureties upon an undertaking given to stay the execution of a judgment pending an appeal, the trial court has no jurisdiction, in determining the amount of the judgment, to take into consideration costs which had been awarded to the appellant on two former appeals, where it is shown that proceedings to collect such former awards had been taken and were involved in another appeal not yet determined.—*Dean v. Hawes*, 32 Cal. App. 677, 163 Pac. 1038.

As to stay of proceedings in lower court, see, post, § 949 and note.

82. Waiver of insufficiency.—Stipulation that an undertaking in due form has been

properly made and filed, etc., made after time before another undertaking had expired, will estop respondent from claiming, after time for filing another undertaking has expired, that undertaking on appeal is insufficient.—*Estate of Marshall*, 118 Cal. 379, 380, 50 Pac. 540; *Springer v. Springer*, 126 Cal. 452, 453, 58 Pac. 1060.

83. Signing certificate to transcript which stated that undertaking in due form was filed within time allowed by law waives insufficiency of undertaking.—*Springer v. Springer*, 126 Cal. 452, 453, 58 Pac. 1060.

84. Joining in stipulation extending time within which to file points and authorities amounts to waiver of insufficiency of undertaking where time within which to appeal had not expired when such stipulation was made but not where time within which to appeal had expired.—*Gardiner v. California G. I. Co.*, 129 Cal. 528, 529, 62 Pac. 110.

As to necessity of undertaking, see, ante, § 940 and note.

As to time for filing undertaking, see, ante, § 940 and note.

§ 943. APPEAL FROM A JUDGMENT FOR DELIVERY OF DOCUMENTS. If the judgment or order appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment or order can not be stayed by appeal, unless the things required to be assigned or delivered be placed in the custody of such officer or receiver as the court may appoint, or unless an undertaking be entered into on the part of the appellant, with at least two sureties; and in such amount as the court, or a judge thereof, may direct, to the effect that the appellant will obey the order of the appellate court upon the appeal. If the judgment or order appealed from appoint a receiver, the execution of the judgment or order can not be stayed by appeal, unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that if such judgment or order be affirmed or the appeal dismissed, the appellant will pay all damages which the respondent may sustain by reason of such stay, not exceeding an amount to be fixed by the judge of the court by which the judgment was rendered or order made, which amount must be specified in the undertaking. If the judgment or order appealed from direct the sale of personal property upon the foreclosure of a mortgage thereon, the execution of the judgment or order can not be stayed on appeal, unless an undertaking be entered into on the part of the appellant, with at least two sureties, in such amount as the court, or the judge thereof, may direct, to the effect that the appellant will, on demand, deliver the mortgaged property to the proper officer if the judgment be affirmed, or in default of such delivery that the appellant and sureties will, on demand, pay to the proper officer the full value of such property at the date of the appeal.

History: Enacted March 11, 1872, re-enactment of § 350 Practice Act; amendment approved March 3, 1880. Code Amdts. 1880 (C. C. P. pt.), p. 6; March 3, 1897, Stats. and Amdts. 1897, p. 56.

JUDGMENT FOR DELIVERY OF DOCUMENTS.

- 1, 2. Construction of section—As to application.
3. Same—To apply only to appellants who are required to perform directions of judgment.
4. Same—To apply to cases where appellant has money or other property in his possession.
5. Same—Relates only to case where appeal has been taken.
6. Decree authorizing sale of pledged property.
7. Decree of partition.
8. Judgment deciding ownership or return in possession of court.
9. Judgment declaring liens to be enforced to be "plaintiff's mortgage and lien" and "intervener's mortgage and lien."
10. Judgment in replevin.
11. Judgment of foreclosure.
12. Judgment referred to in this section.
13. Money is not included within personal property.
14. Money which is a special fund.
15. Order appointing administrator.
16. Order directing insolvent to turn over to receiver goods, wares, and merchandise.
17. Order directing payment of money for family allowance.
18. Road-improvement bonds—Property in controversy—Mandamus.

See, ante, § 936 and note.

As to effect of bond to stay proceedings, see, post, § 946 and note.

As to protection of property in hands of receiver pending appeal, see note 11 L. R. A. 481.

1. Construction of section—As to application.—This section does not apply to a judgment for sale upon the foreclosure of a pledge.—Southern Pac. Co. v. Superior Court, 167 Cal. 250, 139 Pac. 69.

2. An order of the court requiring the sheriff to take into his possession and deliver to the petitioner certain personal property and documents is not stayed by the mere fact of perfecting an appeal under the alternative method without giving the stay-bond provided herein.—Bailey v. Superior Court, 31 Cal. App. 78, 159 Pac. 990.

3. Same—To apply only to appellants who are required to perform directions of judgment or order appealed from.—Born v. Horstmann, 80 Cal. 452, 453, 5 L. R. A. 577, 22 Pac. 169, 338; Pennie v. Superior Court, 89 Cal. 31, 32, 26 Pac. 617; Estate of Woods, 94 Cal. 566, 567, 29 Pac. 1108.

4. Same—To apply to cases where appellant has money or other property in his possession which has been adjudged by lower court to belong to respondent, or

where appellant has been directed to do some act for benefit of respondent, and where it would be unjust to allow appellant to retain possession of property without securing respondent by bond.—Rohrbacher v. Superior Court, 144 Cal. 631, 633, 78 Pac. 22.

5. Same—Relates only to case where appeal has been taken and has only to do with matter of staying execution after appeal, and hence where in petition for mandate to compel fixing of amount of stay-bond there is no affirmation that appeal had been taken from order appointing receiver, but merely that petitioner was desirous of appealing from such order, writ will not issue.—De Leonis v. York, 140 Cal. 333, 334, 73 Pac. 1058.

6. Decree authorizing sale of pledged property on foreclosure of pledge is not within this section, since pledged property was in possession of plaintiff, and no delivery was required.—Rohrbacher v. Superior Court, 144 Cal. 631, 632, 633, 78 Pac. 22.

7. Decree of partition is not stayed by bond under this section.—Born v. Horstmann, 80 Cal. 452, 453, 5 L. R. A. 577, 22 Pac. 169, 338.

8. Judgment deciding ownership of fund in possession of court does not require stay-bond as provided by this section.—McCallion v. Hibernia Sav. & L. Soc., 98 Cal. 442, 445, 33 Pac. 329.

9. Judgment declaring liens to be enforced to be "plaintiff's mortgage and lien" and "intervener's mortgage and lien," and that "such mortgages and liens are ones described in complaint," is within this section and judgment can not be stayed without stay-bond; three-hundred-dollar bond does not warrant supersedeas.—Tolle v. Heydenfeldt, 138 Cal. 56, 57, 70 Pac. 1013.

10. Judgment in replevin requires stay-bond on appeal, though redelivery bond had been given in such action, and hence supersedeas will not be issued where no such bond was given as is required by this section.—Swasey v. Adair, 88 Cal. 203, 206, 26 Pac. 83.

11. Judgment of foreclosure for certain sum directing sale of steamship, apparel, and furniture, and out of proceeds payment of judgment to plaintiff, is not judgment directing assignment or delivery of document or personal property, or judgment directing sale of personal property on foreclosure of mortgage.—Olsen v. Birch, 1 Cal. App. 99, 81 Pac. 656, 657.

12. Judgment referred to in this section is decree passing on matter directly involved in litigation. In all other cases proceedings are held in abeyance by virtue of statute itself.—McCallion v. Hibernia Sav. & L. Soc., 98 Cal. 442, 445, 33 Pac. 329.

13. Money is not included within personal property spoken of under this section, and hence it does not apply to appeal taken

by legatee from decree of distribution, though decree distributes certain moneys.—*In re Schedel*, 69 Cal. 241, 243, 10 Pac. 334.

14. Money which is a special fund, capable of identification, answers to term of personal property as given in this section.—*McCallion v. Hibernia Sav. & L. Soc.*, 98 Cal. 442, 445, 33 Pac. 329. Distinguishing: *Estate of Schedel*, 69 Cal. 241, 10 Pac. 334.

15. Order appointing administrator is stayed by undertaking under section 941, ante.—*Estate of Woods*, 94 Cal. 566, 567, 29 Pac. 1108.

16. Order directing insolvent to turn over to receiver goods, wares, and merchandise or its avails must be stayed by compliance with this section, and hence undertakings for costs on appeal will not stay such order.—*Ex parte Clancy*, 90 Cal. 553, 555, 27 Pac. 411.

17. Order directing payment of money for family allowance is not stayed under

this section.—*Pennie v. Superior Court*, 89 Cal. 31, 32, 33, 26 Pac. 617.

18. Road-improvement bonds—Property in controversy—Mandamus.—In a proceedings in mandamus to compel a county treasurer to deliver to the petitioner certain road-improvement bonds which he claimed to be his property, and a judgment awarding a part of the bonds to certain interveners, and thereafter, pursuant to an order of the court, all of the bonds were delivered by the treasurer to the county clerk to hold until the final determination of the action on an appeal from the judgment, it was held that a writ of mandate will not lie to compel the court to make an order commanding the county clerk to deliver to the petitioner the portion of the bonds not included in those claimed by the interveners, under the provisions of the above section.—*Oswald v. Sloane*, 39 Cal. App. 192, 178 Pac. 312.

§ 944. APPEAL FROM A JUDGMENT DIRECTING THE EXECUTION OF A CONVEYANCE, ETC. If the judgment or order appealed from, direct the execution of a conveyance or other instrument, the execution of the judgment or order can not be stayed by the appeal until the instrument is executed and deposited with the clerk with whom the judgment or order is entered, to abide the judgment of the appellate court.

History: Enacted March 11, 1872, re-enactment of § 351 Practice Act.

EXECUTION OF CONVEYANCE DIRECTED.

1. Construction of section—As to application.
2. Instrument nullity upon reversal.
3. Judgment referred to in this section.

See, ante, § 936 and note.

1. Construction of section—As to application.—Construed to apply to appellants who are required to perform directions of judgment or order appealed from.—*Estate of Schedel*, 69 Cal. 241, 243, 10 Pac. 334; *Born v. Horstmann*, 80 Cal. 452, 453, 5 L. R. A. 577, 22 Pac. 169, 338; *Pennie v. Superior Court*, 89 Cal. 31, 32, 26 Pac. 617;

Estate of Woods, 94 Cal. 566, 567, 29 Pac. 1108.

2. Instrument nullity upon reversal.—Where the defendant in an action to enforce a trust gives a deed to stay execution of the judgment rendered against him and deposits it with the clerk of the court pursuant to above section, the deed becomes a nullity in the hands of the clerk upon the reversal of the judgment.—*United States Oil & Land Co. v. Bell*, 219 Fed. 785.

3. Judgment referred to in this section is decree passing on matter directly involved in litigation. In all other cases proceedings are held in abeyance by virtue of statute itself.—*McCallion v. Hibernia Sav. & L. Soc.* 98 Cal. 442, 445, 33 Pac. 329.

§ 945. UNDERTAKING ON APPEAL CONCERNING REAL PROPERTY. If the judgment or order appealed from, direct the sale or delivery of possession of real property, the execution of the same can not be stayed, unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed, or the appeal dismissed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment or order, not exceeding the sum to be fixed by the judge of the court by which the judgment was rendered or order made, and which must be specified in the under-

taking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency.

History: Enacted March 11, 1872, re-enactment of § 352 Practice Act.

JUDGMENT CONCERNING REAL PROPERTY—UNDERTAKING ON APPEAL.

1. Construction of section—Applies to appellants required to perform.
2. Same—Controls where judgment directs sale of real property.
- 3, 4. Same—Undertaking provided for in above section applies only.
5. Decree of foreclosure directing sale.
6. Same—Appeal from decree—Does not stay proceedings.
- 7, 8. Same—Writ of assistance may issue.
9. Same—Same—Requisites to obtain writ.
10. Same—Same—Same—Affidavit.
- 11-14. Effect of and liability on.
15. Fraudulent conveyance—Judgment directing delivery of real property—Stay of execution—Abstract question.
16. Judgment directing sale of real property—To pay money-judgment in action by vendee against his vendor.
17. Same—Supersedeas—Absence of bond.
18. Judgment directing the sale of a steamship.
- 19, 20. Same—Section applicable to judgment which directs payment by defendant of specific amount of money.
- 21, 22. Judgment foreclosing mechanics' lien—Is not properly stayed by undertaking.
23. Judgment in unlawful detainer.
24. Order requiring plaintiff, in condemnation proceedings, to pay compensation.
25. Stay of proceedings—Affidavits on application for.
26. Same—Where judgment has been executed before application for stay.
27. Undertaking—As to provision for, generally.
- 28, 29. Same—Authority to fix the amount of bond.
30. Same—Duty of court to fix amount of undertaking.
31. Same—Execution of judgment by issuance of writ of possession.
32. Same—On application for mandamus to compel court to fix amount.
33. Same—Order fixing amount may be made ex parte.
34. Same—Order fixing amount need not name separately amounts for waste, occupation, and deficiency.
35. Same—Sufficiency of—Erroneous description of property.
36. Same—Same—Some of sureties on stay-bond on it twice for different sums.
- 37, 38. Same—Sureties, liability on.
39. Same—Same—Partial affirmance of judgment.
40. Undertaking on appeal from decree foreclosing mortgage.
41. Undertaking for payment of deficiency.
- 42-44. Same—Appellant, though not mortgageor, must execute.
45. Same—Same—A contrary impression.
46. Same—Judgment directing defendant to pay certain notes and in default thereof directing sale of certain property.
47. Same—Judgment declaring lien of mortgage subordinate to mechanics' lien.
48. Same—Judgment in partnership accounting.
49. Same—Undertaking against commission of waste.
- 50, 51. Same—Same—Judge of court fixes amount of undertaking.
52. Same—Waiver of provision for payment of deficiency.
53. Undertaking on appeal—From decree and order of sale to satisfy lien other than mortgage-lien.
54. Same—Same—Any further provision in such an undertaking.
55. Undertaking for costs only.
56. Undertaking for use and occupation.
57. Same—Where such appellant dies pending appeal.
58. Undertaking on appeal—From judgment directing delivery of possession of real property.
- 59, 60. Same—Same—Where mortgagee obtained a judgment foreclosing a mortgage against a mortgageor in possession.
61. Same—Provision applies to judgment for possession.
62. Undertaking on appeal—From judgment directing sale of real property merely.

See, ante, § 936 and note.

1. Construction of section—Applies to appellants required to perform conditions of judgment or order appealed from.—Estate of Schedel, 69 Cal. 241, 243, 10 Pac. 334; Born v. Horstmann, 80 Cal. 452, 453, 5 L. R. A. 577, 22 Pac. 169, 338; Pennie v. Superior Court, 89 Cal. 31, 32, 33, 26 Pac. 617; Estate of Woods, 94 Cal. 566, 567, 29 Pac. 1108; Foster v. Superior Court, 115 Cal. 279, 282, 47 Pac. 53.

2. Same—Controls where judgment directs sale of real property and defendant is liable only in case of deficiency in proceeds of such sale, and hence controls where judgment directing defendant to pay certain sum within certain time, or in default thereof certain real estate should be sold by commissioner, and out of proceeds such sum should be paid, and if proceeds were insufficient, deficiency judgment should be docketed against defendant, and execution issued therefor.—*Kreling v. Kreling*, 116 Cal. 458, 61, 48 Pac. 383.

3. Same—Undertaking provided for in above section applies only to appellant who is in possession, but word "possession" must be held to apply to any person who is actually residing on premises and to include persons in subordination to whom property is held, and they can not procure stay of proceedings without required undertaking on ground that another is in actual possession of property if such other holds in subordination to them.—*McMillan v. Hayward*, 84 Cal. 85, 87, 24 Pac. 151.

4. Compare: *Root v. Bryant*, 54 Cal. 82, where it seems to have been in effect held that the undertaking required applies only to persons in possession and that a party out of possession is not required to give an undertaking.

5. Decree of foreclosure directing sale of mortgaged premises, and payment of deficiency arising on sale, must be stayed by bond as provided in this section.—*Boob v. Hall*, 105 Cal. 413, 415, 38 Pac. 977.

As to undertaking on appeal from decree foreclosing mortgage, see par. 40, this note.

6. Same—Appeal from decree—Does not stay proceedings.—In a case in which a deed of trust is by stipulation converted into and foreclosed as a mortgage, an appeal taken by the trustor from the decree of foreclosure, he being in the possession of the property, does not stay proceedings unless a written undertaking is executed and filed as provided in the above section.—*Clemens v. Gregg*, 34 Cal. App. 245, 167 Pac. 294, following the doctrine in *Bank of Woodland v. Stephens*, 137 Cal. 458, 70 Pac. 293.

7. Same—Writ of assistance may issue to recover possession of land sold at foreclosure sale unless stay-bond has been executed, as required by this section, and hence judgment-roll is admissible in evidence at hearing of such writ, though appeal has been taken from judgment.—*California M. & Sav. Bank v. Graves*, 129 Cal. 649, 650, 62 Pac. 259. See *Montgomery v. Tutt*, 11 Cal. 190.

8. Distinguishing: *Murray v. Green*, 64 Cal. 363, 28 Pac. 118; *Naftzger v. Gregg*, 99 Cal. 83, 37 Am. St. Rep. 23, 33 Pac. 757; *In re Blythe*, 99 Cal. 472, 34 Pac. 108.

9. Same—Same—Requisites to obtain writ, as against the parties and those claiming with notice under them after the commencement of the action, is to furnish to the

court proper evidence of a presentation of a deed to them, and a demand of possession, and their refusal to surrender it.—*Montgomery v. Middlemiss*, 21 Cal. 103, 81 Am. Dec. 146; *California M. & S. Bank v. Graves*, 129 Cal. 649, 651, 62 Pac. 259.

10. Same—Same—Same—Affidavit.—"Such evidence, we think, could properly be furnished to the court by affidavit."—*California M. & S. Bank v. Graves*, 129 Cal. 649, 651, 62 Pac. 259.

11. Effect of and liability on.—The undertaking given under above section operates as a permanent stay of execution pending the appeal.—*Jameson v. Chanslor-Canfield Midway Oil Co.*, 173 Cal. 612, 160 Pac. 1066.

12. Where an undertaking has been given pursuant to this section to stay execution pending appeal the supreme court has no inherent or statutory power to require further security as a condition to the maintenance of the stay of execution of the judgment.—*Jameson v. Chanslor-Canfield Midway Oil Co.*, 173 Cal. 612, 160 Pac. 1066.

13. Where an appeal is taken by one person, and the undertaking thereon purports on its face to be given on an appeal taken by several persons, such undertaking is insufficient to support the appeal, and no recovery can be had against the sureties.—*Fry v. Astorg*, 29 Cal. App. 740, 156 Pac. 873.

14. No liability is incurred by the surety on an undertaking on appeal taken by one of several defendants, where the undertaking recites on its face that it was given as security on an appeal taken by all the defendants in the action.—*Fry v. Astorg*, 29 Cal. App. 740, 156 Pac. 873.

15. Fraudulent conveyance—Judgment directing delivery of real property—Stay of execution—Abstract question.—In an action to set aside a conveyance as fraudulent in respect to existing creditors and judgment for plaintiff directing delivery of the real property, from which an appeal has been taken, an order of the trial court staying an execution, and an appeal from such order upon the ground that the form of the order is insufficient under the requirements of the above section, after the appeal from the judgment has been affirmed such appeal from the order presents merely an abstract question and will not be considered by the court.—*Adams v. Prather*, 176 Cal. 164, 167 Pac. 867.

16. Judgment directing sale of real property—To pay money-judgment in action by vendee against his vendor, would be governed by this section were it not that defendant was not in possession and therefore no bond for damages by waste was required. It not being mortgage foreclosure no undertaking for payment of deficiency was required, and hence it was governed by section 949, post.—*Owen v. Pomona L. & W. Co.*, 124 Cal. 331, 334, 57 Pac. 71.

17. Same — Supersedeas — Absence of bond.—An application for a writ of supersedeas pending in appeal, in a case in which the judgment adjudged a vendor's lien and directed sale in satisfaction thereof, will be denied where the trial judge refused to fix the amount of the stay-bond to cover waste alone, as claimed to be sufficient by the appellant, but insisted on including therewith an amount covering the value of the use and occupation of the premises, for the reason that the supreme court has no jurisdiction to fix the amount for which the bond shall be given, and there can be no supersedeas in the absence of a bond the amount of which is fixed in the manner prescribed in the above section.—*Hinkel v. Crowson*, 182 Cal. 68, 186 Pac. 1042.

18. Judgment directing the sale of a steamship, apparel, and furniture and payment of judgment out of proceeds does not come within this section, as to stay of judgment directing payment of money.—*Olsen v. Birch*, 1 Cal. App. 99, 81 Pac. 656, 657. See *Central L. & M. Co. v. Center*, 107 Cal. 193, 40 Pac. 334; *Owen v. Pomona Land Co.*, 124 Cal. 331, 57 Pac. 71.

19. Same — Section applicable to judgment which directs payment by defendant of specific amount of money, and which can be directly enforced by a writ of execution, but has no application to a judgment which may be satisfied in either of two or more modes, or which can not be enforced against the defendant until after plaintiff has exhausted another remedy, and when he is liable only for deficiency in the proceeds of certain property which is primarily chargeable therefor.—*Kreling v. Kreling*, 116 Cal. 460, 48 Pac. 383.

20. Followed in *Olsen v. Birch*, 1 Cal. App. 99, 81 Pac. 656, 657.

21. Judgment foreclosing mechanics' lien—Is not properly stayed by undertaking as required by this section; it is governed by section 949, post.—*Central L. & M. Co. v. Center*, 107 Cal. 193, 198, 40 Pac. 434. See *Corcoran v. Desmond*, 71 Cal. 100, 102, 11 Pac. 815.

22. Judgment directing sale of premises in foreclosure of mechanics' lien, with directions to pay lien in full and out of surplus pay subordinate lien on property, does not come within this section, and hence undertaking on appeal for damages and costs stays proceedings.—*Root v. Bryant*, 54 Cal. 182, 184. See *Central L. & M. Co. v. Center*, 107 Cal. 193, 198, 40 Pac. 334.

23. Judgment in unlawful detainer which directs delivery of possession of real property can not be stayed unless stay-bond is given as provided by this section, and hence appeal from order after final judgment vacating order for satisfaction of judgment does not warrant supersedeas.—*Bateman v. Superior Court*, 139 Cal. 141, 143, 72 Pac. 922.

24. Order requiring plaintiff, in condemnation proceedings, to pay compensation in case where it had entered into possession of premises may be stayed under this section.—*Neale v. Superior Court*, 77 Cal. 28, 29, 18 Pac. 790.

25. Stay of proceedings—Affidavits on application for stay must, in mortgage foreclosure, on ground that appellants were not in possession, go further than merely state such fact; they must show that some one else is in possession adverse to them.—*McMillan v. Hayward*, 84 Cal. '85, 88, 24 Pac. 151.

26. Same—Where judgment has been executed before application for stay of proceedings by supersedeas, motion will be denied.—*Hoppe v. Hoppe*, 99 Cal. 536, 538, 34 Pac. 222.

27. Undertaking—As to provision for, generally.—The present section of the code, like the section of the Practice Act, is double, providing for two distinct undertakings upon two kinds of judgments; namely, one directing sale of real property, and the other directing delivery of possession of real property.—*Englund v. Lewis*, 25 Cal. 337, 354.

28. Same—Authority to fix the amount of bond in all three matters mentioned in section, viz., waste use and occupation and deficiency, is given trial judge by this section, and hence undertaking in sum fixed by judge, is sufficient to stay all proceedings.—*Boob v. Hall*, 105 Cal. 413, 415, 38 Pac. 977.

29. Provision requiring judge to fix amount of undertaking against waste is distinct from clause requiring that undertaking must also provide for payment of deficiency, and authority of judge to fix penalty of undertaking is limited to object named in clause in which it is granted.—*Gutzeit v. Pennie*, 97 Cal. 484, 488, 32 Pac. 584.

30. Same—Duty of court to fix amount of undertaking to stay operation of writ of possession pending appeal from order denying motion to vacate order modifying order for such writ of possession arises from right to appeal therefrom.—*Green v. Hebbard*, 95 Cal. 39, 41, 30 Pac. 202.

31. Same—Execution of judgment by issuance of writ of possession and delivery of possession to respondent can not be considered by court on application to fix amount of undertaking for commission of waste on appeal from judgment directing delivery of possession.—*Gutierrez v. Hebbard*, 104 Cal. 103, 104, 105, 37 Pac. 749.

32. Same—On application for mandamus to compel court to fix amount of undertaking necessary to stay operation of writ of possession under this section, whether court was right or wrong in its ruling on motion to vacate or modify order for issuance of writ of possession will not be considered.—*Green v. Hebbard*, 95 Cal. 38, 41, 30 Pac. 202.

33. Same—Order fixing amount may be made ex parte without notice, though safer practice would be to give respondent opportunity to be heard.—*Hubbard v. University Bank*, 120 Cal. 632, 633, 52 Pac. 1070.

34. Same—Order fixing amount need not name separately amounts for waste, occupation, and deficiency.—It is sufficient to name whole amount which would be necessary to meet requirements, although undertaking itself must contain covenants for each of matters covered by this section.—*Wheeler v. Karnes*, 130 Cal. 618, 620, 63 Pac. 62.

35. Same—Sufficiency of—Erroneous description of property.—Sureties on undertaking against commission of waste in foreclosure proceedings are not liable for waste where property was erroneously described in such undertaking, though it followed complaint and judgment.—*Ogden v. Davis*, 116 Cal. 32, 36, 47 Pac. 72.

36. Same—Same—Some of sureties on stay-bond on it twice for different sums does not vitiate it.—*Wheeler v. Karnes*, 130 Cal. 618, 620, 63 Pac. 62.

37. Same—Sureties, liability on.—Bond for stay of execution which names penal sum of two thousand dollars and recites that this sum is amount fixed by judge, binds sureties equally with principal, and it need not be proved on trial that penal amount of bond to cover deficiency was fixed by order of court.—*Ogden v. Davis*, 116 Cal. 32, 37, 47 Pac. 72.

38. Undertaking in sum of two thousand dollars whereby sureties promise that during possession of property appellant would not commit or suffer any waste and that if judgment was affirmed or appeal dismissed they would pay amount of any deficiency upon sale binds sureties to pay such sum to make good deficiency, and fact that plaintiff, in his action on bond, asked judgment for greater deficiency than amount of such bond does not deprive him of right to recover such amount.—*Ogden v. Davis*, 116 Cal. 32, 37, 47 Pac. 72.

39. Same—Same—Partial affirmance of judgment does not constitute breach of bond given under this section, which provided that if judgment be affirmed or appeal dismissed sureties will pay value of use and occupation of property from time of appeal to delivery of possession.—*Heinlen v. Beans*, 71 Cal. 295, 298, 12 Pac. 167.

40. Undertaking on appeal from decree foreclosing mortgage and ordering sale of mortgaged premises, only stays sale and secures costs; where there is a judgment in personam against the defendant in addition to the decree of foreclosure and order of sale, the lien of the personal judgment on the property of the judgment-debtor, in the county where the judgment is docketed, attaches at the time such judgment is docketed, and expires at the end of two years

from the date of such docketing.—*Englund v. Lewis*, 25 Cal. 337.

See, also, para. 5-10, this note.

41. Undertaking for payment of deficiency on appeal from judgment where sale of real property is directed for purpose of satisfying any lien other than mortgage lien is not required.—*Englund v. Lewis*, 25 Cal. 337, 354; *Pacific Mut. L. Ins. Co. v. Fisher* (Cal. Oct. 26, 1893), 35 Pac. 77; *Kreling v. Kreling*, 116 Cal. 458, 461, 48 Pac. 383.

42. Same—Appellant, though not mortgageor, must execute undertaking to pay deficiency in action for foreclosure of mortgage, though he may not be in possession.—*Spence v. Scott*, 95 Cal. 152, 153, 30 Pac. 202.

43. Bond to stay execution pending appeal from judgment foreclosing mortgage must provide for payment of any deficiency.—*Gutzeit v. Pennie*, 97 Cal. 484, 486, 487, 488, 32 Pac. 584.

44. Appellant in action to foreclose mortgage must furnish bond to pay deficiency judgment, whether such appellant is mortgageor or party who claims mortgaged premises and desires to prevent sale and enjoy property during pendency of appeal.—*Johnson v. King*, 91 Cal. 307, 309, 27 Pac. 644.

45. Same—Same—A contrary impression which seems to have heretofore prevailed among the profession is erroneous.—*Johnson v. King*, 91 Cal. 307, 309, 27 Pac. 644.

46. Same—Judgment directing defendant to pay certain notes and in default thereof directing sale of certain property, proceeds to be applied to payment of notes, and judgment against defendant for any deficiency does not require undertaking for payment of the deficiency.—*Kreling v. Kreling*, 116 Cal. 458, 461, 48 Pac. 383.

47. Same—Judgment declaring lien of mortgage subordinate to mechanics' lien requires no undertaking except that for costs; provisions as to waste and deficiency, if introduced into the undertaking, will be utterly void.—*Pacific Mut. L. Ins. Co. v. Fisher* (Cal. Oct. 26, 1893), 35 Pac. 77, following *Painter v. Painter*, 98 Cal. 625, 626, 33 Pac. 483.

See para. 53, 54, this note.

48. Same—Judgment in partnership accounting, directing sale of real property of partnership for satisfaction of lien of one partner against another, does not require undertaking to pay deficiency in order to stay its execution, since such lien was not created by mortgage, and it is only in such case that an undertaking to pay deficiency is required.—*Painter v. Painter*, 98 Cal. 625, 626, 33 Pac. 483. See *Englund v. Lewis*, 25 Cal. 337, 354.

49. Same—Undertaking against commission of waste as provision in undertaking to stay execution, stating that it is given in compliance with this section, does not extend its effect beyond condition for which

it was executed, and hence undertaking to indemnify against commission of waste will not obviate necessity of provision for payment of deficiency remaining after appropriating to discharge of mortgage-lien the amount realized on the sale.—*Gutzeit v. Pennie*, 97 Cal. 484, 488, 32 Pac. 584.

50. Same—Same—Judge of court fixes amount of undertaking on appeal in all three matters mentioned in above section, namely, (1) waste, (2) use and occupation, and (3) deficiency.—*Boob v. Hall*, 105 Cal. 413, 416, 38 Pac. 977, *Harrison, J.*, dissenting on the point as to the right of judge to fix amount of bond as to deficiency.

51. The amount of the undertaking against waste is fixed by the judge, and the amount of the undertaking to secure payment of deficiency, must be such as to secure payment of the entire deficiency, whatever that amount of such deficiency may prove to be.—*Gutzeit v. Pennie*, 97 Cal. 484, 488, 32 Pac. 584.

52. Same—Waiver of provision for payment of deficiency.—Failure to object to sufficiency of undertaking to stay execution on appeal from mortgage foreclosure because of its failure to provide for payment of any deficiency, does not waive right of respondent to enforcement of judgment foreclosing mortgage because of such failure.—*Gutzeit v. Pennie*, 97 Cal. 484, 489, 32 Pac. 584.

53. Undertaking on appeal—From decree and order of sale to satisfy lien other than mortgage-lien need not provide for payment of any deficiency which the judgment may direct. "To this extent the statute discriminates in favor of mortgage and against other liens."—*Englund v. Lewis*, 25 Cal. 337, 354.

54. Same—Same—Any further provision in such an undertaking, not being required by law, will be utterly void.—*Englund v. Lewis*, 25 Cal. 337, 354.

55. Undertaking for costs only, without provision against commission of waste, is insufficient to stay proceedings under judgment directing receiver to sell mortgaged premises.—*Hoppe v. Hoppe*, 99 Cal. 536, 537, 34 Pac. 222.

56. Undertaking for use and occupation of property from time of appeal until delivery of possession thereof, operated by virtue of statute to give appellant lease of land during that period in consideration of obligations contained in undertaking, and when third person obtained title to such property he took it subject to this outstanding lease, and hence judgment in action by such subsequent owner, that he unlawfully entered into possession of said land, etc., is unsupported by evidence.—*Shepperd v. Tyler*, 92 Cal. 552, 554, 28 Pac. 601.

57. Same—Where such appellant dies pending appeal, and his administrator collects the rent during the period decedent

was entitled to receive it, under the law, in pursuance of such undertaking, and the appeal is denied or judgment rendered against appellant, the remedy must be sought from the estate of decedent in the ordinary mode of prosecuting claims against such estate, or from the sureties on the undertaking; the administrator incurs no personal liability by collecting such rent under such circumstances.—*Shepperd v. Tyler*, 92 Cal. 552, 554, 28 Pac. 601.

58. Undertaking on appeal—From judgment directing delivery of possession of real property must provide against waste, and for payment of value of use and occupation and for these two items only no security for deficiency is required as there can be no deficiency in such case.—*Englund v. Lewis*, 25 Cal. 337, 354; *Whitney v. Allen*, 21 Cal. 233.

59. Same—Same—Where mortgagee obtained a judgment foreclosing a mortgage against a mortgageor in possession, from which the mortgageor appealed, and to perfect the appeal and stay proceedings gave an undertaking with sureties, conditioned, among other things, that if the judgment should be affirmed, the mortgageor would pay the plaintiff the value of the use and occupation of the premises pending the hearing and determination of the appeal. The judgment having been affirmed, and no sale of the property having been made, an action was brought against the sureties to recover the value of the use and occupation between the date of the undertaking and the affirmance of the judgment. The court held that the undertaking, in reference to use and occupation, was not required by the statute, and the sureties were, therefore, not liable.—*Whitney v. Allen*, 21 Cal. 233, 236.

60. The court say: "The judgment was simply a judgment of foreclosure, giving no right to the possession of the property, or to the rents and profits, or to the value of the use and occupation. The right to possession was contingent upon a sale and the execution of a deed; but the act, [section 352 Practice Act, of which the above section of this code is a re-enactment] provides that a purchaser from the time of the sale, etc., shall be entitled to the rents, or the value of the use and occupation. Until a sale has been made, the debtor may remain in possession without being accountable either for rents or for use and occupation, and subject to no liability except that he may be restrained from the commission of waste. The legislature could not have intended that in case of an appeal the liability of the debtor should be increased, and it would be unreasonable to suppose that the intention was to require an undertaking subjecting the sureties to a liability greater than that of the principal. Our opinion is that the provision in regard to use and occupation must be understood as referring to those cases in

which the creditor is entitled to the value of the use, and that an undertaking to pay what the creditor has no legal right to is not binding upon the sureties."—*Whitney v. Allen*, 21 Cal. 233, 236.

61. Same—Provision applies to judgment for possession.—"The above section includes orders as well as judgments, and the provision in question [as to undertaking for rents and profits, or use and occupation] applies more particularly to judgments and orders directing a delivery of possession."—*Whitney v. Allen*, 21 Cal. 233, 237.

62. Undertaking on appeal—From judgment directing sale of real property merely needs only provide security against waste, unless such sale is of mortgaged premises and judgment provides for deficiency, in which case undertaking must provide for payment of such deficiency, but no provision need be inserted for payment of value of use and occupation of premises pending appeal, for the obvious reason that the judgment creditor does not become entitled to value of the use and occupation until after the sale has been made.—*Englund v. Lewis*, 25 Cal. 337, 354.

§ 946. RELEASE OF PROPERTY UNDER LEVY, ON APPEAL. Whenever an appeal is perfected, as provided in the preceding sections of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein, and releases from levy property which has been levied upon under execution issued upon such judgment;

[**Exception to sufficiency of sureties.**] provided, however, said property shall not be released from the levy, if the respondent excepts to the sufficiency of the sureties within five days after the giving of the undertaking staying execution until such sureties, or others, justify in the manner prescribed by law; but the court below may proceed upon any other matter embraced in the action and not affected by the order appealed from. And the court below may in its discretion, dispense with or limit the security required by this chapter, when the appellant is an executor, administrator, trustee, or other person acting in another's right.

[**Attachment not continued.**] An appeal does not continue in force an attachment, unless an undertaking be executed and filed on the part of the appellant by at least two sureties, in double the amount of the debt claimed by him, that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the court below be sustained; and unless, within five days after the entry of the order appealed from, such appeal be perfected.

History: Original section relating to stay of proceedings on appeal, enacted March 11, 1872, founded upon § 353 Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 337; May 19, 1913, Stats. and Amdts. 1913, p. 216. In effect August 10, 1913.

RELEASE OF REAL PROPERTY UNDER LEVY—ON APPEAL.

- 1-6. Amendment or modification — Of judgment or order appealed from.
7. Appeal in claim and delivery—Supersedes bond.
8. Approval of undertaking on appeal.
9. Attachment — As to bond given sheriff to prevent levy of—Not destroyed or affected by giving of stay-bond.
10. Same—Appeal—Failure to give bond to continue attachment.
11. Attachment-lien—As to necessity of bond to preserve on appeal.

12. Same—As to attachment-lien being preserved by filing bond on appeal.
13. Bill of exceptions—Prepared and settled as basis of motion.
14. Same—Settlement and filing.
15. Certification of transcript—Order forbidding.
- 16, 17. Construction of section—As to purpose.
- 18, 19. Same—Construed to stay proceedings on judgment without reference to insufficiency of sureties.
20. Same—Same—As to appeal by plaintiff in attachment.
21. Same—Same—When appeal affected.

22. Corporate charter—Judgment declaring forfeiture.
- 23, 24. Divorce—Alimony pendente lite.
- 25, 26. Same—Modification of decree.
27. Discharge of bond for stay.
28. Effect of appeal—Is to remove subject-matter of adjudication from jurisdiction of court.
29. Same—Statutory.
30. Same—When stay of proceedings.
- 31-34. Same—Same—Act of parties in proceeding in accordance with judgment.
- 35, 36. Eminent domain—Appeal by defendant.
- 37, 38. Execution of judgment—As to generally.
39. Same—Lien acquired by levy.
40. Same—Levy released.
41. Family allowance—Order to pay.
42. Foreclosure—sale after appeal.
43. Increase of amount of bond—In general.
44. Same—Failure of appellant to comply with order.
- 45, 46. Injunction—Appeal from judgment awarding.
47. Same—Dissolution is not affected by appeal.
48. Same—Issuance of injunction.
49. Same—Mandatory injunction.
50. Same—Motion to vacate injunction.
51. Same—Refusal to dissolve temporary injunction.
52. Same—Restrictive injunction.
53. Same—Trade-name.
54. Same—Violation of.
55. Insolvency—Appeal in insolvency proceedings.
56. Same—Functions of receiver.
57. Same—Modification of order.
58. Judgment and order denying new trial—Joint appeal.
59. Money deposited with treasurer—No undertaking required.
- 60-62. New trial—Action on motion for new trial is not suspended by appeal from judgment.
63. Same—Appeal from judgment.
- 64-66. Same—Stay of proceedings on judgment.
67. Nonappealable order.
68. Order dispensing with undertaking.
- 69, 70. Same—Administrator on appeal.
71. Same—Auditor of county.
72. Same—Board of education.
73. Same—City treasurer of City, etc., of San Francisco.
74. Same—Judgment need not have been rendered against appellant in his representative capacity.
75. Same—Must be made within time allowed for filing bond.
76. Order made after judgment.
77. Partial distribution.
78. Passage of ordinance in accordance with judgment.
79. Payment of money into court—Order directing.
- 80, 81. Premature appeal.
82. Same—Affirmance of judgment on.
83. Receiver—Appointment after judgment.
84. Same—Authority after stay.
85. Same—Discharge of receiver.
86. Same—Insolvency—Corporation.
87. Same—Same—Receiver.
88. Sale before appeal—Remedy.
- 89-93. Setting aside or vacating judgment or order.
94. Setting aside order of nonsuit in attachment—Lien not revived.
- 95, 96. Special administrator—Order appointing.
- 97-102. Stay pending appeal.
103. Substitution of attorneys of record—After appeal.
104. Supersedeas—As to generally.
- 105, 106. Same—Directed to lower court.
107. Same—Ground for issuance.
108. Same—Injunction—Office of, not performed by.
109. Same—Object of supersedeas.
110. Same—Pledge.
111. Same—Questions considered—Whether appellant is party aggrieved.
- 112-114. Same—Writ of—Will not issue, when.
115. Unlawful detainer—Undertaking on appeal.
116. Writ of assistance—Proceedings on order for.

See, ante, § 936 and note.

As to effect of appeal and right to appeal on judgment as constituting *res judicata*, see note 37 Am. St. Rep. 29.

As to effect of appeal on *lis pendens*, see note 56 Am. St. Rep. 875.

As to new bond on failure of sureties to justify, see, post, § 948 and note.

As to power of court to issue supersedeas, see note 67 Am. St. Rep. 714.

As to validity of judgment pending appeal, see note 73 Am. Dec. 688.

1. Amendment or modification—Of judgment or order appealed from.—Order amending judgment pending appeal is erroneous.—*Bryan v. Barry*, 8 Cal. 130. See

Kirby v. Superior Court, 68 Cal. 604, 10 Pac. 119.

As to amendment of decrees in judgment or record after appeal, see note 14 Am. Dec. 516.

2. Trial court has no authority to vacate or set aside order denying motion for new trial pending appeal from such order.—*Stewart v. Taylor*, 68 Cal. 5, 8 Pac. 605. See *Kirby v. Superior Court*, 68 Cal. 604, 10 Pac. 119.

3. Superior court can not deprive supreme court of jurisdiction of appeal from judgment by amending it while appeal is pending.—*San Francisco Sav. Union v. Myers*, 72 Cal. 161, 13 Pac. 403. See *Kirby v. Superior Court*, 68 Cal. 604, 10 Pac. 119.

4. After appeal from judgment, trial court has no power to change judgment appealed from so as in effect to prevent review of alleged errors brought up by bill of exceptions.—*Reynolds v. Reynolds*, 67 Cal. 176, 7 Pac. 480. See *Kirby v. Superior Court*, 68 Cal. 604, 10 Pac. 119.

5. Modification of order appealed from is not within power of lower court any more than is proceeding in enforcing it in its entirety.—*Stateler v. Superior Court*, 107 Cal. 536, 539, 40 Pac. 949.

6. Amendment to any pleading pending an appeal is not within jurisdiction of lower court to allow.—*Kirby v. Superior Court*, 68 Cal. 604, 10 Pac. 119.

7. **Appeal in claim and delivery—Super-sedeas bond.**—In an action to claim and delivery against several defendants where the complaint alleges that the defendants became possessed of the property which is the subject-matter of the controversy, a judgment against all the defendants for the return of the property, or for its value as found in case a delivery could not be made, such judgment resting on the implied finding that all the defendants had become possessed of the property, the perfecting of an appeal and the filing of a stay-bond by one of the defendants stayed all further proceedings in the trial court upon the judgment, under the provisions of the above section.—*Eastern Outfitting Co. v. Superior Court*, 38 Cal. App. 374, 176 Pac. 366.

8. **Approval of undertaking on appeal.**—May be set aside after first approval of such undertaking and appeal to supreme court and filing of transcript in that court.—*Palmer v. Galvin*, 2 Cal. Unrep. 446, 6 Pac. 99.

9. **Attachment—As to bond given sheriff to prevent levy of.**—Not destroyed or affected by giving of stay-bond to stay enforcement of judgment on appeal therefrom.—*Ayres v. Burr*, 132 Cal. 125, 128, 64 Pac. 120.

10. **Same—Appeal—Failure to give bond to continue attachment.**—In the case in which an attachment is issued at the commencement of a suit and the defendant

prevails on appeal by the plaintiff the failure to give a bond as provided for in the above section to continue the attachment during the appeal does not destroy the right to recover on the bond originally given when the attachment was issued.—*Kast v. Pacific Surety Co.*, 185 Cal. 450, sub nom. *Kast v. California Corporation*, 197 Pac. 339.

11. **Attachment-lien—As to necessity of bond to preserve on appeal.**—Where appeal was not perfected within five days, and undertaking on appeal was not for double amount claimed, lien of attachment was not preserved.—*Miller v. Wade*, 87 Cal. 410, 412, 25 Pac. 487.

12. **Same—As to attachment-lien being preserved by filing bond on appeal by plaintiff from judgment in favor of defendant,** see *Primm v. Superior Court*, 3 Cal. App. 208, 84 Pac. 786.

13. **Bill of exceptions—Prepared and settled as basis of motion for new trial, and on which such motion was heard and denied, and which constitutes record on appeal from order,** can not be corrected by superior court pending appeal.—*Baker v. Borello*, 131 Cal. 615, 617, 63 Pac. 914.

14. **Same—Settlement and filing of bill of exceptions after judgment and appeal taken, being matter embraced in action and not affected by judgment appealed from, is within power of court after appeal is taken and hence such bill of exceptions will be considered on appeal.**—*Colbert v. Rankin*, 72 Cal. 197, 198, 13 Pac. 491.

15. **Certification of transcript—Order forbidding clerk to certify to correctness of transcript is not authorized, since after appeal is complete trial court has no longer any control over action.**—*People v. Center*, 54 Cal. 236, 237.

16. **Construction of section—As to purpose.**—The obvious purpose of this section was to excuse a stay-bond when the court below in its discretion shall so order, where the appellant is a trustee acting under and by virtue of some official authority, whether by appointment of the court or by appointment under a statute as an officer of the court.—*Mercantile Trust Co. v. Miller*, 166 Cal. 563, 137 Pac. 913.

17. The superintendent of banks when acting as an officer liquidating the assets of a bank and distributing them to its creditors is a "trustee" and also a person acting in "another's right" within the meaning of this section.—*Mercantile Trust Co. v. Miller*, 166 Cal. 563, 137 Pac. 913.

18. **Same—Construed to stay proceedings on judgment without reference to insufficiency of sureties.**—It is only necessary that bond be given at proper time and in due form.—*Lee Chuck v. Quan Wo Chong Co.*, 81 Cal. 222, 228, 15 Am. St. Rep. 50, 22 Pac. 594.

19. Conceded but not decided that this section applies to three-hundred-dollar

bond.—Estate of Skerrett, 80 Cal. 62, 63, 22 Pac. 85.

20. Same—Same—As to appeal by plaintiff in attachment from judgment, in favor of defendant continuing attachment in force on giving appeal bond, see Primm v. Superior Court, 3 Cal. App. 208, 84 Pac. 786.

21. Same—Same—When appeal affected.—Whenever stay-bond or undertaking has been properly executed, and sureties have justified, if excepted to, or court below shall have dispensed with security, appeal is perfected in sense in which words are used in this section.—Hill v. Finnigan, 54 Cal. 493, 494.

22. Corporate charter—Judgment declaring forfeiture of corporate charter is stayed by ordinary appeal bond under this section.—Havemeyer v. Superior Court, 84 Cal. 327, 381, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

23. Divorce—Alimony pendente lite.—Trial court has power to order defendant in action by wife against husband for permanent support and maintenance to pay further counsel fees on appeal after appeal has been taken from order made pendente lite directing him to pay counsel fees to plaintiff.—Ex parte Winter, 70 Cal. 291, 293, 11 Pac. 630.

24. Appeal from decree of divorce does not take away jurisdiction of lower court as to its right to grant temporary alimony and such alimony can not be granted by appellate court.—Reilly v. Reilly, 60 Cal. 624, 626.

25. Same—Modification of decree.—Appeal from order modifying decree in divorce awarding custody of children suspends power of court to compel enforcement of such modified order.—Ex parte Queirolo, 119 Cal. 635, 636, 51 Pac. 956.

26. Judgment decreeing divorce and awarding custody of children can not be amended by trial court by changing custody of children after appeal has been taken from judgment.—Vosburg v. Vosburg, 137 Cal. 493, 495, 70 Pac. 473.

27. Discharge of bond for stay.—Where bond for stay of proceedings has been given, court below has no further control of matter, and can not withdraw his direction or discharge such order.—Lee Chuck v. Quan Wo Chong Co., 81 Cal. 222, 228, 15 Am. St. Rep. 50, 22 Pac. 594.

28. Effect of appeal—Is to remove subject-matter of adjudication from jurisdiction of court below pending appeal and suspend power of that court to enforce its order or judgment until appeal is determined.—Stateler v. Superior Court, 107 Cal. 536, 539, 40 Pac. 949; Ex parte Queirolo, 119 Cal. 635, 636, 51 Pac. 956. See Ruggles v. Superior Court, 103 Cal. 125, 37 Pac. 211.

29. Same—Statutory.—Effect of appeal from judgment is purely matter of statutory regulation and must be determined by construction of the statute under which C. C. P.—138

the appeal is taken.—Ex parte Queirolo, 119 Cal. 635, 636, 51 Pac. 956.

30. Same—When stay of proceedings.—Stay of proceedings pending appeal has legitimate effect of keeping them in condition in which they were when stay of proceedings was granted. It operates to prevent any future change in condition of parties.—Schwarz v. Superior Court, 111 Cal. 106, 113, 43 Pac. 580; Vosburg v. Vosburg, 137 Cal. 493, 70 Pac. 473; De Lemos v. Siddall, 143 Cal. 313, 316, 76 Pac. 1115. See State I. & Ins. Co. v. Superior Court, 101 Cal. 135, 150, 35 Pac. 549.

31. Same—Same—Act of parties in proceeding in accordance with judgment is not affected by provision that appeal stays enforcement of judgment which is limited to proceedings in court below on judgment.—Rose v. Mesmer, 131 Cal. 631, 634, 63 Pac. 1010.

32. Appeal from judgment declaring that certain person had been elected director in private corporation and restraining another person from acting as such director does not prevent board of directors from recognizing plaintiff as director.—Dulin v. Pacific W. & C. Co., 98 Cal. 304, 306, 33 Pac. 123.

33. Appeal on judgment determining right to office in private corporation, while it stays all proceedings on such judgment, does not prevent directors in corporation from recognizing such judgment.—Dulin v. Pacific W. & C. Co., 98 Cal. 304, 33 Pac. 123. See Foster v. Superior Court, 115 Cal. 279, 282, 47 Pac. 58.

34. Provision that appeal stays all proceedings on judgment "in court below," does not restrict its effect elsewhere.—Foster v. Superior Court, 115 Cal. 279, 282, 47 Pac. 58.

35. Eminent domain—Appeal by defendant accompanied by abandonments of all other defenses than that part in relation to compensation, does not affect judgment so as to destroy plaintiff's rights to possession.—Los Angeles P. & G. R. Co. v. Rumpff, 104 Cal. 20, 25, 37 Pac. 859.

36. Attempt to lay pipe-line through premises under judgment granting plaintiff right to lay such lines through premises of appellant, is not allowing property to remain as it was at time of decree and where proper bond has been filed superseas will issue to restrain any further proceedings.—Daly v. Ruddell, 129 Cal. 300, 301, 61 Pac. 1080.

37. Execution of judgment—As to generally.—So far as execution of judgment is concerned, judgment below remains in full force after notice of appeal and bond for costs has been given, until appeal is perfected by proper stay-bond and justification of sureties, if excepted to.—Hill v. Finnigan, 54 Cal. 493, 494.

38. Execution to collect alimony is proceeding on judgment and may be stayed on

appeal.—*Anderson v. Anderson*, 123 Cal. 445, 447, 56 Pac. 61.

39. Same—Lien acquired by levy of execution was not superseded by giving of undertaking on appeal as this section stood in 1873.—*Ewing v. Jacobs*, 49 Cal. 72, 74.

40. Same—Levy released.—Construed that undertaking to stay execution of judgment appealed from releases from levy property levied upon under execution issued upon such judgment, and contention that effect of filing undertaking was merely to stay sale of property, but that officer executing writ may retain possession of such property until sureties on undertaking have been justified, or their justification has been waived or time within which to except to their sufficiency has expired, can not be maintained.—*San Yuen v. McMann*, 99 Cal. 497, 501, 34 Pac. 80.

41. Family allowance—Order to pay.—Appeal from order directing executor to pay certain sum as unpaid family allowance, stays all proceedings, and hence administrator can not be punished for contempt in refusing to pay such family allowance.—*Ruggles v. Superior Court*, 103 Cal. 125, 127, 37 Pac. 211.

42. Foreclosure—sale after appeal.—Appeal from judgment of foreclosure suspends effect of judgment as evidence of matters determined by it, even though its execution is not stayed, and hence where appeal was taken before sheriff's deed was executed to plaintiff, or sale made by him to third person, such third person took property with notice of defeasible character of title of his grantor.—*Di Nola v. Allison*, 143 Cal. 106, 112, 101 Am. St. Rep. 84, 76 Pac. 976.

43. Increase of amount of bond—In general.—Compliance with order fixing amount of stay-bond on appeal in foreclosure suit, perfects appeal, and all further proceedings in court below are thereby stayed, so that court has no power to impose further conditions on appellant, such as fixing larger amount as penalty of stay-bond.—*Hubbard v. University Bank*, 120 Cal. 632, 633, 52 Pac. 1070.

44. Same—Failure of appellant to comply with order of lower court to file another stay-bond on appeal in foreclosure suit in larger amount did not affect stay already secured by first order, and sale of mortgaged premises was therefore unauthorized.—*Hubbard v. University Bank*, 120 Cal. 632, 633, 52 Pac. 1070.

45. Injunction—Appeal from judgment awarding does not suspend injunction where it is merely prohibitory.—*Heinlen v. Cross*, 63 Cal. 44, 45; *Schwarz v. Superior Court*, 111 Cal. 106, 111, 43 Pac. 580; *Rogers v. Superior Court*, 126 Cal. 183, 187, 58 Pac. 452.

46. When existence of judgment containing injunction affords all relief awarded and there is no proceeding to be had under it, stay provided in this section does not

apply.—See *Foster v. Superior Court*, 115 Cal. 279, 282, 47 Pac. 58; *Rogers v. Superior Court*, 126 Cal. 183, 187, 58 Pac. 452.

47. Same—Dissolution is not affected by appeal from judgment awarding an injunction.—*Merced Min. Co. v. Fremont*, 7 Cal. 130.

48. Same—Issuance of injunction.—Appeal from judgment declaring person entitled to office in private corporation stays all proceedings in court, and hence issuance of injunction forbidding directors of corporation from recognizing right of such plaintiff made after appeal was improper and will be annulled.—*Foster v. Superior Court*, 115 Cal. 279, 284, 47 Pac. 58.

49. Same—Mandatory injunction is suspended by an appeal.—*Schwarz v. Superior Court*, 111 Cal. 106, 111, 43 Pac. 580; *Mark v. Superior Court*, 129 Cal. 1, 5, 61 Pac. 436.

50. Same—Motion to vacate injunction contained in judgment is proceeding on judgment and is stayed under this section by appeal though judgment in ordering injunction contained condition that on performance of which defendant might move to have it vacated or set aside.—*Rogers v. Superior Court*, 126 Cal. 183, 187, 58 Pac. 452.

51. Same—Refusal to dissolve temporary injunction.—Appeal from an order refusing to dissolve temporary injunction does not deprive superior court of jurisdiction to try case pending appeal.—*Bliss v. Superior Court*, 62 Cal. 543. See *Rogers v. Superior Court*, 126 Cal. 183, 187, 58 Pac. 452.

52. Same—Restrictive injunction, which is merely subsidiary to mandatory injunction, will also be stayed, pending appeal.—*Mark v. Superior Court*, 129 Cal. 1, 5, 61 Pac. 436.

53. Same—Trade-name.—Judgment enjoining and restraining defendants from using certain name in connection with other business on its signs, etc., is mandatory in so far as it requires removal of signs and hence is suspended by appeal from such judgment, and mere fact that by continuing business after removal of such signs part of injunction enjoining future use of such signs is violated, will not subject defendant to proceedings for contempt.—*Schwarz v. Superior Court*, 111 Cal. 106, 113, 43 Pac. 580.

54. Same—Violation of.—Pending appeal from judgment awarding an injunction, lower court has power to punish party for its violation during such period where judgment was itself executed.—*Heinlen v. Cross*, 63 Cal. 44.

55. Insolvency—Appeal in insolvency proceedings adjudging petitioner insolvent and directing that he file his inventory and schedules and fix day for meeting of creditors for choosing assignee stays all proceedings and will dispense with necessity of filing inventory and choosing of assignee.—*Denney v. Superior Court*, 84 Cal. 7, 9, 24 Pac. 147.

56. Same—Functions of receiver appointed in involuntary proceedings against insolvent are not suspended during appeal from order adjudicating such person to be insolvent.—In matter of Real Estate Associates, 58 Cal. 356.

57. Same—Modification of order.—Order adjudicating person an insolvent and staying all proceedings against him can not be modified by lower court after appeal from such order by creditor so as to permit execution to be levied against property of insolvent, order adjudging such person insolvent and staying proceedings against him not being separate and distinct order.—Statelet v. Superior Court, 107 Cal. 536, 539, 40 Pac. 949.

58. Judgment and order denying new trial—Joint appeal.—Stay-bond executed in pursuance of order of supreme court for purpose of staying execution on judgment pending appeal on judgment and order denying new trial, stays issuance of execution until both appeals have been decided, and hence issuance of execution after dismissal of appeal from order denying new trial was improper and money collected on such execution will be required to be repaid.—Romine v. Cralle, 83 Cal. 432, 434, 23 Pac. 525.

59. Money deposited with treasurer—No undertaking required.—No undertaking upon appeal from judgment was necessary or authorized to stay proceedings in regard to moneys held by county treasurer under stipulation between parties to action whereby rents and profits of receiver theretofore should be placed in custody of county treasurer, subject to further order of court.—Broder v. Conklin, 121 Cal. 289, 290, 53 Pac. 797.

60. New trial—Action on motion for new trial is not suspended by appeal from judgment rendered in lower court, it not being direct proceeding on judgment but independent and collateral thereto.—Knowles v. Thompson, 133 Cal. 245, 247, 65 Pac. 468.

61. Motion for new trial may be heard after appeal has been taken from order refusing to set aside judgment, where such order was not appealable, and appeal had been dismissed on such ground.—Gregory v. Gregory, 102 Cal. 50, 51, 36 Pac. 364.

62. Appeal from judgment does not deprive lower court of jurisdiction to determine motion for new trial.—Rayner v. Jones, 90 Cal. 78, 81, 27 Pac. 24.

63. Same—Appeal from judgment.—Appeal from order granting new trial suspends functions of order, and leaves judgment subsisting for purposes of an appeal therefrom, pending appeal from order.—Henry v. Merguire, 111 Cal. 1, 2, 43 Pac. 387.

64. Same—Stay of proceedings on judgment is effected by filing of sufficient undertaking on appeal from order denying new trial.—Owen v. Pomona L. & W. Co., 124 Cal. 331, 333, 57 Pac. 71. See Fulton v. Hanna, 40 Cal. 278, 280; Holland v. McDade,

125 Cal. 353, 354, 58 Pac. 9; Baldwin v. Superior Court, 125 Cal. 584, 58 Pac. 185; Starr v. Kreuzberger, 131 Cal. 41, 43, 63 Pac. 134.

65. Bond to stay execution on appeal from order denying new trial will prevent entry of judgment against sureties on bond to stay execution given on appeal from judgment in same action, which appeal had been dismissed.—Starr v. Kreuzberger, 131 Cal. 41, 43, 63 Pac. 134.

As to stay-bonds in general, see, ante, § 949 et seq. and notes.

66. Right of appellant to have execution stayed pending appeal from order denying new trial is not impaired by fact that appeal from judgment was dismissed.—Tompkins v. Montgomery, 116 Cal. 120, 123, 47 Pac. 1006. See Fulton v. Hanna, 40 Cal. 278.

67. Nonappealable order.—Proceedings on judgment should be stayed by superior court pending appeal from order, though motion was pending to dismiss such appeal on ground that order was not appealable.—Hale & N. S. N. Co. v. Fox, 122 Cal. 56, 57, 54 Pac. 270.

68. Order dispensing with undertaking on appeal made by judge who tried case while court was in session, is sufficient, though no record of such order was made in minutes of court.—Von Schmidt v. Widber, 99 Cal. 511, 512, 34 Pac. 109.

69. Same—Administrator on appeal from order revoking his appointment is not acting in another's right in sense used in this section so as to dispense with necessity of undertaking on appeal.—In re Danielson, 88 Cal. 480, 481, 26 Pac. 505.

70. Applies where executor, administrator, or guardian is party plaintiff or defendant in action and appeals from judgment or order in such action and does not apply to appeal by administratrix from order directing her to pay claim against estate.—Ex parte Orford, 102 Cal. 656, 657, 36 Pac. 928.

71. Same—Auditor of county who was proceeded against in his official capacity was properly permitted to appeal without making of undertaking on appeal.—Scheerer v. Edgar, 67 Cal. 377, 7 Pac. 760.

72. Same—Board of education.—Appeal by must be dismissed where no order dispensing with undertaking had been obtained and no undertaking and appeal was filed.—Mitchell v. Board of Education, 137 Cal. 372, 373, 70 Pac. 180.

73. Same—City treasurer of City, etc., of San Francisco.—Court may dispense with undertaking on appeal by him.—Von Schmidt v. Widber, 99 Cal. 511, 512, 34 Pac. 109.

74. Same—Judgment need not have been rendered against appellant in his representative capacity in order to justify order dispensing with undertaking on appeal under this section where it is made to appear that matter involves rights of estate, and that if judgment is unreversed prop-

erty rights of such estates will be affected and its assets diminished, and hence though personal judgment was taken against executor order dispensing with undertaking on appeal was proper.—*Kirsch v. Derby*, 93 Cal. 573, 575, 29 Pac. 218.

75. **Same—Must be made within time allowed for filing bond**, and hence order filed subsequent to such time, though it contained direction that it should be entered nunc pro tunc, is unavailing.—*In re Skerrett*, 80 Cal. 62, 63, 22 Pac. 85.

76. **Order made after judgment**.—Stay of execution on judgment on appeal from order made after judgment to set aside execution can not be granted on.—*Carl v. Williams*, 67 Cal. 580, 581, 8 Pac. 93.

77. **Partial distribution**.—Appeal from order decreeing partial distribution of estate does not deprive court of power to settle final account of executor where such account does not contain any items relating to such partial distribution.—*Estate of Thayer*, 1 Cal. App. 104, 81 Pac. 658.

78. **Passage of ordinance in accordance with judgment**.—Construed not to authorize writ of supersedeas against respondents who were not parties to action by county to condemn right of way for road, though they were parties on whose petition for road county acted, and it not appearing that court was attempting to enforce its judgment which had been appealed from, county having passed ordinance declaring that land condemned was public road and granting franchise to respondents to use it for railroad purposes.—*Madera Co. v. Raymond G. Co.*, 138 Cal. 244, 246, 71 Pac. 112.

79. **Payment of money into court—Order directing assignee to pay money into court after an appeal had been taken from order amending order of dismissal of action by such assignee in nature of interpleader was unauthorized and writ of prohibition will issue to restrain enforcement of such order**.—*Kaufman v. Superior Court*, 108 Cal. 446, 450, 41 Pac. 476.

80. **Premature appeal being absolutely void, does not deprive lower court of jurisdiction and no stay of proceedings is effected by undertaking given on appeal**.—*Estate of Kennedy*, 129 Cal. 384, 385, 62 Pac. 64.

81. **Where premature appeal did not remove case from superior court, order of substitution of parties made in supreme court must fail for want of case to support it**.—*Home of Inebriates v. Kaplan*, 84 Cal. 486, 488, 24 Pac. 119.

82. **Same—Affirmance of judgment on appeal will not render subsequent judgment in lower court invalid, where affirmance was in consequence of premature appeal, so that appellate court could not acquire jurisdiction**.—*Brady v. Burke*, 90 Cal. 1, 5, 27 Pac. 52.

83. **Receiver—Appointment after judgment**.—Proceedings upon judgment which are stayed mean that execution—enforcement of judgment—is stayed, and hence where appointment of receiver was step in enforcement of judgment declaring forfeiture of charter of corporation court had no authority to appoint such receiver after appeal had been taken from judgment declaring forfeiture.—*Havemeyer v. Superior Court*, 84 Cal. 327, 381, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

84. **Same—Authority after stay**.—Filing of undertaking operates as supersedeas and suspends all authority of receiver under order, withdraws from him right to control and possession of property involved, and restores same to appealing party, from whom it has been taken.—*Jacobs v. Superior Court*, 133 Cal. 364, 366, 85 Am. St. Rep. 204, 65 Pac. 826.

85. **Same—Discharge of receiver made after appeal from judgment against plaintiff in action in which receiver is appointed is not prohibited by this section**.—*Baughman v. Superior Court*, 72 Cal. 572, 573, 14 Pac. 207.

86. **Same—Insolvency—Corporation**.—Appeal from judgment declaring corporation insolvent suspended execution of such judgment from time appeal is perfected until determination of appeal, and during such time court can not put into execution that part of its judgment authorizing appointment of receiver.—*State I. & Ins. Co. v. Superior Court*, 101 Cal. 135, 150, 35 Pac. 549.

87. **Same—Same—Receiver**.—Transfer of insolvency proceedings after order of adjudication had been made from department in which they were pending to department in which action for dissolution of corporation was pending, did not confer on court any greater power for appointment of receiver pending appeal than court had previously.—*State I. & Ins. Co. v. Superior Court*, 101 Cal. 135, 150, 151, 35 Pac. 549.

88. **Sale before appeal—Remedy**.—Where an execution-sale has been completed before the appellate court acquires jurisdiction of the appeal, in view of the provisions of the above section the court has no power by writ of supersedeas to set aside the sale, but any right of the judgment-debtor to set aside the sale must be enforced in the trial court.—*Craig v. Stansbury*, 137 Cal. App. 668, 174 Pac. 704.

89. **Setting aside or vacating judgment or order**.—Order setting aside void judgment deprives court below of power to proceed on it until appeal is heard and determined, and hence peremptory writ of prohibition will issue.—*Livermore v. Campbell*, 52 Cal. 75, 77.

90. **Appeal from order setting judgment aside does not revive judgment**. Judgment no longer exists so far as assertion of any rights under it is concerned until it shall be brought into force again by reversal of

order setting it aside.—*Estate of Crozier*, 65 Cal. 332, 333, 4 Pac. 109. See *Peycke v. Keefe*, 114 Cal. 212, 214, 46 Pac. 78.

91. Appeal from order vacating order which was erroneous does not revive vacated order, and hence where order satisfying judgment was vacated party in whose favor it was given may proceed upon it.—*Bateman v. Superior Court*, 139 Cal. 141, 143, 72 Pac. 922.

92. Appeal from order dismissing motion to vacate order previously made does not vacate such prior order.—*Credits Com. Co. v. Superior Court*, 140 Cal. 82, 83, 73 Pac. 1009.

93. After appeal from judgment and order refusing to set aside judgment on defendant's motion court had no power to set aside judgment of its own motion.—*Peycke v. Keefe*, 114 Cal. 212, 214, 46 Pac. 78.

94. **Setting aside order of nonsuit in attachment—Lien not revived.**—Where an order of nonsuit has been granted in a proceedings in which an attachment has been levied in the absence of statutory provisions therefor, such order does not revive the lien of the attachment which had been dissolved by the order of the nonsuit, in the absence of an appeal therefrom within five days as provided in the above section and section 553, ante.—*Clark v. Superior Court*, 37 Cal. App. 732, 174 Pac. 681.

95. **Special administrator—Order appointing.**—Appeal from judgment revoking probate of will does not leave will probative will of decedent, and executor as acting executor, and hence act of court in appointing special administrator after taking of appeal was proper, it not being proceeding on the order of revocation but independent order.—*Estate of Crozier*, 65 Cal. 332, 333, 4 Pac. 109.

96. Appeal from order granting general letters of administration does not affect jurisdiction of the superior court over special administration of estate, object of which is to preserve estate until general letters testamentary or of administration are granted, and hence court has jurisdiction pending such appeal to order administrator to turn over all property in his possession forthwith to special administrator appointed by court.—*Estate of Heaton*, 142 Cal. 116, 118, 75 Pac. 662.

97. **Stay pending appeal.**—By the appeal, the jurisdiction of the lower court in regard to all matters relating to the correctness or validity of the judgment or order appealed from is suspended, with the result that the lower court is without power to take any action in regard thereto during the pendency of the appeal. — *Parkside Realty Co. v. MacDonald*, 167 Cal. 342, 139 Pac. 806.

98. In an action against a bank and a third person to determine the ownership of money on deposit in a savings bank, and to enjoin the third person from withdrawing the deposit, the judgment that the

defendant is the owner of the money and that she do have and recover the same from the bank, is not stayed by the taking of an appeal from the judgment by the plaintiff and the giving of the ordinary three-hundred-dollar bond for costs, etc., the bank remaining neutral in the action and not appealing, and the appellant giving no stay-bond.—*Halsted v. First Sav. Bank*, 173 Cal. 605, 160 Pac. 1075.

99. An appeal does not stay the force of a prohibitive injunction, and the lower court has full power to punish a violation of such injunction pending the appeal, but it is otherwise where the injunction is mandatory.—*Wolf v. Gall*, 174 Cal. 140, 162 Pac. 115.

100. The bankruptcy of the defendants in an action against a broker to recover securities deposited on a margin contract and their discharge subsequent to the rendition of the judgment against them and the taking of their appeal therefrom does not operate to stay a determination of the appeal, and upon affirmation of the judgment the plaintiff is entitled to recover his property or assert his rights with respect to the bond given on appeal.—*Hartnett v. Wilson*, 31 Cal. App. 678, 161 Pac. 281.

101. The effect of the perfecting of an appeal is to stay all further proceedings upon the judgment or order appealed from or matters embraced therein in the court below; it operates to remove the subject-matter of the adjudication from the jurisdiction of the court below pending the appeal, and suspends the power of that court to enforce its order until the appeal is determined.—*In re Dupes*, 31 Cal. App. 698, 161 Pac. 276.

102. An appeal taken from an interlocutory decree of divorce wherein the custody of the children of the marriage was awarded to the father has the effect of staying all proceedings as to such custody pending the appeal, and where the mother has possession of them under an order made prior to the trial, the court has no jurisdiction to vacate such order and direct that their possession be given to the father, until the appeal is determined.—*In re Dupes*, 31 Cal. App. 698, 161 Pac. 276.

103. **Substitution of attorneys of record**—After appeal from judgment should properly be made in lower court (*Harrison, J. con.*)—*Woodbury v. Nevada S. R. Co.*, 115 Cal. 85, 88, 46 Pac. 862.

104. **Supersedeas—As to generally.**—The undertaking mentioned in section 941, ante, given on appeal from order which was not one of cases mentioned in sections 942, 943, 944, 945, ante, and section 949, post, stays all proceedings, and hence motion for stay of proceedings will be granted.—*City of Los Angeles v. Pomeroy*, 132 Cal. 340, 341, 64 Pac. 477. See *In re Woods*, 94 Cal. 567, 29 Pac. 1108; *Root v. Bryant*, 54 Cal. 183.

105. **Same—Directed to lower court.**—Writ of supersedeas is directed to court

whose action is sought to be restrained, or to some one of its officers, and is limited to restraining any proceeding on judgment appealed from.—*Dulin v. Pacific W. & C. Co.*, 98 Cal. 304, 306, 33 Pac. 123. See *Rose v. Mesmer*, 131 Cal. 631, 634, 63 Pac. 1010.

106. Nor can writ be employed for any person or persons not parties to judgment.—*Dulin v. Pacific W. & C. Co.*, 98 Cal. 304, 306, 33 Pac. 123.

107. Same — Ground for issuance. — Grounds for staying execution of judgment other than taking of appeal can not be urged on motion for writ of supersedeas in appellate court, but should be first presented in trial court.—*Swasey v. Adair*, 88 Cal. 203, 206, 26 Pac. 83.

108. Same—Injunction—Office of, not performed by.—Writ of supersedeas can not be used to perform functions of injunction against parties to action restraining them from any act in assertion of their rights other than to prevent them from using process of court below to enforce judgment.—*Dulin v. Pacific W. & C. Co.*, 98 Cal. 304, 306, 33 Pac. 123; *Rose v. Mesmer*, 131 Cal. 631, 634, 63 Pac. 1010.

109. Same—Object of supersedeas is to stay proceedings in court below on judgment appealed from, and to suspend enforcement of that judgment until appeal has been determined.—*Hoppe v. Hoppe*, 99 Cal. 536, 537, 34 Pac. 222.

110. Same—Pledge. — On appeal from judgment in favor of pledgee of life insurance policy foreclosing lien of pledge, ordinary bond on appeal in sum of three hundred dollars is sufficient to stay execution, and supersedeas will issue to prevent sale of policy under decree pending appeal.—*Commercial & Sav. Bank v. Hornberger*, 134 Cal. 90, 91, 66 Pac. 74.

111. Same — Questions considered — Whether appellant is party aggrieved, and entitled to appeal from order will not be determined on proceedings for writ of prohibition to prevent enforcement of order after such appeal has been taken.—*Kaufman v. Superior Court*, 108 Cal. 446, 450, 41 Pac. 476.

112. Same — Writ of — Will not issue when.—A writ of supersedeas will not issue

to stay execution on a judgment pending an appeal from an order denying a motion to set the judgment aside, where it appears from the petition that while the attorney who appeared for the petitioner in the action in which the judgment was rendered was not authorized so to do and that the trial of the action and the entry of judgment were had without the petitioner's knowledge, and there is no denial therein that he was duly served with summons, nor assertion made that he made any arrangement for representation by other counsel.—*Bryan v. Superior Court*, 169 Cal. 761, 147 Pac. 938.

113. The granting of a writ of supersedeas is warranted in an action between conflicting claimants to money on deposit in a bank, in which the bank remains neutral, where there is rendered a simple money judgment in favor of one of the claimants against the bank, and the judgment is not stayed by the appeal taken therefrom by the other claimant and it is made to appear that the respondent is without means.—*Halstead v. First Savings Bank*, 173 Cal. 605, 160 Pac. 1075.

114. The power to grant a writ of supersedeas exists in cases where the writ is necessary to preserve the status quo so that the rights involved in an appeal, when determined, may not be lost or prejudiced by reason of the intervening execution of the judgment, and where the statute regulating a stay of proceedings on appeal makes no provisions for such stay in the particular case.—*Halsted v. First Savings Bank*, 173 Cal. 605, 160 Pac. 1075.

115. Unlawful detainer.—Undertaking on appeal in unlawful detainer, given before removal of personal property of defendant, stays proceedings, and defendant is entitled to remain in possession pending appeal.—*Lee Chuck v. Quan Wo Chong Co.*, 81 Cal. 222, 228, 15 Am. St. Rep. 50, 22 Pac. 594.

116. Writ of assistance.—Proceedings on order for writ of assistance were stayed by filing of undertaking for that purpose, but such stay is not permanent and final pending of appeal, since case of failure of surety to justify it becomes nugatory and of no avail.—*Boyer v. Superior Court*, 110 Cal. 401, 403, 42 Pac. 892.

§ 947. UNDERTAKING MAY BE IN ONE INSTRUMENT OR SEVERAL.

The undertakings prescribed by sections nine hundred and forty-one, nine hundred and forty-two, nine hundred and forty-three, and nine hundred and forty-five, may be in one instrument or several, at the option of the appellant.

History: Enacted March 11, 1872, substantial re-enactment of § 354 Practice Act.

FORM OF UNDERTAKING—IN ONE OR SEVERAL INSTRUMENTS.

1-7. Undertakings on appeal and to stay execution.—May be included in one instrument.

8-12. Same—Justices' court.

See, ante, § 936 and note.

As to single undertaking on two or more appeals, see, ante, § 940 and note.

1. **Undertakings on appeal and to stay execution**—May be included in one instrument where objects for which they are executed can be clearly distinguished.—*Sharon v. Sharon*, 68 Cal. 326, 332, 9 Pac. 187.

2. Cited as indicating that appellant might be required to give several or all of undertakings provided for in cases of appeal according to character of judgment and extent of appeal.—*Englund v. Lewis*, 25 Cal. 337, 355.

3. The want of an undertaking will not justify a dismissal of an appeal if the steps taken to perfect it comply with all the requirements of the new or alternative method, even though the appellant may have attempted to follow the old method.—*Title Ins. & Trust Co. v. California Development Co.*, 168 Cal. 397, 143 Pac. 723.

4. An undertaking on an appeal by four appellants jointly that the surety "does hereby undertake and promise on the part of the appellant" to pay all costs and damages, etc., is not sufficient under the old method of appeal. Four parties having appealed, the undertaking should be "on the part of the four," and each of them, not merely "on the part of the appellant." Such an undertaking can support only the appeal of a single appellant, and since there is no way of determining which one is meant, all of the attempted appeals must fail.—*Title Ins. & Trust Co. v. California Development Co.*, 168 Cal. 397, 143 Pac. 723.

5. If by such undertaking the surety promises to "pay all damages and costs which may be awarded against — on the appeal," there is a fatal uncertainty.—*Title Ins. Co. v. California Development Co.*, 168 Cal. 397, 143 Pac. 723.

6. Causes should be permitted to be heard on their merits, where, in so ruling, positive violence is not done to any rule of procedure and practice, notwithstanding formal defects in giving the undertaking or otherwise perfecting the appeal.—*Cohen v. Connick*, 20 Cal. App. Dec. 219, 147 Pac. 479.

7. While there may be a stay-bond and an undertaking to pay the costs on appeal embodied in one instrument, only an under-

taking for the payment of costs is essential to confer jurisdiction upon the appellate court.—*Cohen v. Connick*, 26 Cal. App. 491, 147 Pac. 479.

8. **Same—Justices' court.**—An appeal in a justice's court action is not perfected and will be dismissed, where the sureties on the undertaking fail to justify within five days after service of notice of exception to their sufficiency; and the furnishing by the appellant on the last day for justification of a new bond with a single corporation surety, which does not justify, in lieu of the individual sureties on the excepted undertaking, will be unavailing to save the appeal.—*Keefe v. Superior Court*, 23 Cal. App. 750, 139 Pac. 899.

9. Corporations authorized by the provisions of section 1056, post, to act as sureties on undertakings in judicial proceedings, are subject to the same requirement as to justification as are persons who execute similar undertakings.—*Keefe v. Superior Court*, 23 Cal. App. 750, 139 Pac. 899.

10. Where the defendants in an action in a justice's court are husband and wife, and on appeal both are named as appellants in the notice and undertaking, the wife can not act as surety, although it is asserted that she is not interested in the judgment.—*Keefe v. Superior Court*, 23 Cal. App. 750, 139 Pac. 899.

11. Where the last day for filing an undertaking on an appeal from a justice's court falls on Saturday, which from 12 o'clock noon is a holiday, filing the undertaking on the Monday following is too late, and the superior court can not entertain jurisdiction of the appeal.—*Starr v. Superior Court*, 23 Cal. App. 670, 139 Pac. 241.

12. Jurisdiction of a justice's court appeal is acquired where the undertaking and notice of appeal are received by the justice in time with the request that both be filed, and the fact that the justice failed to indorse the filing mark on the undertaking as of such date by reason of his having of his own volition indorsed thereon an earlier date when the sureties verified the undertaking before him, is not fatal to the appeal.—*Dillon v. Superior Court*, 24 Cal. App. 760, 142 Pac. 503.

§ 948. JUSTIFICATION OF SURETIES ON UNDERTAKING ON APPEAL. The adverse party may except to the sufficiency of the sureties to any of the undertakings mentioned in sections nine hundred and forty-one, nine hundred and forty-two, nine hundred and forty-three, and nine hundred and forty-five, at any time within thirty days after notice of the filing of such undertaking; and unless they or other sureties, within twenty days after the appellant has been served with notice of such exception, justify before a judge of the court below, upon five days' notice to the respondent of the time and place of justification, execution of the judgment, order, or decree appealed from is no longer stayed; and in all cases where an undertaking is required on

appeal by the provisions of this title, a deposit in the court below of the amount of the judgment appealed from, and three hundred dollars in addition, shall be equivalent to filing the undertaking; and in all cases the undertaking or deposit may be waived by the written consent of the respondent.

History: Enacted March 11, 1872, founded upon § 355 Practice Act as amended 1854 (Stats. 1854, p. 84); amendment approved March 24, 1874, Code Amdts. 1873-4, p. 338; March 9, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 6; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 173, held unconstitutional, see history, § 5 ante; amendment approved March 18, 1905, Stats. and Amdts. 1905, p. 155.

STAY OF PROCEEDINGS BELOW— EXCEPTIONS.

1. Decision of clerk—On justification of sureties before him.
2. Same—Or by trial court.
3. Exception to sureties—Objection that affidavit attached to undertaking on appeal is defective.
- 4-6. Failure of sureties on stay-bond to justify—Effect of.
- 7, 8. Same—Same—New bond.
9. Same—Stay of proceedings will not be granted, when.
10. Same—Same—May be granted by appellate court.
11. Failure of sureties to justify, where excepted to—Is not ground for dismissal.
12. Filing new undertaking.
13. Justification by corporation.
14. Justification of sureties—On bond filed in supreme court.
15. Place of justification.
16. Stay of execution—Prior to justification.
17. Time to except to sureties.
18. Waiver of justification.
- 19-21. Waiver of undertaking.
22. Same—Must be made before time for filing the undertaking expires.
23. Same—Need not be filed within five days.

See, ante, § 936, and note.

As to deposit in place of undertaking, see, ante, § 940 and note.

1. **Decision of clerk—On justification of sureties before him** can not be reviewed by appellate court.—*Kreling v. Kreling*, 116 Cal. 458, 461, 48 Pac. 383.

2. **Same—Or by trial court.**—County clerk and judge of superior court are vested with equal authority as to justification of sureties, and there is no provision for review by trial court of action of county clerk in passing on sufficiency of sureties on bond, and hence an order that sureties, who had justified before county clerk, appear and justify before judge, or otherwise writ of assistance would be enforced, is in excess of authority.—*Boyer v. Superior Court*, 110 Cal. 401, 403, 42 Pac. 892.

3. **Exception to sureties—Objection that affidavit attached to undertaking on appeal is defective** is not objection to sufficiency of sureties or an objection which required justification of sureties before court below.—*Schacht v. Odell*, 52 Cal. 447, 449.

4. **Failure of sureties on stay-bond to justify—Effect of** is to leave appeal effectual—only consequences being that execution is not stayed.—*Duncan v. Times-Mirror Co.*, 109 Cal. 602, 605, 42 Pac. 147.

5. **Failure of sureties to justify, when excepted to, is no ground for dismissing appeal.** It affects only stay of execution.—*Swasey v. Adair*, 83 Cal. 136, 137, 23 Pac. 284. See *Wittram v. Crommelin*, 72 Cal. 89, 13 Pac. 160.

6. **Failure of sureties to justify leaves plaintiff in position to enforce execution of his judgment.**—*Hill v. Finnigan*, 54 Cal. 493, 494.

7. **Same—Same—New bond** can not afterwards be filed in court below, code contemplating but one proceeding to stay execution.

8. **Compare:** however, par. 12, this note.

9. **Same—Stay of proceedings will not be granted when sureties on stay-bond fail to justify.**—*Nonpareil M. Co. v. McCartney*, 143 Cal. 1, 3, 76 Pac. 653.

10. **Same—Same—May be granted by appellate court.**—On failure of sureties to stay-bond to justify supreme court will grant supersedeas on proper terms, where such failure was not fault of appellant.—*Hill v. Finnigan*, 54 Cal. 493, 494.

11. **Failure of sureties to justify, where excepted to—Is not ground for dismissal of appeal.**—*Schacht v. Odell*, 52 Cal. 447, 449; *De Jarnatt v. Marquez*, 127 Cal. 558, 560, 73 Am. St. Rep. 90, 60 Pac. 45; *Klingler v. Henderson*, 137 Cal. 561, 562, 70 Pac. 617.

12. **Filing new undertaking.**—Where the bond fails in substantial respects to comply with the statute, and therefore is not effective to stay execution, the appellant may, at any time before the execution of the judgment, and without any authority from the appellate court, file another undertaking, which, if sufficient, will stay execution.—*Bradley Co. v. Mulcrevy*, 166 Cal. 325, 136 Pac. 60.

13. **Justification by corporation.**—Corporation executing undertaking in pursuance of section 942, ante, must justify upon no-

tice on exception to sufficiency of surety taken in pursuance of this section, and in addition to facts which qualify it to do business, it must like natural persons, show surplus assets equal to amount of its undertaking; hence surety company with capital of one hundred thousand dollars is not sufficient sole security on appeal bond for amount of more than two millions.—*Fox v. Hale & S. M. Co.*, 97 Cal. 353, 354, 359, 32 Pac. 446.

14. **Justification of sureties**—On bond filed in supreme court on account of insufficiency of undertaking on appeal which has been approved by judge of supreme court can not be required.—*Stevenson v. Steinberg*, 32 Cal. 373, 375.

15. **Place of justification**—Under Practice Act providing for justification of sureties before county judge, sureties must justify before county judge of county in which action was tried when such officer is selected as one before whom sureties shall justify.—*Roush v. Van Hagen*, 18 Cal. 668, 669.

16. **Stay of execution**—Prior to justification.—Provision that unless sureties justify within twenty days after exception to sureties, execution of the judgment appealed from is no longer stayed, does not affect stay of execution prior to such time, and hence execution is stayed until expiration of time allowed for justification, so that where at time of sale under foreclosure stay-bond had been filed and sureties not excepted to, sale was invalid, though thereafter respondent excepted to such sureties and they failed to justify.—*Wheeler v. Karnes*, 130 Cal. 618, 620, 63 Pac. 62.

17. **Time to except to sureties** begins to run from filing of undertaking, and not from service of notice of appeal.—*Brown v. Green*, 65 Cal. 221, 223, 3 Pac. 811.

18. **Waiver of justification**—Where it appears that sureties appeared at proper time and offered to justify, but matter was continued at respondent's suggestion until his motion to enlarge stay-bond was sustained, when he appears to have abandoned proceedings to justify sureties, contention that such sureties failed to justify can not be sustained.—*Hubbard v. University Bank*, 120 Cal. 632, 633, 52 Pac. 1070.

19. **Waiver of undertaking** is shown by stipulation that appellant has in due time given and filed good and sufficient undertaking on appeal.—*Forni v. Yoell*, 99 Cal. 173, 174, 33 Pac. 887.

20. **Stipulation extending time for filing appellant's brief and for like purposes** would not amount to waiver of right to dismissal of appeal for failure to file undertaking on appeal.—*Rose v. Mesmer*, 134 Cal. 459, 460, 66 Pac. 594.

21. **Stipulation to have case placed on the calendar out of its order for hearing** does not constitute waiver of filing of undertaking on appeal.—*Little v. Jacks*, 68 Cal. 343, 347, 8 Pac. 856, 9 Pac. 264, 11 Pac. 128.

22. **Same—Must be made before time for filing the undertaking expires**.—*Newman v. Maldonado*, 3 Cal. Unrep. 540, 30 Pac. 833, 835.

23. **Same—Need not be filed within five days limited for filing undertaking on appeal, if required to be filed at all**.—*Newman v. Maldonado*, 3 Cal. Unrep. 540, 30 Pac. 833, 835.

As to waiver of insufficiency of undertaking on appeal, see, ante, § 941 and note.

As to waiver of provision for payment of a deficiency judgment, see, ante, § 945 and note.

§ 949. STAY OF PROCEEDINGS IN COURT BELOW; EXCEPTIONS.

In cases not provided for in sections nine hundred forty-two, nine hundred forty-three, nine hundred forty-four, and nine hundred forty-five, the perfecting of an appeal by giving the undertaking or making the deposit mentioned in section nine hundred forty-one, stays proceedings in the court below upon the judgment or order appealed from, except where it directs the sale of perishable property; in which case the court below may order the property to be sold and the proceeds thereof to be deposited, to abide the judgment of the appellate court; and except, also, where it adjudges the defendant guilty of usurping, or intruding into, or unlawfully holding a public office, civil or military, within this state, and except, also, where the order grants, or refuses to grant, a change of the place of trial of an action; and except also where it orders a corporation or its officers or agents, or any of them, to give to a person adjudged to be a director, stockholder or member of such corporation a reasonable opportunity to inspect or take copies of such books, papers or documents of the corporation as the court finds that such director, stockholder or member is entitled by law to inspect or copy; and except, also, where it ad-

judges a building or place to be a nuisance, and as a part of the judgment in the case orders and directs the closing of the building or place against its use for any purpose for any period of time.

History: Enacted March 11, 1872, substantial re-enactment of § 356 Practice Act; amendment approved February 16, 1874, Code Amdts. 1873-4, p. 408; February 27, 1905, Stats. and Amdts. 1905, p. 22; May 12, 1921, Stats. and Amdts. 1921, p. 95. In effect July 29, 1921.

SUPERSEDEAS—EXCEPTIONS.

- 1-3. As to power to issue.
4. Same—Mere informality in judgment insufficient a warrant.
5. A statutory remedy.
6. Administrator—Order appointing.
7. Alimony—Receiver to collect—Judgment for alimony not directing payment of money.
- 8, 9. Change of venue.
10. Same—Denial of motion for—Appeal from order, effect of.
11. Same—Effect of appeal on jurisdiction.
12. Same—Judgment pending appeal.
13. Commission to take depositions during appeal.
14. Construction of section—Creates statutory superseas.
15. Same—Does not apply where there is no appeal from judgment.
16. Same—Includes judgment which is self-executing.
- 17, 18. Same—Undertaking on appeal, under section 941, ante, stays proceedings pending appeal, except in cases provided for in sections 942-945, ante.
19. Distribution—Decree of.
20. Divorce—Order modifying judgment, and giving custody of child to father.
21. Effect of status quo.
22. Election contest—Appeal from judgment.
23. Eminent domain.
24. Family allowance.
25. Foreclosure of mortgage—As to generally.
26. Same—Writ of assistance.
27. Same—Personal property.
28. Foreclosure of pledge—In general.
29. Injunction which preserves status quo.
30. Insolvency — Order adjudging petitioner insolvent.
31. Mandamus—Stayed by undertaking.
32. Money in possession of court.
33. New-trial order.
34. Order appointing receiver.
35. Partition—Decree of partition between heirs.
36. Partnership accounting—In general.
37. Pending appeal from order appointing guardian of incompetent.
38. Perishable property — Judgment for sale of.
39. Receiver to collect alimony.
40. Receiver's account — Order vacating settlement.
- 41, 42. Removal from office — Appeal from judgment.
43. Same—Appeal by intervenor.
44. Sale—Judgment directing—Of steamship, etc.
45. Satisfaction of judgment—Order setting aside—Appeal from—Stay of proceedings.
- 46-56. Stay of execution—Supersedeas.
57. Same—Statutory provision necessary.
- 58, 59. Stay of mandatory injunction—As to generally.
60. Same—Affirmative acts directed—Red Light Abatement Law.
61. Transfer of cause to another county—Deprives court of all jurisdiction.
62. Same—Appeal from order—Effect of.
- 63-66. Undertaking to stay execution and proceedings—As to generally.
67. Same—Appeal from mandatory injunction.
68. Same—Enforced in action only.
69. Same—Same—On appeal from order under section 685, ante.
- 70, 71. Same — Fixing amount of bond by order of court.
72. Same—Same—Mandamus.
- 73-75. Undertakings in other cases—Construction of section.
- 76, 77. Usurpation of office—Construction of section.
78. Vendee and vendor—Judgment for sale and deficiency.
79. Void stay-bond—Effect of.

See, ante, § 936 and note.

As to stay of proceedings in state court on writ of error to supreme court of United States, see note Ann. Cas. 1912A, 259.

1. **As to power to issue.**—The power to issue a writ of supersedeas is one of inherent powers of a court of appeals, to be exercised in any proper case when it appears necessary so to do to preserve the rights of a litigant until final determination of his appeal.—*Reed Orchard Co. v. Superior Court*, (Sup. Ct.), 19 Cal. App. 667, 128 Pac. 18.

2. After an appeal is perfected from judgment of the superior court, that court

does not have general power to stay the execution.—*Mannix v. Superior Court*, 157 Cal. 730, 731, 109 Pac. 264.

3. If upon appeal from judgment of the superior court an undertaking is given pursuant to this section, that court has power to compel the sheriff to respect and observe a stay of execution thereupon given by the statute.—*Mannix v. Superior Court*, 157 Cal. 730, 731, 109 Pac. 264.

4. **Same—Mere informality in judgment insufficient to warrant.**—The fact that the judgment in eminent domain may be informal or erroneous is no ground for a writ of supersedeas, especially where such defect is not a jurisdictional one, but at most an irregularity to be reviewed in the proper proceeding.—*Reed Orchard Co. v. Superior Court*, 19 Cal. App. 648, 128 Pac. 9, 15.

5. **A statutory remedy.**—Whatever stay may be obtained upon appeal must be controlled by the statutes providing for undertakings on appeal and the power of the appellate court to make an order operating as a supersedeas.—*Pierce v. City of Los Angeles*, 159 Cal. 516, 114 Pac. 818. See *Reed Orchard Co. v. Superior Court*, 19 Cal. App. 648, 128 Pac. 9.

6. **Administrator—Order appointing.**—Proceedings in administration of estate under order appointing administrator are stayed by undertaking executed in accordance with section 941, ante.—*Estate of Woods*, 94 Cal. 566, 567, 29 Pac. 1108.

7. **Allimony—Receiver to collect—Judgment for allimony not directing payment of money, but providing that amount awarded shall be collected by receiver out of rents and profits of defendant's real estate, and paid over by him as same shall accrue, execution on is stayed by undertaking under section 941, ante.**—*Anderson v. Anderson*, 123 Cal. 445, 447, 56 Pac. 61.

8. **Change of venue.**—Conceded that appeal from order denying motion to change place of trial entitles appellant to continuance of case in court below while such appeal is pending.—*People ex rel. Scannell v. Whitney*, 47 Cal. 584, 585.

As to transfer of cause to another county. see pars. 61, 62, this note.

9. Appeal from order refusing to grant change of place of trial does not stay proceedings so as to prevent trial of case in court below.—*Howell v. Thompson*, 70 Cal. 635, 636, 11 Pac. 789. See *People ex rel. Scannell v. Whitney*, 47 Cal. 584, 585.

10. **Same—Denial of motion for—Appeal from order, effect of.**—Where an appeal has been taken from an order denying a change of venue, the trial of the cause thereafter and before the appeal is disposed of, is not a proceeding without or in excess of jurisdiction of the court, within the meaning of section 1102, post, so as to authorize the issuing of a writ of prohibition (*People ex rel. Scannell v. Whitney*, 47 Cal. 584), but a reversal of the order will necessitate a re-

versal of any judgment awarded on the trial pending such appeal.—*Howell v. Thompson*, 70 Cal. 635, 11 Pac. 789.

11. **Same—Effect of appeal on jurisdiction.**—Jurisdiction is not lost by appeal from order denying change of venue, and hence trial of case while such appeal is pending would not be without jurisdiction so that writ of prohibition would lie, though such proceeding might be error for which the judgment might be reversed.—*People ex rel. Scannell v. Whitney*, 47 Cal. 584, 585.

12. **Same—Judgment pending appeal.**—On reversal of order refusing to grant change of venue, judgment rendered while appeal from order was pending will be reversed without regard to commission of error or fact that appellant appeared at trial of case.—*Howell v. Thompson*, 70 Cal. 635, 636. See *People ex rel. Scannell v. Whitney*, 47 Cal. 584, 585.

13. **Commission to take depositions during appeal.**—Appeal from a judgment and order refusing new trial pending the court has jurisdiction under section 946, ante, to issue a commission to take depositions of witnesses under sections 2020 and 2021, post, with a view to the use of the same if a new trial should be ordered by the appellate court.—*San Francisco Gas & El. Co. v. Superior Court*, 155 Cal. 30, 33, 34, 99 Pac. 359.

14. **Construction of section—Creates statutory supersedeas or suspension of power of court below to issue execution on judgment or decree appealed from, or if writ of execution is issued prohibition against execution of writ.**—*Dulin v. Pacific W. & C. Co.*, 98 Cal. 304, 306, 33 Pac. 123.

15. **Same—Does not apply where there is no appeal from judgment, but only from order made after judgment denying motion to set aside execution.**—*Carit v. Williams*, 67 Cal. 580, 581, 8 Pac. 93.

16. **Same—Includes judgment which is self-executing; an appeal therefrom does not impair this effect, except that while appeal is pending it is not available as evidence of facts adjudged.**—*Foster v. Superior Court*, 115 Cal. 279, 282, 47 Pac. 58.

17. **Same—Undertaking on appeal, under section 941, ante, stays proceedings pending appeal, except in cases provided for in sections 942-945, ante, where it does not appear that property to be sold by sheriff under execution on judgment appealed from is perishable property.**—*Root v. Bryant*, 54 Cal. 182, 184.

18. Undertaking on appeal under section 941, ante, has effect of staying execution of judgment as to appellants in all respects pending appeal, and hence motion to stay execution will be granted.—*Cummings v. Cummings*, 2 Cal. Unrep. 744, 13 Pac. 322; *City of Los Angeles v. Pomeroy*, 132 Cal. 340, 341, 64 Pac. 477.

19. **Distribution—Decree of.**—Proceeding on decree of distribution is stayed by un-

undertaking in accordance with section 941, ante, on appeal taken by legatee from such decree.—*Estate of Schedel*, 69 Cal. 241, 243, 10 Pac. 334.

20. Divorce—Order modifying judgment, and giving custody of child to father, and directing delivery of child by its mother to its father in pursuance thereof, before appeal will prevent stay of proceedings by giving of undertaking under section 941, ante, and hence mere fact that such undertaking was given will not authorize habeas corpus by mother to recover possession of child.—*De Lemos v. Siddall*, 143 Cal. 313, 315, 76 Pac. 1115, distinguishing *Ex parte Queirolo*, 119 Cal. 635, 51 Pac. 956; *Vosburg v. Vosburg*, 137 Cal. 493, 70 Pac. 473.

21. Effect of status quo.—A judgment of the superior court, from which an appeal has been taken and perfected and a bond to stay execution given is not final, but stands undetermined upon appeal, and the appellant has the right to insist that the status quo shall be preserved until the final adjudication of the controversy in the higher court; and the superior court is without jurisdiction to make an order directing the receiver appointed to hold the property involved in such controversy in custody to turn the same over to the federal court.—*Isom v. Rex Crude Oil Co.*, 147 Cal. 668, 82 Pac. 319.

22. Election contest.—Appeal from judgment declaring plaintiff elected suspends judgment, and hence where contestee had entered office before rendition of judgment he was entitled to retain it pending appeal.—*Day v. Gunning*, 125 Cal. 527, 528, 58 Pac. 172.

23. Eminent domain.—Proceedings under judgment giving plaintiff right to lay pipe-line through premises of appellant are stayed by execution of undertaking provided for in section 941, ante.—*Daly v. Rudell*, 129 Cal. 300, 301, 61 Pac. 1080.

24. Family allowance.—Order directing payment to heir of estate of family allowance is stayed by undertaking given in accordance with section 941, ante.—*Pennle v. Superior Court*, 89 Cal. 31, 32, 33, 26 Pac. 617.

25. Foreclosure of mortgage.—As to generally.—Where liens dealt with in judgment foreclosing them are described as mortgages, three-hundred-dollar bond will not stay judgment or warrant supersedeas.—*Tolle v. Heydenfeldt*, 138 Cal. 56, 57, 70 Pac. 1013.

26. Same—Writ of assistance to recover possession of land sold under mortgage foreclosure sale will not be stayed where only undertaking on appeal is that given under section 941, ante.—*California M. & Sav. Bank v. Graves*, 129 Cal. 649, 651, 62 Pac. 259.

27. Same—Personal property.—Execution of judgment foreclosing mortgage on personal property prior to amendment of code

was stayed by undertaking on appeal as provided by section 941, ante.—*Snow v. Holmes*, 64 Cal. 232, 30 Pac. 806.

28. Foreclosure of pledge.—In general.—Judgment foreclosing pledge, and directing sale of pledged property, is stayed by undertaking in accordance with section 941, ante, and writ of supersedeas will issue to prevent execution of decree pending the appeal.—*Rohrbacher v. Superior Court*, 144 Cal. 631, 633, 78 Pac. 22.

29. Injunction which preserves status quo.—An appeal from such an injunction does not stay execution or proceedings thereunder.—*Clute v. Superior Court*, 155 Cal. 18, 99 Pac. 362.

30. Insolvency.—Order adjudging petitioner insolvent, and directing him to file inventory, and fixing time for meeting of creditors to choose assignee is stayed by ordinary appeal-bond for costs.—*Dennerly v. Superior Court*, 84 Cal. 7, 9, 24 Pac. 147.

31. Mandamus.—Stayed by undertaking.—Judgment granting writ of mandamus is stayed by undertaking as prescribed by section 941, ante.—*Palache v. Hunt*, 64 Cal. 473, 475, 2 Pac. 245.

32. Money in possession of court.—Judgment determining right to money in possession of court is stayed by ordinary appeal-bond for costs, though judgment for costs is also made.—*McCallion v. Hibernia Sav. & L. Soc.*, 98 Cal. 442, 444, 33 Pac. 329.

33. New-trial order.—On appeal from order granting new trial, undertaking for damages and costs is sufficient undertaking to obtain stay of proceedings pending appeal, and hence retrial of cause pending such appeal was erroneous.—*Ford v. Thompson*, 19 Cal. 118, 119.

34. Order appointing receiver in furtherance of the enforcement of an order for alimony which had been appealed, held to be in excess of jurisdiction, since the proceedings were stayed by the bond on appeal under the provisions of this section.—*McAneny v. Superior Court*, 150 Cal. 8, 87 Pac. 1020.

35. Partition.—Decree of partition between heirs of estate is stayed by undertaking executed in accordance with section 941, ante.—*Born v. Horstmann*, 80 Cal. 452, 453, 5 L. R. A. 577, 22 Pac. 169, 338.

36. Partnership accounting.—In general.—Judgment in partnership accounting adjudging that plaintiff is entitled to certain sum, and directing sale of partnership real estate, and if there by any deficiency, judgment for such deficiency against defendant, is stayed by undertaking under section 941, ante.—*Painter v. Painter*, 98 Cal. 625, 626, 33 Pac. 483.

37. Pending appeal from order appointing guardian of incompetent.—The power of the guardian is stayed pending the appeal, by the filing of the undertaking on appeal prescribed herein; and where such guardian, notwithstanding such stay, threatens

to take possession of the property of the incompetent, supersedeas will issue.—*Coburn v. Hynes*, 161 Cal. 687, 120 Pac. 26.

38. Perishable property—Judgment for sale of.—Where court found that property directed to be sold was perishable, three-hundred-dollar-bond does not stay proceedings under this section.—*Tolle v. Heydenfeldt*, 138 Cal. 56, 57, 70 Pac. 1013.

39. Receiver to collect alimony.—Appeal from order appointing receiver to collect alimony does not enlarge rights of plaintiff to issue execution on judgment awarding alimony so as to prevent its being stayed by undertaking required by section 941, ante.—*Anderson v. Anderson*, 123 Cal. 445, 447, 56 Pac. 61.

40. Receiver's account—Order vacating settlement.—Cost-bond on appeal from order vacating order settling receiver's account and directing payment of certain claims stays proceedings thereon but does not stay proceedings on prior order.—*Credits Com. Co. v. Superior Court*, 140 Cal. 82, 83, 73 Pac. 1009.

41. Removal from office—Appeal from judgment removing board of supervisors ipso facto operates as supersedeas, and fact that new board was appointed and qualified, and met and organized before judgment was entered, and appeal taken, does not affect situation.—*Morton v. Broderick*, 118 Cal. 474, 485, 50 Pac. 644.

42. Perfecting appeal by giving undertaking in action brought to oust sheriff for misdemeanors in office, ipso facto, operates as supersedeas.—*Livermore v. Campbell*, 52 Cal. 75, 77.

43. Same—Appeal by intervener in action where it is determined that defendant unlawfully held office and that relator was entitled thereto, does not stay judgment.—*People v. Campbell*, 138 Cal. 11, 18, 70 Pac. 918.

44. Sale—Judgment directing—Of steamship, etc.—Judgment for sum of money, directing sale of steamship, apparel, and apparatus, and payment out of proceeds of such judgment, may be stayed by undertaking, as provided in section 941, ante, and hence undertaking as provided by section 942, ante, is without consideration and void.—*Olsen v. Birch*, 1 Cal. App. 99, 81 Pac. 656, 657.

45. Satisfaction of judgment—Order setting aside—Appeal from—Stay of proceedings.—On an appeal from an order setting aside a satisfaction of judgment, the remedy of supersedeas can not be invoked to stay proceedings upon the final judgment.—*Taylor v. Superior Court*, 44 Cal. App. 23, 185 Pac. 994, following doctrine in *Bateman v. Superior Court*, 139 Cal. 140, 144, 72 Pac. 922.

46. Stay of execution—Supersedeas.—Where an undertaking given to stay execution of a judgment pending appeal is void for want of compliance with the terms of

the order fixing the amount thereof, the appellant may at any time before the taking out of execution file a new bond without first obtaining the authorization of the appellate court so to do.—*Bradley Co. v. Mulcrevy*, 166 Cal. 325, 136 Pac. 60.

47. The Code of Civil Procedure fixes no time within which an undertaking to stay execution must be filed, and it may be given at any time before execution of the judgment.—*Bradley Co. v. Mulcrevy*, 166 Cal. 325, 136 Pac. 60.

48. Where a stay-bond is void, the respondent has the right to enforce execution at once, and this right is not impaired by the fact that he may have instituted proceedings for the justification of the sureties.—*Bradley Co. v. Mulcrevy*, 166 Cal. 325, 136 Pac. 60.

49. The exception in above section which section provides that the perfecting of an appeal by giving an undertaking or making a deposit stays proceedings in the court below upon the judgment or order appealed from, except where it directs the sale of perishable property, has reference to the case where the order appealed from and directing a sale of certain property has been made upon the ground that the property is perishable, and contemplates an adjudication or a finding to that effect on the part of the court making such order.—*Zappettini v. Buckles*, 167 Cal. 27, 138 Pac. 696.

50. An application for a writ of supersedeas to stay execution pending an appeal from a final judgment should bear the title of the original action, and not entitle the petitioner against the superior court.—*Zappettini v. Buckles*, 167 Cal. 27, 138 Pac. 696.

51. The execution of a judgment dissolving a partnership and directing a sale, by a receiver therefor appointed, of the partnership property, consisting of both real and personal property, is stayed on appeal by the filing of a bond in the sum of three hundred dollars for "damages and costs," as provided by section 941, ante, and a writ of supersedeas will issue to restrain the receiver from selling the property pending the appeal.—*Zappettini v. Buckles*, 167 Cal. 27, 138 Pac. 696.

52. It is irregular to entitle the application for a writ of supersedeas as an independent proceeding, and to enter it upon the register of actions as a cause separate from the appeal to which it relates. The motion should have the title of the cause on appeal, and be entered on the register as a motion in the cause and under the same number.—*Southern Pac. Co. v. Superior Court*, 167 Cal. 250, 139 Pac. 69.

53. The power to issue a writ of supersedeas is one of the powers incidental to a court of last resort. It exists in cases where the writ is necessary to preserve the status quo, so that the rights involved in an appeal, when determined by the appellate court, may not be lost or prejudiced by rea-

son of the intervening execution of the judgment or order appealed from, in cases where the statute regulating a stay of proceedings on appeal makes no provisions for such stay in the particular case.—*Southern Pac. Co. v. Superior Court*, 167 Cal. 250, 139 Pac. 69.

54. A judgment is not stayed by an appeal from an order made after judgment and by the filing of a bond, except on an appeal from an order refusing a new trial.—*Bryan v. Superior Court*, 169 Cal. 761, 147 Pac. 938.

55. A writ of supersedeas will not issue to stay execution on a judgment pending an appeal from an order denying a motion to set the judgment aside, where it appears from the petition that while the attorney who appeared for the petitioner in the action in which the judgment was rendered was not authorized so to do and that the trial of the action and the entry of judgment were had without the petitioner's knowledge, and there is no denial therein that he was duly served with summons, nor assertion made that he made any arrangement for representation by other counsel.—*Bryan v. Superior Court*, 169 Cal. 761, 147 Pac. 938.

56. Where the appeal acts as a supersedeas, the appellate court will issue a writ of supersedeas or stay of proceedings when the trial court is about to issue an execution or other order with the intention of carrying the judgment into effect.—*Reed Orchard Co. v. Superior Court*, 19 Cal. App. 648, 128 Pac. 9, 12.

57. **Same—Statutory provision necessary.**—No stay of execution is effected by an appeal unless by virtue of some statutory provision.—*Reed Orchard Co. v. Superior Court*, 19 Cal. App. 648, 128 Pac. 9, 12. See *Pierce v. City of Los Angeles*, 159 Cal. 516, 114 Pac. 818.

58. **Stay of mandatory injunction—As to generally.**—Such an injunction can not be enforced pending a duly perfected appeal.—*Clute v. Superior Court*, 155 Cal. 18, 99 Pac. 362.

59. A proceeding of the court in contempt for a violation of an injunction, prohibitory in terms, but mandatory in effect, which has been stayed by a duly perfected appeal, is in the nature of a process for the enforcement of the affirmative feature of the injunction, and in such case, a writ of supersedeas may properly issue out of the appellate court to arrest the same.—*Clute v. Superior Court*, 155 Cal. 18, 99 Pac. 362.

60. **Same—Affirmative acts directed—Red Light Abatement Law.**—Under the provisions of section 941c, ante, as it stood before its repeal, and of the above section as it at present stands, in a proceeding under the Red Light Abatement Law in which the judgment directs affirmative acts that would operate to the irreparable injury of the appellant if he should be successful on his appeal, that part of the decree which di-

rects the removal of tenants and property and the sale of chattels, being mandatory, will be stayed by operation of an appeal from the judgment without an application to the trial court for the relief provided by section 9 in the Red Light Abatement Law.—*People ex rel. Bradford v. Laine*, 177 Cal. 742, 171 Pac. 941, following the doctrine in *Dewey v. Superior Court*, 81 Cal. 64, 22 Pac. 333; *Dullin v. Pacific Wood & Coal Co.*, 98 Cal. 304, 33 Pac. 123; *Stewart v. Superior Court*, 100 Cal. 543, 34 Pac. 156, 163; *Schwarz v. Superior Court*, 111 Cal. 106, 43 Pac. 580; *United Railroads of San Francisco v. Superior Court*, 172 Cal. 80, 155 Pac. 463.

61. **Transfer of cause to another county—Deprives court of all jurisdiction.**—In a case in which a court in which an action is brought makes an unconditional order changing the place of trial to another county, this order operates *eo instanti*, to change the jurisdiction over the cause to the new county; and is no provision for a stay of proceedings in case of a change of trial, the provisions of the above section not applying thereto.—*Searcy v. Superior Court*, — Cal. App. —, 190 Pac. 202.

As to change of venue, see pars. 8-12, this note.

62. **Same—Appeal from order—Effect of.**—In the case of an appeal from an order granting a change of the place of trial to another county in the interval between the change of the place of trial and the hearing from the appeal granting the change, the court to which the cause is transferred is the only court having any powers in the premises, and during that interval may grant additional allowances and may proceed in every way with the trial or other disposition of the case, because an appeal subsequently taken from the order of change of place of trial does not have the effect to re-invest in the court in which the action was originally instituted any of the powers which had already passed to the new court.—*Searcy v. Superior Court*, — Cal. App. —, 190 Pac. 202.

63. **Undertaking to stay execution and proceedings—As to generally.**—One having a right to appeal from order appointing a receiver has also the right to give the undertaking provided by section 943, ante, and stay the execution of the order.—*Windsor Pottery W. v. Superior Court*, 13 Cal. App. 360, 363, 109 Pac. 843.

64. In obligating itself to secure obedience by the appellant of any order made upon appeal, the surety of an undertaking given under this section does all the law requires. There is no consideration for an added covenant that the surety would permit judgment to be taken against it on motion and where such covenant is included in the bond and judgment is taken against the surety upon motion he can not recover from the appellant.—*United States Fidelity & G. Co. v. More*, 155 Cal. 415, 417, 101 Pac. 302.

65. The provisions of section 942; ante, are not applicable to an undertaking given to stay execution of a judgment in claim and delivery adjudging the plaintiff entitled to the possession of certain property or to a money judgment in case possession could not be had.—*Churchill v. More*, 7 Cal. App. 767, 770, 96 Pac. 108.

66. Undertaking to stay execution upon appeal from interlocutory decree directing accounting and delivery of property in action for dissolution of copartnership is not sufficient to stay execution upon appeal from final decree entered in the action.—*Doudell v. Shoo*, 159 Cal. 448, 114 Pac. 579.

67. Same—Appeal from mandatory injunction, it is the duty of the court to fix the amount of the bond necessary to stay execution, and where defendant has applied to the court to so do, he should not be judged guilty of contempt for failure to obey the injunction pending the determination of the court upon his application and until he have a reasonable opportunity to give the bond.—*Clute v. Superior Court*, 155 Cal. 15, 20, 99 Pac. 362.

68. Same—Enforced in action only.—An undertaking given in pursuance of an order of the supreme court for a supersedeas can be enforced by action only, and can not be enforced by a summary judgment, without process or notice, as specially provided in the case of an undertaking under this section.—*Weldon v. Rogers*, 154 Cal. 636, 98 Pac. 1070.

69. Same—Same—On appeal from order under section 685, ante.—An undertaking such as is here contemplated is effectual only when used on an appeal from a judgment or order directing the payment of money, and is of no avail on appeal from an order made under the authority of section 685, ante, which is not such an order, although it may be directed to a judgment of that description, and may itself direct the issue of execution for a stated sum; and an ex parte judgment against the sureties upon an undertaking on appeal from such an order, entered under the authority of this section, is void.—*Weldon v. Rogers*, 154 Cal. 635, 98 Pac. 1070.

70. Same—Fixing amount of bond by order of court or a judge thereof is essential to the staying of the execution, otherwise it would necessarily follow that regardless of the value of the property involved a bond in any amount which the appellant might elect to give might be sufficient.—*United States Fidelity & G. Co. v. More*, 155 Cal. 415, 417, 101 Pac. 302.

71. It is the duty of the judge to fix the amount of the undertaking in order to state the proceeding pending an appeal and in case of his refusal a writ of mandate will lie to compel such action.—*Windsor Pottery W. v. Superior Court*, 13 Cal. App. 360, 362, 109 Pac. 848.

72. Same—Same—Mandamus.—It is held to be the duty of the court, upon a proper application in that behalf, to fix the amount of the undertaking to be given to stay proceedings under the writ, pending appeal, and mandamus lies to compel the performance of that duty.—*Gordan v. Graham*, 153 Cal. 299, 95 Pac. 145.

73. Undertakings in other cases—Construction of section.—The exception as to the sale of perishable property has reference to the case where the order appealed from and directing a sale has been made on the ground that the property is perishable, and contemplates an adjudication or finding to that effect on the part of the court making such order.—*Zappettini v. Buckles*, 167 Cal. 27, 138 Pac. 696.

74. An undertaking under this section will not stay execution of a judgment foreclosing a trust deed for a large sum and directing the sale of both personality and realty. The undertaking in such a case is that provided for in section 945, ante.—*Southern Pac. Co. v. Superior Court*, 167 Cal. 250, 139 Pac. 69.

75. The stay given by virtue of this section in case of appeal is effectual only as to the judgment in so far as it affects the appellant, requires him to do something for the benefit of the respondent, or permits something to be done as to the appellant. There is no provision of law requiring a stay-bond from the appellant as a condition precedent to staying proceedings in the lower court on the judgment appealed from in so far as the judgment is against the appellant. Any stay bond given under such circumstances would be without consideration and hence unenforceable.—*Halsted v. First Sav. Bank*, 173 Cal. 605, 160 Pac. 1075.

76. Usurpation of office—Construction of section.—Provision that appeal does not stay proceedings on judgment where it adjudges defendant guilty of usurping or intruding into or unlawfully holding public office, civil or military, within state, authorizes construction that proceedings on judgment are stayed when it affirms right of plaintiff to any office which is not public. Director in private corporation can not be said to hold public office.—*Foster v. Superior Court*, 115 Cal. 279, 283, 47 Pac. 58.

77. Appeal from judgment declaring that defendant had usurped and intruded, and was unlawfully exercising office, and that relator was entitled to office, did not stay execution of judgment.—*Ex parte Henshaw*, 73 Cal. 486, 487, 15 Pac. 110.

78. Vendee and vendor—Judgment for sale and deficiency.—Undertaking on appeal as prescribed by section 941, ante, stays proceedings on judgment in action by vendee against his vendor by which, after directing that plaintiff recover certain sum of money from defendant, sale of land is directed, and deficiency judgment provided

for, where at time plaintiff is in possession of premises.—*Owen v. Pomona L. & W. Co.*, 124 Cal. 331, 333, 57 Pac. 71.

As to operation of stay, see, ante, § 946 and note.

79. Void stay-bond—Effect of.—The provisions of this section are not applicable to a case where the stay-bond on appeal is absolutely void.—*Maze v. Langford*, 16 Cal. App. 746, 117 Pac. 929.

§ 950. WHAT PAPERS TO BE USED ON APPEAL FROM THE JUDGMENT. On appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, of the judgment-roll, and of any bill of exceptions upon which the appellant relies.

History: Enacted March 11, 1872, founded upon § 346 Practice Act as amended 1854, Stats. 1854, p. 84; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 338; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 173, held unconstitutional, see history, § 5 ante; amendment approved April 24, 1915, Stats. and Amdts. 1915, p. 205. In effect August 8, 1915.

APPEAL FROM JUDGMENT—PAPERS USED ON.

1. Affidavits—Printed in transcript.
2. Same—To contradict transcript.
3. Same—Used on motion after judgment.
4. Amendment—Not amended by supreme court.
5. Same—Statement on motion for new trial—Not amended by supreme court.
- 6, 7. Bill of exceptions.
8. Same—Applicable to all appeals.
- 9, 10. Same—Erroneously entitled.
11. Same—Same—"Statement of the case."
- 12-14. Same—Necessity for.
15. Construction of section—"Appeal from final judgment."
16. Same—Authorizes making of statement for use on appeal from judgment.
17. Same—Review on appeal from judgment and from order subsequent to judgment.
- 18-21. Contents of transcript—In general.
22. Same—Copy of order appealed from.
23. Same—Copy of pleadings.
24. Same—Copies of papers designated in this section must be set out.
25. Same—Court below is not authorized to say what papers shall be used on appeal.
26. Same—Interlineation in printed record.
27. Same—Motion to dismiss—What considered.
28. Errors—Against respondent.
29. Same—In striking out portions of answer.
- 30-33. Judgment—Record on appeal from judgment.
34. Matter which does not tend in some degree to illustrate point made.
35. Motion to strike from transcript and disregard certain order.

36. Notice of appeal.
37. Omission of some parts of judgment-roll.
38. Printing transcript.
39. Proof of service of notice of appeal.
- 40, 41. Same—Permission to make proof.
- 42-53. Record furnished on appeal.
54. Service of transcript.
- 55, 56. Single transcript on several appeals.
57. Statement of grounds of appeal.
58. Statement of case used on hearing of motion for new trial.
- 59, 60. Same—Necessity for use on motion for new trial.
61. Time to file transcript.
- 62, 63. Same—Commencement of.
64. Same—Depositing transcript with express company for transmission.
65. Same—Dismissal.
- 66, 67. Same—Excuse for failure to file.
- 68-73. Same—Extension of time.
74. Same—Filing printed transcript on same day motion to dismiss.
- 75-78. Same—Statement not settled.
79. Same—Same—Refusal to settle.
- 80, 81. Same—What considered on motion to dismiss.
- 82, 83. Transcript—Necessity of.
84. Undertaking should not be embodied in transcript.
85. Waiver of insufficiency of transcript.

See, ante, § 936 and note.

As to right of appellant to prepare transcript under provisions of above section, instead of under the provisions of section 953a, post, on an appeal under the alternative method, without affecting the validity of his appeal, see, ante, § 940, note pars. 62-67.

1. Affidavits—Printed in transcript which form no part of record, can not be considered.—*Warren & Malley v. Russell*, 129 Cal. 381, 383, 62 Pac. 75.

2. **Same**—To contradict transcript.—Affidavit of defendant can not be used to show refusal to grant continuance was erroneous where facts as set forth in bill of exceptions show there was no error.—*Frost v. Witter*, 132 Cal. 421, 429, 85 Am. St. Rep. 53, 64 Pac. 705.

3. **Same**—Used on motion after judgment can not be considered on appeal from final judgment, unless they are embodied in bill of exceptions, or statement settled in due form.—*Welsh v. Allen*, 54 Cal. 211, 212.

4. **Amendment**—Not amended by supreme court.—Bill of exceptions can not be amended by supreme court, which must review order on record on which it was made.—*Baker v. Borello*, 131 Cal. 615, 617, 63 Pac. 914.

5. **Same**—Statement on motion for new trial.—Not amended by supreme court.—The action of trial court must be reviewed on transcript of records of that court.—*Clare v. Sacramento E. P. & L. Co.*, 122 Cal. 504, 507, 55 Pac. 326.

6. **Bill of exceptions** to constitute part of transcript on appeal must be settled as provided in section 649 or 650, ante.—*Witter v. Andrews*, 122 Cal. 1, 2, 54 Pac. 276.

7. **Bill of exceptions** need not become part of judgment-roll to constitute record on appeal from judgment.—*Caldwell v. Parks*, 47 Cal. 640, 641.

8. **Same**—Applicable to all appeals.—Bill of exceptions is equally applicable to any and all kinds of appeals provided for by code.—*Brandt v. Clark*, 81 Cal. 634, 638, 22 Pac. 863.

9. **Same**—Erroneously entitled.—On appeal from judgment, bill of exceptions may be used, and fact that it was entitled to bill of exceptions on motion for new trial is immaterial.—*Bedan v. Turney*, 99 Cal. 649, 651, 34 Pac. 442.

10. **Calling document statement** rather than bill of exceptions will not deprive appellant of his appeal where he was not entitled to statement of case but was entitled to bill of exceptions.—*Witter v. Andrews*, 122 Cal. 1, 2, 54 Pac. 276.

11. **Same**—**Same**—"Statement of the case."—Thus, where the appellant set forth in the transcript a document which he entitled "statement of the case," in which was set forth all the matters essential to a bill of exceptions, it was held sufficient for all purposes.—*Pease v. Fink*, 3 Cal. App. 371, 85 Pac. 657.

12. **Same**—**Necessity for**.—Construed not to forbid hearing of appeal from judgment unless there should be bill of exceptions, but only that court shall be furnished with copy of any bill on which appellant relies.—*Thompson v. Hancock*, 51 Cal. 110, 111.

13. **Absence of bill of exceptions** is not ground for dismissal of appeal, but rather for an affirmance of judgments, if there is nothing in record on which action of superior court can be properly reviewed.—*C. C. P.*—139

Howell v. Howell, 101 Cal. 115, 116, 35 Pac. 443.

14. **Where order appealed from was, in effect, a judgment, and could be reviewed on judgment-roll, motion to dismiss appeal for want of bill of exceptions will be denied.**—*Howell v. Howell*, 101 Cal. 115, 116, 35 Pac. 443.

15. **Construction of section**—"Appeal from final judgment" means appeal only from final judgment mentioned in subdivision 1 of section 963, post, and does not include appeals in probate matters which are provided for in subdivision 3.—*Estate of Franklin*, 133 Cal. 584, 588, 65 Pac. 1081.

16. **Same**—**Authorizes making of statement for use on appeal from judgment, where motion for new trial was based on minutes of court without any statement, though time for appealing from order denying new trial had expired before application was made to settle such statement.**—*Vinson v. Los Angeles P. R. Co.*, 141 Cal. 151, 152, 74 Pac. 757.

17. **Same**—**Review on appeal from judgment and from order subsequent to judgment is to be had on record, to be made up and filed according to this section, if appeal be from judgment, or, according to section 956, post, from order subsequent to judgment.**—*People v. Center*, 61 Cal. 191, 195.

18. **Contents of transcript**—**In general.**—Where transcript does not contain copy of judgment-roll, or bill of exceptions, or statement in case, appeal from judgment can not be considered.—*Welsh v. Allen*, 54 Cal. 211, 212.

As to record furnished on appeal, see pars. 40-53, this note.

19. **Where transcript purports to contain record of all proceedings of superior court which is sought to be reviewed on appeal, it is sufficient to avoid dismissal under rule 5 of supreme court.**—*Tompkins v. Montgomery*, 116 Cal. 120, 122, 47 Pac. 1006.

20. **Where record fails to show that complaint, answer, findings, or judgment were ever filed in court below, or that judgment was ever entered, and there is no certificate to papers which would constitute judgment-roll, and it does not appear that transcript was filed, or that order denying new trial was ever entered, record is insufficient, and judgment must be affirmed.**—*Wells v. Kreyenhagen*, 117 Cal. 329, 330, 49 Pac. 128.

21. **Appeal will not be dismissed on ground that transcript fails to show papers used on hearing in court below, and upon which court acted in making and rendering order appealed from, as it involves examination of transcript.**—*Wolf v. Board of Supervisors*, 143 Cal. 333, 334, 76 Pac. 1108.

22. **Same**—**Copy of order appealed from.**—Where bill of exceptions in transcript contains order appealed from, appeal will not be dismissed on ground that transcript

does not contain copy of order appealed from, especially where certificate of clerk states that transcript does contain copy of order appealed from.—*Wolf v. Board of Supervisors*, 143 Cal. 333, 334, 76 Pac. 1108.

23. **Same**—Copy of pleadings should appear in record, otherwise it does not meet requirements of statute.—*Hart v. Plum*, 14 Cal. 149, 153.

24. **Same**—Copies of papers designated in this section must be set out and become part of transcript.—*San Francisco & N. P. R. Co. v. Anderson*, 77 Cal. 297, 298, 19 Pac. 517.

25. **Same**—Court below is not authorized to say what papers shall be used on appeal, such matter being regulated by code.—*People v. Center*, 54 Cal. 236.

26. **Same**—Interlineation in printed record is not ground for dismissal of appeal.—*Swasey v. Adair*, 83 Cal. 136, 138, 23 Pac. 284.

27. **Same**—Motion to dismiss—What considered.—Appeal can not be dismissed where entire record in transcript must be examined for purpose of ascertaining sufficiency of ground urged in support of motion, and hence ground for dismissal that transcript does not contain any specification of error of law or particulars in which evidence is insufficient to support verdict can not be considered on motion to dismiss.—*Jarman v. Rea*, 129 Cal. 157, 160, 61 Pac. 790.

28. **Errors**—Against respondent.—On appeal from judgment appellant is required to bring up judgment-roll and any bill of exceptions or statement in case on which he relies, and hence errors committed against respondent need not be shown by such bill of exceptions.—*Klauber v. San Diego st. C. Co.*, 98 Cal. 105, 107, 32 Pac. 876.

29. **Same**—In striking out portions of answer can not be presented on appeal without bill of exceptions.—*Spence v. Scott*, 97 Cal. 181, 182, 31 Pac. 52, 939.

30. **Judgment**—Record on appeal from judgment consists of notice of appeal, and judgment-roll and error in granting judgment on pleadings may be considered, when such fact is recited in judgment, without bill of exceptions.—*Weeks v. Garibaldi S. G. M. Co.*, 73 Cal. 599, 600, 15 Pac. 302.

As to record furnished on appeal, see pars. 40-53, this note.

As to reviewable judgment, see, post, § 956 and note.

As to the judgment-roll, see, ante, 670 and note.

Same—As to opinion of court below as part of record on appeal, see note 15 L. R. A. 798.

31. Only papers which can be considered on appeal from final judgment are notice of appeal and judgment-roll where there is no bill of exceptions and stipulation for judgment can not be considered.—*Spinetti v. Brignardello*, 53 Cal. 281, 283.

32. Appeal from judgment where no bill of exceptions is filed brings up only judgment-roll or such part of it as is necessary to explain points relied on, and hence as petition for certiorari is no part of judgment-roll it is not brought up on such appeal.—*Reynolds v. County Court*, 47 Cal. 604, 605.

33. On appeal from judgment, examination is confined to judgment-roll, and any bill of exceptions, statement on motion for new trial, and statement of case on which appellant relies; if questions do not thus arise there is no duty on court to decide them.—*Emeric v. Alvarado*, 64 Cal. 529, 594, 2 Pac. 418.

34. Matter which does not tend in some degree to illustrate point made on appeal should be omitted from transcript.—*Estate of Boyd*, 25 Cal. 511.

35. Motion to strike from transcript and disregard certain order and finding on ground that it is not part of record will not be considered until final decision of case.—*Estate of Williams*, 4 Cal. Unrep. 511, 36 Pac. 6.

36. Notice of appeal should be included in transcript on appeal.—*Woodside v. Hewel*, 107 Cal. 141, 143, 40 Pac. 103.

37. Omission of some parts of judgment-roll from transcript, is not ground for dismissal of appeal, and respondent must notify appellant of his objections, and appellant will then have permission to supply papers, but failing to do so, must take risk of having his appeal dismissed.—*Helings v. Duval*, 119 Cal. 199, 200, 51 Pac. 335.

38. Printing transcript.—Clerk of supreme court has no authority to permit appellant to have transcript printed, but when transcript is filed, sufficient funds must be deposited to pay for printing by clerk. In this case, however, held that such agreement excuses appellant for failure to file transcript within time provided by law.—*Ward v. Healy*, 110 Cal. 587, 589, 42 Pac. 1071.

39. Proof of service of notice of appeal need not be included in transcript and its absence is no ground for dismissal of appeal.—*Warren v. Hopkins*, 110 Cal. 506, 509, 42 Pac. 986. See *Modesto Bank v. Owens*, 121 Cal. 223, 225, 53 Pac. 552; *People v. Alameda T. R. Co.*, 30 Cal. 182, 184; *Ellis v. Bennet*, 2 Cal. Unrep. 302, 3 Pac. 801.

40. **Same**—Permission to make proof.—Motion to dismiss appeal for failure of transcript to show service of notice of appeal will be denied where at hearing proof of such service was made.—*Estate of Stratton*, 112 Cal. 513, 520, 44 Pac. 1028.

41. Where transcript fails to show service of notice of appeal, appellant will be allowed to show by proper proof that sufficient service had been made, and appeal will not be dismissed for such failure in transcript.—*Knowlton v. MacKenzie*, 110 Cal. 183, 190, 42 Pac. 580.

42. Record furnished on appeal.—A supplemental bill of exceptions is reviewable on an appeal from a judgment, although not reviewable on appeal from an order denying a new trial.—*Title Ins. & Trust Co. v. California Devel. Co.*, 171 Cal. 174, 152 Pac. 542.

See, also, pars. 30-33, this note.

As to contents of transcript on appeal, see pars. 18-27, this note.

43. Upon an appeal from an order denying a motion for a new trial, affidavits stated to have been used on the motion can not be considered where they are not authenticated in any manner.—*Moore v. Pacific Coast Steel Co.*, 171 Cal. 489, 153 Pac. 912.

44. A bill of exceptions duly proposed and settled for use on motion for a new trial may be used in support of an appeal from the judgment, although it was not regularly used on the motion for a new trial.—*Vore v. Ephraim*, 173 Cal. 245, 159 Pac. 719.

45. An appeal from an order denying a motion for a change of the place of trial of an action upon the ground of the convenience of witnesses can not be considered on its merits, where the transcript contains no certificate of the judge of the court that the papers and records which the transcript contains, or any of them, were used upon the hearing of the motion.—*Avello v. Sampson*, 28 Cal. App. 324, 152 Pac. 313.

46. Where an appellant supports his appeal by the judgment-roll alone, he can not complain of a failure to find on his allegations of new matter. It will be presumed, in favor of the correctness of the judgment and findings, that no evidence upon this phase of the case was in fact presented to the court.—*Parker v. Power*, 28 Cal. App. 332, 152 Pac. 935.

47. Where upon an appeal from a judgment of nonsuit, the evidence is not brought up in the transcript, the judgment must be affirmed.—*Nicholson v. Leatham*, 28 Cal. App. 597, 153 Pac. 965.

48. An appellate court will not take cognizance of the contents of an affidavit which has come into the transcript under a certificate describing it as part of the judgment-roll, when it is not a part of the judgment-roll and does not appear to have been one of the papers used in connection with the order from which the appeal was taken.—*Nolte v. Nolte*, 29 Cal. App. 126, 154 Pac. 873.

49. If a proposed amended answer is not incorporated in the record of the proceedings of the trial, the appellate court can not determine whether the lower court was right or wrong in refusing permission to file it.—*Calara Valley Realty Co. v. Smith*, 29 Cal. App. 589, 156 Pac. 369.

50. Affidavits in support of a motion for a new trial on the ground of newly discov-

ered evidence can not be considered on appeal, although contained in the printed transcript, where not in any manner authenticated as part of the record on appeal.—*Crofford v. Crofford*, 29 Cal. App. 662, 157 Pac. 561.

51. In this action to establish a trust, alleged error in refusing the admission in evidence of a letter written by the defendant to the husband of one of the plaintiffs in reply to a letter written by the latter concerning the consummation of an escrow arrangement already admitted in evidence, can not be considered on appeal where the record contains no copy of the excluded letter.—*McIntosh v. Hunt*, 29 Cal. App. 779, 157 Pac. 839.

52. An appellant may, under above section, include the evidence in the record.—*Gambetta v. Gambetta*, 30 Cal. App. 261, 157 Pac. 1141.

53. A defendant, having failed to answer, may take his appeal from the judgment-roll alone.—*Gambetta v. Gambetta*, 30 Cal. App. 261, 157 Pac. 1141.

54. Service of transcript.—Failure to serve transcript on respondent's attorney until after it was filed is not ground for dismissing appeal.—*Estate of Boyd*, 25 Cal. 511, 514.

55. Single transcript on several appeals.—On appeal from judgment and order subsequent to judgment record on each appeal may be included in one transcript.—*Sharon v. Sharon*, 68 Cal. 326, 338, 9 Pac. 187.

56. Where on four appeals but one transcript was made up, and so that court can not determine on what lower court acted, appeals will be dismissed.—*People v. Center*, 61 Cal. 190, 194.

57. Statement of grounds of appeal need not be included in transcript on appeal taken on judgment-roll alone.—*Solomon v. Reese*, 34 Cal. 28, 34.

58. Statement of case used on hearing of motion for new trial is part of record on which appeal from judgment may be heard.—*Sharon v. Sharon*, 68 Cal. 326, 338, 9 Pac. 187; *Scott v. Wood*, 81 Cal. 398, 399, 22 Pac. 871; *Brind v. Gregory*, 122 Cal. 480, 481, 55 Pac. 250. See *People v. Crane*, 60 Cal. 279; *Somers v. Somers*, 83 Cal. 621, 622, 24 Pac. 162.

59. Same—Necessity for use on motion for new trial.—Provision that appellant must furnish copy of any statement on which he relies authorizes use of statement on motion for new trial whether such statement had been used on motion or not and latter part of section does not affect this right.—*Wall v. Mines*, 128 Cal. 136, 138, 60 Pac. 682.—See *Brandt v. Clark*, 81 Cal. 634, 638, 22 Pac. 863; *Jue Fook Sam v. Lord*, 83 Cal. 159, 160, 23 Pac. 225; *Forni v. Yoell*, 99 Cal. 173, 178, 33 Pac. 887; *Brind v. Gregory*, 120 Cal. 640, 641, 53 Pac. 25; *Witter v. Andrews*, 122 Cal. 1, 2, 54 Pac. 276; *Kelly v.*

Ning Yung Ben. Assoc., 138 Cal. 602, 603, 72 Pac. 148.

60. Statement prepared on motion for new trial but not used on such motion may be used on appeal from judgment for purpose of determining as to whether errors of law had been committed, but not as to sufficiency of evidence where appeal from judgment was not taken within sixty days after its rendition.—*Wolf v. King*, 1 Cal. App. 749, 82 Pac. 1055.

61. Time to file transcript.—Appeal will be dismissed for failure to file transcript within time provided by rule of supreme court.—*Hart v. Kimberly*, 5 Cal. Unrep. 532, 46 Pac. 618; *Johnson v. Goodyear Min. Co.*, 6 Cal. Unrep. 274, 57 Pac. 383; *Warren v. McGowan*, 7 Cal. Unrep. 190, 77 Pac. 909.

62. Same—Commencement of.—Appeal not being perfected until undertaking on appeal is filed, period of forty days in which to file transcript did not commence until such undertaking was filed.—*Wadsworth v. Wadsworth*, 74 Cal. 104, 105, 15 Pac. 447.

63. Time in which to file transcript does not begin to run at time appeal is taken, but from time of settlement of statement on motion for new trial.—*Somers v. Somers*, 83 Cal. 621, 622, 24 Pac. 162.

64. Same—Depositing transcript with express company for transmission to clerk of supreme court is not equivalent of filing so as to render filing of transcript prior to service of notice to dismiss appeal.—*Ward v. Healy*, 110 Cal. 587, 589, 42 Pac. 1071.

65. Same—Dismissal.—Transcript on appeal not having been filed within time prescribed by rules of court, and no extension of time having been obtained, will be dismissed.—*Galloway v. Rouse*, 63 Cal. 280, 281.

66. Same—Excuse for failure to file.—Failure to file transcript within time prescribed by rule of court was not excused by fact that trial court had granted appellant new trial and respondent on such appeal had perfected appeal from order granting new trial.—*Cuckhater v. Henry*, 40 Cal. Dec. 137.

67. Failure to file transcript within time limited by rule of court and stipulation of parties will not justify dismissal of appeal where facts and circumstances presented in affidavit are such as to excuse failure.—*Esrey v. Southern Pac. Co.*, 4 Cal. Unrep. 402, 35 Pac. 310. See *Carter v. Paige*, 77 Cal. 64, 19 Pac. 2.

68. Same—Extension of time.—Whether motion to dismiss appeal would be sufficient ground for extension of time, within which to file transcript referred to but not decided, because appellant had made no application for such extension.—*White v. White*, 112 Cal. 577, 579, 44 Pac. 1026.

69. Under Rule II of supreme court, extension of time within which to file transcript may be granted by supreme court,

and hence appeal will not be dismissed where transcript was filed within time as extended.—*Meeker v. Hoffer*, 57 Cal. 140, 141.

70. Where transcript is not filed within time granted by supreme court, but appellant acted in good faith on an erroneous construction of order extending time, and transcript was served soon after such time, appeal will not be dismissed.—*Brunnings v. Townsend*, 6 Cal. Unrep. 647, 64 Pac. 106.

71. Time in which to file transcript from appeal on judgment is not extended by taking of appeal from order denying new trial until settlement of bill of exceptions on such order, though it is customary that both appeals should be included in one transcript.—*Butler v. Soule*, 117 Cal. 226, 227, 49 Pac. 5.

72. That bill of exceptions to be used on motion for new trial might be used on appeal from judgment does not extend time for filing transcript more than forty days after settlement of such bill of exceptions, though motion for new trial had not been decided.—*Bell v. S. P. R. Co.* 137 Cal. 77, 69 Pac. 692.

73. Bill of exceptions taken on order of court refusing to vacate its order for issuance of writ of assistance does not extend time in which transcript on appeal from judgment in case must be filed.—*Pignaz v. Burnett*, 121 Cal. 292, 293, 53 Pac. 633.

74. Same—Filing printed transcript on same day motion to dismiss appeal for failure to file transcript was filed will not defeat such motion. It is only when transcript is filed before motion to dismiss is served that it is sufficient.—*Ward v. Healy*, 110 Cal. 587, 589, 42 Pac. 1071.

75. Same—Statement not settled.—Motion to dismiss appeal because transcript was not filed in time, will be denied, where bill of exceptions or statement on motion for new trial had not yet been settled.—*Estate of Walkerly*, 4 Cal. Unrep. 819, 37 Pac. 893; *Pignaz v. Burnett*, 119 Cal. 157, 161, 51 Pac. 47; *Bernard v. Sloan*, 138 Cal. 746, 747, 72 Pac. 360; *San Francisco L. & C. Co. v. State*, 141 Cal. 354, 355, 74 Pac. 1047; *Castro v. Breidenbach*, 143 Cal. 335, 336, 76 Pac. 1114.

76. Failure to file transcript within forty days after settlement of bill of exceptions will not authorize dismissal of appeal, where judge neglected to attach his certificate to such appeal, and took motion under adjustment, when requested to do so, until forty days had elapsed.—*Jackson v. Puget Sound L. Co.*, 115 Cal. 632, 633, 47 Pac. 603.

77. Where superior judge, after motion to dismiss appeal on ground that no transcript had been filed, settled statement, which was objected to on ground of irregularities, appeal will not be dismissed for failure to file transcript.—*Estate of Scott*, 124 Cal. 671, 673, 57 Pac. 654.

78. Motion to dismiss for failure to file transcript within forty days after taking of appeal, where transcript was filed within forty days after settlement of statement of case made after new trial, was denied.—*Vinson v. Los Angeles P. R. Co.*, 141 Cal. 151, 152, 74 Pac. 757.

79. Same—Same—Refusal to settle.—On failure to file transcript within 40 days after refusal of judge to settle bill of exceptions, appeal will be dismissed. Such refusal to settle then regarded same as settlement.—*White v. White*, 112 Cal. 577, 579, 44 Pac. 1026.

80. Same—What considered on motion to dismiss.—On motion to dismiss appeal for failure to file transcript in time, certificate of clerk of superior court showing what order was appealed from can only be considered. Affidavit of appellant is not admissible.—*Chevassus v. Purr*, 134 Cal. 434, 435, 66 Pac. 568.

81. Alleged defects in statement of case will not be considered on motion to dismiss appeal, but when case comes up on its merits.—*Richardson v. Eureka*, 92 Cal. 64, 65, 28 Pac. 102.

82. Transcript—Necessity of.—Where appellant fails to file transcript, appeal will be dismissed.—*In re Moss*, 7 Cal. Unrep. 172, 74 Pac. 546.

As to transcripts—Authentication of, see, post, § 953 and note.

Same—Contents of, see, post, §§ 951, 952 and notes.

83. Failure to file transcript as to certain respondents is not affected by fact that they are included in notice of appeal with others on whom bill of exceptions has been served, which bill has not yet been settled, where no bill of exceptions has been served on respondents who move to dismiss appeal.—*Emeric v. Alvarado*, 106 Cal. 646, 647, 40 Pac. 11.

84. Undertaking should not be embodied in transcript on appeal.—*San Francisco & N. P. R. Co. v. Anderson*, 77 Cal. 297, 298, 19 Pac. 517.

85. Waiver of insufficiency of transcript.—Stipulation that transcript contains all that is necessary for purposes of appeal waives objection that transcript does not contain all judgment-roll.—*Solomon v. Reese*, 34 Cal. 28, 34.

§ 951. WHAT PAPERS TO BE USED ON APPEAL FROM ORDERS, EXCEPT ORDERS GRANTING NEW TRIALS. On appeal from a judgment rendered on an appeal, or from an order, except an order granting a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the judgment or order appealed from, and of papers used on the hearing in the court below.

History: Enacted March 11, 1872, founded upon § 346 Practice Act as amended 1854, Stats. 1854, p. 84; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 339; April 24, 1915, Stats. and Amdts. 1915, p. 205. In effect August 8, 1915.

APPEAL FROM ORDERS EXCEPT NEW-TRIAL ORDERS—PAPERS USED ON.

1. Absence of copy of order from record on appeal—Appeal not considered.
2. Affidavit used on hearing of motion to set aside service of summons.
3. Certification—Construed not to provide any method.
4. Certificate from clerk that an undertaking on appeal filed.
- 5-7. Same—Judge certifying that certain papers were used on hearing of motion is not proper method.
8. Change of venue—Motion for.
9. Construction of section—To apply only to orders which are themselves appealable.
10. Copy of order appealed from—By whom furnished.
11. Default—Order setting aside.
12. Duty of appellant—As to generally.
- 13-15. Identification of papers—Necessity of.
- 16, 17. Same—Bill of exceptions is only proper method.

18. Injunction—Order dissolving preliminary.

19, 20. Same—Appeal from order revoking temporary restraining order.

21. Return of sale—Used on hearing.

22. Statement on motion for new trial.

23. Sufficiency of authentication of record.

24. Supplementary proceedings.

25. Undertaking on appeal.

26. Writ of assistance—Copy of motion for and notice.

See, ante, § 936 and note.

1. Absence of copy of order from record on appeal—Appeal not considered.—In a case in which the order attempted to be appealed from is not in the record, as required by the provisions of the above section, the appeal will not be considered.—*Timmons v. Coonley*, 39 Cal. App. 35, 179 Pac. 429.

As to who to furnish copy of order, see par. 10, this note.

2. Affidavit used on hearing of motion to set aside service of summons by publication must be authenticated by being in-

cluded in bill of exceptions, and hence where bill of exceptions merely refers to such affidavit which is included in transcript, but appears after certificate of clerk to judgment-roll, such affidavit can not be considered.—*San Diego Sav. Bank v. Goodsell*, 137 Cal. 420, 423, 70 Pac. 299.

3. Certification—Construed not to provide any method by which papers used on hearing of motion should be certified, and hence certificate of clerk that certain papers were used can not be held determinative of such fact as against subsequent statement that he signed certificate by mistake, and did not know and had no means of knowing whether affidavits were or were not used at hearing of motion—they not being marked or indorsed by clerk.—*Baker v. Synder*, 58 Cal. 617.

As to sufficiency of authentication of record, see par. 23, this note.

See, post, § 952 and note pars. 3-7.

4. Certificate from clerk that an undertaking on appeal, in due form, has been properly filed by appellant is imperatively required by section 953, ante.—*San Francisco & N. P. R. Co. v. Anderson*, 77 Cal. 297, 299, 19 Pac. 517.

5. Same—Judge certifying that certain papers were used on hearing of motion is not proper method of identifying such papers, and certificate which did not certify that affidavits set out were same as those used, or true copies of them, or that they were all that were used, is insufficient.—*Somers v. Somers*, 81 Cal. 608, 613, 22 Pac. 967.

But see par. 6, this note.

6. Certificate of judge that papers in transcript were those used on hearing of motion is sufficient when made by judge who heard motion.—*Schammel v. Schammel*, 70 Cal. 72, 73, 11 Pac. 497. See *Pleper v. Centinela L. Co.*, 56 Cal. 173.

But see par. 5, this note.

7. Certificate of presiding judge and clerk made after service and filing of notice of motion to dismiss appeal will not supply defects in transcript in failing to contain proof of service of notice of appeal, undertaking, bill of exceptions, or papers used on motion from order in which appeal was taken.—*Ellis v. Bennet*, 2 Cal. Unrep. 302, 3 Pac. 801.

8. Change of venue—Motion for.—As amended in 1874 construed not to require papers on hearing of motion for change of venue to be brought up by bill of exceptions, and hence where transcript contains papers used on hearing below accompanied by certificate of judge, stating what papers were used, such papers were properly before appellate court.—*Pleper v. Centinela L. Co.*, 56 Cal. 173, 174.

9. Construction of section—To apply only to orders which are themselves appealable and does not relate to papers used on hearing which resulted in judgment, and hence papers used on hearing of motion to file

supplemental complaint need not be authenticated by bill of exceptions on appeal from judgment.—*Giddings v. Seventy-Six L. & W. Co.*, 109 Cal. 116, 120, 41 Pac. 788.

10. Copy of order appealed from—By whom furnished.—Requirement that appellant must furnish supreme court with copy of order appealed from indicates that copy of such order must be furnished by clerk of court in which it was made, and not by clerk of court to which action was transferred by such order.—*Mansfield v. O'Keefe*, 133 Cal. 362, 363, 65 Pac. 826.

As to absence of copy of order appealed from preventing consideration of appeal, see par. 1, this note.

11. Default—Order setting aside.—On appeal from the order setting aside default, the transcript must contain the bill of exceptions prepared and signed as prescribed by the code.—*Grazidal v. Bastanchure*, 47 Cal. 167.

12. Duty of appellant—As to generally.—Under the provisions of the above section the appellant is required to furnish the court with a copy of the notice of appeal, a copy of the order or judgment appealed from, and all papers used on the hearing in the court below.—*Patterson v. Rutherford*, 39 Cal. App. 647, 179 Pac. 704.

13. Identification of papers—Necessity of.—On appeal from order changing place of trial where no papers are identified as having been used on hearing of motion, it will be presumed that court exercised its power properly.—*McAulay v. Truckee I. Co.*, 79 Cal. 50, 51 Pac. 434. See *Pardy v. Montgomery*, 77 Cal. 326, 19 Pac. 530.

See pars. 5, 6, this note.

14. Where papers found in transcript were not identified as having been used on hearing in court below, order appealed from must be affirmed.—*White v. Longmire*, 63 Cal. 232. See *Baker v. Synder*, 58 Cal. 617.

15. Where transcript contains no bill of exceptions or showing as to what papers were used on hearing of order appealed from, such order will not be reviewed.—*Ellis v. Bennet*, 2 Cal. Unrep. 302, 3 Pac. 801.

16. Same—Bill of exceptions is only proper method of authenticating papers used on hearing of motion, for though this section does not specify as to how such papers shall be authenticated, such method is specified by above section and section 649 and 650, ante, and hence certificate of judge is not sufficient to identify such papers.—*Herrlich v. McDonald*, 80 Cal. 472, 476, 22 Pac. 299; *Somers v. Somers*, 81 Cal. 608, 609, 22 Pac. 967.

17. Rule XXXII of supreme court, requiring that papers or evidence used on hearing of motion must be authenticated by bill of exceptions when no other mode of authentication is provided by law, was intended to apply to those appeals of which order was sought to be reversed because of matters alleged to be shown by affidavits, or evidence used or taken on hearing of

court below, and does not apply when order appealed from is taken on matters appearing on its face, and hence findings of court, in settling account of executor, need not be authenticated by bill of exceptions, but are part of judgment-roll.—*Miller v. Lux*, 100 Cal. 609, 612, 35 Pac. 345, 639.

18. Injunction—Order dissolving preliminary must be furnished in transcript on appeal.—*Kimple v. Conway*, 69 Cal. 71, 72, 10 Pac. 189.

19. Same—Appeal from order revoking temporary restraining order and refusing injunction is heard on papers used on hearing in court below, and no bill of exceptions is necessary unless to identify such papers.—*Hunt v. Steese*, 75 Cal. 620, 626, 17 Pac. 920.

20. Appeal from order dissolving injunction must be heard on papers used on hearing in court below, and where such papers are not authenticated by bill of exceptions, or other mode authorized by law, showing that they were used on such motion, appeal will be dismissed and appellant will not be allowed to bring up all papers on file in court below.—*Spreckels v. Spreckels*, 114 Cal. 60, 62, 45 Pac. 1022.

21. Return of sale—Used on hearing of motion to confirm sale must be included in record, or order confirming sale will not be reviewed.—*Estate of Robinson*, 142 Cal. 152, 157, 75 Pac. 777.

22. Statement on motion for new trial can be used on another appeal only when

such appeal is from final judgment, and hence can not be used on appeal from order settling account of executor.—*Estate of Franklin*, 133 Cal. 584, 588, 65 Pac. 1081.

23. Sufficiency of authentication of record.—An appeal from an order made upon proceedings had supplementary to execution the record is sufficiently authenticated under the provisions of the above section and section 953, post, where the papers are evidence used on the hearing appeared in the form of affidavits and written orders, and were stipulated by counsel to be correct copies.—*Pioneer Invest. & T. Co. v. Muncey*, 33 Cal. App. 740, 166 Pac. 591.

As to authentication of papers on appeal, see, post, § 952, note pars. 1-3.

As to certification of record, see pars. 3-7, this note.

24. Supplementary proceedings.—Construed not to require findings in supplementary proceedings to be brought up by bill of exceptions.—*Lyons v. Marcher*, 119 Cal. 382, 383, 51 Pac. 559.

25. Undertaking on appeal should not be embodied in transcript.—*San Francisco & N. P. R. Co. v. Anderson*, 77 Cal. 297, 298, 19 Pac. 517.

26. Writ of assistance—Copy of motion for and notice of motion for order to show cause why such writ should not be issued, should be included in transcript on appeal from such order, so as to show that appellants were parties to motion.—*Miller v. Bate*, 56 Cal. 135, 136.

§ 952. WHAT PAPERS TO BE USED ON AN APPEAL FROM AN ORDER GRANTING A NEW TRIAL. On appeal from an order granting a new trial the appellant must furnish the court with a copy of the notice of appeal, of the order appealed from, the judgment-roll and any bill of exceptions prepared and settled as provided in section six hundred fifty of this code subsequently to the order granting the motion.

History: Enacted March 11, 1872; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 339; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 174, held unconstitutional, see history, § 5 ante; amendment approved April 24, 1915, Stats. and Amdts. 1915, p. 205. In effect August 8, 1915.

PAPERS TO BE USED ON APPEAL FROM ORDER DENYING NEW TRIAL.

- 1-3. Authentication—Affidavits used on hearing of motion for new trial.
4. Bill of exceptions—Is method of authentication.
5. Certification of transcript.
- 6, 7. Judgment-roll must be in transcript.
8. Notice of intention to move for new trial—Formerly no part of record on appeal.
- 9, 10. Same—Notice of intention—Present practice—Must be included in bill of exceptions.
11. Order denying motion for new trial.

12-14. Statement or bill of exceptions.

15. Undertaking on appeal.

See notes appended under repealed sections 661 and 936, ante.

1. Authentication—Affidavits used on hearing of motion for new trial must be incorporated in bill of exceptions under Rule XXIX supreme court, hence certificate of judge authenticating certain affidavits as having been used on hearing of motion, without showing that these were all papers used at hearing, is insufficient.—*Melde v. Reynolds* 120 Cal. 231, 236, 52 Pac. 491.

As to authentication of record on appeal, see, ante, § 951, note par. 23.

As to certification of papers on appeal, see, ante, § 951, note pars. 3-7.

2. Affidavits used on motion for new trial can not be considered on appeal from order made on such motion unless they are incorporated in bill of exceptions.—*Skinner v. Horn*, 144 Cal. 278, 279, 77 Pac. 904. See *Cahill v. Baird*, 138 Cal. 691, 72 Pac. 342.

3. Construed to make duty of appellant to bring up not only judgment-roll and bill of exceptions or statement on motion for new trial, but also such affidavits as may have been used on hearing, properly authenticated in bill of exceptions, and in absence of such showing it will be conclusively presumed that motion was in part based on some ground on which affidavits could be used, that affidavits were in fact used on hearing, and were sufficient to justify court in making order appealed from.—*Skinner v. Horn*, 144 Cal. 278, 280, 77 Pac. 904.

4. Bill of exceptions—Is method of authentication.—Papers used on hearing of motion for new trial must be authenticated by bill of exceptions under Rule XXIX supreme court, and hence certificate of judge that certain papers annexed to such certificate were used, and that no other papers were used by attorney on behalf of motion, does not entitle appellant to be heard on appeal from order denying motion to vacate and set aside judgment, order denying new trial, and stay of execution.—*Ramsbottom v. Fitzgerald*, 128 Cal. 75, 76, 60 Pac. 522.

See, ante, § 951 and note paras. 4-7.

5. Certification of transcript.—Clerk of court is not authorized to certify or determine what papers were used on hearing of motion for new trial, and his certificate is of no effect.—*Melde v. Reynolds*, 120 Cal. 234, 237, 52 Pac. 491.

See, post, § 953 and note paras. 5-10.

6. Judgment-roll must be in transcript on appeal from order denying new trial, and where final judgment is not embodied in judgment-roll appeal will be dismissed, unless such judgment be furnished.—*Kimple v. Conway*, 69 Cal. 71, 73, 10 Pac. 189.

7. Appeal will not be dismissed for failure of transcript to include judgment-roll, where before hearing of motion such judgment-roll is supplied.—*Richardson v. City of Eureka*, 92 Cal. 64, 65, 28 Pac. 102. See *Paige v. Roeding*, 89 Cal. 69, 26 Pac. 787.

8. Notice of intention to move for new trial—Formerly no part of record on appeal.—The notice of intention to move for

new trial is no part of record on appeal.—*Hook v. Hall*, 68 Cal. 22, 23, 8 Pac. 596; *Pico v. Cohn*, 78 Cal. 384, 385, 20 Pac. 706; *Richardson v. Eureka*, 92 Cal. 64, 28 Pac. 102.

As to notice of intention to move for new trial as part of record, see, ante, § 661 and note.

9. Same—Notice of intention—Present practice—Must be included in bill of exceptions.—A copy of the notice of intention, though incorporated in the transcript is not a part of the judgment-roll, and unless it is included in a bill of exceptions can not be considered on appeal.—*Cormond v. United Railroads*, 41 Cal. App. 683, 183 Pac. 218.

10. Where the notice did not appear in a bill of exceptions neither the stipulation of the parties to the correctness of the transcript nor the certificate of the clerk that the papers in the transcript are true copies of the originals can supply what the law requires should be made to appear in the bill of exceptions. — *Cormond v. United Railroads*, 41 Cal. App. 683, 183 Pac. 218.

11. Order denying motion for new trial is part of record, and where it recites that motion was made on grounds set forth in defendant's notice of motion, it sufficiently shows that notice was given. It is not necessary that notice should be formally set out.—*Randall v. Duff*, 79 Cal. 115, 122, 3 L. R. A. 754, 19 Pac. 532, 21 Pac. 610.

12. Statement or bill of exceptions as used on hearing of motion for new trial in court below, must be brought up to appellate court by transcript on appeal from order granting or refusing new trial, and hence where transcript is in such imperfect condition that it has to be disregarded, there is no record on which appellant is entitled to be heard.—*Thompson v. Patterson*, 54 Cal. 542, 547.

13. Where record on appeal from order denying new trial contains no bill of exceptions appellate court can not review error.—*Pereira v. City Sav. Bank*, 128 Cal. 45, 46, 47, 60 Pac. 524.

14. Where no statement or bill of exceptions to be used on motion for new trial was settled by court, order denying motion must be affirmed.—*Machado v. Kinney*, 135 Cal. 354, 355, 67 Pac. 331.

15. Undertaking on appeal should not be embodied in transcript.—*San Francisco & N. P. R. Co. v. Anderson*, 77 Cal. 297, 298, 19 Pac. 517.

§ 953. COPIES, HOW CERTIFIED. The copies provided for in the last three sections must be certified to be correct by the clerk or the attorneys. If it appear that there is any paper or record in the custody of the clerk of the trial court which was before the trial court but which is not included in the record on appeal, and an examination of such paper or record will assist in a determination of the appeal on its merits, the court in which the appeal is pending may, on motion of either party, or on its own motion, require the pro-

duction of a certified copy of such paper or record, and the same shall thereupon be deemed a part of the record on appeal.

History: Enacted March 11, 1872, founded upon § 346 Practice Act as amended 1854 (Stats. 1854, p. 84); amendment approved March 24, 1874, Code Amdts. 1873-4, p. 339; May 6, 1919, Stats. and Amdts. 1919, p. 290; May 29, 1921, Stats. and Amdts. 1921, p. 194. In effect July 29, 1921.

COPIES—CERTIFICATION OF.

1. Affidavit of appellant or clerk—Can not be substituted for certificate.
2. Appeal by new and alternative method—As to rehearing to present evidence not printed in brief.
3. Same—Evidence—Duty to print in brief.
4. Authority of clerk—Limited to certify correctness of copies of papers.
5. Certificate to transcript—In general.
6. Same—Sufficiency of.
7. Same—Same—Filing new transcript
8. Same—Same—Informal certificate.
9. Same—Same—Where certificate to transcript says nothing as to any bill of exceptions.
10. Same—Whether alleged documents when certified will constitute transcript.
- 11, 12. Certificate to undertaking.
13. Same—Amended certificate.
14. Same—Conclusiveness.
- 15-21. Same—Sufficiency—Certificate that transcript is correct.
- 22, 23. Same—Time of filing.
24. Stipulation of correctness of transcript.

See, ante, § 936 and note.

1. **Affidavit of appellant or clerk—Can not be substituted for certificate** provided for in this section.—*Winder v. Hendrick*, 54 Cal. 275-277.

2. **Appeal by new and alternative method—As to rehearing to present evidence not printed in brief.**—In the case of an appeal by the new and alternative method, as prescribed in the above section and the following sections to and including section 953c, post, a rehearing on appeal can not be granted for the purpose of enabling either party to present to the court evidence not printed in his brief, on the submission of what in fact constitutes a new record on appeal; either party is required by the sections above referred to, to print in his brief such portions of the record as he desires to call to the attention of the court, and on failure to exercise this right and duty by a submission without complying therewith, another hearing thereof upon other evidence than that first presented at the hearing in the appellate court, can not be granted.—*Peterkin v. Randolph Marketing Co.*, — Cal. App. —, 191 Pac. 947.

3. **Same—Evidence—Duty to print in brief.**—In an appeal under the new and al-

ternative method, it is not a compliance with the requirements of the statute for an appellant to print in his opening brief, or in the supplement thereto, only the testimony in the case favorable to his contentions; the regulation requires all the evidence, material to the point made on the appeal shall be printed in order that the court may consider its weight and sufficiency, and any conflict presented therein, and where the court is not thus prepared, the appellate court can not intelligently pass upon the appeal on its merits without imposing on counsel a further presentation of the record, or assuming the vexatious burden of an examination of the typewritten transcript, which the court is not required to do.—*Eddy v. Stowe*, 43 Cal. App. 789, 185 Pac. 1024, following the doctrine in *Marcucci v. Vowinkel*, 164 Cal. 693, 130 Pac. 430; *Pasadena Realty Co. v. Clune*, 34 Cal. App. 33, 34, 166 Pac. 1027.

4. **Authority of clerk—Limited to certify correctness of copies of papers** designated in previous sections as forming record on appeal, and he is not authorized by law to certify that certain papers have been used on hearing of motion for new trial.—*Melde v. Reynolds*, 120 Cal. 234, 237, 52 Pac. 491.

5. **Certificate to transcript—In general.**—Transcript which was not certified by clerk of court or attorneys, as provided in this section, can not be considered on appeal.—*Ellis v. Bennet*, 2 Cal. Unrep. 302, 3 Pac. 801.

See, ante, § 952 and note par. 5.

As to order forbidding clerk to certify correctness of transcript, see, ante, § 946 and note.

6. **Same—Sufficiency of.**—Certificate that record contains complete copies of record and documents on file, and among others of last bill of exceptions, "including order refusing new trial," is sufficient to make such order part of record where second bill of exceptions recites hearing of motion, and then states "court having heard argument of counsel and being fully advised, doth order that such motion be and same is hereby denied."—*Hagman v. Williams*, 88 Cal. 146, 149, 25 Pac. 1111.

7. **Same—Same—Filing new transcript.**—Motion to dismiss appeal because transcript was not properly authenticated, will be denied, where at hearing of motion appellant presented another copy of transcript properly authenticated by certificate, and asked leave to file same.—*Swortfiguer v. White*, 137 Cal. 391, 70 Pac. 214.

8. **Same—Same—Informal certificate to transcript,** is not ground for dismissal where appellant furnished proper certificate at hearing of motion.—*Hellings v. Duval*, 119 Cal. 199, 200, 51 Pac. 335.

9. **Same—Same—Where certificate to transcript says nothing as to any bill of exceptions,** purported bill of exceptions can not be considered.—*Pereira v. City Sav. Bank*, 128 Cal. 45, 46, 47, 60 Pac. 524. *

10. **Same—Whether alleged documents when certified will constitute transcript on appeal** is question which clerk of court can not determine. It is his duty to certify correctness of documents, if they are correct copies, and transmit same to this court, and hence on his refusal, order will be granted compelling him to certify correctness of such documents.—*People v. Center*, 54 Cal. 236.

As to certificate as to what papers were used on hearing of motions, see, ante, §§ 951, 952 and notes.

11. **Certificate to undertaking.**—In absence of certificate by clerk that undertaking on appeal is in due form, or of any copy of undertaking certified by that officer, it will be assumed that instrument on file was not in due form.—*Winder v. Hendrick*, 54 Cal. 275-277.

12. **Transcript must show that an undertaking has been filed in time.**—*Pacific Mut. L. Ins. Co. v. Edgar*, 132 Cal. 197, 198, 64 Pac. 260.

13. **Same—Amended certificate that undertaking on appeal in due form has been properly filed,** may be allowed to be filed under Rule XIII supreme court.—*Swasey v. Adair*, 83 Cal. 136, 137, 23 Pac. 284.

14. **Same—Conclusiveness.**—Certificate of clerk that undertaking on appeal in due form has been properly filed is not conclusive, but court may go behind certificate and determine whether undertaking is sufficient to confer jurisdiction.—*Duncan v. Times-Mirror Co.*, 109 Cal. 602, 606, 42 Pac. 147.

15. **Same—Sufficiency—Certificate that transcript is correct** is not sufficient certificate that undertaking on appeal is in due form and has been properly filed, though undertaking is in transcript and from its indorsements appears in proper form.—*San Francisco & N. P. R. Co. v. Anderson*, 77 Cal. 297, 298, 19 Pac. 517; *Jones v. Iverson*, 3 Cal. Unrep. 707, 31 Pac. 625; *Shay v. Chicago C. Co.*, 111 Cal. 549, 552, 44 Pac. 237.

16. **Copy of undertaking on appeal certified by county clerk to be correct,** from indorsements on which it appears that undertaking in due form was properly filed, does not satisfy requirements of section.—*Swasey v. Adair*, 83 Cal. 136, 137, 23 Pac. 284.

17. **Certificate "that good and sufficient undertaking on appeal in due form of law has been executed and is now on file in said action in my office,"** is not sufficient certificate by clerk as to such undertaking.—*Watson v. Cornell*, 52 Cal. 644.

18. **Certificate of clerk that a "good and sufficient undertaking on appeal was properly filed herein"** complies with requirements of section, and is prima facie sufficient.—*Downing v. Rademacher*, 136 Cal. 673, 675, 69 Pac. 415. See *Meeker v. Hoffer*, 57 Cal. 140.

19. **Certificate of clerk that "sufficient undertaking on appeal in due form of law was properly filed therein"** sufficiently complies with section.—*Meeker v. Hoffer*, 57 Cal. 140, 141.

20. **Certificate that "undertaking in due form of law is on file in my office"** is insufficient certificate to show that undertaking on appeal has been filed, or that it was properly filed.—*Pacific Mut. L. Ins. Co. v. Edgar*, 132 Cal. 197, 198, 64 Pac. 260.

21. **Certificate of clerk that "undertaking on appeal was properly filed in his office"** is insufficient in failing to recite that undertaking on appeal was in due form—expression "properly filed" not being equivalent or intended to include "in due form."—*Winder v. Hendrick*, 54 Cal. 275-277.

22. **Same—Time of filing.**—Where on motion to dismiss certificate by clerk was filed, showing that undertaking on appeal in due form had been filed, which was not objected to for insufficiency, appeal will not be dismissed, though at time motion was made no such certificate was on file.—*Shay v. Chicago C. Co.*, 111 Cal. 549, 552, 44 Pac. 237. See *Warren v. Hopkins*, 110 Cal. 506, 42 Pac. 986.

23. **Where transcript does not contain copy of undertaking on appeal, and certificate of clerk, so far as it relates to such undertaking, does not conform to this section and will be dismissed.**—*Watson v. Cornell*, 52 Cal. 644.

24. **Stipulation of correctness of transcript** seems to obviate necessity of certificate by clerk, and does not prevent respondent from denying sufficiency of statement.—*Leonard v. Shaw*, 114 Cal. 69, 72, 45 Pac. 1012.

§ 953a. PREPARATION OF PAPERS ON APPEAL, NOTICE TO COUNTY CLERK. Any person desiring to appeal from any judgment, order or decree of the superior court to the supreme court or any of the district courts of appeal, may, in lieu of preparing and settling a bill of exceptions pursuant to the provisions of section six hundred and fifty of this code, or for the purpose of

presenting a record on appeal from any appealable judgment or order, or for the purpose of having reviewed any matter or order reviewable on appeal from final judgment, file with the clerk of the court from whose judgment, order or decree said appeal is taken, or to be taken, a notice stating that he desires or intends to appeal, or has appealed therefrom, and requesting that a transcript of the testimony offered or taken, evidence offered or received, and all rulings, instructions, acts or statements of the court, also all objections or exceptions of counsel, and all matters to which the same relate, be made up and prepared. Said notice must be filed within ten days after notice of entry of the judgment, order or decree, or if a proceeding on motion for new trial be pending, within ten days after notice of decision denying said motion, or of other termination thereof.

[Phonographic report of trial.] Upon receiving said notice, it shall be the duty of the court to require the stenographic reporter thereof to transcribe fully and completely the phonographic report of the trial. The stenographic reporter shall, within twenty days after said notice has been filed with the clerk, prepare a transcript of the phonographic report of the trial including therein copies of all writings offered or received in evidence and all other matters and things required by the notice above referred to to be therein contained, and shall file the same with the clerk of said court upon the same being filed; it shall be the duty of the clerk forthwith to give the attorneys appearing in said cause notice that said transcript has been filed, and that within five days after the receipt of said notice the same will be presented to the judge for approval.

[Transcript presented to judge.] At the time specified in the notice of the clerk to the attorneys said transcript shall be presented to the judge for his approval, and the judge shall examine the same and see that the same is a full, true and fair transcript of the proceedings had at the trial, the testimony offered or taken, evidence offered or received, instructions, acts or statements of the court, also all objections and exceptions of counsel and matters to which the same relate. The judge shall thereupon certify to the truth and correctness of said transcript and the same shall, when so settled and allowed, be and become a portion of the judgment-roll and may be considered on appeal in lieu of the bill of exceptions now provided for by law.

[Additional matters in transcript.] If the judgment, order or decree appealed from be not included in a judgment-roll, the party desiring to appeal shall on the filing of said notice specify therein such of the pleadings, papers, records and files in said cause as he desires to have incorporated in said transcript in addition to the matters hereinbefore required and the same shall be included.

[Respondents may require additions.] The respondents on said appeal may at the time said transcript is presented for settlement and allowance, require the insertion therein of such other papers, files, documents, records and proceedings of said cause as they then desire to have incorporated therein, and the

said papers, files, documents, records and proceedings shall when so incorporated be deemed fully authentic for use on said appeal. The parties may by stipulation omit any matters from said record which they desire to so omit.

History: Enactment approved March 20, 1907, Stats. and Amdts. 1907, p. 750. Kerr's Stats. and Amdts. 1906-7, p. 471; amendment approved April 24, 1915, Stats. and Amdts. 1915, p. 206. In effect August 8, 1915.

PREPARATION OF PAPERS ON APPEAL —NOTICE TO COUNTY CLERK.

1. Action for damages for a malicious assault — Appeal under provisions of above section—Presumptions.
2. Action to recover for breach of warranty — Review of instructions — Sufficiency of record.
3. Action to set aside decree of foreclosure—Appeal from judgment—Insufficient record.
4. Appeal by new and alternative method — Record on appeal — Authentication.
5. Same — Same — Same — Absence of certificate of trial judge.
- 6, 7. Same — Same — Motion to dismiss—Filing typewritten transcript — Effect of.
8. Same—Same—Request for transcript —Does not include what.
9. Same — Same — Typewritten transcript—Bill of exceptions not provided for.
10. Appeal from order — Record on — Authentication of papers.
11. Appeal from order made after final judgment — Certificate of judge, not clerk required.
- 12-23. Assignment and specification of error—In general.
24. Bill of exceptions—Undertaking on appeal.
- 25, 26. Construction of section—As to purpose of act.
- 27-30. Same—Course of appellant who does not follow section.
31. Same — Mandatory as to notice to clerk.
32. Delay in notice for transcript—Dismissal not entered—Where relief granted by trial court.
33. Same—Relief for.
- 34, 35. Denial of motion for new trial—Notice of—Presence in court sufficient.
36. Same — Same — Failure to file — Proper refusal to certify transcript.
37. Filing request for transcript—Time for—Date of notice of entry of judgment.
38. Homestead — Finding of abandonment—Transcript on appeal.
39. Improperly prepared transcript — Proper practice to affirm.
40. Insufficient certificate—As to effect of.
41. Same—Presumption.
42. Insufficient record — Briefs — Statement of cause.
43. Judgment-roll — Printing — Type-written record.
44. Notice of appeal—As to what constitutes a sufficient.
45. Same—Annulment of marriage.
46. Same—Proceedings on motion for new trial—Notice of termination of such proceedings.
- 47-50. Same—Service of notice.
- 51-53. Notice of entry of judgment—Written notice not necessary.
54. Notice of presentation for certification of transcript by mail.
55. Notice to clerk demanding transcript —As to time of filing.
56. Same—A jurisdictional prerequisite.
57. Same—Failure to serve notice.
- 58-60. Same — Giving within prescribed time—Mandatory.
- 61, 62. Same—Insufficiency of.
63. Same—Relief from default.
64. Order denying motion for new trial —How brought up on appeal.
65. Same — Newly discovered evidence—Sufficiency of record.
66. Preparation of transcript—Certification—Cure of omission of order for preparation.
67. Same—Code provisions not jurisdictional.
68. Same—From minutes of judge—In sufficient record.
69. Same—Same—Insufficient as bill of exceptions.
70. Same—Mandate to trial judge.
- 71, 72. Same — Notice to clerk within ten days.
73. Printed transcript — Provisions of sections 953a and 953c—not applicable.
74. Record on appeal—As to how made up.
75. Same — Authentication of affidavits —Necessity of.
76. Same—Bringing up evidence.
77. Same—Defects in—Effect of.
78. Same — Same — Presumption on appeal.

79. Same—Failure to print portions of record in briefs.
80. Same—Insufficiency of brief.
81. Same—Printing of in briefs.
82. Same—Sufficiency of—Appeal not dismissed, when.
83. Same—Unauthenticated affidavits.
84. Reporter's transcript—As to taking place of bill of exceptions—Review of evidence.
85. Same—Mandamus to compel to prepare transcript.
86. Same—New trial refused—Report of testimony lost—Reversal on appeal.
- 87-92. Transcript on appeal—As to what may be included in.
- 93-102. Same—Authentication or certification.
103. Same—Commencement to run of time for filing.
104. Same—Judge's certificate to be attached to.
105. Same—Mandamus to compel judge to allow and certify.
106. Same—Sufficiency of.
- 107-109. Same—Time for serving and filing transcript.
110. Time for making demand for record—Termination of new trial proceedings—Notice of decision—"Or other termination."
111. Time of appeal—Actual notice of decision—Written notice not essential.
112. Same—Same—Minute-order denying new trial.
- 113-115. Typewritten record—Where unauthorized.

As to independent character of sections of the code, see, ante, § 941b, note par. 4.

As to right of appellant taking appeal by the new and alternative method to prepare transcript under the provisions of section 950, ante, instead of under the provisions of the above section, without affecting the validity of his appeal, see, ante, § 940, note pars. 62-67.

1. Action for damages for a malicious assault—Appeal under provisions of above section—Presumption.—In the case of an action prosecuted for damages resulting from a malicious assault, it being claimed by plaintiff that a sore upon the foot was the approximate result of the alleged assault and the testimony given at the trial was evenly balanced upon the question, the physician attending the plaintiff having testified that although the plaintiff became sick and disabled it was not at all clear that such sickness or disability was caused by or resulted from the alleged assault or that the infected sore on one of her feet was attributed to such assault and that she did not complain of the injury to the foot

until some time after the assault; the question as to what caused the injury was one for determination by the trial court, and that court had power under the facts to determine that the condition of the foot was not caused by the injury received in the assault complained of; and on an appeal from a judgment awarding damages, taken under the provisions of the above section, in support of the judgment the appellate court will assume that the trial court did determine that the injury to the foot was not caused by the assault; there being nothing in the record tending in the least to show that the trial court abused its discretion, the judgment of the trial court will be affirmed and the appeal dismissed.—Kimball v. Swenson, — Cal. App. —, 196 Pac. 781.

2. Action to recover for breach of warranty—Review of instructions—Sufficiency of record.—On an appeal from a judgment in an action to recover damages for a breach of warranty, taken under the new and alternative method, instructions given to the jury, which are not included in the clerk's transcript, in the absence of a certification by the trial judge as to correctness, or as being the instructions actually given, although at the foot of each instruction there is a notation supposedly made by the trial judge in the course of his consideration of the instructions proffered by the respecting parties to the suit.—Tracy Brick & Art Stone Co. v. Wurster, 44 Cal. App. 652, 187 Pac. 125.

3. Action to set aside decree of foreclosure—Appeal from judgment—Insufficient record.—In an action to set aside a decree of foreclosure of mortgage, on an appeal from the judgment according to the method provided in the above section where the appellants fail to print in their briefs the pleadings, findings, or judgments, or any portion thereof, and there is nothing more than a mere fragmentary statement of some of the evidence, it appearing from the appellant's brief that the action was to set aside a decree in a previous action for the foreclosure of the mortgage upon the ground that the owner of the mortgaged property was never served with summons in the foreclosure proceedings, and that the appearance entered for him was unauthorized, the failure of the appellants to print sufficient of the record to establish any error on the part of the trial court, the record is defective under the provisions of the above section.—Hawley v. Assurance Co., 182 Cal. 111, 187 Pac. 1.

4. Appeal by new and alternative method—Record on appeal—Authentication.—On an appeal from a judgment under the provisions of the above section and following sections to and including section 953c, post, all that may be certified by the clerk, is the judgment-roll with the notice of appeal.—Richmond v. Julian Consol. Min. Co., 176 Cal. 600, 169 Pac. 356.

5. Same—Same—Same—Absence of certificate of trial judge.—In the case of such an appeal authenticated by the clerk as provided by law, in the absence of a certificate of the trial judge other papers than the judgment-roll and notice of appeal form no part of the record on appeal and they can not be considered.—*Richmond v. Julian Consol. Min. Co.*, 176 Cal. 600, 169 Pac. 356, following the doctrine in *Totten v. Barlow*, 165 Cal. 378, 132 Pac. 749; *Bush v. Allen*, 172 Cal. 102, 155 Pac. 456.

6. Same—Same—Motion to dismiss—Filing typewritten transcript—Effect of.—Under the provisions of Rule V of the supreme court, the fact that before a respondent gave notice of motion to dismiss an appeal, the appellant had filed in the appellate court a typewritten clerk's transcript, is a sufficient answer to a motion to dismiss.—*Pioneer Truck Co. v. Hawley*, 39 Cal. App. 481, 179 Pac. 447, applying the doctrine in *Beckett v. Stuart*, 35 Cal. App. 796, 171 Pac. 107.

7. The court say that by the holding above given they are not to be understood as declaring that appellant need not print in his brief, or in a supplemental brief thereto, such portions of the record as he desires to call to the attention of the court, as required by the provisions of section 953c, post.—*Pioneer Truck Co. v. Hawley*, 39 Cal. App. 481, 179 Pac. 447.

8. Same—Same—Request for transcript—Does not include what.—Under the provisions of the above section requiring an appellant to file with the clerk a request for a transcript of the testimony, when he desires to obtain such testimony, does not apply to the matter of obtaining a copy of the notice of appeal and of the judgment-roll.—*Pioneer Truck Co. v. Hawley*, 39 Cal. App. 481, 179 Pac. 447.

9. Same—Same—Typewritten transcript—Bill of exceptions not provided for.—On an appeal under the new and alternative method as provided for in the above section and sections 953b and 953c, post, the appeal is to be heard on typewritten transcript, and there is no provision made for presenting the evidence by a bill of exceptions, consequently it is only in those cases where the proceedings on the trial have been reported and can be produced in full by a reporter's transcript, that this form of appeal can be resorted to.—*Koeberle v. Coit*, — Cal. App. —, 189 Pac. 727, following the doctrine of *Harpold v. Slocum*, 186 Cal. 364, 143 Pac. 609; *Bush v. Allen*, 172 Cal. 102, 155 Pac. 456; *Allen v. Conroy*, 22 Cal. App. 409, 134 Pac. 730; *Clemens v. Gregg*, 34 Cal. App. 272, 167 Pac. 299.

As to bill of exceptions, see par. 24, this note.

10. Appeal from order—Record on—Authentication of papers.—Under the provisions of the above section the judge alone is authorized to authenticate the papers used at a hearing, and this must be done by

incorporating them in the bill of exceptions, or in the record in accordance with the provisions of the above section.—*Patterson v. Rutherford*, 39 Cal. App. 647, 179 Pac. 704, applying the doctrine in *Herrlich v. McDonald*, 80 Cal. 472, 22 Pac. 299; *San Diego Bank v. Goodsell*, 137 Cal. 420, 70 Pac. 299; *Hertel v. Emireck*, 178 Cal. 534, 174 Pac. 30.

11. Appeal from order made after final judgment—Certificate of judge, not clerk, required.—Where the appeal is from an order after judgment the judge and not the clerk must certify the papers and proceedings for appeal.—*Barnebee v. Humstock*, 42 Cal. App. 659, 183 Pac. 951.

12. Assignment and specification of error—In general.—Where the record on appeal is prepared under above section providing that the reporter's transcript, authenticated by the judge, shall be a part of the judgment-roll and may be used on appeal instead of a bill of exceptions, no specifications of particulars in which the evidence is alleged to be insufficient is required.—*Cortelyou v. Imperial Land Co.*, 166 Cal. 14, 134 Pac. 981.

13. Where there is no assignment of error in the taxation of costs presented by the record on appeal, the appellate court will not review error claimed to consist in the service and filing of the bill of costs after the time allowed by the statute.—*Estate of Weir*, 168 Cal. 330, 143 Pac. 612.

14. Assignments of error, based on certain rulings of the trial court made during the examination of witnesses, are examined and held to be without merit.—*Ellsworth v. Palmtag*, 168 Cal. 360, 143 Pac. 602.

15. Neither the trial court nor the supreme court can consider the question of the sufficiency of the findings when such specifications are not made in substantial terms, for the law itself declares that unless so made they shall be disregarded.—*Crow v. Crow*, 168 Cal. 607, 143 Pac. 689.

16. The ancient strictness of the rule governing the sufficiency of specifications has been much abated; but nevertheless the specifications in any case must be sufficient to convey fair and correct knowledge both to the adverse party and to the trial court of the precise findings excepted to as not being sustained by the evidence, and this for the manifest purpose that the adverse party may know what evidence by way of amendments to embody in the statement or bill, and that the trial court's attention may be properly directed to these designated matters.—*Crow v. Crow*, 168 Cal. 607, 143 Pac. 689.

17. Where defects in an affidavit in a continuance because in the absence of a witness could have been cured by amendment, they are, on appeal, deemed to have been waived if no objection is raised below.—*Swayne v. Wells-Russell & Co.*, 169 Cal. 204, 146 Pac. 686.

18. Where error is claimed in rulings of the trial court on instructions, it is the duty of the party complaining on appeal to point out the error, otherwise it will not be reviewed, as it is not incumbent on a reviewing court to search through the record for the purpose of discovering for itself wherein the action of the trial court in the respect complained of involves error prejudicial to the defendant.—*People v. Stein*, 23 Cal. App. 108, 137 Pac. 271.

19. Where some eighteen rulings upon the admission or rejection of evidence are generally assigned as error, and no particular point concerning any one of the rulings is discussed in the brief of the appellant, but the appellate court is merely referred to the pages and folios of the transcript where the objections and rulings are to be found, it will not examine and pass upon the points thus presented.—*People v. Guaragna*, 23 Cal. App. 120, 137 Pac. 279.

20. A general assignment of errors in the admission or rejection of evidence, by the statement in the appellant's brief that an examination of the record will satisfy the court of the correctness of his position, will not be considered on appeal.—*Murdough v. Murdough*, 23 Cal. App. 179, 137 Pac. 267.

21. A specification of error that the court refused to give certain instructions asked for by the appellant can not be considered on appeal, if the text of such instructions does not appear in the record outside of the specifications.—*Polkinghorn v. Riverside Portland Cement Co.*, 24 Cal. App. 615, 142 Pac. 140.

22. It is not fair to raise the question on appeal that the findings are not supported by the evidence, where counsel for the appellant presents no evidence at the trial, but merely relies on "a legal defense," "as shown by the demurrer."—*Yellow Jacket Gold & Silver Min. Co. v. Holbrook*, 24 Cal. App. 687, 142 Pac. 128.

23. A claim of error in refusing to give certain instructions is without merit, where the record fails to disclose any request for the giving thereof.—*People v. Vukojevich*, 25 Cal. App. 459, 143 Pac. 1058.

24. **Bill of exceptions—Undertaking on appeal.**—The preparation of a bill of exceptions instead of a reporter's transcript, does not affect question of undertaking on appeal by new and alternative method.—*Nezlik v. Cole*, 43 Cal. App. 130, 184 Pac. 523.

As to bill of exceptions not being provided for on appeal under new method of appeal, see par. 9, this note.

25. **Construction of section—As to purpose of act.**—The object of the amendment of August 8, 1915, to above section, extending the time for filing notice with the clerk for the making up and preparation of a transcript to be used on appeal from a judgment when a proceeding on motion

for new trial is pending, is to enable a party to include in his transcript the matters material to a review of the action of the court on his motion for a new trial, and thus to enable the desired review to be had.—*Schmitt v. White*, 172 Cal. 554, 158 Pac. 216.

26. It was not, however, intended by such amendment to give a party who had appealed from a judgment prior to the change in the law and whose right to such a record had absolutely expired prior to such date, a right to a new record for the purpose of reviewing matters in no way germane to the question of the correctness of the disposition by the trial court of the motion for new trial, and material only to questions involved in the appeal from the judgment as the law stood before the change.—*Schmitt v. White*, 172 Cal. 554, 158 Pac. 216.

27. **Same—Course of appellant who does not follow section.**—Where the appellant does not follow this section he must print the transcript and serve and file copies thereof in the manner provided by the supreme court rules. The appellant can not avoid the rule requiring the record on appeal from the judgment-roll alone to be printed by giving the clerk a notice, purporting to be within the terms of this section, to have the judgment-roll prepared as a typewritten record by the stenographic reporter. This section does not apply to such a case.—*Harpold v. Slocum*, 168 Cal. 364, 143 Pac. 609.

28. An appeal under this and the two following sections is authorized on an appeal from an order granting a motion to change the place of trial where the proceedings at the hearing were not taken down by a stenographer, and the evidence submitted consisted entirely of the files and records of the section.—*Pierce v. Works*, 171 Cal. 684, 154 Pac. 852.

29. The proceeding for a record under this section is an independent one; it is an alternative method of preparing the record in lieu of a bill of exceptions. The proceeding must be started within the time fixed by law, and unless begun within said time the transcript can not be obtained.—*Schmitt v. White*, 172 Cal. 554, 158 Pac. 216.

30. The reporter's transcript of the proceedings at the trial can not be considered on a review of the order of the trial court dismissing the motion for neglect and delay in prosecuting it, as distinguished from an order denying the motion on the merits of enabling such a review to be had where the proceeding on motion for a new trial was pending at the date the change in the law took effect.—*Schmitt v. White*, 172 Cal. 554, 158 Pac. 216.

31. **Same—Mandatory as to notice to clerk.**—The above section is mandatory, not merely directory, in the provisions respecting notice to clerk to prepare transcript.—See pars. 58-60, this note.

32. Delay in notice for transcript—Dismissal not entered—Where relief granted by trial court.—In the case of an appeal taken under the provisions of the above section a motion to dismiss the appeal, made upon the ground that the appellants' notice to the clerk to prepare a transcript was not filed within the time prescribed by the above section will not be granted in those cases in which the trial court has granted to appellant relief from such delay.—*Revert v. Hesse*, 184 Cal. 295, 193 Pac. 943.

33. Same—Relief for.—In a case where an appellant has failed to file with the clerk within the time required by the provisions of the above section, a notice to prepare the transcript as provided in the above section, relief from such default does not reside in the appellate court, because the granting of relief from failure to file such notice within the requisite time lies solely within the jurisdiction of the trial court.—*Revert v. Hesse*, 184 Cal. 295, 193 Pac. 943, following *Estate of Keating*, 158 Cal. 109, 110 Pac. 109; *Fiske v. Cosbey*, 168 Cal. 334, 143 Pac. 611; *Brown v. Superior Court*, 175 Cal. 141, 165 Pac. 429.

34. Denial of motion for new trial—Notice of—Presence in court sufficient.—The mere presence of a party in court on the hearing at which a motion for a new trial is denied, is not sufficient to constitute notice of decision refusing such new trial as to start the time running for the filing with the clerk of a notice requesting a transcript, to be used on appeal, as required by the above section.—*Schaefer v. Dinwiddie*, 44 Cal. App. 405, 186 Pac. 617.

35. In order to make such presence in court on the hearing of the motion when denied presumptive actual notice of the decision there must be an overt act of the party; because the courts do not give such effect to the mere presence of a party in court on a hearing at which the action in question may be taken, unless by some affirmative proceeding in the matter the party indicates that he has taken cognizance of the ruling of the court.—*Schaefer v. Dinwiddie*, 44 Cal. App. 405, 186 Pac. 617, following *Brown v. Superior Court*, 175 Cal. 141, 165 Pac. 429.

36. Same—Same—Failure to file—Proper refusal to certify transcript.—In a case in which an appellant fails to file the notice requesting preparation of the record within ten days after notice of entry of judgment, the trial court is justified in refusing to settle and certify the transcript, and so also is the clerk in refusing to forward any record prepared under the above section.—*Spear v. Monroe*, 181 Cal. 728, 186 Pac. 149.

37. Filing request for transcript—Time for—Date of notice of entry of judgment.—Under the provisions of the above section the date of an acknowledgment of service of notice of entry of judgment is not conclusive, and in the instance case was held

sufficient to sustain a finding of the trial court that notice to the clerk by the appellant, requesting the preparation of a transcript, was filed within ten days after the entry of the judgment as required by the section.—*Andrews v. Robertson*, 177 Cal. 434, 170 Pac. 1129.

38. Homestead—Finding of abandonment—Transcript on appeal.—Where in a proceeding by a widow of a decedent to obtain a decree declaring that the homestead of herself and the decedent had vested in her as the surviving spouse, under the provisions of section 1723, post, an order denying the relief, based on a finding that the spouses had abandoned the homestead an appeal from such finding in which there is no demand for a transcript under the provisions of the above section and the record presented fails to set forth the evidence given at the trial in support of the finding, the judgment will be affirmed.—*Estate of Allen*, 175 Cal. 354, 165 Pac. 110.

39. Improperly prepared transcript—Proper practice to affirm.—When the appeal is from an order made after judgment and the transcript was not prepared in compliance with the requirements of the above section, the order should be affirmed.—*Barnebee v. Hunstock*, 42 Cal. App. 659, 183 Pac. 951.

40. Insufficient certificate—As to effect of.—A certificate which recites in effect that certain notices, stipulations, and affidavits set forth "are correct and were before me and considered by me in connection with other testimony" upon the various rulings of which appellant complains, is manifestly insufficient.—*Nadeau v. Lynch*, 41 Cal. App. 755, 183 Pac. 238.

41. Same—Presumption.—The "other testimony" referred to not being presented, the court can not consider it, but, in support of the action of the lower court, all presumptions will be indulged.—*Nadeau v. Lynch*, 41 Cal. App. 755, 183 Pac. 278.

42. Insufficient record—Briefs—Statement of cause.—An appeal taken under the above section and the following sections to and including section 953c, post, comes up on a typewritten transcript, and where the appellant fails to print in his briefs, or in a supplement appended thereto, such portions of the record as he desires to call to the attention of the court, as required by section 953c, post, no duty devolves upon the court to examine a voluminous typewritten transcript in search of errors upon which to base a reversal, and the judgment so appealed from will be affirmed.—*Scott v. Hollywood Park Co.*, 176 Cal. 680, 169 Pac. 379.

43. Judgment-roll—Printing—Typewritten record.—On an appeal taken under the provisions of the above and succeeding sections, it is not necessary under Rule VII of the supreme court that the judgment-roll shall be printed; the old record on appeal, including the judgment-roll, may be type-

written.—*McKinnell v. Hansen*, 34 Cal. App. 76, 167 Pac. 887; *Emmett v. Coons*, 34 Cal. App. 197, 167 Pac. 888, 890.

44. Notice of appeal—As to what constitutes a sufficient.—Where a person desiring to appeal from a judgment rendered against him files with the clerk of the superior court a document entitled "notice of appeal and request for transcript under section 953a of the Code of Civil Procedure" in which appellant stated that the plaintiff "has appealed" etc., from the judgment and requested a transcript of evidence was held not to be a good notice of appeal.—*Eddy v. Hunter*, — Cal. App. —, 189 Pac. 291.

As to sufficiency of appeal, see, ante, § 941b, note pars. 5-13.

45. Same—Annulment of marriage.—In a case for annulment of marriage a party seeking to appeal from an order allowing alimony and expenses pendente lite who after giving the notice of appeal required, serves upon the clerk a notice and demand of transcript, the appeal being from an order is one in which there is no judgment-roll, and the appellant is required to insert in his notice to the clerk an innumeration of the particular papers and records which he desires incorporated in the transcript, and in a case in which he fails to do so but simply gives to the clerk a notice in the form required by the above section in cases where the appeal is from a final judgment and in which there is a judgment-roll, and there being no proper transcript before the appellate court the appeal will be dismissed.—*Albertsen v. Albertsen*, — Cal. App. —, 192 Pac. 1040, following the doctrine in *Thompson v. American Fruit Co.*, 21 Cal. App. 338, 131 Pac. 878; *Pouchan v. Godeau*, 21 Cal. App. 365, 131 Pac. 879.

46. Same—Proceedings on motion for new trial—Notice of termination of such proceedings.—In a case in which the defendants gave notice of their intention to move for a new trial, but did not bring the same on for hearing, nor was any action taken by the trial court in relation to such motion within three months after the service of the entry of the judgment, this would have the effect of a denial of the motion without a further order, and amounted to a termination of the proceedings on the motion for a new trial, under the provisions of section 660, ante; and a party seeking to limit the time within which notice and demand may be filed with the clerk of the court as provided in the above section must give a written notice of such "other termination thereof" of the new trial proceedings.—*Stoner v. Security Trust Co.*, — Cal. App. —, 190 Pac. 500.

47. Same—Service of notice.—An appeal from a judgment in an action for damages for slander of title will not be dismissed for failure of the appealing defendants to serve the notice of appeal upon a defaulting co-defendant who has not appealed from the C. C. P.—140

judgment taken and rendered against him by default, and whose interest can not in any wise be affected by a reversal of the judgment appealed from.—*Fearon v. Fodera*, 169 Cal. 370, Ann. Cas. 1916D, 312, 148 Pac. 200.

48. Service of such notice on disclaiming defendants is unnecessary, where the judgment appealed from is absolutely silent as to them.—*Fearon v. Fodera*, 169 Cal. 370, Ann. Cas. 1916D, 312, 148 Pac. 200.

49. Under the provision in above section with reference to notice of entry of judgment, actual notice established by satisfactory evidence of record will start the statute in motion without the service of a formal written notice.—*Hartfield v. Alderete*, 26 Cal. App. 604, 147 Pac. 991.

50. An appeal from a judgment will be dismissed for failure to file the transcript on the appeal as provided by above section within the time prescribed by law and the rules of the appellate court, notwithstanding no written notice of entry of the judgment has been served upon the appellant, where he has filed his notice of appeal without such written notice.—*French v. Macnider*, 28 Cal. App. 67, 151 Pac. 371.

51. Notice of entry of judgment—Written notice not necessary.—A written notice of the entry of judgment is not necessary to start running the time for filing the notice to the clerk to prepare the transcript, when appellant has actual knowledge thereof, and the filing of the notice of appeal is conclusive evidence that he knew of the judgment or order.—*Fiske v. Gosbey*, 168 Cal. 334, 143 Pac. 611.

52. The decisions which hold that under section 941b, post, the notice therein mentioned must be in writing and that actual notice is not sufficient to set the time running for the purposes stated in that section, are not applicable to the provisions of above section.—*French v. Macnider*, 28 Cal. App. 67, 151 Pac. 371.

53. A written notice of the entry of the judgment or order sought to be appealed from is not necessary to start running the time for filing the notice in demand required to be filed with the clerk, in those cases in which the appellant has actual knowledge thereof.—*McDowell v. Title Guarantee & Trust Co.*, — Cal. App. —, 192 Pac. 103, following the doctrine in *Fiske v. Gosbey*, 168 Cal. 334, 143 Pac. 611.

54. Notice of presentation for certification of transcript by mail.—Consideration of the transcript prepared under the above section will not be refused on the ground that notice of its presentation for certification was given by mail, and that it specified only two days for presentation.—*Lawrence v. The Premier Indemnity Assurance Co.*, 180 Cal. 688, 182 Pac. 431.

55. Notice to clerk demanding transcript—As to time of filing.—Under the provisions of the above section a person intend-

ing to appeal, or serving notice of appeal, must within ten days file a notice with the clerk demanding a transcript of the testimony stating that the party desires or intends to appeal or has appealed from the judgment, and requiring that a transcript of the testimony be made up and prepared.—*McDowell v. Title Guarantee & Trust Co.*, — Cal. App. —, 192 Pac. 103.

56. Same—A jurisdictional prerequisite.—A party desiring to appeal under the new and alternative method who fails to file the notice requesting preparation of the record on appeal within the time specified in the above section loses his right to appeal for the reason that such notice goes to the jurisdiction in so far as the preparation of the record is concerned, at least in the absence of an order of the trial court relieving the party from his default in the matter of failing to file such notice.—*Spear v. Monroe*, 181 Cal. 728, 186 Pac. 149, following doctrine in *Estate of Keating*, 158 Cal. 109, 110 Pac. 109; *Fiske v. Gosbey*, 168 Cal. 334, 143 Pac. 611.

As to being mandatory provision, see pars. 58-60, this note.

57. Same—Failure to serve notice upon the clerk as required by the above section within the time appointed by law, an appellant loses his right to proceed with the preparation of his transcript on appeal in the manner provided in the above section.—*McDowell v. Title Guarantee & Trust Co.*, — Cal. App. —, 192 Pac. 103.

58. Same—Giving within prescribed time—Mandatory.—The language of the above section, in speaking of what an appellant must do, and what the clerk and stenographer shall thereafter do, reads differently; the code provision as to what the appellant must do is mandatory in form, and if any rights are lost by not giving notice as required it is the fault of the appellant alone.—*Valine v. Valine*, — Cal. App. —, 192 Pac. 69, distinguishing *Smith v. Jaccard*, 20 Cal. App. 280, 128 Pac. 1023, 1026, referred to and affirmed in the case of *Fisher v. Oliver*, 174 Cal. 782, 164 Pac. 800, on the ground that the point determined by the court in those two cases turned upon the construction of that portion of the above section relating to the acts to be done by court officials, and not to acts to be done by the appellant himself.

59. The above section is mandatory, not merely directory, as to the ten-day notice required, after entry of judgment, to the clerk to prepare the transcript.—*Des Granges v. Des Granges*, 175 Cal. 67, 165 Pac. 13.

60. Transcript can not be reviewed where appellant failed to give the notice required, and where no relief was asked under section 473, ante, or attempt made otherwise to excuse the failure.—*Des Granges v. Des Granges*, 175 Cal. 67, 165 Pac. 13.

61. Same—Insufficiency of.—A notice to the clerk that the defendant desires to appeal without stating that he does appeal is ineffectual.—*Michelson v. City of Sacramento*, 173 Cal. 108, 159 Pac. 431.

62. The clerk of the trial court is justified in disregarding a request by a person intending to appeal for the preparation of a transcript of the testimony, as provided in above section, if such person fails to file any undertaking to pay the cost of the transcript, as required by section 953b, post.—*Harpold v. Slocum*, 168 Cal. 364, 143 Pac. 609.

63. Same—Relief from default.—A person desiring to appeal from a judgment or order not having filed the notice and demand with the clerk required by the above section within the ten days prescribed after knowledge of the entry of the judgment the trial court is without jurisdiction to relieve such person from such default under the provisions of section 473, ante, in a case in which a period of more than six months has elapsed after the default, within which such relief might have been granted.—*McDowell v. Title Guarantee & Trust Co.*, — Cal. App. —, 192 Pac. 103.

64. Order denying motion for new trial—How brought up on appeal.—Notwithstanding the fact that a motion for new trial must now be made upon the minutes of the court, and no bill of exceptions is necessary or can be used for the purposes of the motion in the lower court, yet where the motion for new trial is denied, and it is sought to review on appeal the order denying it, and the record is not brought up in the manner prescribed by the above section it can only be brought up by a bill of exceptions presented and settled after the order denying the motion for new trial is made, in conformity with the practice which has always prevailed in connection with motions for new trials made upon the minutes of the court, and to this bill of exceptions the requirements of section 648, ante, apply.—*Mills v. Brady*, 185 Cal. 317, 196 Pac. 776, approving and following the doctrine in *Hawley v. Harrington*, 152 Cal. 188, 92 Pac. 177; *Carter v. Canty*, 181 Cal. 749, 186 Pac. 346; *Martin v. Hilderbrand*, 183 Cal. 270, 191 Pac. 676.

65. Same—Newly discovered evidence—Sufficiency of record.—On an appeal from an order denying a motion for new trial on the ground of newly discovered evidence, the appeal can not be considered where the affidavits on which the motion purports to have been made, though embodied in the printed transcript, are not authenticated either by incorporation into a bill of exceptions or are presented under the provisions of the above section.—*Hertel v. Emireck*, 178 Cal. 534, 174 Pac. 30, following the doctrine in *Herrlich v. McDonald*, 80 Cal. 472, 22 Pac. 299; *Von Glahn v. Brennan*, 81 Cal. 261, 22 Pac. 596; *Meide v. Reynolds*, 120 Cal. 234, 52 Pac. 491; *San Diego Sav. Bank*

v. Goodsell, 137 Cal. 420, 70 Pac. 299, and referring to supreme court Rule XXIX, 177 Cal. lvii, 176 Pac. vii.

66. Preparation of transcript—Certification—Cure of omission of order for preparation.—On an appeal from a judgment taken under the provisions of the above and succeeding sections, where the appellant files within the required time, a notice of intention and request for a transcript, and the court never ordered the reporter to prepare the transcript as required by the above section, but the transcript was prepared and certified by the judge, the omission to order the preparation of the transcript was cured by the certification of the judge.—*White v. Hendley*, 35 Cal. App. 267, 169 Pac. 710.

67. Same—Code provisions not jurisdictional.—On an appeal by the new and alternative method, under the provisions of the above section and succeeding sections to and including section 953c, post, relating to the preparation of the transcript on appeal, which transcript is a substitute for the bill of exceptions under the old method of appeal, such provisions are not jurisdictional, and delays in the preparation due to the reporter and the clerk are not fatal to the appeal.—*Fisher v. Oliver*, 174 Cal. 781, 164 Pac. 900.

68. Same—From minutes of judge—Insufficient record.—In the case of an appeal taken in accordance with the requirements of the above section, the record must contain a transcript of the evidence and proceedings prepared by the phonographic reporter under the provisions of the section and a transcript prepared by the judge from his own minutes, certified to by him, is insufficient.—*Clemens v. Gregg*, 34 Cal. App. 272, 167 Pac. 299, applying the rule in *Totten v. Barlow*, 165 Cal. 378, 132 Pac. 749; *Bush v. Allen*, 172 Cal. 102, 155 Pac. 456.

69. Same—Same—Insufficient as bill of exceptions.—In the case of an appeal taken under the alternative method, a transcript prepared by the judge from his own minutes can not be regarded as a bill of exceptions prepared under the old method of appeal and defective merely in that it is not printed, notwithstanding the fact the judge certified to its correctness.—*Clemens v. Gregg*, 34 Cal. App. 272, 167 Pac. 299.

70. Same—Mandate to trial judge.—A writ of mandate will not lie against a judge of the superior court requiring him to settle, allow and properly certify a transcript on appeal attempted to be prepared under the provisions of above section, for use on an appeal from a judgment, if the appellant has neglected, for more than ten days after filing his notice of appeal, to file with the clerk of the superior court a notice requesting the preparation of the transcript, as required by the express provisions of that section.—*Fiske v. Gosbey*, 168 Cal. 334, 143 Pac. 611.

71. Same—Notice to clerk within ten days.—The above section requires that the notice to the clerk referred to therein must be filed within ten days after notice of entry of the judgment, order, or decree appealed from. The filing of a notice of appeal is conclusive evidence that the appellant knew of the judgment or order, and its contents, at the time of the filing of the notice, and such filing fixes the beginning of the time to give the notice to the clerk, in the absence of anything to show that he had notice thereof theretofore.—*Fiske v. Gosbey*, 168 Cal. 334, 143 Pac. 611.

72. By failing to give such notice to the clerk within the time fixed by law, the appellant loses his right to proceed with the preparation of his transcript on appeal in the manner provided by said section 953a, and relief from the failure to give such notice, if it can be given at all, must be sought in the lower court.—*Fiske v. Gosbey*, 168 Cal. 334, 143 Pac. 611.

73. Printed transcript—Provisions of sections 953a and 953c—Not applicable.—"The provisions of these sections [§§ 953a, 953c] have no application to bills of exception or statements settled and allowed by the trial judge as provided in section 653. . . . When such method of bringing up the record is adopted, it must be presented by a printed transcript thereof."—*Title Land Co. v. Schaefer*, 41 Cal. App. 294, 182 Pac. 463.

74. Record on appeal—As to how made up.—The record on appeal may be made up in any way authorized by the code, no matter whether the appeal is taken under the old or new method.—*Nezik v. Cole*, 43 Cal. App. 130, 184 Pac. 523.

75. Same—Authentication of affidavits—Necessity of.—Under an appeal taken in accordance with the provisions of the above and succeeding sections, affidavits used on a motion must be identified and authenticated by the trial judge before they can be considered by the appellate court; the certificate of the clerk of the court can not take the place of authentication by the judge.—*Waymeyer v. California Trona Co.*, 176 Cal. 395, 168 Pac. 563, following the doctrine in *Nash v. Harris*, 57 Cal. 242; *Fish v. Benson*, 71 Cal. 428, 432, 12 Pac. 454; *Totten v. Barlow*, 165 Cal. 378, 132 Pac. 749; *Estate of Gamble*, 166 Cal. 253, 256, 135 Pac. 970.

As to unauthenticated affidavits, see par. 83, this note.

76. Same—Bringing up evidence.—Since the amendment of the legislature in 1915 there are two methods of bringing up evidence for consideration by the court of appeal; one is in the method provided for by the above section and succeeding sections, and the other is by a bill of exceptions, as provided in sections 648 and 650, ante.—*Weissband v. City of Petaluma*, 37 Cal. App. 296, 304, 177 Pac. 955.

77. Same—Defects in—Effect of.—Under the provisions of Rule XXIX, where an ap-

peal has been taken by the method provided in the above and succeeding sections, an appellate court can not review an order of the trial court unless the evidence taken on the hearing is authenticated by being incorporated in a bill of exceptions or in the record prepared in accordance with the provisions of above and following sections to and including section 953c.—*Clemens v. Gregg*, 34 Cal. App. 272, 167 Pac. 299, applying the doctrine in *Hibernia Sav. & L. Soc. v. Doran*, 161 Cal. 118, 118 Pac. 526.

78. Same—Same—Presumption on appeal.—Where the record on appeal under the above and subsequent sections to and including section 953c, post, made at the request of the plaintiff, and stipulated as correct by counsel and settled by the trial judge, does not contain a copy of the proposed answer, which admittedly had been served and offered for filing and was in the custody of the clerk, was brought to the attention of and considered by the court, as the notice of motion indicated that it would be; an appellate court, in support of the action, will presume such to have been the case; and for like reason it must also be presumed that such answer stated a good defense on the merits.—*County of Los Angeles v. Lewis*, 179 Cal. 398, 177 Pac. 154.

79. Same—Failure to print portions of record in briefs.—In a case in which the record on appeal under the new and alternative method consisted of a typewritten "Clerk's Transcript on Appeal," and also a typewritten "Reporter's Transcript on Appeal" prepared as prescribed in the above section where there is a failure of the appellant to print in the briefs the portion of the record desired to be called to the attention of the court, as required by section 953, ante, the appellate court may affirm the judgment on that sole ground.—*Beecham v. Burns*, 34 Cal. App. 754, 168 Pac. 1058.

80. Same—Inaufficiency of brief.—On an appeal taken under the provision of the above section and subsequent sections to and including section 953c, post, from a judgment against them, stating in their brief that the action was brought to recover damages for the breach of a written contract, claiming that the complaint fails to allege nonperformance of any act which appellants had undertaken to perform, but does not set out any part of the complaint and only a single disconnected clause of the contract, this constitutes a total failure to comply with the requirements of section 953c, post, and the appellate court is not called upon to consider the point sought to be made.—*Chandlee v. McCalla*, 179 Cal. 678, 178 Pac. 709, following doctrine in *O'Rourke v. Skellenger*, 169 Cal. 270, 146 Pac. 633; *Miller v. Oliver*, 174 Cal. 404, 163 Pac. 357; *Estate of Keith*, 175 Cal. 26, 165 Pac. 10.

81. Same—Printing of int briefs.—In an appeal by the new and alternative method

where the court on appeal has been prepared in typewritten form under the provisions of the above and following sections to and including section 953c, post, the parties must print in their brief, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court.—*Dutwiler v. Klunk*, 37 Cal. App. 796, 174 Pac. 919, following *Barker Bros. v. Joos*, 37 Cal. App. 311, 171 Pac. 1085.

82. Same—Sufficiency of—Appeal not dismissed, when.—On an appeal from a judgment alone, under the alternative method, where there is before the court a typewritten copy of the judgment-roll certified by the clerk of the trial court, the appeal will not be dismissed because of the absence of such a record of the trial as is designated under the above section designed to take the place of a bill of exceptions.—*Beckett v. Stuart*, 35 Cal. App. 796, 171 Pac. 107, following the doctrine in *McKinell v. Hansen*, 34 Cal. App. 76, 167 Pac. 887.

83. Same—Unauthenticated affidavits.—Where an appeal is taken from a judgment for the purpose of reviewing an order denying a motion to vacate and set aside the judgment, on the ground that no notice of the filing of the findings or of the time when the findings would be presented to the judge, was served upon the appellant, affidavits in the clerk's transcript, which were filed on the motion to strike out the judgment, can not be considered where they are not certified or otherwise authenticated by the judgment as having been used at the hearing of the motion.—*Boos v. Byrnes*, 33 Cal. App. 755, 166 Pac. 596.

As to authentication of affidavits, see par. 75, this, note.

84. Reporter's transcript—As to taking place of bill of exceptions—Review of evidence.—In the case of an appeal by the new and alternative method, under the provisions of the above section, prosecuted in a case in which there has been no motion made for a new trial, the evidence may be reviewed without bill of exceptions, the reporter's transcript, prepared according to the requirements of the above section, serves all the purposes of a bill of exceptions; but it is necessary that the parties print in their briefs such portions of the record as they desire to call to the attention of the court.—*Hoyt v. Thomas*, — Cal. App. —, 195 Pac. 260.

85. Same—Mandamus to compel to prepare transcript.—Where an appeal is taken by the new and alternative method under the provisions of the above section and section 953b, post, it becomes the duty of the stenographic reporter to make a transcript of the report of the trial within twenty days after the notice of appeal has been given and the bond required in said section 953b fully secures the stenographer in his costs and charges in the preparation and filing of such transcript; he can not

refuse to so file because his fees remain unpaid.—*Harris v. Burt*, — Cal. App. —, 190 Pac. 1053, following the doctrine in *Gjurich v. Fieg*, 160 Cal. 331, 116 Pac. 745.

86. Same.—New trial refused.—Report of testimony lost.—Reversal on appeal.—In a case in which an appeal is taken under the provisions of the above section from an order denying a motion for a new trial where a considerable portion of the report of the testimony taken and other proceedings in the trial court are not available for the purpose of making a proper record either for the motion for a new trial or on an appeal under the provisions of the above section, the trial court should grant the defendant a new trial of the cause de novo on such a showing, for the reason that the phonographic report of such testimony and proceedings having been lost or destroyed and could not be found by the official reporter in time for the preparation of the record required.—*Snell v. Neilson*, — Cal. App. —, 194 Pac. 530.

87. Transcript on appeal.—As to what may be included in.—In preparing a transcript to be used on an appeal from an order confirming a sale of real estate of a deceased person the appellant may in his notice to the clerk request that the transcript shall contain not only the testimony and proceedings taken and had at the hearing, but also copies of the petition for sale, the order of sale, the return of sale, the notice of hearing of the return, the bid received, and the order of confirmation, and the trial judge must certify to the correctness of the transcript containing copies of such documents.—*Going v. Guy*, 166 Cal. 279, 135 Pac. 1128.

88. Where there is no provision requiring the making of a judgment-roll, the appellant may include in his notice to the clerk a request that the documents relating to the order appealed from and corresponding to the judgment-roll be included in the transcript to be made up and prepared by the reporter, and where requested the reporter must include them in the transcript.—*Going v. Guy*, 166 Cal. 279, 135 Pac. 1128.

89. A transcript of proceedings upon an appeal from an order granting a motion for change of place of trial, where the proceedings at the hearing were not taken down by a stenographic reporter, and the evidence submitted to the court consisted entirely of the files and records of the action, may be prepared under above section and consist of copies of the records and files in the action including the papers presented and used upon the motion, and it is the duty of the trial judge to authenticate the same.—*Pierce v. Works*, 171 Cal. 684, 154 Pac. 352.

90. Where an appeal was under this section, intermediate orders and papers referred to are clearly no part of the judgment-roll, and as their integrity and purpose have not been certified to by the trial

judge, they can not be considered.—*Dietz v. Scott*, 27 Cal. App. 320, 149 Pac. 775.

91. Where the only transcript on appeal from certain orders refusing to set aside a judgment of default is one certified by the county clerk, and not by the judge, as required by above section, the record on appeal is insufficient.—*Carignani v. Tortolani*, 28 Cal. App. 44, 151 Pac. 172.

92. An order refusing to set aside a judgment of default can not be reviewed, where the only transcript is one certified by the county clerk and not by the judge as required by above section.—*Carignani v. Tortolani*, 28 Cal. App. 44, 151 Pac. 172.

93. Same.—Authentication or certification.—Prior to the enactment of this and the two following sections the only way of authenticating the record on appeal was by incorporating the matter in a bill of exceptions or statement of the case. An additional method was provided by this section, which declared that "in lieu of preparing and settling a bill of exceptions" such matters may be incorporated in such transcript prepared and certified in the manner provided. But as to matters not contained in the judgment-roll, except the notice of appeal, authentication by the clerk is neither necessary nor sufficient, the section requiring, in effect, that as to all such matters, the transcript shall be settled by the judge, after notice to both parties, and in terms requiring that the judge shall certify to the truth and correctness of the transcript. Where the papers and records have not been so settled and certified they constitute no part of the record on appeal and can not be considered by the appellate court.—*Totten v. Barlow*, 165 Cal. 378, 132 Pac. 749.

94. So far as the judgment-roll and the notice of appeal are concerned, no other authentication than the certificate of the clerk or the stipulation of the attorneys has ever been necessary, and with respect to these papers the main effect of this and the two following sections seems to be to permit the use of typewritten instead of printed copies.—*Totten v. Barlow*, 165 Cal. 378, 132 Pac. 749.

95. Whether the appeal is taken under the new or old method in preparing the record the appellant may follow the method prescribed herein, that is, the reporter's transcript authenticated by the judge shall be a part of the judgment-roll and may be used instead of a bill of exceptions.—*Cortelyou v. Imperial Land Co.*, 166 Cal. 14, 134 Pac. 981.

96. "This section appears to be a pitfall for the unwary." On an appeal from a decree of distribution taken hereunder, the appellate court, in the absence of any bill of exceptions or transcript of the trial authenticated by the trial judge, can not take notice of the contents of papers copied into the transcript, except those that may be and were authenticated by the clerk alone.

The only papers which can thus be considered are those which would be the equivalent of a judgment-roll in an ordinary civil action.—*Estate of Gamble*, 166 Cal. 253, 135 Pac. 970.

97. The fact that the proposed transcript does not contain the statements of the court made at the hearing of the motion for change of place of trial, or the objections of counsel for plaintiff to granting the same, is not a sufficient ground of objection to the certification of the transcript, as there is no necessity for the incorporation of such matters therein, where the only evidence was the files and records of the action, and such indorsements of admission of service and filing as there were thereon.—*Pierce v. Works*, 171 Cal. 684, 154 Pac. 852.

98. A judge of a superior court is not justified in refusing to certify a transcript of proceedings claimed to have been prepared in accord with the provisions of above section, for use on an appeal from an order granting a motion for change of place of trial to the county of the defendants' alleged residence, upon the ground that the proposed transcript is not certified by the clerk or any one else as containing true or correct copies of the original documents, papers, files and records, when no objection has been made by the opposing attorneys on any such ground.—*Pierce v. Works*, 171 Cal. 684, 154 Pac. 852.

99. Mandamus will not lie to compel a trial judge to certify to the correctness of the reporter's transcript of the proceedings at the trial which had been prepared under above section for use on appeal from the judgment, where the right to a record under such section as it existed prior to the amendment of August 8, 1915, had been lost by expiration of time, notwithstanding a proceeding on motion of a new trial was pending at the time such amendment became effective, and where it also appears that the bill of exceptions upon which the notice of intention to move for a new trial was made was properly refused settlement on account of the inexcusable default of the petitioner.—*Schmitt v. White*, 172 Cal. 554, 158 Pac. 216.

100. On an appeal from a judgment taken under the alternative method, mandamus will not lie to compel the trial judge to certify to the correctness of the transcript, where there was no phonographic report taken of the proceedings of the trial.—*Bush v. Allen*, 172 Cal. 100, 155 Pac. 456.

101. The typewritten transcript must be certified by the trial court or the appeal can not be considered.—*Lewis v. Lapique*, 26 Cal. App. 448, 147 Pac. 221.

102. Where the transcript on appeal is not certified to by the trial judge there is no proper record or appeal which may be reviewed.—*Carignani v. Tortolani*, 28 Cal. App. 44, 151 Pac. 172.

103. **Same—Commencement to run of time for filing.**—In the case of an order sustaining a motion to dismiss proceedings for a new trial, on the ground of lack of diligence in prosecuting the same, which order becomes final by failure to appeal from it, the party, instead of appealing, having moved to vacate the order of dismissal on the ground that his delay in prosecuting the motion for a new trial was due to mistake and excusable neglect, which motion was granted, but thereafter the court made an order ex parte purporting to vacate the last named order and setting aside the motion to vacate the order dismissing the proceedings for a new trial for further hearing, and after hearing made an order finally denying the motion to vacate the order dismissing the proceeding for a new trial, the last order denied the motion for a new trial and definitely ended the proceedings therefor, and the time for filing the transcript on appeal, so far as affected by the pendency of the proceeding for a new trial is concerned, commenced to run at least upon the order of the last-named order.—*Bryan v. Tevis*, 177 Cal. 626, 171 Pac. 433.

104. **Same—Judge's certificate to be attached to.**—In those cases in which the judge's certificate is not attached to the transcript on appeal in accordance with the provisions of the above section, but the certificate of the clerk alone is attached to the transcript the appeal must be considered where the appellate court has won upon the judgment-roll alone, for the reason that the clerk is qualified to certify to the judgment-roll only.—*Kibbe v. Graves*, — Cal. App. —, 191 Pac. 81, following doctrine in *Lane v. Tanner*, 156 Cal. 135, 103 Pac. 846; *Christianson Lumber Co. v. Seawall*, 157 Cal. 405, 108 Pac. 276; *Knoch v. Hatzlip*, 163 Cal. 20, 124 Pac. 997.

105. **Same—Mandamus to compel judge to allow and certify.**—Mandamus will not lie to compel a judge to settle, allow, and properly certify a transcript on appeal attempted to be prepared under this section, for use on appeal from a judgment where the appellant has neglected for more than ten days after filing his notice to file with the clerk a notice requesting the preparation of the transcript.—*Fiske v. Gosbey*, 168 Cal. 334, 143 Pac. 611.

106. **Same—Sufficiency of.**—On an appeal from a judgment denying a peremptory writ of mandate against a judge of a police court where the transcript purporting to have been prepared under the provisions of the above section and following sections to and including section 953c, post, contains, in addition to a certified copy of the judgment-roll and notice of appeal, a statement, certified by the clerk, of testimony and proceedings in the police court purported to have been received in evidence in the superior court, the transcript is not, as to such additional matter, duly certified, in

that it was not transcribed by the court reporter, and it not appearing to have been duly certified by the judge of the superior court.—*People ex rel. Simons v. Bunnell*, 38 Cal. App. 548, sub nom. *Simons v. Bunnell*, 177 Pac. 173.

107. Same—Time for serving and filing transcript.—Under Rule II of the supreme court, where a transcript is prepared under above section, the date of the certification of the transcript by the judge or the clerk, as the case may be, marks the time of the completion of the preparation of the transcript, and must therefore be regarded as the date from which the time within which the transcript must be filed in the appellate court begins to run. Hence the filing thereof within forty days from such date is within the legal time for that act to be performed.—*Jaques v. Yuba County Supervisors*, 22 Cal. App. 627, 135 Pac. 686.

108. Neither the statute nor any rule of the appellate courts contains any provision prescribing a limit to the time within which a transcript is to be prepared.—*Jaques v. Yuba County Supervisors*, 22 Cal. App. 627, 135 Pac. 686.

109. Although a transcript is not filed within the time prescribed, a motion to dismiss the appeal on that ground will be denied if the transcript is filed prior to the hearing of the motion.—*Jaques v. Yuba County Supervisors*, 22 Cal. App. 627, 135 Pac. 686.

110. Time for making demand for record—Termination of new trial proceedings—Notice of decision—“Or other termination.”—The ten days’ time “after notice of decision” denying a motion for new trial or “other termination” of such a motion, within which a party may file a demand for record under the above section, or may serve a proposed bill of exceptions under section 650, ante, commences to run immediately from the failure of the trial court to pass on the motion within three months after the verdict of the jury or service on the moving party of notice of decision of the court; written notice of the decision denying the motion is not essential in such a case under the peculiar statutory provisions; actual notice only is required, and in the event of such a termination of the new trial proceedings the law itself gives the notice.—*Bernschein v. Whitaker*, 175 Cal. 130, sub nom. *Bornschein v. Whitaker*, 165 Pac. 523; *Moore v. Strayer*, 175 Cal. 171, 165 Pac. 530.

As to construction of the phrase “or other termination of proceeding,” see, ante, § 941b, note par. 123.

111. Time of appeal—Actual notice of decision—Written notice not essential.—Where actual notice is established by satisfactory evidence in the record, this will start the statute running as to the period of limitation without the service of a formal written notice; but such actual notice must be clearly shown by facts appearing in the records, files, or minutes of the court.—*Brown v. Superior Court*, 175 Cal. 141, 165 Pac. 429.

112. Same—Same—Minute-order denying new trial.—A mere entry in the minutes of the trial court, reciting that a motion for a new trial came on regularly for hearing, that certain persons appearing as attorneys for the parties, and that the motion was denied, is insufficient to show actual notice of the denial of the motion by the attorney of the moving party.—*Brown v. Superior Court*, 175 Cal. 141, 165 Pac. 429.

113. Typewritten record—Where unauthorized.—The above section and section 953c, post, do not permit the filing of a typewritten record on appeal in all cases, and do not permit it in the case of an appeal from the judgment upon the judgment-roll alone, meaning by that term the papers constituting the judgment-roll as specified in section 670, ante. On such an appeal, the appellant can not avoid the rule of the supreme court requiring the record upon appeal to be printed, by giving the clerk a notice, purporting to be within the terms of above section, to have the judgment-roll prepared as a typewritten record by the stenographic reporter.—That section does not apply to such a case.—*Harbold v. Slocum*, 168 Cal. 364, 143 Pac. 609.

114. Owing to the doubt attending the construction of those sections, the failure to print the transcript on appeal in a case where the rules of the supreme court required such printing will not warrant a dismissal of the appeal, if the appellant seasonably and in good faith filed a typewritten record prepared by the stenographic reporter, believing it to be a sufficient transcript.—*Harbold v. Slocum*, 168 Cal. 364, 143 Pac. 609.

115. There is no authority, either in the rules of court or in the statutory provisions, for a transcript presented by certified typewritten copies in those cases in which the appeal is from the judgment upon the judgment-roll alone. The above section and following sections to and including section 953c, post, as they stood in August, 1914, did not apply to such an appeal.—*Lapique v. Plummer*, 33 Cal. App. 317, 165 Pac. 56.

§ 953b. UNDERTAKING TO PAY COST OF TRANSCRIPT. At the time the said notice provided for in the last section is filed with the clerk of the court, the appellant, or person intending to appeal, shall file an undertaking in an amount to be fixed by the clerk, with two good and sufficient sureties,

by which the party giving said notice shall undertake and agree to pay the clerk the cost of preparing said transcript, or may arrange personally with the stenographic reporter for his compensation.

History: Enactment approved March 20, 1907, Stats. and Amdts. 1907, p. 751, Kerr's Stats. and Amdts. 1906-7, p. 472; amendment approved April 24, 1915, Stats. and Amdts. 1915, p. 207. In effect August 8, 1915.

UNDERTAKING TO PAY COST OF TRANSCRIPT.

1. Partial payments to stenographer—Insufficient compliance with section.
- 2-4. Undertaking to pay clerk's costs—Construction.

See, ante, § 936 and note.

As to independent character of sections of the code, see, ante, § 941b, note par. 4.

1. **Partial payments to stenographer—Insufficient compliance with section.**—A person appealing under the new and alternative method, under the provisions of section 953a, ante, who has not filed an undertaking as required in the above section, but who has made payments on account to the reporter without a showing of a personal arrangement between him and the reporter under which he had obtained credit from the reporter, or a waiver of his right to be secured by an undertaking to be filed as required by the above section, this will be insufficient to relieve such party from default in the preparation of the transcript within the time required by section 953a,

ante.—*McDowell v. Title Guarantee & Trust Co.*, — Cal. App. —, 192 Pac. 103.

2. **Undertaking to pay clerk's costs—Construction.**—This is meant solely for the protection of the clerk and stenographer, and instead of furnishing the undertaking the party may arrange personally with the stenographer for his compensation.—*Pierce v. Works*, 171 Cal. 684, 154 Pac. 852.

3. The mere failure to file with the clerk the undertaking provided for by above section to secure the cost of preparing the transcript can not be urged as a good ground of objection to the certification of a transcript in fact prepared and delivered by the clerk to the judge for settlement, since the giving of such undertaking may be waived by the clerk.—*Pierce v. Works*, 171 Cal. 684, 154 Pac. 852.

4. While there may be a stay-bond and an undertaking to pay the costs on appeal embodied in one instrument, only an undertaking for the payment of costs is essential to confer jurisdiction upon the appellate court.—*Cohen v. Connick*, 26 Cal. App. 491, 147 Pac. 479.

§ 953a. CLERK TO TRANSMIT THE PREPARED RECORD ON APPEAL.

Where, on appeals taken from judgments, orders or decrees of the superior court to the supreme court or district courts of appeal the appellant elects to avail himself of the provisions of the three preceding sections, it shall be the duty of the clerk of the court from which the appeal is taken, [1] within ten days after the preparation of the record, [2] to transmit to the clerk of the court to which the appeal is taken, [3] the record prepared in accordance with the provisions of the two preceding sections.

Said records shall be filed with the clerk of the court to which the appeal is taken and no transcript thereof need be printed.

In filing briefs on said appeal the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court.

[Omissions from record may be filed as supplement.] No appeal shall be dismissed nor shall any appeal be decided adversely to any party for failure to print in his brief the portion of the record or any part thereof in support of his points, but in such case the court hearing the appeal shall direct such party to print and serve on the adverse party and file with it a supplement to his brief in which shall be set forth in full that portion of the record relied on by such party and not printed in any former brief. The court shall fix the time within which such supplement shall be served and filed and shall permit or require

such additional portions of the record to be printed, served and filed as may be desirable for the full presentation of the points at issue.

History: Enactment approved March 20, 1907, Stats. and Amdts. 1907, p. 751, Kerr's Stats. and Amdts. 1906-7, p. 472; amendment approved May 3, 1919, Stats. and Amdts. 1919, p. 261. In effect July 22, 1919.

**TRANSMITTING PREPARED RECORD —
BRIEFS, AND WHAT TO CONTAIN
—REVIEW.**

1. Amendment of 1919—Construction as to effect of.
- 2, 3. Brief of appellant — Failure to print portions of record in—Affirmance.
- 4, 5. Same — Same — May be stricken from files.
6. Same—Defective brief — Supplemental record.
7. Same — Incorporating evidence in—Effect of.
8. Same—Insufficiency of—Court will not search transcript.
9. Same — Same — Presumption from record.
10. Same—Omission of evidence from—Effect of.
11. Same—Opening, not closing brief, referred to.
12. Same—Requirements as to brief on appeal by reporter's transcript.
13. Same—Sufficiency of—Burden of showing errors.
14. Certiorari — Record on appeal — Sufficiency of briefs.
15. Construction of section—As to intention.
16. Same — Amendment of 1919 — As to origin.
17. Same — Same — Does not relieve party of duty to print in brief.
18. Same—Same—Immaterial portions of record—Not required to be printed.
19. Same — Appeal on sufficiency of the evidence — Requirements as to the brief.
20. Same—Applicable, when.
- 21- 23. Same—"Positive" in its requirements.
24. Same — Purpose of requiring matters printed in brief.
25. Failure to print evidence in brief—Effect of.
26. Failure to print material parts of record in brief—Effect of.
27. Failure to print parts of record showing error—Effect of.
- 28- 33. Insufficient record—Affirmance of judgment.
- 34- 36. Same—Failure to print record in brief.
37. Judgment denying partial distribution — Defective record on appeal — Affirmance.
38. Motion for supplemental record—Burden is upon party moving.

39. Non-compliance with requirements of section as to printing evidence in briefs—Rule in prior case followed.
40. Opening brief — Failure to meet requirements of above section—Effect of.
- 41- 43. Points in brief—Failure to print abstracts from record.
44. Printing material parts of record in appellant's brief.
45. Printing material parts of transcript in brief.
46. Printing parts of record in brief—In general.
47. Same—Necessary to decision.
48. Printing record in brief—Failure to do so—Court will not look into typewritten transcript.
49. Same — Parts of record showing error must be printed in brief.
- 50- 52. Printing testimony—Failure to print—Insufficiency of evidence not considered.
53. Same—Reference to pages.
54. Same—Requirement as to printing testimony applies to both parties.
- 55- 58. Record on appeal — Failure to print portions of in brief—Affirmance of judgment.
- 59, 60. Same—Printing in brief.
61. Same—Same—Rule as to printing record.
62. Same — Sufficiency of — Scope of review.
- 63- 68. Transmission of record on appeal—Construction of section.
69. Typewritten transcript — Failure to print parts of record in brief — Affirmance of judgment.
70. Same—Not reviewable.
- 71- 73. Same—Scope of review—Presumption.
74. Same—Same—Briefs referring to transcript only.

See, ante, § 936 and note.

As to independent character of sections of the code, see, ante, § 941b, note par. 4.

1. Amendment of 1919—Construction as to effect of.—The amendment of 1919 to the above section does not relieve the parties from the necessity of printing in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court, when the appeal is taken under the new and alternative method as prescribed by sections 953, ante, to and including the above section

of the code.—*Eddy v. Stowe*, 43 Cal. App. 739, 185 Pac. 1024.

2. Brief of appellant—Failure to print portions of record in—Affirmance.—In a case in which an appellant fails to print in the brief, or in a supplement appended thereto, the portions of the record he desires to call to the attention of the court, as required in the above section, the appellate court may affirm the decision on that ground alone.—*Beecham v. Burns*, 34 Cal. App. 754, 168 Pac. 1058; *Lillard v. Abbott Hardware Co.*, 34 Cal. App. 719, 168 Pac. 707.

3. Where no part of the judgment-roll is printed in or with the brief, and none of the testimony given at the trial is therein printed, except very brief and fragmentary extracts which are wholly insufficient to illustrate the points made or to show error, the judgment must be affirmed for failure to comply with the requirements of the above section.—*Lillard v. Abbott Hardware Co.*, 34 Cal. App. 719, 168 Pac. 707.

4. Same—Same—May be stricken from files.—In the case in which the opening brief for the appellants is typewritten, not indexed, only four copies filed, and no attempt appearing to have been made in its preparation to conform to the requirements of Rule VIII of the court (177 Cal. 1, 176 Pac. ix, and instead of calling the attention of the court to those parts of the record desired to be presented, as provided in the above section the brief attains merely those portions of the voluminous testimony considered by the appellant to be favorable to her contention without any reference to the transcript, and with but little comment as to the nature and effect of the evidence, the appellate court will be justified in striking from the files the brief and dismissing the appeal.—*McCahan v. McCahan*, — Cal. App. —, 190 Pac. 460.

5. In a case in which an appeal is brought under the new and alternative method where the appellant has failed to print in the opening brief, or in a supplement thereto, such portions of the record as is desired to call to the attention of the court, such omission, under the amendment of 1919 to the above section does not permit of a dismissal of the appeal.—*Kinderman v. Shipley*, — Cal. App. —, 190 Pac. 472.

6. Same — Defective brief—Supplemental record.—In a case in which an appeal under the new and alternative method is taken, even though the appellant in his brief directs attention to the number of rulings which it is insisted are errors committed by the court, and upon which appellant bases an argument for reversal, if he neglects to print in his brief the parts of the record necessary to illustrate the points made, as required by the provisions of the above section, and without reference to which parts of the record the argument of the appellant is unintelligible, upon the service of the brief, the attorneys for the respondent may apply to the court for an order directing appellant to serve and file

a supplemental record, as required by the amendment to the above section.—*Palmer v. Guaranty Trust & Sav. Bank*, 45 Cal. App. 572, 188 Pac. 302.

7. Same—Incorporating evidence in—Effect of.—In a case in which an appellant in his brief quotes some portion of the testimony, he thereby attracts the attention of the appellate court to "such portions of the record as he desires to call to the attention of the court," within the provisions of the above section, and where the testimony thus quoted is not sufficient to maintain his contention the judgment will be affirmed without further examination of the record.—*Emmett v. Coons*, 34 Cal. App. 197, 167 Pac. 888, 890.

8. Same—Insufficiency of—Court will not search transcript.—Where an appeal is taken under the new and alternative method, and the parties have failed to print in their briefs, or in a supplement appended thereto, as required by the provisions of the above section, such parts of the record as they desire to call to the attention of the court, appellate courts will not search the transcript for the portions applicable to the points presented.—*Varney Bros. & Co. v. Abbott*, 39 Cal. App. 721, 192 Pac. 894.

9. Same—Same—Presumption from record.—In the case of an action to recover the purchase-price of corporation stock, on an appeal from judgment there is presented a typewritten transcript, and the appellants print a copy of the complaint in their brief but do not print the answer filed thereto or state the issues raised thereby, an appellate court is justified in assuming that the answer admitted the delivery of the stock, under the provisions of the above section.—*Tucker v. Scott*, 181 Cal. 734, 186 Pac. 150.

10. Same—Omission of evidence from—Effect of.—Where an appeal is taken under the new and alternative method under the provisions of the above section it is the duty of the appellant to print in his brief the evidence upon which he relies to secure a reversal; the appellate court will not search the transcript to find the evidence which the appellant and the respondent, for that matter, have omitted from the briefs in disregard of the above section.—*Shorr v. City of Azusa*, 38 Cal. App. 709, 177 Pac. 513.

11. Same—Opening, not closing brief, referred to.—The requirement as to printing necessary parts of testimony relates to the opening and not the closing brief of appellant.—*Gustafsen v. Wassen*, 42 Cal. App. 70, 183 Pac. 352.

12. Same—Requirements as to brief on appeal by reporter's transcript.—Parties appealing on reporter's transcript must conform to the provisions of above section if they want to insure a satisfactory consideration of the evidence.—*Bublitz v. Reeves*, 40 Cal. App. 75, 180 Pac. 28.

13. Same — Sufficiency of — Burden of showing errors.—Under the provisions of the above section it is incumbent upon an

appellant under the new and alternative method to print in his brief such portions of the record as he deems essential to a correct understanding and determination of the appeal, and while in the absence of any brief on the part of the respondent the appeal may be determined upon those portions of the record printed in appellant's brief, it is incumbent upon such appellant by and in his brief to show that error resulting in a miscarriage of justice has occurred, in order to entitle him to a reversal, even in the absence of any brief or appearances on behalf of the respondent.—*Lutz v. Merchants Nat. Bank*, 179 Cal. 401, 177 Pac. 158.

14. Certiorari—Record on appeal—Sufficiency of briefs.—An appeal from a judgment rendered on writ of certiorari will be affirmed where the only writ on appeal is in the form of a typewritten transcript, and no part of it is printed in the brief or in a supplement appended thereto, as required by the provisions of the above section.—*Anderson v. Recorder's Court*, 36 Cal. App. 123, 171 Pac. 812, following the doctrine in *Jones v. American Potash Co.*, 35 Cal. App. 128, 169 Pac. 397; *Stewart v. Andrews*, 35 Cal. App. 230, 169 Pac. 397; *Helper v. Wright*, 35 Cal. App. 567, 170 Pac. 667.

15. Construction of section—As to intention.—The legislature did not intend that the appellant should be required to print in his brief all the testimony or even so much as related to the points urged for reversal.—*De Bock v. De Bock*, 43 Cal. App. 283, 184 Pac. 890.

16. Same—Amendment of 1919—As to origin.—The following dictum of Mr. Justice James is gathered for its just and forceful protest against freak, not to say silly and vicious legislation (like former § 288a Penal Code), and no state in the Union suffers more from such legislation than California. Speaking of said amendment this language is used: "The legislature of 1919, —apparently at the instance of some counsel who, through the negligent failure to meet the requirement of the section, had not secured consideration for contentions made,—adopted an amendment to the section, which provides that an appeal shall not be decided adversely to a party by reason of the failure to print portions of the record relied upon, but that in such a case the court shall make an order directing the party to file such supplement containing printed portions of the record relied upon and fixing the time within which such may be done. Paraphrasing the amendment a little, it requires the court to say to a party: 'You have failed to read or observe an unmistakably plain provision of the statute; therefore we will allow you time within which to do this.' To that extent the appellate court has become an adjunct of the law school."—*Avery v. Hagenois*, 45 Cal. App. 176, 177, 187 Pac. 119.

17. Same—Same—Does not relieve party of duty to print in brief.—The amendment to the above section, by the legislature of

1919 providing that no appeal shall be dismissed nor shall any appeal be decided adversely to any party for failure to print in his brief the portions of the record claimed to support his points does not relieve the party from the necessity of printing in his brief, or in a supplement appended thereto, such portions of the record as it is desired to call to the attention of the court, when the appeal is taken under the provisions of sections 953 to and including above section.—*Friend & Terry Lumber Co. v. Devine*, — Cal. App. —, 188 Pac. 1007, following the doctrine in *Eddy v. Stowe*, 43 Cal. App. 789, 185 Pac. 1024.

18. Same—Same—Immaterial portions of record—Not required to be printed.—While the above section as amended requires the party to print in his brief all those portions of the record which are claimed to support his points he is not required thereby to print in his brief those portions of the record which do not support his point.—*Friend & Terry Lumber Co. v. Devine*, — Cal. App. —, 188 Pac. 1007.

19. Same—Appeal on sufficiency of the evidence—Requirements as to the brief.—In those cases in which the appeal is on the ground of the insufficiency of the evidence to support the judgment the party appealing is not relieved from the requirements that he shall print in his brief those portions of the record which support his contentions, and will be required to include therein such part of the evidence as tends to make out his contention, but will not be required to include evidence which is immaterial to his point.—*Friend & Terry Lumber Co. v. Devine*, — Cal. App. —, 188 Pac. 1007.

20. Same—Applicable, when.—The provision of above section dispensing with the necessity of printing the transcript of the record on appeal applies only where the appellant has availed himself of the method of appeal provided by section 953a, ante, and the latter section relates and applies only to cases where a reporter's transcript is prepared and settled; it follows, therefore, that in cases where there is no substitute for a bill of exceptions or reporter's transcript prepared, under that section, there is no statutory exemption from the necessity of printing the transcript, and the rules of the supreme court on that subject must prevail.—*Harpold v. Slocum*, 168 Cal. 364, 143 Pac. 609.

21. Same—"Positive" in its requirements.—Judge Brittain says that the above section is "positive in its requirements. It has been frequently construed by both the supreme court and the district court of appeals. *Miler v. Oliver* (174 Cal. 404, 163 Pac. 357) was filed more than a year before the appellant's opening brief was filed in this case." (In the case cited the section was not construed, but the court held that where the transcript of the record is presented in typewriting, and the plaintiff fails to print in his brief, as required in the above section, such portions of the record as he desires

to call to the attention of the court, this justifies an affirmance of the judgment without further consideration].—City Street Improvement Co. v. Silvershield, 40 Cal. App. 597, 181 Pac. 393.

22. The word "positive," in the above decision, is manifestly used for "mandatory." The above section being an act of the legislature, is necessarily "positive"; all acts passed by the legislature and approved by the governor, or becoming law under the constitution without his approval, are "positive" law. The word "positive" can mean nothing whatever in this connection.

23. In common parlance, "positive" means absolute, certain (Coleman v. Roberts, 1 Mo. 97, 100); or it means direct, express, as opposed to circumstantial (Schrack v. McKnight, 84, Pa. St. 26, 30); but none of these meanings, as recognized by the courts, apply in the given case, or express what the learned judge evidently intended to say.

24. **Same—Purpose of requiring matters printed in brief.**—The purpose of the above statute requiring the matters relied upon to be printed in the brief, is not only for the benefit of the appellate court, but also for the benefit of the respondent, and the mere reference to the transcript on file in the appellate court by page, would compel the respondent to visit the office of the clerk of the court and inspect the transcript, and for that reason is insufficient.—Pasadena Realty Co. v. Clune, 34 Cal. App. 33, 166 Pac. 1025.

25. **Failure to print evidence in brief—Effect of.**—Where the printed briefs contain no record of the evidence on the point to be determined the court should not be expected to explore unaided by counsel such a volume of evidence as is contained in a typewritten transcript of 289 pages, for the material necessary for the decision.—Walberg v. Underwood, 41 Cal. App. 679, 183 Pac. 254.

26. **Failure to print material parts of record in brief—Effect of.**—Where the plaintiff failed to print the material parts of the record in his brief no burden rests upon the appellate court to look into the typewritten transcript.—Reed v. Reed, 40 Cal. App. 102, 180 Pac. 43.

27. **Failure to print parts of record showing error—Effect of.**—Where the appeal is taken by the alternative method the fact that appellant failed to print in the brief the parts of the record showing error justified affirmance.—Patten & Davis Lumber Co. v. Inman, 40 Cal. App. 111, 180 Pac. 26.

28. **Insufficient record — Affirmance of judgment.**—On an appeal from a judgment taken by the alternative method, where the appellant relies solely upon his claim of the insufficiency of the evidence to justify the findings and judgment but does not by quotation, reference, or otherwise direct the court to the portions of the record upon which he relies to sustain his point, the judgment will be affirmed.—Frankfort Gen-

eral Ins. Co. v. Cramer, 178 Cal. 553, 174 Pac. 33, following the rule in Marcucci v. Vowinkel, 164 Cal. 693, 130 Pac. 430; O'Rourke v. Skellenger, 169 Cal. 270, 146 Pac. 633; Williams v. Hawkins, 20 Cal. App. 161, 128 Pac. 754; Wong Ah Sure v. Ty Fook, 37 Cal. App. 465, 174 Pac. 64.

29. The evidence relied upon by the appellant should be printed in his opening brief together with such parts of the record as he desires to call to the attention of the appellate court; it is not proper procedure to omit to do so, and discuss the evidence in the reply brief.—Wong Ah Sure v. Ty Fook, 37 Cal. App. 465, 174 Pac. 64.

30. The record on appeal being prepared under the alternative method of appeal, without examining the typewritten transcript the court will rely solely upon those portions of the records which the parties print in their briefs, in accordance with the requirements of the above section.—Moore v. Guajardo, 37 Cal. App. 342, 174 Pac. 92, following the doctrine in Barker Bros. v. Joos, 36 Cal. App. 311, 171 Pac. 1085.

31. The appellate court will not look to the typewritten transcript filed under the alternative method of appeal, to determine whether grounds exist for the reversal of the judgment appealed from, in the absence of compliance with the requirements of above section.—Greer-Robbins Co. v. Pacific Surety Co., 37 Cal. App. 540, 174 Pac. 110, following Barker Bros. v. Joos, 36 Cal. App. 311, 171 Pac. 1085.

32. An alleged error in denying a motion to strike out a bill of costs is not properly presented where the appellant fails to print in his brief any portion of the record containing the order, or showing the motion, or the grounds thereof, in accordance with the requirements of the above section.—Wheeler v. Houston, 37 Cal. App. 407, 174 Pac. 121.

33. On an appeal on the ground of alleged error in ruling upon the admission of evidence, where no part of the record upon this question is printed in the brief of the appellant, or in the brief of the opposing party, the matter is not properly before the court for determination for failure to print in the briefs, or in a supplement appended thereto the portions of the record relied upon to sustain the points, as required by the above section.—Dutwiler v. Klunk, 37 Cal. App. 796, 174 Pac. 919.

34. **Same — Failure to print record in brief.**—In an appeal by the new and alternative method from a judgment for breach of a written contract on ground that complaint fails to allege non-performance but the appellants fail to set out in their brief any part of the complaint and but a single disconnected clause of the contract, this constitutes a total failure to comply with the requirements of the above section, and the appellate court is not called upon to consider the point sought to be made by appellants.—Chandlee v. McCalla, 179 Cal. 678,

178 Pac. 709, following doctrine in *O'Rourke v. Skellenger*, 169 Cal. 270, 146 Pac. 633; *Miller v. Oliver*, 174 Cal. 404, 163 Pac. 357; *Estate of Keith*, 175 Cal. 26, 165 Pac. 10.

35. Such an appeal from an order denying a new trial, predicated upon claimed insufficiency of evidence to support specified findings, but neither the findings nor any part thereof, nor any portion of the pleadings framing the issues to which such findings would be responsive, is printed in the appellant's brief, and is not record presented in the manner required by the above section upon which the merits of the appeal can be considered.—*McLaren v. Hards*, 39 Cal. App. 104, 178 Pac. 332, following the doctrine in *California Sav. Bank v. Canne*, 34 Cal. App. 768, 770, 169 Pac. 395.

36. Upon such an appeal where the appellant neither prints any of the record in his brief nor designates in any way the parts of the transcript upon which he wishes to call to the attention of the court, the brief will not be considered, under the provisions of the above section.—*Welk v. Sorenson*, 179 Cal. 604, 178 Pac. 498, following the doctrine in *Miller v. Oliver*, 174 Cal. 404, 163 Pac. 357; *Estate of Keith*, 175 Cal. 26, 165 Pac. 10.

37. **Judgment denying partial distribution—Defective record on appeal—Affirmance.**—Upon an appeal from a judgment denying and dismissing a petition for the partial distribution of an estate of a deceased person taken under the provisions of section 953a, ante, and subsequent sections, where the appellant does not include in his brief, or in a supplement thereto, any part of the record or of the evidence upon which the lower court acted in determining the alleged relationship of appellant to the deceased, but simply contains reference to a few rules regarding the admission and rejection of evidence, and with the claim, unsupported in most instances by arguments or citations of authority, that the rulings were erroneous, the judgment must be affirmed.—*Estate of Keith*, 175 Cal. 26, 165 Pac. 10.

38. **Motion for supplemental record—Burden is upon party moving.**—In a case in which the appeal is taken under the above and related sections on the ground that the evidence is insufficient to sustain the judgment and the appellant prints in his brief such portions of the testimony as in his judgment supports his contention, a party moving for a supplemental record had the burden of showing that material evidence has been omitted which is essential for the court to consider in passing upon the appeal.—*Friend & Terry Lumber Co. v. Devine*, — Cal. App. —, 188 Pac. 1007.

39. **Non-compliance with requirements of section as to printing evidence in briefs—Rule in prior case followed.**—Failure to comply with requirements of the section as to printing evidence in the briefs, the court is justified in court in applying the rule announced in *Welk v. Sorenson*, 179

Cal. 604, 178 Pac. 498.—*Arthur v. Fetterman*, 42 Cal. App. 53, 183 Pac. 307.

40. **Opening brief—Failure to meet requirements of above section—Effect of.**—An appellant taking an appeal under the new and alternative method who fails to incorporate in his brief the things required by the above section in failing to incorporate therein the second amended complaint, or the answer thereto, a consideration of which is necessary in order to the determination of the issues tried, there is a failure to comply to the requirements of the above section; but where the typewritten record is not particularly voluminous, the court may, without assuming to establish a precedent thereby, examine the pleadings found in the clerk's transcript, and with the information thus obtained, fairly consider the contentions of the appellant.—*Avery v. Hagenols*, 45 Cal. App. 176, 187 Pac. 119.

41. **Points in brief—Failure to print abstracts from record.**—In a case in which an appeal from a judgment is taken by the new and alternative method and the only record consists of a typewritten transcript, no part of the record being printed in the briefs, except the findings of fact and conclusions of law in the brief of the respondent, and the facts found are sufficient to support the judgment, the judgment must be affirmed, since it will be presumed that counsel have presented in their brief all portions of the record which they desire to call to the attention of the appellate court, as required by the above section.—*Anderson v. Wilcox*, 36 Cal. App. 430, 172 Pac. 398.

42. In an appeal under the alternative method, under the provisions of the above section, the parties must print in their briefs such portions of the record as they desire to call to the attention of the appellate court; mere references to the transcript are not sufficient.—*Borba v. De Mello*, 36 Cal. App. 601, 172 Pac. 1113.

43. An omission to print in the briefs, or in a supplement appended thereto, such portions of the record as it is desired to call to the attention of the appellate court is not a ground for a dismissal of the appeal, since the omission may be provided by stipulation of parties, or in other briefs.—*Verdier v. Stoll*, 36 Cal. App. 573, 172 Pac. 1127.

44. **Printing material parts of record in appellant's brief.**—Where the appeal is taken under the alternative method it is incumbent on appellants to print in their briefs or a supplement thereto, so much of the record as is necessary to enable the court to pass upon the questions presented intelligently.—*Hammond v. Hazard*, 40 Cal. App. 45, 180 Pac. 46.

45. **Printing material parts of transcript in brief.**—The court will not search a typewritten transcript for the material portions of the record required to be printed

in appellant's brief.—*Tobey v. Randall*, 41 Cal. App. 292, 182 Pac. 771.

46. Printing parts of record in brief—In general.—An appeal under the alternative method deserves no consideration when the appellant does not print in his briefs such portions of the record as he wishes to rely upon.—*Marsh v. Lapp*, 180 Cal. 231, 180 Pac. 533.

47. Same—Necessary to decision.—Under the new and alternative method of appeal the appellant's brief must select from the record and accurately present for convenient reference those portions of the record which are necessary to the decision.—*Noyes v. Huffman*, 41 Cal. App. 676, 183 Pac. 284.

48. Printing record in brief—Failure to do so—Court will not look into typewritten transcript.—On an appeal from a judgment under the new and alternative method, where the record is prepared in accordance with the provisions of that method, the parties must, under the provisions of the above section, print in their briefs such portions of the record as they desire to call to the attention of the appellate court, and where they fail to do so, the appellate court will not look into the typewritten transcript to ascertain whether the points argued as grounds for reversal are well made.—*Pitt v. Pensinger*, 37 Cal. App. 199, 173 Pac. 598, following doctrine in *Barker Bros. v. Joos*, 36 Cal. App. 311, 171 Pac. 1085.

49. Same—Parts of record showing error must be printed in brief.—Such parts of the record are required to be printed in the appellant's briefs.—*Forrington v. San Luis Obispo Co.*, 40 Cal. App. 44, 180 Pac. 42.

50. Printing testimony—Failure to print—Insufficiency of evidence not considered.—Where the brief of appellants does not contain the testimony the court will not consider the sufficiency of the evidence.—*Silverstein v. Kohler & Chase*, 181 Cal. 51, 9 A. L. R. 1177, 183 Pac. 451.

51. Where the main question on appeal is the sufficiency of the pleadings and evidence to support the judgment, and no part of the pleadings nor any extracts from the evidence is printed in appellant's brief, the judgment will be affirmed.—*Ockenden v. Cutting*, 41 Cal. App. 138, 182 Pac. 307.

52. When the appellant makes no attempt to print in his brief any portion of the territory relative to or having any bearing on the errors of the court complained of, as required by the above section, the court will not feel obliged to examine a voluminous record with reference to such errors.—*Dupes v. Dupes*, 43 Cal. App. 67, 184 Pac. 425.

53. Same—Reference to pages.—A mere reference to the pages of the transcript does not satisfy the requirements of the above section.—*Gustafsen v. Wasson*, 42 Cal. App. 70, 183 Pac. 352.

54. Same—Requirement as to printing testimony applies to both parties.—The re-

quirement of the section as to printing portions of testimony necessary to decision, applies to both parties.—*Schaad v. Barceloux*, 42 Cal. App. 337, 183 Pac. 716.

55. Record on appeal—Failure to print portions of in brief—Affirmance of judgment.—On an appeal taken from a judgment under the alternative method, as provided for in sections 953a, supra, where the appellant fails to print in his brief, or in a supplement appended thereto, any portion of the judgment-roll, or a sufficient portion of the evidence to enable the court to determine the merits of the principal contention as to the insufficiency of the evidence to justify the findings, as required by the provisions of the above section, the judgment must be affirmed for failure to so print in the brief.—*McKinnell v. Hansen*, 34 Cal. App. 76, 167 Pac. 887.

56. In those cases in which the appellant fails to print in his brief the portions of the record he wished to call to the attention of the appellate court, and that court in order to ascertain whether there is merit in the contention of the appellant, would be compelled to examine the typewritten transcript and look therein for the testimony and copies of documents relied upon, when such record and testimony is required by the above section to be printed in the brief, the appellate court will not be required to make such examination, and will be justified in affirming the judgment because of failure of so to print in the brief.—*Marcucci v. Vonwinckel*, 164 Cal. 693, 136 Pac. 430; *Miller v. Oliver*, 174 Cal. 407, 163 Pac. 357; *Wills v. Woolner*, 21 Cal. App. 528, 132 Pac. 283; *Pasadena Realty Co. v. Clune*, 34 Cal. App. 33, 166 Pac. 1025; *McKinnell v. Hansen*, 34 Cal. App. 76, 167 Pac. 887.

57. On an appeal taken under the new and alternative method as provided for in section 953a, ante, the judgment should be affirmed in those cases in which the appellants fail to print any part of the judgment-roll in their brief.—*Easterly v. Spraul*, 35 Cal. App. 39, 169 Pac. 396, citing previous cases to the same effect; see also *Stewart v. Drews*, 35 Cal. App. 230, 169 Pac. 397.

58. An appeal from an order granting a motion to set aside a judgment and giving permission to file an amended complaint, in which there is no record other than a typewritten transcript prepared in accordance with the provisions of section 953a, ante, and the brief of the appellant contains none of the evidence and no part of the record as required by the above section, the judgment will be affirmed.—*Stewart v. Drews*, 35 Cal. App. 230, 169 Pac. 397.

59. Same—Printing in brief.—Where an appeal is taken under the alternative method provided for in section 953a, ante, and following sections, supra, by the provisions of the above section the appellant is required to print enough of the record in his brief to illustrate the points made to enable the court to determine those points.—

California Sav. & Commercial Bank v. Canne, 34 Cal. App. 768, 169 Pac. 395.

60. The parties must print in their briefs such portions of the record as they desire to call to the attention of the court, under the requirements of the above section.—*Sea v. Lorden*, 37 Cal. App. 444, 174 Pac. 85.

61. **Same—Same—Rule as to printing record.**—In an appeal taken under the alternative method as indicated by the preceding paragraph, it is impossible to lay down any rule as to just what must be printed in the brief for the reason that it depends upon the circumstances of each case; and it is not in every case in which it is claimed that the evidence is insufficient to support the findings, or is irrelevant to the issues, that it is necessary to print the entire complaint and answer, because in many cases only a single allegation is involved in the appeal.—*California Sav. & Commercial Bank v. Canne*, 34 Cal. App. 768, 169 Pac. 395.

62. **Same—Sufficiency of—Scope of review.**—An appeal taken under the alternative method, in which neither party prints in his brief such portions of the record as he desires to call to the attention of the appellate court for the reason that the parties having omitted to comply with the directions of the above section in that regard no duty is imposed upon the court to examine the typewritten transcript.—*Helper v. Wright*, 35 Cal. App. 567, following the doctrine in *Marcucci v. Vonwinckel*, 164 Cal. 693, 130 Pac. 430; *Miller v. Oliver*, 174 Cal. 407, 163 Pac. 357; *Wills x. Woolner*, 21 Cal. App. 528, 132 Pac. 283; *Pasadena Realty Co. v. Clune*, 34 Cal. App. 33, 166 Pac. 1025; *McKinnell v. Hansen*, 34 Cal. App. 76, 167 Pac. 887; *Cunnison v. Miller*, 34 Cal. App. 267, 167 Pac. 890.

63. **Transmission of record on appeal—Construction of section.**—The dispensing with the printing of the record on appeal applies only where the appellant has availed himself of the method of appeal provided by the two preceding sections.—*Harpold v. Slocum*, 168 Cal. 364, 143 Pac. 609.

64. Where the appellant has not complied with these provisions the appellate court is not required to make more than a cursory examination of the typewritten record on file. "Indeed, we would be fully justified, under the provision above quoted, in refusing to examine it at all."—*O'Rourke v. Skellenger*, 169 Cal. 270, 146 Pac. 633.

65. The sufficiency of the evidence to support a particular point raised will not be considered on appeal unless the evidence therein is printed in the brief.—*Town of St. Helena v. Merriam*, 171 Cal. 135, 152 Pac. 299.

66. If a party to an action expects to take his appeal under the alternative method and have his record prepared according to the procedure affecting that method, then he must see to it that the official phonographic reporter is present at

the trial, in order that a transcript of the evidence and proceedings may be furnished by the one officer whose duty it is to prepare it.—*Bush v. Allen*, 172 Cal. 102, 155 Pac. 456.

67. Upon an appeal taken from a judgment under the alternative method, only the judgment-roll can be considered, where the transcript as to other matters is authenticated by the clerk alone.—*Bush v. Allen*, 172 Cal. 102, 155 Pac. 456.

68. No duty devolves on the court to search the record for evidence to support the finding where the respondent neither appeared nor presented any brief at the hearing on appeal.—*Mullia v. Ye Planry Building Co.*, 32 Cal. App. 6, 161 Pac. 1008.

69. **Typewritten transcript—Failure to print parts of record in brief—Affirmance of judgment.**—On an appeal from a judgment under the new and alternative method, where the transcript of the record is presented in typewriting as provided in section 953a, ante, the failure of the appellant to print in his briefs such portions of the record as he desires to call to the attention of the court justifies an affirmance of the judgment without further consideration by the appellate court.—*Miller v. Oliver*, 174 Cal. 404, 163 Pac. 357.

70. **Same—Not reviewable.**—Appellate courts will not look to the typewritten transcript, filed under the alternative method of appeal, for the purpose of determining whether grounds exist for the reversal of the judgment appealed from, where attorneys fail to comply with the requirements of the above rule.—*Sea v. Lorden*, 37 Cal. App. 444, 174 Pac. 85, following *Barker Bros. v. Joos*, 36 Cal. App. 311, 171 Pac. 1085.

71. **Same—Scope of review—Presumption.**—In a case where the only record on appeal from a judgment consists of a typewritten transcript, an appellate court need not go further than to those portions of the record which have been printed in the briefs under the requirements of the above section, since it is presumed that by their briefs counsel have submitted all portions of the record which they desire to call to the attention of the court.—*Rattray v. Wickershelm Implement Co.*, 36 Cal. App. 253, 171 Pac. 964; *Blochman Commercial & Sav. Bank v. Ketcham*, 36 Cal. App. 284, 171 Pac. 1084.

72. On an appeal from an order setting aside an order which opened a default, in which a typewritten transcript on appeal only has been filed, it will be presumed by the appellate court that the appellants have printed in their briefs such portions of the record as they desire to call to the attention of the court and the court will confine its statement of facts to the matters thus brought to its attention.—*Perkins v. Edinburg*, 36 Cal. App. 116, 171 Pac. 971.

73. On such an appeal as is indicated in the preceding paragraph, where the record does not show the facts, the court will presume

that they supported the ruling of the trial court, since they may have been in dispute, or entirely favorable to the plaintiff.—*Perkins v. Edinburg*, 36 Cal. App. 116, 171 Pac. 971.

74. Same—Same—Briefs referring to transcript only.—In a case in which an appeal is taken under the new and alternative method, and no portions of the record are printed in appellant's brief as required by

the provisions of the above section, but references are made to the pages of the typewritten transcript only, the appellate court will not look to the typewritten transcript for the purpose of determining whether grounds exist for the reversal of the judgment appealed from.—*Barker Bros. v. Joos*, 36 Cal. App. 311, 171 Pac. 1015, referring to the numerous cases which had therefore been decided upon the point.

§ 954. WHEN APPEAL MAY BE DISMISSED. WHEN NOT. If the appellant fails to furnish the requisite papers, the appeal may be dismissed; but no appeal can be dismissed for insufficiency of the undertaking, if a good and sufficient undertaking, approved by a justice of the supreme court be filed in the supreme court, or (where the appeal is pending before a district court of appeal either by direct appeal thereto or by transfer thereto by the supreme court) if a good and sufficient undertaking, approved by a justice of said district court of appeal, be filed in said district court, before the hearing upon motion to dismiss the appeal.

[New bond ordered when.] When it is made to appear to the satisfaction of the court or a judge thereof, from which the appeal was taken, that a surety or sureties upon an appeal bond from any cause has or have become insufficient, and the bond or undertaking inadequate as security for the payment of the judgment appealed from, or that the bond has been lost or destroyed, the last-named court, or a judge thereof, may order the giving of a new bond with sufficient sureties, as a condition to the maintenance of the appeal. The said bond or undertaking shall be approved by the last-named court, or a judge thereof; and in case said securities fail to justify before said last-named court, or a judge thereof, or fail to comply with the order to appear and justify, execution may issue upon the judgment as if no undertaking to stay execution had been given.

History: Enacted March 11, 1872, founded upon § 346 Practice Act as amended 1854 (Stats. 1854, p. 84); amendment approved March 16, 1895, Stats. and Amdts. 1895, p. 59; June 14, 1906, Stats. and Amdts. 1906, p. 52; March 18, 1907, Stats. and Amdts. 1907, p. 579, Kerr's Stats. and Amdts. 1906-7, p. 472.

DISMISSAL OF APPEAL.

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| <p>1-3. Appeal dismissed, when.</p> <p>4, 5. Appeal not dismissed, when.</p> <p>6. Construction of section—Implies there may be undertaking which is insufficient.</p> <p>7. Same—Notice of insufficiency—Construed with rules of supreme court.</p> <p>8. Same—Provision for new bond when old becomes insufficient.</p> <p>9-12. Same—Undertaking not merely insufficient, but invalid.</p> <p>13. Same—Waiver of right.</p> <p>14. Inadvertent omission from the transcript of part of judgment-roll.</p> <p>15. Lack of bill of exceptions.</p> <p>16. Motion to affirm judgment—Ground of.</p> | <p>17. Motion to dismiss—Error in settling statement.</p> <p>18-20. Same—Examination of record required.</p> <p>21, 22. Same—Grounds of motion—Statement of.</p> <p>23. Same—Same—Attorney not of record.</p> <p>24. Same—Same—Disobedience of appellant to order of lower court.</p> <p>25. Same—Same—Fivolousness of appeal.</p> <p>26. Same—Same—Jurisdiction.</p> <p>27. Same—Same—Premature service of notice of intention to move for new trial.</p> <p>28, 29. Same—Same—Proceedings prior to order appealed from.</p> <p>30. Same—Same—Proper parties to motion for new trial.</p> <p>31. Same—Same—Want of sufficient undertaking.</p> |
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- 32-35. Same—Merits of appeal can not be considered.
36. Same—Same — Bill of exceptions will not be looked into.
37. Same—New trial affirmed — Appeal from judgment dismissed.
38. Same—Service of motion to dismiss appeal.
39. New undertaking—In general.
40. Same—Authorized, when — Defective affidavit.
- 41, 42. Same—Failure of sureties to justify.
43. Same—Failure of undertaking to provide for payment of damages and costs in case of dismissal.
44. Same—Mistake in giving title of case in undertaking.
45. Same—Neglect of sureties to sign undertaking at customary place.
- 46, 47. Same—Failure to file good and sufficient undertaking within time allowed by this section.
48. Same—Insufficiency of new undertaking.
- 49, 50. Same—Justification on new bond.
- 51-53. Same — Where no undertaking has really been filed.
54. Same—Same—Premature filing.
- 55-60. Same—Same — Single undertaking on several appeals.
61. Notice of motion to dismiss appeal—Sufficiency of.
62. Same—Clerical error in notice of motion.

See, ante, § 936 and note.

1. **Appeal dismissed, when.**—An appeal from an order sustaining a demurrer to a complaint without leave to amend must be dismissed, where the record does not show that any judgment was entered and does not contain any other notice of appeal, since an order sustaining or overruling a demurrer is not an appealable order.—*Rickert v. Zoeger*, 169 Cal. 399, 146 Pac. 894.

2. An appeal from a judgment must be dismissed where no bill of exceptions or other record on appeal has been filed or presented within time, or request made to the clerk to certify to a correct or any transcript of the record of the case, or any transcript or record of the case filed in the appellate court.—*Briles v. Paulson*, 28 Cal. App. 461, 152 Pac. 942.

3. Where more than forty days have elapsed since an appeal has been perfected, and no transcript has been filed or extension of time given, the appeal will be dismissed on motion of the respondents.—*Palmer v. Woodruff*, 30 Cal. App. 251, 157 Pac. 1137.

4. **Appeal not dismissed, when.**—An appeal from an order denying a new trial in such an action will not be dismissed for failure to serve the notice of appeal upon C. C. P.—141

the co-defendants of the appellants.—*Fearon v. Fodera*, 169 Cal. 370, Ann. Cas. 1916D, 312, 148 Pac. 200.

5. An appeal taken by the state from a judgment rendered against it will not be dismissed for its failure to file its points and authorities within the time prescribed by Rule II, subdivision 4, of the supreme court, where the appellant was ready to file its opening brief at the time of the hearing of the motion to dismiss the appeal, and at such time made a sufficient showing of excuse for its default.—*Mono County Irr. Co. v. State*, 31 Cal. App. 719, 162 Pac. 641.

6. **Construction of section—Implies there may be undertaking which is insufficient,** and that this insufficiency may be remedied by new undertaking, for when original undertaking is itself sufficient, there is no room for application of section.—*Bay City B. & L. Assoc. v. Broad*, 128 Cal. 670, 671, 61 Pac. 368.

7. **Same — Notice of insufficiency — Construed with rules of supreme court** to require dismissal of appeal for failure to furnish requisite papers only when appellant fails to file such additional record after notified of necessary papers by suggestion of diminution of record, and hence appeal will not be dismissed for failure to include notice of appeal in transcript until suggestion of diminution of record has been made.—*Woodside v. Hewel*, 107 Cal. 141, 143, 40 Pac. 103.

8. **Same—Provision for new bond when old becomes insufficient,** as condition for maintenance of appeal, construed to mean merely that in absence of giving of new stay-bond, execution may issue on judgment, and not that appeal must be dismissed where appellants had perfected their appeal by giving ordinary appeal-bond.—*Mersfelder v. Spring*, 136 Cal. 619, 620, 69 Pac. 251.

9. **Same — Undertaking not merely insufficient, but invalid.**—Where the undertaking is not merely insufficient but invalid for any purpose the objection thereto can not be obviated by filing a new one under this section.—*Theisen v. Matthal*, 165 Cal. 249, 139 Pac. 747.

10. It is true that this section specifically refers to appeals to the supreme court and to a district court of appeals, but the supreme court, in considering appeals from the justices' court, has approved the same practice as that expressly authorized in this section.—*Cohen v. Connick*, 26 Cal. App. 491, 147 Pac. 479.

11. Causes should be permitted to be heard on their merits, where, in so ruling, positive violence is not done to any rule of procedure and practice, notwithstanding formal defects in giving the undertaking or otherwise perfecting the appeal.—*Cohen v. Connick*, 26 Cal. App. 491, 147 Pac. 479.

12. This section refers to appeals to the supreme or district courts of appeal and

is not applicable to appeals from justices' courts. An undertaking on appeal from a judgment rendered in the justices' court of San Bernardino township, county of San Bernardino, which refers to the judgment as one rendered by the justices' court of Los Angeles township, county of Los Angeles, and to the appeal as being to the superior court of the county of Los Angeles, is wholly insufficient to identify the appeal, and it is error to permit the amendment of such undertaking by substituting the proper township and county.—*Brownell v. Superior Court*, 32 Cal. App. 227, 162 Pac. 419.

13. Same—Waiver of right.—Right to move for dismissal of appeal is not waived by stipulating to correctness of bill of exceptions or transcript on appeal.—*County of San Bernardino v. Riverside Co.*, 135 Cal. 618, 620, 67 Pac. 1047.

14. Inadvertent omission from the transcript of part of judgment-roll is not ground for dismissal of appeal, since if omission is deemed material respondent may have defect remedied by suggestion of diminution of record.—*Paige v. Roeding*, 89 Cal. 69, 26 Pac. 787.

15. Lack of bill of exceptions, embodying and authenticating proceedings in superior court, is not ground for dismissal of appeal.—*Randall v. Duff*, 105 Cal. 271, 272, 38 Pac. 739.

16. Motion to affirm judgment—Ground of.—Lack of bill of exceptions embodying and authenticating proceedings of court below is not ground for motion to affirm judgment, but will cause affirmance when appeal comes on to be heard on merits, such motion being in effect only motion to advance cause on docket.—*Randall v. Duff*, 105 Cal. 271, 272, 38 Pac. 739.

17. Motion to dismiss—Error in settling statement on motion for new trial can not be reviewed on motion to dismiss appeal.—*Estate of Scott*, 124 Cal. 671, 673, 57 Pac. 654.

18. Same—Examination of record required.—Determination as to whether motion was authorized in court below requires reference to record, and hence will not be considered on motion to dismiss appeal on such ground.—*Estate of Kasson*, 135 Cal. 1, 2, 66 Pac. 871.

19. Whether grounds relied on on appeal from order refusing to vacate judgment would have been appealable on appeal from judgment involves examination of record, and for that reason will not be considered on motion to dismiss appeal.—*Hibernia Sav. & L. Soc. v. Cochran*, 6 Cal. Unrep. 821, 66 Pac. 732.

20. Motion to dismiss appeal which involves examination of entire record, and incidentally consideration of merits of appeal, will be continued until hearing on merits.—*Leonis v. Leffingwell*, 6 Cal. Unrep. 219, 55 Pac. 897.

21. Same—Grounds of motion—Statement of.—Good practice requires that grounds for dismissal of appeal should be embodied in notice of motion.—*Newman v. Maldonado*, 3 Cal. Unrep. 540, 30 Pac. 833, 835.

22. Failure to give undertaking on appeal, which was not made one of grounds of motion for dismissal of appeal, will not be considered.—*Pignaz v. Burnett*, 119 Cal. 157, 164, 51 Pac. 48.

23. Same—Same—Attorney not of record.—Appeal will not be dismissed because appellant's attorney is not attorney of record in case, but member of firm of attorneys who appeared in court below as attorneys of record.—*Woodmen of World v. Rutledge*, 133 Cal. 640, 641, 65 Pac. 1105.

24. Same—Same—Disobedience of appellant to order of lower court, requiring him to bring child into state, custody of which had been awarded to respondent in decree of divorce, is not ground for dismissing his appeal from judgment and order denying motion for new trial.—*Vosburg v. Vosburg*, 131 Cal. 628, 629, 63 Pac. 1009.

25. Same—Same—Frivolousness of appeal.—Appeal will not be dismissed on ground that it is frivolous, or taken merely for delay.—*Nevills v. Shortridge*, 129 Cal. 575, 577, 62 Pac. 120.

26. Same—Same—Jurisdiction.—Appeal will be dismissed by court, of its own motion, when it has no jurisdiction of appeal, whenever its attention is called thereto.—*Pedlar v. Stroud*, 116 Cal. 461, 462, 48 Pac. 371.

27. Same—Same—Premature service of notice of intention to move for new trial, or failure to serve such notice at all, does not constitute reason for dismissal of appeal on ground that court has no jurisdiction to hear it.—*Estate of Ryer*, 110 Cal. 556, 42 Pac. 1082.

28. Same—Same—Proceedings prior to order appealed from.—Appeal from order denying new trial will not be dismissed on ground of any defect in proceedings of superior court leading up to order, as this would involve examination of action by court below which can properly be had only on hearing of appeal.—*Estate of Scott*, 124 Cal. 671, 673, 57 Pac. 654.

29. Matters occurring prior to order appealed from can not be considered on motion to dismiss appeal.—*Bell v. Staacke*, 137 Cal. 307, 308, 70 Pac. 171. See *Heinlen v. Heilbron*, 94 Cal. 636, 30 Pac. 8; *Knowlton v. McKenzie*, 110 Cal. 183, 190, 42 Pac. 580; *Barnhart v. Fulkerth*, 92 Cal. 155, 28 Pac. 221; *Centerville & K. Irr. D. Co. v. Bacholdt*, 109 Cal. 111, 41 Pac. 813; *Estate of Ryer*, 110 Cal. 556, 42 Pac. 1082; *Sutter Co. v. Tisdale*, 128 Cal. 180, 60 Pac. 757.

30. Same—Same—Proper parties to motion for new trial.—Whether other parties should have been made parties to a motion for new trial in the court below is not in-

volved in motion to dismiss appeal from order denying such motion.—*Johnson v. Phenix Ins. Co.*, 146 Cal. 571, 575, 80 Pac. 719. See *Watson v. Sutro*, 77 Cal. 609, 20 Pac. 88.

31. Same—Same—Want of sufficient undertaking can not be considered on motion to dismiss appeal when it is not made ground of such motion.—*Clarke v. Mohr*, 125 Cal. 540, 543, 58 Pac. 176.

32. Same—Merits of appeal can not be considered on motion to dismiss.—*Swasey v. Adair*, 83 Cal. 136, 138, 23 Pac. 284.

33. Whether appeal is without merit will not be considered on motion to dismiss.—*Swasey v. Adair*, 83 Cal. 136, 138, 23 Pac. 284.

34. On motion to dismiss appeal, question whether decree of foreclosure in directing balance of money received from sale of mortgaged premises to be delivered to assignee in insolvency of mortgageor was valid and binding until reversed, can not be considered.—*Vincent v. Collins*, 122 Cal. 387, 391, 55 Pac. 129.

35. Want of merit in appeal is not ground for dismissing it.—*People ex rel. Fogg v. Perris Irr. Dist.*, 6 Cal. Unrep. 349, 58 Pac. 907.

36. Same—Same—Bill of exceptions will not be looked into on motion to dismiss appeal for purpose of determining whether court erred in its ruling, but it will be assumed that exception to ruling was taken in good faith.—*Melde v. Reynolds*, 120 Cal. 234, 238, 52 Pac. 491. See *Randall v. Duff*, 104 Cal. 126, 37 Pac. 803.

37. Same—New trial affirmed—Appeal from judgment dismissed.—Appeal from judgment will be dismissed where appeal from order granting new trial has been affirmed, effect of affirmance of order being to set aside judgment.—*Blackburn v. Abila*, 4 Cal. Unrep. 982, 39 Pac. 797.

38. Same—Service of motion to dismiss appeal on executrix of former executor is not sufficient to bring parties before court where it does not appear that such executrix has been substituted for such executor.—*Chevassus v. Burr*, 134 Cal. 434, 435, 66 Pac. 568.

As to dismissal of appeal when taken before entry of judgment, see, ante, § 939 and note.

As to dismissal of appeal for failure to file undertaking, see, ante, § 940 and note.

As to dismissal of appeal for failure to take appeal in time, see, ante, § 939 and note.

39. New undertaking—In general.—Appeal will not be dismissed because of insufficiency of undertaking, where new undertaking is filed in supreme court and approved by chief justice of such court.—*Moyle v. Landers*, 78 Cal. 99, 107, 12 Am. St. Rep. 22, 20 Pac. 241.

40. Same—Authorized, when—Defective affidavit.—Objection that affidavit attached

to undertaking is defective in that it does not state that sureties were residents, or householders, or freeholders within state, can be remedied by new undertaking in due form, approved by one of justices of supreme court, and hence appeal will not be dismissed where this is done.—*Schacht v. Odell*, 52 Cal. 447, 449.

41. Same—Failure of sureties to justify.—Undertaking to stay execution may be filed in supreme court after appeal has been taken by reason of failure of sureties on former undertaking to justify.—*Tompkins v. Montgomery*, 116 Cal. 120, 123, 47 Pac. 1006; *McClatchy v. Sperry*, 6 Cal. Unrep. 345, 58 Pac. 529; *Nonpareil M. Co. v. McCartney*, 143 Cal. 1, 3, 76 Pac. 653.

42. But such permission will not be granted without any showing excusing such failure.—*Williams v. Borgwardt*, 115 Cal. 617, 618, 47 Pac. 594.

43. Same—Failure of undertaking to provide for payment of damages and costs in case of dismissal of appeal, in addition to providing that appellant will pay all damages and costs which may be awarded against him on appeal, is case of insufficiency which may be remedied by filing another undertaking.—*Jarman v. Rea*, 129 Cal. 157, 159, 61 Pac. 790.

44. Same—Mistake in giving title of case in undertaking.—Where undertaking on appeal names court and department thereof, gives number of case, and accurately describes judgment and order denying motion for new trial, mistake in giving title of case is within this section, and new undertaking approved by justice of supreme court is authorized.—*Butler v. Ashworth*, 100 Cal. 334, 336, 34 Pac. 780.

45. Same—Neglect of sureties to sign undertaking at customary place, by mere oversight, renders undertaking merely insufficient, and hence new undertaking on appeal may be filed, and motion to dismiss appeal denied.—*Bay City B. & L. Assoc. v. Broad*, 128 Cal. 670, 671, 61 Pac. 368.

46. Same—Failure to file good and sufficient undertaking within time allowed by this section, and have indorsed thereon approval of justice of appellate court, in place of insufficient and irregular undertaking, renders the appeal ineffectual, and appeal will be dismissed.—*Wood v. Pendola*, 77 Cal. 82, 83, 19 Pac. 183; *Duncan v. Times-Mirror Co.*, 109 Cal. 602, 603, 42 Pac. 147; *Jarman v. Rea*, 129 Cal. 157, 158, 159, 61 Pac. 790; *Zane v. De Onativia*, 135 Cal. 440, 442, 67 Pac. 685. See *Estate of Wells*, 148 Cal. 659, 84 Pac. 37.

47. And court has no power to allow new undertaking to be filed after hearing on such motion.—*Duncan v. Times-Mirror Co.*, 109 Cal. 602, 603, 605, 42 Pac. 147; *Zane v. De Onativia*, 135 Cal. 440, 442, 67 Pac. 685.

48. Same—Insufficiency of new undertaking.—Where new undertaking omits to provide for payment of damages and costs

on dismissal of appeal, it will not prevent dismissal of appeal because of insufficiency of original undertaking to make such provision.—*Estate of Fay*, 126 Cal. 457, 458, 58 Pac. 936.

49. Same—Justification on new bond.—Amendment of this section by Stats. 1895, p. 59, contemplates: First, That perfect bond had been prepared and filed in first instance, and that imperfections thereto subsequently arose. Second, It contemplates appeals from money judgments. Third, It gives court and judge authority only to order new bond, and it in no way provides for further or second justification of sureties on their original bond, and hence order of court requiring sureties on bond, who had justified before county clerk, to appear and justify before judge, was improper.—*Boyer v. Superior Court*, 110 Cal. 401, 403, 42 Pac. 892.

50. Under provision that no appeal shall be dismissed for insufficiency of undertaking, provided good and sufficient undertaking, approved by justice of supreme court, be filed before hearing on motion to dismiss, approval of undertaking by justice amounts only to determination that undertaking is such in form and substance as statute requires, and does not dispense with necessity of justification of sureties.—*Stevenson v. Steinberg*, 32 Cal. 373, 374.

51. Same—Where no undertaking has really been filed filing of new undertaking on appeal is unauthorized.—*Estate of Heydenfeldt*, 119 Cal. 346, 348, 349, 51 Pac. 543. See *Duffy v. Greenebaum*, 72 Cal. 157, 160, 12 Pac. 74, 13 Pac. 323; *Schurtz v. Romer*, 81 Cal. 244, 245, 22 Pac. 657; *McCormick v. Belvin*, 96 Cal. 182, 183, 31 Pac. 16.

52. And this even though there was an undertaking for stay of execution.—*Duffy v. Greenebaum*, 72 Cal. 157, 160, 12 Pac. 74, 13 Pac. 323. See *Biagi v. Howes*, 63 Cal. 384.

53. Section contemplates that though undertaking has been filed it may be of such character or in such form as not to fully indemnify respondent against costs and damages which he may sustain by reason of appeal. The phrase "insufficiency of undertaking" indicates distinction between undertaking which does not fully comply with terms of section 941, ante, and entire absence of undertaking, and undertaking may be filed which is so defective as not to constitute any obligation on sureties therein, and which is in reality no undertaking at all. In such case, there is more than mere insufficiency, and this section does not apply.—*Jarman v. Rea*, 129 Cal. 157, 158, 159, 61 Pac. 790.

As to failure of sureties to justify as ground for dismissal of appeal, see, ante, § 948 and note.

As to new stay-bond in appellate court when sureties becomes insufficient, see, ante, § 942 and note.

As to waiver of insufficiency of undertaking, see, ante, § 941 and note.

54. Same—Same—Premature filing.—Where undertaking was signed by sureties before making of order denying motion for new trial, no consideration existed for such undertaking, and hence there was more than deficiency in such undertaking, and new undertaking can not be filed on appeal.—*Stackpole v. Hermann*, 126 Cal. 465, 466, 58 Pac. 935.

55. Same—Same—Single undertaking on several appeals.—On motion to dismiss appeal for want of undertaking, where there is single undertaking for three appeals, fact that only one of orders appealed from was appealable will not be considered so as to render undertaking an undertaking on appealable order only.—*Estate of Heydenfeldt*, 119 Cal. 346, 348, 349, 51 Pac. 543.

56. Single undertaking from three orders, each of which is independently appealable, and another which can not be reviewed on appeal from others, amounts to no undertaking, and new undertaking on appeal can not be filed.—*Wadleigh v. Phelps*, 148 Cal. 135, 81 Pac. 418, 420.

57. Construed to be limited to cases of defective undertaking. Where undertaking on appeal from judgment, and from order denying new trial, refers only to appeal from judgment, it does not constitute undertaking on appeal from order denying new trial, and hence this section does not authorize filing of new undertaking.—*Pacific Pav. Co. v. Bolton*, 89 Cal. 154, 155, 26 Pac. 650.

58. Construed not to authorize undertaking to be filed when on appeal from two orders, only undertaking filed recited only one appeal without distinguishing which of two appeals was referred to—it, being so ambiguous, must be regarded as if none had been filed.—*Home & L. Assoc. v. Wilkins*, 71 Cal. 626, 12 Pac. 799.

59. Where on appeal from order dissolving injunction, and from judgment, but one undertaking was filed, which recited taking of both appeals, and provided that appellant would pay all damages and costs on appeals, or either of them, not exceeding six hundred dollars, it is sufficient to justify court in permitting new undertaking to be filed and refusing dismissal of appeal from order dissolving injunction on ground that no undertaking was filed.—*Spreckels v. Spreckels*, 114 Cal. 60, 61, 45 Pac. 1022.

60. Undertaking on appeal from order denying new trial filed in appellate court is ineffectual where no undertaking on such appeal had been filed in lower court, though undertaking on appeal from judgment had been filed, but which contained no reference to appeal from order denying motion for new trial.—*Schurtz v. Romer*, 81 Cal. 244, 245, 22 Pac. 657.

61. Notice of motion to dismiss appeal—Sufficiency of.—Motion to dismiss appeal

where two appeals have been taken and do not depend upon same considerations, and there is nothing in motion to indicate to which appeal motion is directed, will not be considered.—*De la Cuesta v. Calkins*, 5 Cal. Unrep. 163, 41 Pac. 1098.

62. Same—Clerical error in notice of motion to dismiss appeal will not invalidate it.—*Pacific Pav. Co. v. Bolton*, 89 Cal. 154, 155, 26 Pac. 650.

§ 955. EFFECT OF DISMISSAL. The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal.

History: Enacted March 11, 1872.

EFFECT OF DISMISSAL.

- 1, 2. Dismissal—Affirms judgment.
3. Same—Because prematurely taken.
4. Same—Because there was nothing to appeal from.
5. Same—For failure to file transcript within time.
6. Same—For failure to furnish requisite papers.
7. Same—For technical defect.
8. Same—For want of prosecution.
9. Same—On merits.

See, ante, § 936 and note.

1. Dismissal—Affirms judgment appealed from.—*Barnhart v. Edwards*, 128 Cal. 572, 156, 61 Pac. 176.

2. Dismissal of appeal is affirmance of judgment only in limited sense. If judgment is void on its face, dismissal of appeal no wise cures such vital defect; at most it prevents second appeal, and relieves order or judgment from attack for error or irregularity which could be taken advantage of on appeal.—*Sullivan v. Gage*, 145 Cal. 759, 770, 79 Pac. 537.

3. Same—Because prematurely taken, does not operate as affirmance of judgment.—*Estate of Kennedy*, 129 Cal. 384, 385, 62 Pac. 64.

4. Same—Because there was nothing to appeal from will not preclude another appeal in same case, when record shall have been made up, upon which appeal can be taken.—*Estate of Rose*, 80 Cal. 166, 171, 22 Pac. 86.

5. Same—For failure to file transcript within time prescribed, which did not provide that it was made without prejudice to right to take another appeal, was affirmance of judgment, and hence the second appeal will be dismissed.—*Garibaldi v. Garr*, 97 Cal. 253, 32 Pac. 170.

6. Same—For failure to furnish requisite papers, not expressly made without prejudice, amounts to affirmance of judgment, and subsequent appeal will be dismissed.—*Spinetti v. Brignardello*, 54 Cal. 521.

7. Same—For technical defect in notice of appeal, or undertaking, or like, will not bar second appeal, and will not amount to affirmance.—*Karth v. Light*, 15 Cal. 324, 326.

8. Same—For want of prosecution, unless it be made "without prejudice," or where it is on merits, is bar to another appeal.—*Estate of Rose*, 80 Cal. 166, 171, 22 Pac. 86. See *Karth v. Light*, 15 Cal. 324, 326.

9. Same—On merits is bar to second appeal, since it amounts to affirmance of judgment.—*Karth v. Light*, 15 Cal. 324, 326.

§ 956. WHAT MAY BE REVIEWED ON APPEAL FROM JUDGMENT.

Upon an appeal from a judgment the court may review the verdict or decision, and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment, or which substantially affects the rights of a party. The court may also on such appeal review any order on motion for a new trial. The provisions of this section do not authorize the court to review any decision or order from which an appeal might have been taken.

History: Enacted March 11, 1872; amendment approved April 3, 1876, Code Amdts. 1876-6, p. 92; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 174, held unconstitutional, see history, § 5 ante; amendment approved May 3, 1915, Stats. and Amdts. 1915, p. 328. In effect August 8, 1915.

REVIEW ON APPEAL FROM JUDGMENT.

- 1-7. As to what reviewable on appeal from judgment—In general.
8. Administrator's account.

9. Affirmance of judgment—Void because of want of service.
10. Alimony—Order granting.
11. Amendment—Order permitting defendant to amend answer.

12. Appealable order—Can not be reviewed, when.
13. Attachment—Order dissolving.
14. Same—Order refusing to dissolve.
- 15, 16. Construction of section—As to purpose.
17. Same—Amendment of 1915—Matters reviewable.
18. Same—"Verdict or decision," means what.
19. Contest of will—Order dismissing.
20. Cost-bill—Order denying motion to strike items from.
21. Same—Order striking out cost-bill.
- 22, 23. Death of respondent—After submission of appeal.
24. Demurrer—Order overruling.
25. Same—Same—Rights of parties.
26. Executor—Order setting aside decree settling account of.
27. Findings—Appellate court has no authority to make.
28. Same—New trial ordered.
29. Frivolous appeal—Imposition of penalties.
30. Insufficiency of evidence—Appeal from judgment.
31. Interlocutory decree—Can not be reviewed.
32. Interlocutory judgment in divorce—Not reviewable on appeal.
- 33, 34. Interlocutory order in partition—Can not be reviewed on appeal, when.
35. Irregularities in attachment.
36. Judgment—Order refusing to set aside and vacate.
37. Motion to dismiss appeal—On ground that reversal of order dissolving temporary injunction would have no effect.
38. Modification of judgment—When made.
- 39-41. New trial—As to unqualified reversal remanding cause for.
- 42, 43. Same—Affirmance—Appeal from judgment will be dismissed.
- 44, 45. Same—Effect to set aside judgment.
46. Same—Judgment-roll; error on, not considered.
- 47, 48. Same—Order striking out affidavits.
49. Same—Reversal of order granting.
50. Same—Reversal of order denying.
51. Nonsuit—Order granting motion for—Can be reviewed on appeal, when.
52. Notice of appeal—New and alternative method of appeal—Notice must contain what—Matters reviewable on.
53. Objection to complaint—Which may be obviated.
54. Order denying motion to vacate judgment—An appealable order.
55. Order denying new trial—Not appealable.
- 56-58. Same—Reviewable on appeal from judgment.
59. Order not appealable—As to generally.
60. Order striking out amended complaint—Made with leave—Appealable order.
61. Partial distribution—Reversal of order vacating previous order.
- 62, 63. Pleading—Order striking out.
64. Purchase of lands at judicial sale—By stranger to decree.
65. Receiver—Order appointing before judgment.
66. Same—An order approving account of.
67. Same—Charge of property—Order authorizing receiver.
68. Refusal to hear motion—To dismiss cause for want of prosecution.
69. Refusal to settle statement—On motion for new trial.
70. Rehearing—Not to be granted because of erroneous statement in pleading.
71. Same—Motion for new trial is not proper remedy.
72. Removal of cause—Order refusing to transfer cause to United States circuit court.
73. Sale—Proceeds of on reversal.
74. Satisfaction—Effect of partial.
75. Stipulated facts—Reversal—New trial will not be ordered when.
76. Substitution of plaintiff—Order denying application to vacate order.

See, ante, § 936 and note.

As to appeal from new trial order after amendment of 1915 to section 963, see, post, § 963 and note.

As to dismissal of attempted appeal from order denying motion for new trial, see, post, § 963 and note.

As to necessity of exceptions to authorize review on appeal, see, ante, § 646 and note.

As to power of trial court to hear and determine motion for new trial after an appeal has been taken but before the same has been determined, see, ante, § 939, note par. 20.

As to review of sufficiency of evidence on appeal from judgment not taken within sixty days after its entry, see, ante, § 939 and note.

As to scope of inquiry on appeal affected by contents and sufficiency of bills of exceptions and statements, see, ante, §§ 650, 659, 661 and notes.

As to scope of inquiry on appeal limited by record, see, ante, § 661 and note.

1. As to what reviewable on appeal from judgment—In general.—Where the trial court, in granting a new trial, states in the order that it is denied so far as the suffi-

ciency of the evidence is concerned, that particular ground is excluded from consideration upon appeal from the order, but with respect to any other ground advanced in support of the motion, the decision of the trial court that the new trial was refused with respect to any one of them is not binding upon the appellate court, and, upon appeal, such question may be considered.—*Steil v. Sun Ins. Office*, 171 Cal. 795, 155 Pac. 72.

2. The supreme court may not pass upon the weight of evidence.—*Cox v. Schnerr*, 172 Cal. 371, 156 Pac. 509.

3. The evidence taken upon the trial of an action for services performed can not be reviewed upon an appeal taken from the judgment, where the purported statement of the case containing the evidence is not shown by the record to have ever been settled by the trial judge, or to have attached thereto any stipulation authorizing the taking of notice of its contents by the appellate court.—*Yount v. Arakalian Bros. Co.*, 26 Cal. App. 472, 147 Pac. 467.

4. An order vacating a judgment of nonsuit being made after final judgment is appealable, and where no direct appeal was taken therefrom, the insertion by the appellant in his notice of appeal from a subsequent judgment in favor of the plaintiff, that the appeal was taken from "every interlocutory and intermediate order made in said case adverse to said defendant" does not bring before the appellate court for review the order vacating the nonsuit and can not be reviewed.—*Hughes v. Chung Sun Tung Co.*, 28 Cal. App. 371, 154 Pac. 299.

5. An order overruling a demurrer to an amended complaint and a refusal to strike out portions thereof is not reviewable on an appeal from an order denying a new trial.—*Tingey v. Callahan Const. Co.*, 28 Cal. App. 777, 154 Pac. 28.

6. The sufficiency of the pleadings to support the judgment, or the sufficiency of the findings of fact to sustain the conclusions of law, can not be considered on an appeal from an order denying a new trial; the appellate court is limited in its review to the grounds upon which the new trial was asked.—*Bloxham v. Tehama County Tel. Co.*, 29 Cal. App. 326, 155 Pac. 634.

7. While there is no longer an appeal from an order denying a motion for a new trial, yet the points made before the trial court in support of a motion for a new trial may be reviewed on an appeal from the judgment.—*Wiley B. Allen Co. v. Wood*, 32 Cal. App. 76, 162 Pac. 121.

8. **Administrator's account.**—On appeal from order settling administrator's account, all proceedings leading up to it, including evidence on which it is based, are open to review.—*Estate of Rose*, 80 Cal. 166, 170, 22 Pac. 86.

9. **Affirmance of judgment—Void because of want of service** of summons, on some ground other than sufficiency of service, does not validate such judgment.—*Pioneer L. Co. v. Maddux*, 109 Cal. 633, 642, 50 Am. St. Rep. 67, 42 Pac. 295.

10. **Alimony—Order granting** being incident of action for divorce can not be considered on appeal from order denying new trial where appeal from judgment was dismissed.—*Hunter v. Hunter*, 111 Cal. 261, 269, 52 Am. St. Rep. 180, 31 L. R. A. 411, 43 Pac. 756.

11. **Amendment—Order permitting defendant to amend answer** by denying that there was any community property will not be reviewed on appeal from judgment declaring marriage to be legal, and granting divorce but not determining property rights of parties, since order in no way involves merits, nor affected judgment as entered.—*Sharon v. Sharon*, 77 Cal. 102, 105, 19 Pac. 230.

12. **Appealable order—Can not be reviewed, when.**—Appealable order can not be reviewed on appeal from final judgment.—*Regan v. McMahon*, 43 Cal. 625, 627; *McCourtney v. Fortune*, 42 Cal. 387.

As to non-appealable order, see par. 59, this note.

13. **Attachment—Order dissolving** attachment is not order involving merits, and necessarily affecting judgment, so as to be reviewed on appeal from judgment.—*Allender v. Fritts*, 24 Cal. 447, 448.

14. **Same—Order refusing to dissolve** attachment is not intermediate order involving merits, and necessarily affecting judgment, which can be reviewed on appeal from judgment.—*Allender v. Fritts*, 24 Cal. 447, 448.

15. **Construction of section—As to purpose.**—The provisions of the above section as they stood before its repeal were designed, in the event that an appeal was taken under the new and alternative method as therein provided, to compel the prevailing party to look to the files to ascertain whether or not an appeal had been taken.—*Slayden v. O'Dea*, — Cal. App. —, 189 Pac. 1062, following the doctrine in *Southern Pac. Co. v. Superior Court*, 167 Cal. 255, 139 Pac. 69.

16. Thus in the case of action brought against a corporation which thereafter became defunct by reason of the fact of the failure to pay the corporation license-tax the directors of such corporation, on such forfeiture are required by law to manage and control the action for and on behalf of and in the name of the corporation, as much so as if they had been substituted for it as parties defendant, and they must be deemed to have received due notice of an appeal taken from judgment rendered in the cause, under the provisions of the above section.—*Slayden v. O'Dea*, — Cal. App. —, 189 Pac. 1062.

17. Same—Amendment of 1915—Matters reviewable.—The clear intention of the legislature in the amendment of 1915 to the above section and sections 939, ante, and 963, post, was to provide for a review of all matters that might be considered on such an appeal from the judgment and the plain purpose was to give an opportunity for a review in any and every case in lieu of the review which was previously afforded.—*Wilcox v. Hardisty*, 177 Cal. 752, 171 Pac. 947.

18. Same—"Verdict or decision," means something different from what is intended by phrase "any intermediate order or decision" where latter does not mean written findings of fact and law required by sections 632, 633, ante, to be filed with clerk as result of trial on merits; and hence intermediate non-appellable order or decision, except it involve merits or vacate judgment, may be reviewed on appeal from final judgment taken within one year from entry thereof, and without any specification in bill of exceptions of particulars in which evidence is insufficient, since exception to such intermediate order or decision is not an exception to verdict or decision.—*Clifford v. Allman*, 84 Cal. 528, 531, 532, 24 Pac. 292.

19. Contest of will—Order dismissing because of lack of interest of contestant is reviewable on appeal from final order or judgment admitting will to probate.—*Estate of Edelman*, 148 Cal. 233, 113 Am. St. Rep. 231, 82 Pac. 962.

20. Cost-bill—Order denying motion to strike items from can not be reviewed on appeal from final judgment, where order was special order and made subsequent to rendition and entry of final judgment.—*Empire G. M. Co. v. Bonanza G. M. Co.*, 67 Cal. 406, 410, 7 Pac. 810. See *Quitow v. Perrin*, 120 Cal. 255, 260, 52 Pac. 632.

21. Same—Order striking out cost-bill and retaining costs may be reviewed on appeal from judgment, though motion involved less than three hundred dollars.—*Quitow v. Perrin*, 120 Cal. 255, 260, 52 Pac. 632. See *Empire G. M. Co. v. Bonanza G. M. Co.*, 67 Cal. 406, 410, 7 Pac. 810.

22. Death of respondent—After submission of appeal.—Where respondent dies after submission of appeal, judgment of affirmance will be entered nunc pro tunc as of time prior to his death.—*Lucas v. Provines*, 130 Cal. 270, 272, 62 Pac. 509; *McPike v. Heaton*, 131 Cal. 109, 111, 82 Am. St. Rep. 335, 63 Pac. 179.

23. Where appellant dies after argument and submission of appeal, and before decision, judgment will be entered as of day before his death.—*Ede v. Cumeo* (Cal. Dec. 23, 1898), 55 Pac. 773.

24. Demurrer—Order overruling to complaint will not be reviewed on appeal by plaintiff from judgment in favor of defendant.—*Bank of National City v. Johnston*, 6 Cal. Unrep. 418, 60 Pac. 776.

25. Same—Same—Rights of parties.—After reversal and remand of judgment, parties in court below have same right which they originally had, and where judgment reversed was one rendered on overruling demurrer, plaintiffs may dismiss their action instead of amending their complaint as allowed by judgment.—*Richards v. Bradley*, 129 Cal. 670, 671, 62 Pac. 316.

26. Executor—Order setting aside decree settling account of may be reviewed on appeal by executor from subsequent decree settling his final account—it being an intermediate order which affects the judgment.—*Estate of Cahalan*, 70 Cal. 604, 607, 12 Pac. 427.

27. Findings—Appellate court has no authority to make findings of fact, and where judgment is reversed for insufficiency of evidence to support judgment, new trial must be ordered.—*Kellogg v. King*, 114 Cal. 378, 389, 55 Am. St. Rep. 74, 46 Pac. 166.

28. Same—New trial ordered.—Where consideration of question, would involve, not review of findings of trial court, but question upon which trial court made no findings, would necessitate making, in appellate court, such findings, and new trial will be ordered in lower court.—*Blood v. La Serena L. & W. Co.*, 113 Cal. 221, 230, 41 Pac. 1017, 45 Pac. 252.

29. Frivolous appeal—Imposition of penalties.—In a case in which there is no merit in the appeal, and it is apparent that it was taken merely for delay, the appellate court should, as contemplated by the above section, impose penalties in discouragement of such appeals.—*First Nat. Bank v. Copen*, 39 Cal. App. 619, 179 Pac. 708.

30. Insufficiency of evidence—Appeal from judgment.—The insufficiency of the evidence may be considered on an appeal from the judgment under the amendment of 1915, even though the appeal was taken in 1911, an order denying a motion for a new trial not having been entered until 1916.—*Ford v. Freeman*, 40 Cal. App. 221, 180 Pac. 545.

31. Interlocutory decree—Can not be reviewed on appeal from final judgment.—*Lorenz v. Jacobs*, 53 Cal. 24. See *Barry v. Barry*, 56 Cal. 10.

32. Interlocutory judgment in divorce.—Not reviewable on appeal from final judgment—appeal from that determination being given by act providing for such judgment.—*Deyoe v. Superior Court*, 140 Cal. 476, 486, 98 Am. St. Rep. 73, 74 Pac. 28.

33. Interlocutory order in partition—Can not be reviewed on appeal from final judgment.—*Barry v. Barry*, 56 Cal. 10, 11; *Holt v. Holt*, 131 Cal. 610, 612, 63 Pac. 912.

34. And hence objection that complaint failed to state sufficient facts, and that court failed to find on issue tendered in appellant's answer, as to homestead right in property, can not be reviewed on appeal

from final judgment confirming sale.—Holt v. Holt, 131 Cal. 610, 612, 63 Pac. 912.

35. Irregularities in attachment as to its inception or form must be considered on direct appeal from order refusing to dissolve an attachment and not on appeal from judgment.—Mudge v. Steinhart, 78 Cal. 34, 38, 12 Am. St. Rep. 17, 20 Pac. 147.

36. Judgment—Order refusing to set aside and vacate judgment is not reviewable on final judgment, it being subject of distinct appeal.—McCourtney v. Fortune, 42 Cal. 387, 390.

37. Motion to dismiss appeal—On ground that reversal of order dissolving temporary injunction would have no effect, will not be granted where such effect does not clearly appear.—Fox v. Grayson, 6 Cal. Unrep. 72, 53 Pac. 932.

38. Modification of judgment—When made.—Judgment for more than amount claimed in complaint will not be reversed, but merely modified by reducing amount to that stated in complaint.—Kerry v. Pacific M. Co., 121 Cal. 564, 574, 54 Pac. 89.

39. New trial—As to unqualified reversal remanding cause for new trial, and does not authorize entry of judgment without new trial.—Heidt v. Minor, 113 Cal. 385, 387, 45 Pac. 700.

40. Unqualified reversal of judgment on appeal remands cause for new trial, and hence expressed direction that cause be remanded for new trial is therefore unnecessary.—Falkner v. Hendy, 107 Cal. 49, 54, 40 Pac. 21, 386.

41. Reversal of judgment and order refusing new trial vacates judgment and leaves case standing for trial.—Westall v. Altschul, 126 Cal. 164, 166, 58 Pac. 458.

42. Same—Affirmance—Appeal from judgment will be dismissed where order granting new trial has been affirmed, such affirmance operating to vacate judgment.—San Jose S. D. Bank v. Bank of Madera, 121 Cal. 543, 545, 54 Pac. 85.

43. Where order granting new trial has been affirmed, judgment and appeal therefrom should be dismissed.—San Jose S. D. Bank v. Bank of Madera, 121 Cal. 543, 545, 54 Pac. 85.

44. Same—Effect to set aside judgment.—Reversal of order denying new trial has effect of setting aside judgment denying probate of will.—Estate of Kaufman, 117 Cal. 288, 297, 59 Am. St. Rep. 179, 49 Pac. 192.

45. Affirmance of order granting new trial leaves nothing in court below on which appeal from judgment can operate, order granting new trial having effect to vacate judgment.—Etchas v. Orena, 121 Cal. 270, 272, 53 Pac. 798.

46. Same—Judgment-roll; error on not considered.—It is only on appeal from judgment that court can consider error apparent on judgment-roll, or review verdict or de-

cision of case if excepted to, or errors assigned on statement, hence such matters can not be considered on appeal from order denying new trial.—Thompson v. Patterson, 54 Cal. 542, 546.

47. Same—Order striking out affidavits filed on motion for new trial may be reviewed on appeal from order denying motion.—Melde v. Reynolds, 120 Cal. 234, 238, 52 Pac. 491.

48. Order striking amended affidavit on motion for new trial from files is reviewable on appeal from order denying motion for new trial.—Melde v. Reynolds, 120 Cal. 234, 238, 52 Pac. 491.

49. Same—Reversal of order granting new trial leaves verdict and judgment standing.—Pierce v. Birkholm, 110 Cal. 669, 672, 43 Pac. 205.

50. Same—Reversal of order denying new trial sets aside judgment.—Estate of Kaufman, 117 Cal. 288, 297, 59 Am. St. Rep. 179, 49 Pac. 192.

51. Nonsuit—Order granting motion for—Can be reviewed on appeal from judgment based on order of nonsuit, and also from order denying new trial.—Converse v. Scott, 137 Cal. 239, 244, 70 Pac. 13.

52. Notice of appeal—New and alternative method of appeal—Notice must contain what—Matters reviewable on.—Under an appeal by the new and alternative method from a judgment or an order, the provisions of the sections providing for such an appeal do not dispense with the necessity for the notice of appeal to separately state whether the appeal is taken from the judgment or from some order or both.—Starkey v. Parker, 44 Cal. App. 215, 186 Pac. 195.

53. Objection to complaint—Which may be obviated when cause is remanded for new trial by amendment to complaint, will not be considered where judgment is reversed.—Lissak v. Crocker E. Co., 119 Cal. 442, 447, 51 Pac. 688.

54. Order denying motion to vacate judgment—An appealable order.—An order denying a motion to set aside and vacate a judgment is itself an appealable order, under the provisions of the above section and section 963, post, and can not be reviewed upon appeal from the judgment.—Boos v. Byrnes, 33 Cal. App. 755, 166 Pac. 596.

55. Order denying new trial—Not appealable.—Under the amendment of the above section and section 963, post, in 1915, an order denying a motion for a new trial is not an appealable order; but is reviewable on an appeal from the judgment.—Jones v. Baxter, — Cal. App. —, 197 Pac. 361, following the doctrine in Roberts v. Colyear, 179 Cal. 669, 180 Pac. 937. See Millar v. Millar, — Cal. App. —, 197 Pac. 811.

56. Same—Reviewable on appeal from judgment.—Under the provisions of the above section and of section 963, post, as

amended in 1915 an order denying a motion for a new trial is reviewable on appeal from the final judgment only.—*White v. Hendley*, 35 Cal. App. 267, 169 Pac. 710.

57. Under the provisions of the above section, as amended in 1915, an order denying a motion for a new trial may be reviewed on an appeal from final judgment.—*Nathan v. Porter*, 36 Cal. App. 356, 172 Pac. 170.

58. The right to an appeal from an order denying a new motion is a statutory right and is governed by the law in existence and operation at the time of the entry of the order denying the motion for the new trial; and a case of an amendment to the law governing in this respect which changes or abrogates the right of appeal from an order denying the motion, a motion for new trial having been made before the provisions of such amendment went into effect, and the order on the motion having been made after the statute went into effect, the amendment will control and the right of appeal limited or abrogated.—*Nathan v. Porter*, 36 Cal. App. 356, 172 Pac. 170, following the doctrine in *Woodruff v. Colyear*, 172 Cal. 440, 156 Pac. 475.

59. Order not appealable.—As to generally.—An order denying a motion for a new trial is not an appealable order.—*Nadeau v. Lynch*, 41 Cal. App. 755, 183 Pac. 278, *Sayler v. Taylor*, 42 Cal. App. 474, 183 Pac. 843.

As to appealable orders, see par. 12, this note.

60. Order striking out amended complaint.—Made with leave.—Appealable order.—In a case in which a complaint is filed in claim and delivery, to which defendants answer separately, and thereafter, on permission of the court, an amended complaint is filed changing the cause of action to one in conversion, and praying damages therefor and on the hearing, but before any findings were filed, and judgment thereon entered, the court, of its own motion, and without notice to the plaintiff, struck the amended complaint from the files and ordered the cause to stand submitted upon the original complaint and answers thereto, the order permitting the filing of the amended complaint being the judgment or conclusion of the court upon matters before it, and one affecting the rights of the parties, the court could not, under the provisions of section 937, ante, strike the amended complaint from the files without leave to the plaintiff, the judgment permitting the amendment being subject to review on appeal from the judgment in the cause, under the provisions of the above section.—*Ross v. Flynn*, — Cal. App. —, 189 Pac. 293.

61. Partial distribution.—Reversal of order vacating previous order denying petition for partial distribution of estate leaves order reversed without any force, and proceedings stand as they were before order

was made.—*Estate of Mitchell*, 126 Cal. 248, 250, 58 Pac. 549.

62. Pleading.—Order striking out necessarily affects judgment, and may be reviewed on appeal from it.—*Clifford v. Allman*, 84 Cal. 528, 532, 24 Pac. 292; *Alpert v. Bliss*, 145 Cal. 565, 569, 79 Pac. 171.

63. Order striking out portion of complaint may be reviewed on appeal from judgment, as it is intermediate order which involves merits and affects judgment.—*Swain v. Burnette*, 76 Cal. 299, 302, 18 Pac. 394.

64. Purchase of lands at judicial sale.—By stranger to decree.—When a stranger to the decree purchases lands at a judicial sale under an erroneous judgment, his title is not defeated by subsequent reversal on appeal.—*Mills v. Lang*, 38 Cal. App. 776, 177 Pac. 493.

65. Receiver.—Order appointing before judgment is not reviewable on appeal from final judgment.—*French Bank Case*, 53 Cal. 495, 550.

66. Same.—An order approving account of receiver in mortgage foreclosure proceeding, and allowing claims against receiver, is reviewable only on appeal from final judgment in action.—*Illinois T. & S. Bank v. Pacific R. Co.*, 99 Cal. 407, 33 Pac. 1132.

67. Same.—Charge of property.—Order authorizing receiver appointed during progress of action to take charge of and conduct business must be reviewed on appeal from judgment.—*Free Gold M. Co. v. Splers*, 135 Cal. 130, 132, 67 Pac. 61.

68. Refusal to hear motion.—To dismiss cause for want of prosecution can not be reviewed on appeal from final judgment, since decision on motion did not involve merits of action, or necessarily affect judgment thereafter rendered.—*Garthwaite v. Bank of Tulare*, 134 Cal. 237, 243, 66 Pac. 326.

69. Refusal to settle statement.—On motion for new trial can not be reviewed on appeal from judgment or order denying new trial. Remedy is by mandamus.—*Machado v. Kinney*, 135 Cal. 354, 355, 67 Pac. 331; *Hartmann v. Smith*, 140 Cal. 461, 467, 74 Pac. 7.

70. Rehearing.—Not to be granted because of erroneous statement in pleading, where such statement was relied on by appellant and respondent paid no attention to it, and made no suggestion that it was clerical or other error, and relied wholly on another matter.—*Buhman v. Nickels & Brown Bros.*, 1 Cal. App. 266, 82 Pac. 85, 86.

71. Same.—Motion for new trial is not proper remedy for one desiring rehearing of original petition in supreme court for writ of prohibition, petition for rehearing being proper method.—*Granger's Bank v. Superior Court*, 101 Cal. 198, 199, 35 Pac. 642.

72. Removal of cause—Order refusing to transfer cause to United States circuit court may be reviewed on appeal from final judgment, as it is intermediate order.—*Tripp v. Santa Rosa St. R.*, 69 Cal. 631, 632, 11 Pac. 219.

73. Sale—Proceeds of on reversal.—Where judgment has been reversed on appeal, proceeds of sale of property under execution on such judgment belong to defendant, and do not constitute payment of note sued on.—*Carpy v. Dowdell*, 131 Cal. 499, 500, 63 Pac. 180.

74. Satisfaction—Effect of partial.—Affirmance of judgment will not be affected

by fact that it has been in part satisfied.—*Ryland v. Heney*, 130 Cal. 426, 431, 62 Pac. 610.

75. Stipulated facts—Reversal—New trial will not be ordered when facts in case are stipulated, and judgment is reversed on appeal, but judgment will be ordered entered on stipulated facts.—*Eureka v. McKay & Co.*, 123 Cal. 666, 673, 56 Pac. 439.

76. Substitution of plaintiff—Order denying application to vacate order of substitution of plaintiffs may be reviewed on appeal from final judgment.—*Grant v. Los Angeles Pac. R. Co.*, 116 Cal. 71, 72, 47 Pac. 872.

§ 957. REMEDIAL POWERS OF AN APPELLATE COURT. When the judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with protection of a purchaser of property at a sale ordered by the judgment, or had under process issued upon the judgment, on the appeal from which the proceedings were not stayed; and for relief in such cases the appellant may have his action against the respondent enforcing the judgment for the proceeds of the sale of the property, after deducting therefrom the expenses of the sale. When it appears to the appellate court that the appeal was made for delay, it may add to the costs such damages as may be just.

History: Enacted March 11, 1872; amended March 24, 1874, Code Amdts. 1873-4, p. 340.

REMEDIAL POWERS OF APPELLATE COURT.

1. Action to recover value of property sold under judgment.
2. Same—Attorney's fees.
- 3, 4. Appeal for delay—Damages imposed.
5. Construction of section—Action against one who did not enforce judgment.
- 6, 7. Same—An appellant who can not obtain a stay.
8. Same—Applies only to those cases where judgment operates on specific property.
9. Same—Fixes amount of recovery.
10. Same—Not mandatory.
11. Same—Not restrictive of rights of appellant.
12. Costs on appeal—As to what recoverable.
13. Same—Recall of remittitur.
- 14, 15. Damages—Appeal taken merely for delay.
16. Same—Belief that appellant had sufficient grounds for reversal.
- 17-19. Same—F frivolous appeal, or one taken merely for delay—Remedy.
- 20, 21. Division of judges—Affirmance on.
22. Eminent domain—Restitution of the premises taken in.
23. Enforcement of judgment—By execution.
24. Same—Right of appeal not affected.
25. Extent of restitution—On reversal of order.
26. Frivolous appeal—Awarding damages on.
- 27-30. Same—Appeal for delay merely.
31. Same—Appeal to keep alive an action.
32. Same—Decision of supreme court flatly adverse—Immaterial amendment to code.
- 33, 34. Same—Manifestly destitute of merit.
35. Same—Title to property previously determined adversely.
36. Same—Trivial error in computation of interest.
37. Same—Same—Error in issuance of order of sale.
- 38-41. Modification of judgment merely.
42. Order prior to judgment—Restitution of money paid, in consequence of order made prior to judgment.
43. Purchaser at judicial sale—Reversal of judgment—Effect of.
44. Redelivery of stock—Which had been turned over to defendant.
45. Reversal of judgment.
46. Same—Action of lower court.
- 47, 48. Same—Effect of.

49. Right to assess damages—Appeal frivolous.
50. Sale—Reversal of judgment on appeal set aside sale.
51. Same—To plaintiff of defendant's property.
52. Same—Purchaser of property from plaintiff.
53. Taxes—Levy of which had been made in pursuance of judgment.
54. Same—Compliance by appellant with judgment of lower court.

See, ante, § 936 and note.

1. Action to recover value of property sold under judgment to plaintiff may be brought by defendant on reversal of judgment, such reversal entitling him to restitution of property.—*Black v. Vermont M. Co.*, 137 Cal. 683, 684, 70 Pac. 776.

2. Same—Attorney's fees in action to recover value of property sold under execution pending appeal from judgment can not be recovered.—*Dowdell v. Carpy*, 137 Cal. 333, 338, 70 Pac. 167.

3. Appeal for delay—Damages imposed.—In those cases in which there is no merit in an appeal and it has no object other than vexation and delay, it is proper for an appellate court to exercise the power given by the above section to add to the costs such damages as may be just.—*Pringle v. Fassler*, 176 Cal. 264, 168 Pac. 114.

As to frivolous or groundless appeal, see pars. 14-19, 26-37, 49, this note.

4. Under the provisions of the above section where an appeal is taken without cause and for purposes of delay, it is a case for the imposition of damages within the discretion of the court.—*Laughlin v. Pacific Coast Motor Car Co.*, 177 Cal. 86, 169 Pac. 996.

5. Construction of section — Action against one who did not enforce judgment to recover proceeds of sale of property under mortgage foreclosure is not authorized, and hence where complaint to recover such proceeds alleged that in action to foreclose mortgage second mortgagee had filed cross-complaint and judgment of foreclosure was entered on both mortgages, that order of sale on judgment so rendered was duly issued, on which certain sum was realized, part of which was applied to payment of prior mortgage leaving balance, does not show right of action against second mortgagee as it does not appear that he was enforcing judgment or that he received such balance where judgment was reversed as to him.—*Patton v. Thomson*, 3 Cal. 871, 33 Pac. 97.

6. Same—An appellant who can not obtain a stay of proceedings is not without remedy in case he secures a reversal or modification of the judgment, this being provided herein.—*Southern Pac. Co. v. Superior Court*, 167 Cal. 250, 139 Pac. 69.

7. Where two days after the holder of a mortgage appealed from a judgment in foreclosure declaring the lien superior to his mortgage the property was sold under the judgment, the appellant has his remedy by action as provided for in this section.—*Sunset Lumber Co. v. Bachelder*, 167 Cal. 512, Ann. Cas. 1916B, 664, 140 Pac. 35.

8. Same—Applies only to those cases where judgment operates on specific property in such manner that its title is not changed, as by directing possession of real estate or delivery of documents, or of particular personal property in hands of defendant.—*Hewitt v. Dean*, 91 Cal. 617, 719, 25 Am. St. Rep. 227, 28 Pac. 93. See *Farmer v. Rogers*, 10 Cal. 335.

9. Same — Fixes amount of recovery where property has been sold under judgment pending appeal, to be amount of proceeds of property after deducting therefrom expenses of sale, and not actual value of property.—*Dowdell v. Carpy*, 137 Cal. 333, 337, 70 Pac. 167.

10. Same—Not mandatory on court in requiring it to order restitution of premises on reversal of judgment, where property had been taken under judgment, but power conferred is to be exercised when circumstances of case call for use of judicial discretion.—*Spring Valley W. W. v. Drinkhouse*, 95 Cal. 220, 222, 223, 30 Pac. 218; *Yndart v. Den*, 125 Cal. 85, 89, 57 Pac. 761.

11. Same—Not restrictive of rights of appellant whose property had been sold pending appeal, but is remedial statute, and is to be liberally construed.—*Di Nola v. Allison*, 143 Cal. 106, 113, 101 Am. St. Rep. 84, 76 Pac. 976.

12. Costs on appeal—As to what recoverable.—The costs which have been paid by respondent may be ordered by supreme court to be returned to him on reversal of judgment, with legal interest, to end that status quo may be restored.—*Stockman v. Riverside L. & I. Co.*, 64 Cal. 57, 59, 28 Pac. 116.

13. Same—Recall of remittitur.—Where a judgment is affirmed by the appellate court, but the remittitur contains no provision that the respondent shall recover his costs on appeal, the remittitur may be recalled on motion and the clerk be directed to issue a new one containing a provision for such costs.—*Morgrage v. National Bank*, 25 Cal. App. 133, 142 Pac. 1124.

14. Damages—Appeal taken merely for delay, no transcript being filed, will be dismissed with damages.—*Koelling v. Rutz*, 108 Cal. 664, 665, 41 Pac. 781.

As to frivolous or groundless appeals, see pars. 3, 4, 26-37, 49, this note.

15. Twenty per cent of amount of judgment may be added to cost as damages where appeal was taken for delay.—*Shain v. Belvin*, 79 Cal. 262, 264, 21 Pac. 747; *Williams v. Hall*, 79 Cal. 606, 608, 21 Pac. 695.

16. Same—Belief that appellant had sufficient grounds for reversal does not prevent court from awarding damages as costs when it appears that appeal was taken for delay, since reversal may be desired for delay only, as in case where appeal is taken on technical objection and does not affect merits of case.—*Lemon v. Rucker*, 80 Cal. 609, 610, 22 Pac. 471.

17. Same—F frivolous appeal, or one taken merely for delay—Remedy must be sought under this section and not by motion to dismiss.—*Nevills v. Shortridge*, 129 Cal. 575, 577, 62 Pac. 120.

As to frivolous appeals, see pars. 3, 4, 26-37, 49, this note.

18. Whether appeal is frivolously taken, merely for delay, can not be considered on motion to dismiss, as it involves examination of merits.—*Randall v. Duff*, 104 Cal. 126, 127, 43 Am. St. Rep. 79, 37 Pac. 803.

19. On motion to dismiss appeal, and for damages where uncontradicted affidavit shows that appeal was taken for delay, damages will be allowed on dismissal of appeal, though ordinarily court will not look into record to see if appeal is frivolous.—*McFadden v. Dietz*, 115 Cal. 697, 699, 47 Pac. 777.

20. Division of judges—Affirmance on—Where judges of supreme court are equally divided as to whether judgment should be affirmed or reversed, it will be affirmed.—*Santa Rosa C. R. v. Central St. R. Co.*, 112 Cal. 436, 437, 44 Pac. 733.

21. Where one of justices of supreme court is disqualified, and others are equally divided in opinion, judgment will be affirmed.—*Smith v. Ferries & C. H. R. Co.*, 5 Cal. Unrep. 889, 51 Pac. 710.

22. Eminent domain—Restitution of the premises taken in condemnation proceedings will not be made without reversal of judgment on appeal, in which case was remanded to lower court, merely to try question of amount of compensation and damages to be awarded, where money deposited with trial court was amply sufficient to satisfy any judgment for damages which might be recovered.—*Spring Valley W. W. v. Drinkhouse*, 95 Cal. 220, 222, 223, 30 Pac. 218.

23. Enforcement of judgment—By execution before expiration of time to appeal can not take away right of defendants to appeal from judgment, and in case of reversal of judgment, to restitution of all property and rights lost by reason of judgment.—*Kenney v. Parks*, 120 Cal. 22, 24, 52 Pac. 40.

24. Same—Right of appeal not affected.—The right of an appellant to prosecute his appeal is not lost by reason of the fact that after the appeal is taken the judgment has been satisfied by section.—*Knight v. Marks*, 183 Cal. 354, 191 Pac. 531.

25. Extent of restitution—On reversal of order for writ of restitution, appellant is entitled to be restored to all that he lost

by virtue of order, and to be placed in same position as he was prior to execution of writ, and this requires removal of all persons who have been placed in possession of lands by virtue of writ, as well as all others who have come in under them after that date.—*Hyde v. Boyle*, 105 Cal. 102, 106, 38 Pac. 643.

As to restitution of property on reversal of judgment, see notes 28 Am. Dec. 368; 17 Am. St. Rep. 264; 96 Am. St. Rep. 124.

26. Frivolous appeal—Awarding damages on—Where appeal is frivolous, judgment will be affirmed with damages.—*Clark v. Nordholt*, 121 Cal. 26, 28, 53 Pac. 400; *Henehan v. Hart*, 127 Cal. 656, 658, 60 Pac. 426; *Herst v. Hart*, 128 Cal. 327, 328, 60 Pac. 846.

As to damages for frivolous appeal, see pars. 3, 4, 14-19, this note.

27. Same—Appeal for delay merely.—Where the supreme court can conceive of no object the appellant could have had in taking an appeal, unless to obtain undue delay, the case is a proper one for the imposition of damages.—*Roberts v. Buckingham*, 172 Cal. 458, 156 Pac. 1018.

28. While the appeal may be without merit even to such a degree as to render it frivolous, nevertheless, when the court can not say that the appellant, acting as his own attorney, was cognizant of such fact, it can not be said that he took the appeal for delay.—*Dunn v. Warden*, 28 Cal. App. 202, 151 Pac. 671.

29. Damages in the sum of fifty dollars may be awarded against an appellant, in addition to costs where the appeal is groundless and frivolous, and apparently taken for purposes of delay.—*Crofford v. Crofford*, 29 Cal. App. 662, 157 Pac. 561.

30. An appeal taken for no other purpose than to delay the enforcement of the judgment in an action on a mortgage for five hundred dollars will carry damages to the appellant in the sum of fifty dollars.—*Moore v. Lauff*, 30 Cal. App. 452, 158 Pac. 557.

31. Same—Appeal to keep alive an action.—Where an appeal is taken for no other motive than of keeping alive an action on a claim utterly without foundation, the award of damages in the sum of one hundred dollars on account thereof is proper.—*Lapique v. Agoure*, 170 Cal. 79, 148 Pac. 517.

32. Same—Decision of supreme court flatly adverse—Immaterial amendment to code.—Where the decisions of the supreme court are flatly adverse to the appellate's contention, and his only claim is that an obviously immaterial amendment of a code section has altered the established rule, it is proper to impose upon him one hundred dollars as damages.—*Weinstock-Nichols Co. v. Courtney*, 26 Cal. App. 445, 147 Pac. 218.

33. Same—Manifestly destitute of merit.—In an action to cancel a deed where the findings and judgment were in favor of the defendants, and the plaintiff's appeal is held

by the appellate court to be without merit, the case is one for the imposition of damages for talking a frivolous appeal.—*Miller v. Oliver*, 174 Cal. 404, 163 Pac. 357.

34. Where an appeal is manifestly destitute of merit, the court is warranted in penalizing the appellant by the imposition of damages for a frivolous appeal taken purely for delay.—*Johnson v. Dixon Farms Co.*, 29 Cal. App. 52, 155 Pac. 136.

35. Same—Title to property previously determined adversely.—The title to the property in controversy having been previously finally determined adversely to the contention of the appellant, in the case of *Thompson v. McKenna*, 22 Cal. App. 129, 133 Pac. 512, the present appeal is deemed frivolous, and damages are awarded against the appellant.—*Estate of McKenna*, 168 Cal. 339, 143 Pac. 605.

36. Same—Trivial error in computation of interest where entire relief sought could have been obtained on application to trial court, shows the appeal is essentially frivolous, and judgment will be affirmed with proper correction in computation of interest, with costs and damages against appellant.—*Rountree v. I. X. L. Line Co.*, 106 Cal. 62, 63, 39 Pac. 16.

37. Same—Same—Error in issuance of order of sale.—Appeal from order refusing to vacate and set aside order of sale issued on decree of foreclosure because it was made before amount of interest had been inserted in decree of foreclosure, is frivolous, such failure amounting to mere clerical misprision, and order will be affirmed with damages.—*Janex v. Bullard*, 107 Cal. 130, 132, 40 Pac. 108.

38. Modification of judgment merely.—If judgment directing sale of property to satisfy lien is modified by merely reducing amount of lien, such fact alone does not show that appellant has lost any property so as to authorize sale to be set aside.—*Barnhart v. Edwards*, 128 Cal. 572, 577, 61 Pac. 176. See *Johnson v. Lamping*, 34 Cal. 293, 301.

39. Where judgment for sum of money, and directing that mortgaged property be sold to satisfy it, is modified on appeal only by reducing amount of judgment so slightly that amount of judgment still remained more than amount for which mortgaged property was sold, defendant can not be said to have lost any property or rights by such sale so as to justify its being set aside.—*Hettitt v. Dean*, 91 Cal. 617, 619, 25 Am. St. Rep. 227, 28 Pac. 93.

40. Where judgment of foreclosure is greatly modified on appeal by change in computation of interest, sale under foreclosure will not be set aside, as the only amount lost by such sale was amount of such interest, and where it appears that defendant received in rents and profits greater sum than such interest, restitution of amount of interest will not be required.—*Yndart v. Den*, 125 Cal. 85, 89, 57 Pac. 761.

41. Where judgment foreclosing laborer's lien was reversed as to counsel fees included therein, but affirmed in other respects, and no order of restitution of property was ever made by appellate or superior court, title of purchaser at sale under lien foreclosure was not affected by reversal.—*Purser v. Cady*, 5 Cal. Unrep. 704, 49 Pac. 180.

42. Order prior to judgment—Restitution of money paid, in consequence of order made prior to judgment which was not appealed from, will not be made on reversal of judgment, such money not being paid after or in consequence of judgment appealed from.—*Reynolds v. Reynolds*, 2 Cal. Unrep. 547, 8 Pac. 184.

As to extent of restitution, see par. 25, this note.

43. Purchaser at judicial sale—Reversal of judgment—Effect of.—The title of one not a party to a judgment which is erroneous but not void, who purchases at judicial sale under such judgment, is not defeated or impaired by a subsequent reversal of the judgment on appeal, under the provisions of the above section; but where a party to the judgment or decree purchases the property he and his subsequent grantees acquire a defeasible title only, which falls with a subsequent reversal of the judgment, under the provisions of section 347, ante.—*Mills v. Laing*, 38 Cal. App. 776, 177 Pac. 493.

As to reversal of judgment, see pars. 45-48, this note.

44. Redelivery of stock—Which had been turned over to defendant in pursuance of decree of distribution, plaintiff is entitled to on reversal of decree.—*Ashton v. Heydenfeldt*, 124 Cal. 14, 17, 56 Pac. 624.

45. Reversal of judgment with directions to court below to enter judgment in conformity with opinion of supreme court, vacates decree reversed and leaves it as if it never had been rendered; and this is so, though reversal directed change only in sum declared due and court might have ordered affirmance with modified judgment, and hence successor of creditor is entitled to recover possession of premises sold on mortgage foreclosure.—*Cowdery v. London & S. F. Bank*, 139 Cal. 298, 304, 96 Am. St. Rep. 115, 73 Pac. 196.

See par. 43, this note.

As to reversals of judgment, see note 96 Am. St. Rep. 124.

46. Same—Action of lower court.—On reversal of judgment with directions to enter judgment in conformance with opinion, court below has no power to modify original judgment, though change directed was only amount of the judgment to be rendered, and might have been by affirmance and modification of judgment on appeal instead of by reversal.—*Cowdery v. London & S. F. Bank*, 139 Cal. 298, 304, 96 Am. St. Rep. 115, 73 Pac. 196.

47. **Same—Effect of.**—Right of defendant whose property has been taken on judgment which is subsequently reversed, does not depend on provisions of this section.—*Reynolds v. Harris*, 14 Cal. 667, 679; *Di Nola v. Allison*, 143 Cal. 106, 113, 101 Am. St. Rep. 84, 76 Pac. 976.

48. **Reversal of judgment on ground that it is not supported by findings, does not necessarily imply that any judgment should have been rendered on those findings.**—*Haidt v. Minor*, 113 Cal. 385, 387, 45 Pac. 700.

49. **Right to assess damages—Appeal frivolous.**—Where an appeal is not only frivolous, but was taken for delay, as is made apparent from a record and the appellant's brief in support of the alleged error, the legislature has wisely provided that as a means of discouraging the making of appeals for such purposes the court may, in affirming the judgment, add to the costs on appeal such damages as may be just. The remedy may seem a harsh one, for the reason that, as a rule, a client is governed largely in such matters by the advice of his attorney who lends himself to such practice; but there is no other method by which to prevent the growing evil.—*Hale v. Cline*, 45 Cal. App. 616, 188 Pac. 295.

As to assessing damages for frivolous appeals, see pars. 3, 4, 14-19, 26-37, this note.

50. **Sale—Reversal of judgment on appeal sets aside sale of property under judgment,**

where sale was made to plaintiff, and appellant is restored to his original estate in land.—*Reynolds v. Harris*, 14 Cal. 667, 669; *Di Nola v. Allison*, 143 Cal. 106, 114, 115, 101 Am. St. Rep. 84, 76 Pac. 976.

51. **Same—To plaintiff of defendant's property for satisfaction of judgment in whole or in part may be set aside on reversal of judgment directing sale.**—*Barnhart v. Edwards*, 128 Cal. 572, 576, 61 Pac. 176.

52. **Same—Purchaser of property from plaintiff in foreclosure action, who had purchased property under foreclosure sale, is not in position to invoke any equity in his favor, or claim any protection from restitution where his purchase was made after appeal had been taken from judgment and he was chargeable with notice of defendant's rights in his vendor's title.**—*Di Nola v. Allison*, 143 Cal. 106, 114, 115, 101 Am. St. Rep. 84, 76 Pac. 976.

53. **Taxes—Levy of which had been made in pursuance of judgment by board of supervisors, is not set aside by reversal of judgment on appeal.**—*San Diego School Dist. v. Board of Supervisors*, 97 Cal. 438, 439, 32 Pac. 517.

54. **Same—Compliance by appellant with judgment of lower court, directing it to levy tax, did not cause it to lose any property or rights of which restitution could be made in case of reversal.**—*San Diego School Dist. v. Board of Supervisors*, 97 Cal. 438, 439, 32 Pac. 517.

§ 958. ON JUDGMENT ON APPEAL, REMITTITUR MUST BE CERTIFIED TO THE CLERK OF THE COURT BELOW. When judgment is rendered upon the appeal, it must be certified by the clerk of the appellate court to the clerk with whom the judgment-roll is filed, or the order appealed from is entered. In cases of appeal from the judgment, the clerk with whom the roll is filed must attach the certificate to the judgment-roll, and enter a minute of the judgment of the appellate court on the docket, against the original entry. In cases of appeal from an order, the clerk must enter at length in the records of the court the certificate received, and minute against the entry of the order appealed from, a reference to the certificate, with a brief statement that such order has been affirmed, reversed, or modified, by the appellate court on appeal.

History: Enacted March 11, 1872, re-enactment of § 358 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 174, held unconstitutional, see history, § 5 ante; amendment approved May 6, 1919, Stats. and Amdts. 1919, p. 290. In effect July 22, 1919.

JUDGMENT ON APPEAL—REMITTITUR.

1. Amendments allowed—Order of lower court not required.
- 2, 3. Authority of clerk of lower court.
4. Costs—Judgment of appellate court—Power of trial court over.
- 5, 6. Jurisdiction of appellate court—When lost.

7. Jurisdiction of superior court—In general.
8. Same—To make further judgment.
9. Same—To modify judgment.
10. Modification—How made.
- 11, 12. Motion to recall remittitur.
13. Same—Death of respondent.
14. Same—Notice of motion.

15. Same—Void judgment of appellate court.

16. Remittitur—Failure of clerk to indorse—Presumption as to official acts.

See, ante, § 936 and note.

1. **Amendments allowed—Order of lower court not required.**—Where remittitur had gone down to lower court, it became of record in such court and had all force of order made in that court, and hence where judgment on appeal remanded cause for new trial with leave to parties to amend their pleadings, plaintiff was entitled to file amended complaint without special order therefor.—*Pottkamp v. Buss*, 5 Cal. Unrep. 462, 46 Pac. 169.

2. **Authority of clerk of lower court.**—Clerk of superior court in making entries required by this section, acts by authority of appellate court. No action is required on part of superior court to authorize entry or issuance of execution thereon. Judgment of supreme court becomes judgment of superior court as soon as remittitur is filed and entry is made, and hence time within which to levy execution begins to run from entry of remittitur in docket.—*McMann v. Superior Court*, 74 Cal. 106, 107, 108, 15 Pac. 448.

3. On remittitur from supreme court on reversal of judgment directing entry of judgment, which was declared in specific terms, clerk below could enter such judgment in vacation.—*McMillan v. Richards*, 12 Cal. 467, 468.

4. **Costs—Judgment of appellate court—Power of trial court over.**—Unqualified reversal of judgment by supreme court fixes liability for costs on all defendants, and where such judgment has been docketed in conformity with Rule XXIII of the supreme court and this section, the trial court is without power to vacate or set aside such judgment. But the trial court has power to make such judgment conform to the decision of the higher court; therefore, where the findings of the trial court are affirmed as to certain defendants, but the judgment is reversed with directions to the lower court to proceed in conformity with the opinion, contemplating merely the entry of a judgment against the respondents as to where the findings were affirmed, action of the trial court in setting aside judgment for costs docketed against such defendants will be sustained.—*Chapman v. Hughes*, 3 Cal. App. 622, 86 Pac. 908. See *Long v. Superior Court*, 127 Cal. 686, 687, 60 Pac. 464; *Baker v. Southern Cal. R. Co.*, 130 Cal. 113, 114, 62 Pac. 302.

5. **Jurisdiction of appellate court—When lost.**—When remittitur has gone down to lower court, appellate court loses jurisdiction unless it has been issued inadvertently, or some fraud or imposition has been practised on court or opposite party.—*Richardson v. Chicago P. & P. Co.*, 135 Cal. 311, 312, 67 Pac. 769.

6. As general rule, supreme court can not exercise any jurisdiction over case in which remittitur has been issued and filed in court below, but this does not apply where judgment of reversal was obtained by fraud, since in such case jurisdiction of court is not divested.—*Trumpler v. Trumpler*, 123 Cal. 248, 252, 55 Pac. 1008.

7. **Jurisdiction of superior court—In general.**—When remittitur is filed with clerk with whom judgment-roll is filed, jurisdiction of superior court reattaches, and failure of clerk to make entries required by this section and attach certificates to judgment-roll does not deprive court of jurisdiction nor render nugatory its order, nor keep alive stay of execution on appeal.—*Granger v. Sheriff*, 140 Cal. 190, 195, 73 Pac. 816.

8. **Same—To make further judgment.**—Judgment of supreme court modifying judgment appealed from is final and adjudication of action, and superior court has no authority to make any further judgment or order.—*Vance v. Smith*, 132 Cal. 510, 511, 64 Pac. 1078.

9. **Same—To modify judgment.**—Superior court has no power to modify judgment of supreme court after remittitur.—*Estate of Pichoir*, 146 Cal. 404, 80 Pac. 512.

10. **Modification—How made.**—Where judgment is ordered modified by appellate court, fact that former judgment was vacated and new judgment made to cover whole ground was not improper method of modifying such judgment.—*Downing v. Rademacher*, 138 Cal. 324, 327, 71 Pac. 343.

11. **Motion to recall remittitur**, made after it has been duly and regularly issued, is too late, court having lost jurisdiction by going down of the remittitur.—*Estate of Levinson*, 108 Cal. 450, 459, 41 Pac. 483, 42 Pac. 479.

12. Remittitur conforming to judgment, and rendered, will not be recalled where it is too late to amend judgment.—*San Francisco Sav. Union v. Long*, 6 Cal. Unrep. 27, 56 Pac. 882.

13. **Same—Death of respondent.**—Remittitur will not be recalled because of death of respondent pending trial without substitution of his executors, where same attorneys represented respondent and his executors, and no contention is made that judgment was wrong; judgment in such case being not void, but merely erroneous.—*Martin v. Wagner*, 124 Cal. 204, 205, 56 Pac. 1023.

14. **Same—Notice of motion.**—Where notice of motion to recall remittitur disclosed grounds of motion, relief will not be denied because notice did not expressly state such grounds.—*Baker v. Southern Cal. R. Co.*, 130 Cal. 113, 114, 62 Pac. 302.

15. **Same—Void judgment of appellate court.**—Remittitur will be recalled where judgment rendered by appellate court is void, and appeal will be restored to the

calendar.—*Martin v. Wagner*, 124 Cal. 204, 205, 56 Pac. 1023.

As to power of appellate court after remittitur, see note 21 Am. Dec. 118.

16. Remittitur—Failure of clerk to indorse—Presumption as to official acts.—Under the provisions of the above section where the record contains no evidence to the contrary on the sending down of a remittitur after decision on appeal, the presumption is that the clerk of the su-

preme court promptly transmitted the remittitur after its issuance; that it was duly received in the lower court; that the clerk of the lower court duly received it, and that thereafter he did promptly attach the certificate to the judgment-roll, and enter minute of the judgment of the supreme court in the docket, against the original entry, as his official duties required him to do.—*Fischer v. Lukens* (Cal. App.), 178 Pac. 302, case not officially reported.

§ 959. PROVISIONS OF THIS CHAPTER NOT APPLICABLE TO APPEALS TO SUPERIOR COURTS. The provisions of this chapter do not apply to appeals to superior courts.

History: Enacted March 11, 1872; amendment approved March 9, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 7; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 174, held unconstitutional, see history, § 5 ante.

See, ante, § 936 and note.

As to appeals to superior court, see, post, §§ 974-980 and notes.

[By Act March 26, 1880, Chapter II is declared "amended," but in fact repealed, and a new Chapter II substituted therefor. See Code Amdts. 1880 (C. C. P. pt.), p. 14.]

CHAPTER II.

APPEALS TO SUPREME COURT.

- § 963. When an appeal may be taken.
- § 964. Appeals; in what cases appealed from justices' courts.
- § 965. Appeals by executors and administrators.
- § 966. Acts of executors and administrators, where appointment vacated.
- § 967. [No such section.]
- § 968. [No such section.]

- § 969. Who may take appeal from probate court. [Repealed.]
- § 970. Executors and administrators not required to give undertaking on appeal. [Repealed.]
- § 971. Acts of acting administrator, etc., not invalidated by reversal of order appointing him. [Repealed.]

§ 963. WHEN APPEAL MAY BE TAKEN. An appeal may be taken from a superior court in the following cases:

1. From a final judgment entered in an action, or special proceeding, commenced in a superior court, or brought into a superior court from another court;

2. From an order granting a new trial in an action or proceeding tried by a jury where such trial by jury is a matter of right, or granting or dissolving an injunction, or refusing to grant or dissolve an injunction, or appointing a receiver, or dissolving or refusing to dissolve an attachment, or changing or refusing to change a place of trial, from any special order made after final judgment, from any interlocutory judgment, order, or decree, hereafter made or entered in actions to redeem real or personal property from a mortgage

thereof, or lien thereon, determining such right to redeem and directing an accounting; and from such interlocutory judgment in actions for partition as determines the rights and interests of the respective parties and directs partition to be made, and interlocutory decrees of divorce.

3. From a judgment or order granting or refusing to grant, revoking or refusing to revoke, letters testamentary, or of administration, or of guardianship; or admitting or refusing to admit a will to probate, or against or in favor of the validity of a will, or revoking or refusing to revoke the probate thereof; or against or in favor of setting apart property, or making an allowance for a widow, or child; or against or in favor of directing the partition, sale or conveyance of real property, or settling an account of an executor, administrator or guardian, or refusing, allowing or directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, or legacy, or distributive share; or confirming or refusing to confirm a report of an appraiser or appraisers setting apart a homestead; from an order, judgment or decree fixing inheritance-tax or determining that no inheritance-tax is due.

History: Original section enacted March 11, 1872, re-enactment of § 347, Practice Act, as amended 1854, Stats. and Amdts. 1854, p. 84; repealed and present section enacted March 28, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 14; amendment approved March 19, 1889, Stats. and Amdts. 1889, p. 324; March 27, 1897, Stats. and Amdts. 1897, p. 209; February 14, 1899, Stats. and Amdts. 1899, p. 8; February 28, 1901, Stats. and Amdts. 1900-1, p. 85; April 24, 1915, Stats. and Amdts. 1915, p. 209; May 17, 1917, Stats. and Amdts. 1917, p. 624. In effect July 27, 1917.

APPEAL TO SUPREME COURT—WHEN MAY BE TAKEN.

1. Action to annul contract of sale—Interlocutory judgment—Appeal.
2. Amendment—Order denying motion to amend minutes.
- 3-5. Appeals in probate matters.
6. Same—Orders after final judgment.
7. Appellant is not compelled to elect.
8. "Attachment"—As used in above section.
9. Same—Irregularities in attachment.
- 10, 11. Same—Order dissolving, or refusing to dissolve.
12. Banking — Insolvency — Judgment under Bank Commissioners' Act.
13. Bill of exceptions — Order granting relief from failure to present.
14. Certiorari—Supreme court has jurisdiction of appeal from judgment of superior court on.
15. Character of order—How determined.
- 16, 17. Consent judgment—Appeal does not lie.
18. Construction of section — As not affected by sections 663 and 663½, ante.
19. Same — As not applying to appeal from justices' courts.
20. Same—As to what appealable under.
21. Same—Amendment of 1915.
22. Same—Finality of judgment.
- 23-25. Same—Same—As to what is.
26. Same—Same—Only judgment.
- 27-30. Same—Subdivision 1.
31. Same—Subdivisions 1 and 2.
- 32-34. Same—Subdivision 2.
- 35-37. Same—Subdivision 3.
38. Same—Same—Has no application to probate proceedings.
39. Same—Same—Order denying motion for relief.
40. Continuance—Order refusing.
41. Court reporter, official—Claim of, presented for allowance.
42. Decisions reviewable—In general—As to what appellate court can consider.
43. Same—Same—Amount of costs and attorney's fees.
44. Same—Same—Appeal from part of judgment.
45. Same — Same — Appeal under new and alternative method.
46. Same — Same — Case originating in superior court.
47. Same—Same — Same — Meaning of word "possession."

48. Same—Same—Effect of appeal from new-trial order—Amendment of bill of exceptions.
49. Same—Same—Final judgment.
50. Same—Same—Statement on motion for new trial prepared subsequently to the hearing.
51. Same—Same—Vacation of ex parte orders.
- 52-55. Same—As to appealable orders—Order after final judgment.
56. Same—Same—Same—Probate proceedings.
- 57, 58. Same—Same—Order appointing receiver.
59. Same—Same—Order changing place of trial.
60. Same—Same—Order denying change of place of trial.
61. Same—Same—Order denying dismissal of action.
62. Same—Same—Order denying leave to amend complaint.
63. Same—Same—Order denying motion for new trial.
64. Same—Same—Same—Editorial note.
65. Same—Same—Order denying motion to dissolve an injunction.
66. Same—Same—Order denying motion to vacate judgment.
67. Same—Same—Order granting motion to dissolve attachment.
68. Same—Same—Order granting motion to vacate temporary injunction.
69. Same—Same—Order made under section 949, ante.
- 70, 71. Same—As to nonappealable orders—Appeal does not lie, when.
72. Same—Same—Same—Order refusing to dismiss.
73. Same—Same—Same—Original judgment or order not subject of appeal.
74. Same—Same—Same—Same—Circumstances which will authorize an appeal from an order refusing to vacate judgment.
75. Same—Same—Orders denying motion for new trial—Construction of code provision.
76. Same—Same—Order denying motion for nonsuit.
77. Same—Same—Order denying motion to strike out testimony.
- 78, 79. Same—Same—Order on demurrer.
80. Same—Same—Order setting aside a default.
81. Same—Errors of law—Review of.
- 82-85. Same—Review of sufficiency of evidence—Appeal from judgment within sixty days.
86. Same—Same—Same—Judgment rendered prior to amendment of 1907.
- 87-90. Same—Same—Appeal from judgment taken more than sixty days after rendition.
91. Same—Same—Appeal under new and alternative method—Review of evidence.
92. Same—Same—Duty of respondent.
- 93, 94. Same—Same—Judgment of dismissal without findings of fact.
95. Decree denying distribution—Conclusiveness of—Not an "opinion."
96. Decree settling final account.
97. Default—Default-judgment entered by clerk.
98. Same—Order denying motion to vacate—Appeal.
99. Same—Order of default.
100. Same—Order denying motion for judgment.
- 101-103. Same—Order denying motion to set aside default.
104. Demurrer—Judgment on.
105. Same—Order overruling demurrer.
106. Demurrer to amended complaint—Sustained without leave to amend—Absence of judgment.
107. Discharge of executor or administrator—Motion to vacate—Minutes of court.
108. Dismissal of action—Order dismissing action.
109. Same—As to part of defendants.
110. Same—Order refusing to dismiss action for want of prosecution.
111. Same—Order refusing to vacate order setting aside order of dismissal.
112. Same—Order setting aside order of dismissal.
113. Dismissal of appeal—Order appealed from and pleadings may be considered.
- 114, 115. Dissolution—Order refusing to dissolve injunction.
- 116, 117. Divorce—Alimony—Order directing payment of.
118. Same—Same—Sale by receiver.
119. Same—Decree of superior court granting divorce.
120. Same—Vacated judgment.
121. Eminent domain—Final judgment.
- 122, 123. Same—Order of final condemnation.
124. Estate of decedent—Rejection of claim.
125. Execution—Labor claims.
126. Same—Order refusing to quash.
- 127, 128. Ex parte order—Refusal to vacate.
129. Findings—Order denying motion for entry of different judgment.
130. Guardianship—Appointment.
131. Same—Same—Incompetent.

132. Same—Same—Nonresident sister incompetent—Not party aggrieved.
133. Same—"Ad litem" guardian, not included.
134. Same—Aggrieved party—Incompetent.
135. Same—Order for payment of money.
136. Same—Restoration to capacity.
137. Same—Revocation of letters—Order refusing.
138. Inferior courts—Practice of first appealing from justices' court to superior court.
139. Same—Judgment of superior court on appeal.
140. Inheritance-tax—Writ of prohibition to prevent order directing payment.
- 141-143. Injunctions (subdivision 2)—As to generally.
144. Same—As to order granting being appealable.
145. Same—Same—Ex parte order.
146. Same—Bank—Injunction against in proceedings by bank commissioners.
147. Same—Declaratory order that injunction is no longer in force.
148. Finality of judgment.
149. Same—Preliminary—Order striking out mandatory portion.
150. Same—Refusal of application for order to show cause.
151. Same—Sale—Order made after judgment restraining.
152. Insolvency—Discharge of debtor.
153. Same—Homestead—Order setting aside.
154. Same—Settlement of accounts.
155. Same—Same—Order setting aside.
156. Interlocutory decree—For sale in partition, and confirmation thereof.
- 157, 158. Interlocutory judgment—In action to enforce trust.
159. Interlocutory order—Subjecting trust-fund to payment of claim.
160. Same—In cases other than partition.
161. Interpleader—Order amending order dismissing complaint.
162. Intervention—Interlocutory decree.
163. Judgment—Appeal lies from judgment entered by trial court in conformity with directions.
164. Same—Correction—Order denying motion.
165. Same—Costs—Fee of guardian ad litem—Order adding to judgment.
- 166-171. Same—Motion to vacate or set aside—Order refusing.
172. Same—New trial granted—Appeal pending.
173. Jurisdictional amount—Special orders made after final judgment.
174. Juvenile court proceedings—Appeal from—Limitation of right of.
175. Modification of judgment—Order that judgment entered be reduced.
176. Same—As directed by appellate court.
- 177, 178. Mandamus—Judgment of superior court granting or denying application.
179. Moot question—Appeal from judgment which raises.
180. New-trial order.
- 181-183. Same—Affidavits—Order striking out.
- 184, 185. Same—Dismissal of motion.
186. Same—Divorce—Order denying motion for new trial in.
187. Same—Of motion not authorized.
188. Same—Settlement of statement.
189. Same—Same—Order denying motion to settle statement.
- 190, 191. Same—Same—Order striking statement from files.
192. Same—Same—Order refusing to strike out statement.
193. Same—Same—Order refusing to vacate order striking statement.
194. Same—Transcript.
195. Nonappealable orders—Appeal from judgment pending.
196. Same—Same—Motion to dismiss.
197. Same—Same—Merits of appeal can not be examined.
198. Nonsuit—Order of.
199. Order confirming sale in partition.
200. Order denying new trial (subdivision 2)—Not appealable order.
201. Same—Same—Appeal from order and from judgment.
- 202-205. Same—Same—Dismissal.
- 206-210. Same—Same—Effect of amendment of 1915.
211. Same—Same—Reviewable on appeal from judgment.
212. Order directing manner of disposing of the body of deceased.
213. Order directing payment of attorney's fee incurred by unsuccessful proponent of will.
214. Order directing payment of money by defendant into court.
215. Order directing sale of land outside of state—Appealable order.
216. Order dismissing action—Constitutes a final judgment.
217. Order dissolving an attachment—An appealable order.
218. Order for family allowance—Construed to authorize an appeal.
219. Order for sale of perishable property—Made under section 949, ante.

220. Order for sale of real estate of deceased person.
- 221-224. Order granting new trial—Appealable order.
225. Order denying motion for execution for alimony—Not appealable.
226. Order denying motion to strike—Not appealable.
227. Order on supplementary proceedings—Review of.
228. Order refusing to vacate—Appointment of receiver.
229. Same—Ex parte order.
230. Order relating to transcript—Subsequent order refusing to set aside—“Special order after judgment.”
231. Order requiring sureties upon stay-bond to justify.
232. Order setting aside default in action where no judgment has been entered.
233. Order settling accounts of administrator — Effect of revocation of letters.
234. Order vacating a default—Where no judgment has been entered.
235. Order vacating dismissal after transfer—Appealable order.
236. Order vacating judgment of dismissal—“Order after judgment”—Appealable—Prohibition.
237. Partnership accounting—Interlocutory decree—Appealable order.
- 238, 239. Partition—Confirmation of sale.
- 240-242. Same—Interlocutory decree.
- 243, 244. Same—Same—Character of.
245. Same—Receiver—Order appointing.
246. Same—Reference—Order vacating order of.
- 247, 248. Pleadings—Order striking out portion of.
249. Same—Order directing that complaint be made more definite and certain.
- 250-252. Probate proceedings — Appeals can only be taken from such judgments and orders as are mentioned.
253. Same—Account, settlement of—Appeal from order.
254. Same—Same—Findings and decree.
255. Same — Same — Irrespective of amount involved.
256. Same—Same—Not final judgment.
257. Same—Same—Time for appeal.
- 258-260. Same — Same — Vacating order settling.
- 261, 262. Same—Administrator—Right of appeal.
263. Same—Attorney’s fees—Order allowing.
264. Same—Claim—Allowance of.
265. Same—Same—Order directing payment of.
266. Same—Same—Same—After appeal.
267. Same—Same—Same—Amount immaterial.
268. Same—Same—Same—Dismissal of petition for.
269. Same—Same—Same—Preferred claim.
- 270, 271. Same—Compensation of executor.
- 272, 273. Same—Contempt—Order adjudging executor or administrator in.
- 274, 275. Same—Contest—Dismissal.
- 276, 277. Same—Same—New trial—Order granting.
278. Same—Same—Same—Order denying.
- 279, 280. Same—Same—Same—Statement on.
281. Same—Same—Setting aside orders, etc.—Order denying motion of contestants of will.
- 282, 283. Same—Conveyance—Order for.
284. Same—Decree of final distribution.
285. Same—Same—Postponement—Order refusing.
286. Same—Same—Partial distribution—Order decreeing.
287. Same—Same—Relief in equity not granted.
288. Same—Same—Right of executor to appeal.
- 289, 290. Same—Same—Order refusing to set aside and vacate.
- 291, 292. Same—Same—Order vacating.
293. Same—Dismissal of action—Order commanding.
294. Same—Execution—Order of probate court refusing to quash.
- 295, 296. Same—Family allowance—Order granting.
297. Same—Same—Order refusing to grant.
298. Same—Final orders in special probate proceedings.
- 299, 300. Same—Homestead—Order setting apart.
301. Same—Same—Setting aside proceedings.
302. Same—Same—Vacating order—Order denying motion.
303. Same—Mortgage—Order authorizing.
304. Same—New trial—Order denying.
305. Same—Probate of will—Order refusing.
306. Same—Restoration of property—Order requiring.
- 307-309. Same—Revocation of probate—Appeal lies from order refusing.
310. Same—Same—Prior to amendment.
311. Same—Sale of property—Order of probate court directing.

312. Same—Same—Order of probate court directing executor to proceed with.
313. Same—Same—Order confirming sale.
314. Same—Same—Same—Order refusing to hear evidence or to confirm.
315. Same—Same—Resale—Order of court directing.
316. Same—Same—Return of purchase-money—Order dismissing petition for.
317. Same—Same—Setting aside—Order of probate court refusing.
- 318, 319. Same—Special administrator—Order appointing.
320. Same—Suit in name of administratrix—Order directing.
321. Quo warranto—Decision of judge at chambers.
- 322-326. Receiver—Accounts of—Order approving.
327. Same—Amendment to section allowing appeal from order appointing receiver.
- 328, 329. Same—Prior to amendment of section.
330. Same—Compensation—Order fixing receiver's.
- 331-333. Same—Order that receiver take property.
334. Redemption—Order adjudging that plaintiff is barred from all equity of.
- 335-338. Refusal to set aside appealable order.
- 339, 340. Same—Writ of assistance.
341. Refusal to set aside nonappealable order.
- 342, 343. Removal of cause—Order refusing.
344. Report of referee—Confirmation of.
345. Same—Order overruling exceptions.
346. Revocation of probate of will—Order dismissing proceedings—Appealability.
347. Separate appeals—Every judgment and order subsequent to judgment.
348. Same—No separate appeal lies from parts of two judgments.
349. Specific performance—Interlocutory decree.
350. Stay of execution—Order striking undertaking to stay execution from files.
351. Substitution of parties—Order denying application to vacate order.
352. Same—Order granting.
353. Summary proceedings—All judgments rendered in special civil proceeding.
354. Same—Removal from office.
355. Supplementary proceedings—In general.
356. Same—Rulings on evidence on—Not an appealable order.
357. Trustee—Order vacating order substituting.
358. Void judgment—Rendered by court without jurisdiction.
359. Same—On appeal from inferior court.
360. Same—Order setting aside.
361. Void orders may be appealable.
362. Writ of assistance—In general.
363. Same—In sale in partition.
364. Same—Order refusing to restrain sheriff from executing writ of.
365. Writ of error—Will not be granted in proceedings where appeal lies.
366. Writ of possession—Error in granting.

See, also, ante, § 936 and note.

As to appeals in drainage proceedings, see note 10 L. R. A. 288.

As to consideration of insufficiency of the evidence on the appeal from the judgment, see, ante, § 956, note par. 30.

As to construction regarding intention of legislature by amendments in 1915 to above and other sections, see, ante, § 956, note par. 17.

As to judgments and orders which are appealable, see, ante, § 936, note pars. 68-81.

As to power of trial court to hear and determine motion for new trial after appeal has been taken but before the same has been determined, see, ante, § 939, note par. 20.

As to review of satisfied judgment, see, ante, § 936 and note.

1. **Action to annul contract of sale—Interlocutory judgment—Appeal.**—In the case of an interlocutory judgment entered in an action to annul a contract for the sale of real property and to quiet the plaintiff's title thereto and requiring the plaintiff within a limited time to tender to the defendant a deed, and upon defendant's failure within a designated time thereafter to make the payments provided in the contract, the plaintiff's title to be quieted, is not an appealable order under the provisions of the above section as amended in 1915.—*Krotzer v. Clark*, 178 Cal. 736, 147 Pac. 657, applying the doctrine in *Illinois Trust & Sav. Bank v. Alvord*, 99 Cal. 407, 33 Pac. 1132; *Title Ins. & Trust Co. v. California Devel. Co.*, 159 Cal. 484, 114 Pac. 838; *Grey v. Brennan*, 147 Cal. 355, 81 Pac. 1014.

2. **Amendment—Order denying motion to amend minutes of court is not appealable.**—It not being special order made after final judgment within meaning of subdivision 2, since it in no manner affected judgment or bore any relation to it.—*Griess v. State Inv. Ins. Co.*, 93 Cal. 411, 418, 28 Pac. 1041.

3. **Appeals in probate matters must find authority in subdivision 3 of above section which points out all and the only cases or instances in which an appeal may be taken**

in probate proceedings. There is no other provision of law which purports to authorize an appeal in any case in probate matters.—*Estate of Seymour*, 15 Cal. App. 287, 114 Pac. 1023.

As to appealability of order dismissing proceedings for revocation of probate of a will, see pars. 307-309, this note.

As to decree settling final account, see par. 51, this note.

4. Under above section, subdivision 3, allowing an appeal in probate proceedings from an order "against or in favor of . . . making an allowance for a widow or child," opposing creditors and the administrator of an insolvent estate may appeal from an order directing the payment of a family allowance under such original order therefor, for a period subsequent to one year after the granting of letters.—*Estate of Treat*, 162 Cal. 250, 258, 121 Pac. 1003.

5. An order setting aside a prior order confirming the sale of land belonging to the estate of a deceased person is in legal effect an order against directing the sale or conveyance of real property, within the meaning of subdivision 3 of this section, and is appealable.—*Estate of West*, 162 Cal. 352, 353, 122 Pac. 953.

6. Same—Orders after final judgment.—Subdivision 2, of above section, giving right of appeal from orders after final judgment does not apply to probate matters.—*Estate of Seymour*, 15 Cal. App. 287, 114 Pac. 1023.

7. Appellant is not compelled to elect as to which one of the two methods of appeal he will adopt and proceed under. If he has perfected an appeal under either method it is sufficient. If his appeal is perfected, tested by the new method, it is unimportant whether he unsuccessfully attempted to file a sufficient cost bill in addition to serving his notice, neither of which the new method requires. It was entirely voluntary on his part whether as a matter of protection he should do so or not and his appeal is not imperiled because in an attempt at cautiousness he has erred in some matter of proceeding which he might have omitted and his appeal still be good. If the appeal would otherwise be good, by simply filing the notice of appeal in unsuccessful attempt to take steps required in the old method and not required by the new will be deemed unimportant and of no legal significance as affecting the appeal.—*Mitchell v. California & O. S. S. Co.*, 154 Cal. 731, 734, 99 Pac. 202.

8. "Attachment"—As used in above section is broad enough to include seizure and custody under writ as well as writ itself, and hence order releasing attached property on ground that it is not liable to seizure is appealable as order dissolving attachment—such orders not relating to discharging writs of attachment where same were improperly or erroneously issued.—*Risdon I. & L. W. v. Citizens' T. Co.*, 122 Cal. 94, 96, 68 Am. St. Rep. 25, 54 Pac. 529.

9. Same—Irregularities in attachment as to its inception or form must be considered on direct appeal from order refusing to dissolve attachment, and not on appeal from judgment.—*Mudge v. Steinhart*, 78 Cal. 34, 38, 12 Am. St. Rep. 17, 20 Pac. 147.

10. Same—Order dissolving or refusing to dissolve attachment is appealable.—*Mudge v. Steinhart*, 78 Cal. 34, 38, 12 Am. St. Rep. 17, 20 Pac. 147.

11. Order refusing to dissolve attachment is not appealable under this section.—*Alender v. Fritts*, 24 Cal. 447, 448.

12. Banking—Insolvency—Judgment under Bank Commissioners' Act to effect that corporation is insolvent, and that it is unsafe for it to continue business, and that property of corporation be delivered to it for purpose of liquidation, to be administered under direction of bank commissioners, and that injunction applied for be issued as final judgment, is appealable; and hence order refusing to modify such injunction was proper.—*People ex rel. Bank Commissioners v. Bank of Mendocino*, 133 Cal. 107, 65 Pac. 124.

13. Bill of exceptions—Order granting relief from failure to present bill of exceptions in time is not appealable—it not being special order made after judgment since it in no manner affected judgment or bore any relation to it, nor was it final determination of any matter affecting appellant in proceedings before court in which it was made.—*Kaltschmidt v. Weber*, 136 Cal. 675, 676, 69 Pac. 497.

14. Certiorari—Supreme court has jurisdiction of appeal from judgment of superior court on certiorari from justice of the peace, regardless of amount involved.—*Heinlen v. Phillips*, 88 Cal. 557, 558, 26 Pac. 366 overruling: *Blendenfeld v. Fresno Mill Co.*, 82 Cal. 425, 22 Pac. 113.

15. Character of order—How determined.—Whether order is appealable is to be determined by what it purports to determine, not by what may be its actual operative effect.—*Estate of Bullock*, 75 Cal. 419, 421, 17 Pac. 540.

16. Consent judgment—Appeal does not lie.—On a consent judgment will not be reversed on appeal.—*Estate of Lorenz*, 124 Cal. 495, 497, 57 Pac. 381.

As to review of judgments by consent, see, ante, § 936 and note.

17. Judgment under stipulation is not appealable, it being judgment by consent.—*Pacific Pav. Co. v. Vizelich*, 1 Cal. App. 281, 82 Pac. 82.

18. Construction of section—As not affected by sections 963 and 963½, ante, authorizing court to vacate and set aside judgment and enter another and different judgment, on motion, for such sections merely provide remedy in addition to appeal, and hence inconsistency between findings and judgment may be reviewed on appeal from judgment.—*Patch v. Miller*, 125 Cal. 240, 241, 57 Pac. 986.

19. **Same—As not applying to appeal from justices' courts,** and hence order denying motion to strike out plaintiff's cost-bill on appeal from justice of peace, is not appealable as special order after judgment.—*Henigan v. Ervin*, 110 Cal. 37, 40, 42 Pac. 457.

20. **Same—As to what appealable under.**—An order denying a motion to vacate a default is not appealable, not being one of those enumerated herein. An attempt to appeal from a nonappealable order does not give the appellate court jurisdiction or authority to review it.—*Sherman v. Standard Mines Co.*, 166 Cal. 524, 137 Pac. 249.

21. **Same—Amendment of 1915.**—This section as amended is applicable to every case where such order was made subsequent to the date of taking effect of the amendment, regardless of whether the proceedings for a new trial were initiated prior or subsequent to such date.—*Woodruff v. Colyear*, 172 Cal. 440, 156 Pac. 475.

22. **Same—Finality of judgment.**—Recital that defendants are enjoined until further order of court in injunction, made as part of final judgment, does not render such judgment any less final.—*People v. Bank of Mendocino Co.*, 133 Cal. 107, 108, 65 Pac. 124.

23. **Same—Same—As to what is.**—Final judgment as used in subdivision 2 means final judgment mentioned in subdivision 1 of this section.—*Estate of Smith*, 98 Cal. 636, 640, 33 Pac. 744.

24. **Final judgment in subdivision 2** refers to one mentioned in subdivision 1, and not to those mentioned in subdivision 3.—*Estate of Calahan*, 60 Cal. 232, 233.

25. **Final judgment as used in subdivision 1** applies only to those judgments known at common law as final judgments, and does not apply to determination termed orders or judgments defined in subdivision 3 of this section, and for that reason right of appeal is expressly given to such orders and judgments.—*Estate of Smith*, 98 Cal. 636, 640, 33 Pac. 744.

26. **Same—Same—Only judgment.**—Where judgment is only judgment provided for by act it is final judgment in strictest sense of term.—*People v. Bank of Mendocino Co.*, 133 Cal. 107, 108, 65 Pac. 124. See *Stockton C. H. & A. W. v. Glen's Falls Ins. Co.*, 98 Cal. 567, 577, 33 Pac. 633.

27. **Same—Subdivision 1.**—A judgment upon demurrer in a suit in equity to avoid the effect of a deed brought against the administrator of the estate of the deceased grantor, claimants to the title under subsequent conveyances and their mortgagees, dismissing the action as to the subsequent claimants, and leaving it still pending and undetermined as to the mortgagees and the administrator, is a final judgment from which an appeal will lie.—*Baxter v. Boege*, 173 Cal. 589, 160 Pac. 1072.

28. An order overruling a motion to reopen a case before decision rendered is not an appealable order, but is reviewable on appeal from the judgment and the order

denying new trial when the proceeding on the motion is incorporated in the bill of exceptions.—*Phenegar v. Paolini*, 27 Cal. App. 381, 149 Pac. 1008.

29. An appeal taken from a judgment dismissing an amended complaint in intervention as to three defendants, but leaving the question undetermined as to the seven other defendants, must be dismissed.—*Dabney Oil Co. v. Providence Oil Co.*, 29 Cal. App. 251, 155 Pac. 114.

30. A judgment for damages in an action to recover for personal injuries, from which an appeal has been taken without bond, is a final judgment.—*In re Berlin Dye Works & Laundry Co.*, 225 Fed. 683.

31. **Same—Subdivisions 1 and 2.**—Construed to embrace under subdivisions 1 and 2, orders and judgments other than those in probate proceedings.—*Estate of Calahan*, 60 Cal. 232, 233.

32. **Same—Subdivision 2.**—An appeal lies "from any special order made after final judgment" under this section, but is general in its character and therefore is controlled by the special law in section 1222, which makes a judgment of contempt final and conclusive and therefore nonappealable.—*Gale v. Tuolumne County Water Co.*, 169 Cal. 46, 145 Pac. 532.

33. No appeal lies from an order discharging one as a receiver.—*Edwards v. Western Land & Power Co.*, 27 Cal. App. 724, 151 Pac. 16.

34. An appeal taken from an order denying a motion for a new trial subsequent to the taking effect of the amendment of 1915 to above section abolishing such appeals, must be dismissed, notwithstanding the institution of proceedings in the direction of making of such a motion prior to the taking effect of the amendment.—*Hester v. McMullan*, 29 Cal. App. 664, 157 Pac. 521.

35. **Same—Subdivision 3.**—Construed to embrace under subdivision 3 only such judgments and orders as are made in probate proceedings.—*Estate of Calahan*, 60 Cal. 232, 233.

36. No authority is found herein for an appeal from an order refusing to set aside a previous order for the sale of lands belonging to the estate of a decedent.—*Estate of McCarty*, 169 Cal. 708, 147 Pac. 941.

37. An appeal does not lie from a finding but only from the order denying the letters.—*Estate of Funkenstein*, 170 Cal. 594, 150 Pac. 987.

38. **Same—Same—Has no application to probate proceedings.**—The provisions of the above subdivision have no application to probate proceedings.—*In re Allen's Estate*, 175 Cal. 356, 165 Pac. 1011.

39. **Same—Same—Order denying motion for relief.**—An order denying a motion to be relieved from failure to propose a bill of exceptions in a probate matter is not appealable, since it is not within the sole exception of subdivision 3, section 963, al-

lowing appeals in probate matters.—In re Allen's Estate, 175 Cal. 356, 165 Pac. 1011.

40. **Continuance—Order refusing** is not appealable order.—Haraszthy v. Horton, 46 Cal. 545, 546.

41. **Court reporter, official—Claim of, presented for allowance** to court or judge, is not an action, nor a special pleading, within subdivision 1 of above section.—Pipher v. Superior Court, 3 Cal. App. 626, 86 Pac. 904.

42. **Decisions reviewable—In general—As to what appellate court can consider.**—Appellate court is not authorized to consider evidence unless it is contained in a transcript as provided by this section or in a statement or bill of exceptions, and evidence contained in the transcript not so authenticated will not be considered by the appellate court.—Lane v. Tanner, 156 Cal. 135, 137, 103 Pac. 846.

43. **Same—Same—Amount of costs and attorney's fees.**—Where the amount of costs allowed are less than three hundred dollars, the action of the trial court in the matter is not reviewable upon appeal.—Meyer v. Perkins, 20 Cal. App. 661, 130 Pac. 206, 208.

44. **Same—Same—Appeal from part of judgment.**—Ordinarily an appeal from a specific part of a judgment, authorized by section 940, ante, leaves the parts not appealed from unaffected, and such unaffected parts must be deemed final, being a final judgment of the facts and rights which they determine.—Whalen v. Smith, 163 Cal. 360, 362, 125 Pac. 904. See dis. op. and concur. op., 125 Pac. 904, 906.

45. **Same—Same—Appeal under new and alternative method** does not limit consideration and review, and if taken in six months from entry of judgment, the evidence may be reviewed and considered as well as anything else.—Larsen v. Larsen, 15 Cal. App. 533, 115 Pac. 340.

As to review of evidence on such an appeal, see par. 91, this note.

46. **Same—Same—Case originating in superior court.**—The supreme court has no jurisdiction of an appeal from a judgment of the superior court rendered in an action involving possession of land on an appeal from a justices' court, notwithstanding the complaint contains an allegation of the possession of the demised premises by the defendant.—O'Meara v. Hables, 163 Cal. 240, 124 Pac. 1003.

47. **Same—Same—Same—Meaning of word "possession."**—In the provisions of the Code of Civil Procedure denying jurisdiction to the justices' court of actions involving the possession of real property (§§ 112, 838), and in the constitutional provisions conferring such jurisdiction on the superior courts and on the supreme court on appeal, the possession there referred to is such possession as has relation to title or is necessary to the enforcement or defeat of the cause of action asserted.—O'Meara v. Hables, 163 Cal. 240, 124 Pac. 1003.

48. **Same—Same—Effect of appeal from new-trial order—Amendment of bill of exceptions.**—An appeal from an order denying a new trial deprives the superior court of jurisdiction to set aside such order, and while the order is in force the record upon which it is based can not be amended.—Merced Bank v. Price, 152 Cal. 699, 93 Pac. 866.

49. **Same—Same—Final judgment.**—A judgment is not final within the meaning of section 939, ante, authorizing an appeal therefrom in certain cases, unless it be one which finally disposes of the rights of all the parties to the action in relation to the matter in controversy, in effect, ending the proceedings in the court in which entered.—Anglo-California Bank v. Superior Court, 153 Cal. 756, 96 Pac. 803.

50. **Same—Same—Statement on motion for new trial prepared subsequently to the hearing of the motion** may be considered on appeal from the judgment, although not considered on appeal from the order.—Blood v. La Serena Land & Water Co., 150 Cal. 771, 89 Pac. 1090.

51. **Same—Same—Vacation of ex parte orders.**—Applies to such orders alone as the court has power to make without notice, and not to void ex parte orders made outside the jurisdiction of the court, which have the effect of depriving of property without due process of law.—Boca & Loyaltan R. Co. v. Superior Court, 150 Cal. 147, 152, 88 Pac. 715.

52. **Same—As to appealable orders—Order after final judgment.**—It seems to be now the settled rule in this state that any special order made after final judgment affecting such judgment, although not depended upon, is an appealable order.—Magee v. Superior Court, 10 Cal. App. 154, 161, 101 Pac. 532.

53. An order dismissing proceedings on motion for new trial is a special order after judgment, and is appealable.—Kokole v. Superior Court, 17 Cal. App. 457, 120 Pac. 67.

54. Section 941b, ante, is applicable to the same subject-matter as subdivision 3 of this section. It allows an appeal to be taken from a judgment, order or decree at any time after the rendition thereof, provided it is within sixty days after notice of the entry thereof has been served on the attorney of record of the adverse party, or if no such notice is given, then not later than six months after such entry.—Foss v. Johnstone, 158 Cal. 119, 110 Pac. 294.

55. Order made after a sale upon execution requiring the party holding possession of the property sold to deliver it to the execution purchaser is an appealable order.—Magee v. Superior Court, 10 Cal. App. 154, 160, 101 Pac. 532.

56. **Same—Same—Same—Probate proceedings.**—The provisions of subdivisions 2 and 3 of the above section regulating appeals from a special order made after final judgment, have no application to probate

proceedings.—*Estate of Allen*, 175 Cal. 356, 165 Pac. 1011.

57. Same—Same—Order appointing receiver.—Since the amendment of 1907 providing for stay of execution, and the amendment of the same year to section 939, ante, providing for appeals from such orders, an interested party has a plain, speedy and adequate remedy in ordinary course of law; that is, by appeal, and prohibition will not lie to arrest proceedings under such an order.—*Lightner Min. Co. v. Superior Court*, 14 Cal. App. 649, 112 Pac. 909.

58. Since the amendment of 1907 permitting appeals from such orders, and the amendment of the same year to section 943, ante, providing for stay of execution, an interested party has a plain, speedy and adequate remedy by appeal, and prohibition will not lie to arrest proceedings under such an order.—*Lightner Min. Co. v. Superior Court*, 14 Cal. App. 649, 112 Pac. 909.

59. Same—Same—Order changing place of trial.—Such an order is appealable, and such appeal must be taken within sixty days after the entry or the filing of the order, such order, when entered or filed, being a final and absolute disposition of the case on the part of the court making it; and it is final for all purposes, unless there is a condition attached to the transfer which must be complied with before it becomes effective.—*Chase v. Superior Court*, 154 Cal. 795, 99 Pac. 355.

60. Same—Same—Order denying change of place of trial.—Since an order denying a change of place of trial is itself appealable, its correctness can not be reviewed on the appeal from the judgment.—*Bohn v. Bohn*, 164 Cal. 532, 129 Pac. 981, 984.

61. Same—Same—Order denying dismissal of action.—An order denying a motion of the plaintiff to dismiss an action, made in open court, and not in the manner prescribed by section 581, ante, as to dismissal by plaintiff, is held to be an order affecting the judgment, since the judgment would not have been rendered if the motion had been granted, and is reviewable on appeal from the judgment, and can not be reviewed on certiorari.—*Huntington Park Co. v. Superior Court*, 17 Cal. App. 695, 121 Pac. 701.

See par. 76, this note.

62. Same—Same—Order denying leave to amend complaint.—The fact that the appeal was not taken within sixty days after rendition does not affect the jurisdiction of the court to consider an exception to an order refusing an amendment to the complaint.—*Campbell-Kawannanako v. Campbell*, 152 Cal. 203, 93 Pac. 184.

63. Same—Same—Order denying motion for new trial.—Appeal may be taken from order denying motion for new trial immediately upon its entry, and it is not prematurely taken because a modified judgment had not as yet been entered.—*O'Rourke v. Finch*, 8 Cal. App. 263, 265, 96 Pac. 784.

64. Same—Same—Same—Editorial note.—Such an order is no longer an appealable order, since the amendment of 1915.—See pars. 200-211, this note.

65. Same—Same—Order denying motion to dissolve an injunction is itself appealable.—*County of Tehama v. Sisson*, 152 Cal. 179, 93 Pac. 667.

See pars. 67 and 68, this note.

66. Same—Same—Order denying motion to vacate judgment.—An order made after final judgment denying a motion made under sections 663 and 663a, ante, to vacate and set aside the judgment, as not supported by the findings, is appealable under the provisions of the above section.—*Taylor v. Darling*, 19, Cal. App. 232, 125 Pac. 249.

67. Same—Same—Order granting motion to dissolve attachment is appealable, and therefore can not be reviewed on appeal from judgment.—*Kennedy v. Merickel*, 8 Cal. App. 378, 384, 97 Pac. 81.

See par. 65, this note.

68. Same—Same—Order granting motion to vacate temporary injunction.—Appeal from portion of judgment wherein it was adjudged "that the temporary injunction heretofore issued herein to the sheriff of said county be, and the same is, hereby, dissolved and vacated," is not an order within the meaning of section 936, ante.—*Bekins v. Dieterle*, 5 Cal. App. 586, 91 Pac. 105.

See pars. 65 and 67, this note.

69. Same—Same—Order made under section 949, ante, appealable order under the above section being one after final judgment.—*Rogers v. Superior Court*, 158 Cal. 467, 111 Pac. 357.

70. Same—As to non-appealable orders—Appeal does not lie from order ruling upon demurrer.—*Kinard v. Gordan*, 10 Cal. App. 219, 221, 101 Pac. 696.

71. No appeal is hereby given from order vacating the allowance of a claim against an estate.—*Kowalsky v. Superior Court*, 13 Cal. App. 218, 220, 109 Pac. 158.

72. Same—Same—Same—Order refusing to dismiss an action is not of itself an appealable order.—*Forrester v. Lawler*, 14 Cal. App. 171, 111 Pac. 284.

73. Same—Same—Same—Original judgment or order not subject of appeal, it can not be made reviewable by the device of moving to set it aside and appealing from the order denying the motion, and even where there is a right of appeal from a judgment or order a party can not ordinarily take an appeal from a subsequent order denying a motion to vacate the judgment or order complained of; but this is a mere rule of practice established by the supreme court without the aid of any statute.—*Title Insurance & T. Co. v. California Devel. Co.*, 159 Cal. 484, 114 Pac. 838.

74. Same—Same—Same—Same—Circumstances which will authorize an appeal from an order refusing to vacate judgment or

order are that the appellant was not a party to the proceeding resulting in the original judgment or order and for that reason could not appeal therefrom or that such original judgment or order was made ex parte and the party complaining did not have notice in time to appeal or had no opportunity to make a bill of exceptions or other record which would present his whole grounds of objection. But in every case where this course has been allowed the order from which an appeal was sought to be taken was without the class of orders made directly appealable and the only theory upon which the court could entertain an appeal from an order refusing to vacate where such order is not made the subject of direct appeal would be that the order refusing to vacate is identical with the original order.—*Title Insurance & T. Co. v. California Devel. Co.*, 159 Cal. 484, 114 Pac. 838.

75. Same—Same—Orders denying motion for new trial—Construction of code provision.—The amendment of 1915 to the above section operated to deprive an appellant of a separate appeal from an order denying a motion for a new trial, but the amendment of the same year to section 956, ante, operated equally to make such an order reviewable on an appeal from the final judgment.—*White v. Hendley*, 35 Cal. App. 267, 169 Pac. 710.

See, also, pars. 200-211, this note.

76. Same—Same—Order denying motion for nonsuit.—An order denying a motion for a nonsuit is not appealable.—*Leavens v. Pinkham & McKevitt*, 164 Cal. 242, 128 Pac. 399, 400.

See par. 61, this note.

77. Same—Same—Order denying motion to strike out testimony.—A ruling made in the course of a trial refusing to strike out certain testimony is not appealable.—*Leavens v. Pinkham & McKevitt*, 164 Cal. 242, 128 Pac. 399, 400.

78. Same—Same—Order on demurrer.—An appeal does not lie from an order either sustaining or overruling a demurrer. The action of the court upon the demurrer can only be reviewed upon an appeal from final judgment entered in an action or special proceeding.—*Hanke v. McLaughlin*, 20 Cal. App. 204, 128 Pac. 772.

79. Order sustaining a demurrer is not appealable, but may be reviewed on an appeal from the judgment.—*Hadsall v. Case*, 15 Cal. App. 542, 115 Pac. 330.

80. Same—Same—Order setting aside a default is not appealable.—*Rose v. Leland*, 17 Cal. App. 309, 119 Pac. 532.

81. Same—Errors of law—Review of.—While the sufficiency of the evidence can not be considered on an appeal from the judgment taken more than sixty days after entry, yet if the appeal is taken within six months errors of law occurring at the trial may be reviewed.—*Union Lumber Co. v.*

Sunset Road Oil Co., 17 Cal. App. 460, 120 Pac. 44.

As to raising objection for first time on appeal, see, ante § 938, note par. 522.

82. Same—Review of sufficiency of evidence—Appeal from judgment within sixty days, as provided in section 939, ante, subdivision 3, ante, affects the right of the appellate court to consider and review the evidence.—See *Union Lumber Co. v. Sunset Road Oil Co.*, 17 Cal. App. 460, 462, 120 Pac. 44.

See pars. 93 and 94, this note.

83. Insufficiency of the evidence is not reviewable on an appeal from the judgment unless such appeal is taken within sixty days after entry thereof.—*First Natl. Bank v. Trognitz*, 14 Cal. App. 178, 111 Pac. 402.

84. An exception to the decision that it is not supported by the evidence, can not be reviewed on appeal from the judgment unless such appeal be taken within sixty days after entry.—*Cordano v. Ferretti*, 15 Cal. App. 674, 115 Pac. 657.

85. Appeal not taken within sixty days after rendition of judgment, the case is not before the appellate court on the sufficiency of the evidence, but upon its competency and admissibility alone.—*Andrews v. Wheeler*, 10 Cal. App. 614, 619, 103 Pac. 144.

86. Same—Same—Same—Judgment rendered prior to amendment of 1907 is controlled by the law as before the amendment and the evidence could be reviewed if the appeal was taken within sixty days from the rendition of the judgment, although it must have been taken fifty days subsequent to the amendment.—*Boin v. Spreckels Sugar Co.*, 155 Cal. 612, 616, 102 Pac. 937.

87. Same—Same—Appeal from judgment taken more than sixty days after rendition of the judgment, the sufficiency of the evidence to justify the decision is not reviewable, such review being expressly forbidden by this section.—*Layne v. Johnson*, 19 Cal. App. 95, 97, 124 Pac. 860.

See pars. 93 and 94, this note.

88. Sufficiency of the evidence to support the judgment can not be reviewed on appeal therefrom when the appeal is taken more than sixty days after rendition of the judgment.—*Hawley v. Harrington*, 152 Cal. 189, 92 Pac. 177; *Morcom v. Balersky*, 16 Cal. App. 480, 117 Pac. 560; *Union Lumber Co. v. Sunset Road Oil Co.*, 17 Cal. App. 460, 462, 120 Pac. 44.

89. The appeal not having been taken within sixty days after rendition and entry, the exceptions that the decision is not supported by the evidence can not be reviewed.—*Crandall v. Parks*, 152 Cal. 774, 93 Pac. 1018.

90. Where the appeal from the judgment was not taken until some five months after service of notice of entry thereof, in no event can the sufficiency of the evidence to

justify the findings be considered.—*National Bank of California v. Mulford*, 17 Cal. App. 555, 120 Pac. 446.

91. Same—Same—Appeal under new and alternative method—Review of evidence.—Where there is no notice of entry of judgment, and an appeal is taken under the new and alternative method within six months, the appellant is entitled to have a review of the evidence to support a finding with the same effect as though the appeal had been taken under the old method within sixty days.—*Brown v. Coffee*, 17 Cal. App. 384, 121 Pac. 309, 311.

92. Same—Same—Duty of respondent.—Where the respondent objects to a review of the evidence on the ground that the appeal was not taken within sixty days after notice of entry of judgment, it is his duty to furnish proof of service of such notice to that court which would have prevented the review (on rehearing).—*Brown v. Coffee*, 17 Cal. App. 386, 121 Pac. 309, 311.

93. Same—Same—Judgment of dismissal without findings of fact.—A judgment of dismissal, without findings, and without an opportunity to the appellant to prepare the record contemplated and required by sections 648 and 649, ante, is not "an exception to the decision or verdict," within the meaning of section 939, ante and the evidence may be reviewed although the appeal may not have been taken within sixty days after rendition.—*Rickey Land & C. Co. v. Glader*, 153 Cal. 180, 94 Pac. 768. See *Falkner v. Hendy*, 107 Cal. 52, 40 Pac. 21, 386.

94. In such case the supreme court must have the power to review the judgment of dismissal upon the evidence which was before the trial court, or the right of appeal becomes a vain and empty thing, and the decision granting the motion to dismiss, which motion, under the statute, is addressed to the discretion of the trial court, can never be corrected, however glaring the abuse of such discretion may be.—*Rickey Land & C. Co. v. Glader*, 153 Cal. 179, 180, 94 Pac. 768.

95. Decree denying distribution—Conclusiveness of—Not an "opinion."—An order which has been in force for many years, reciting that various previous orders approving and settling accounts, and directing and confirming distribution of the estate from time to time, had become final and conclusive and that final and complete distribution of the estate had been made, declaring that no decree of distribution will be made other than one confirming the distribution already made, is not a mere "opinion" but is an order "refusing the distribution" of an estate upon the ground that the estate has already been fully distributed, and is an appealable order under the provisions of the above section; such order not having been appealed from within the time allowed by law becomes final and conclusive upon all the parties in interest.—*Estate of Yorba*, 176 Cal. 166, 167 Pac. 854.

96. Decree settling final account and that settling annual account are appealable.—*Estate of Richmond*, 9 Cal. App. 402, 405, 99 Pac. 554.

As to appeals in probate matters, see pars. 46-48, this note.

As to order settling accounts, and effect of revocation of letters, see par. 68, this note.

97. Default—Default-judgment entered by clerk may be appealed from. Such right of appeal is not affected by fact that appellant might also move trial court to vacate it and set it aside.—*Jameson v. Simond's S. Co.*, 144 Cal. 3, 4, 77 Pac. 662.

98. Same—Order denying motion to vacate—Appeal.—An order denying a motion to vacate a default, is not an appealable order under the provisions of the above section.—*Timmons v. Coonley*, 39 Cal. App. 35, 197 Pac. 429.

99. Same—Order of default.—Order of default entered by clerk is not appealable, nor is it special order made after final judgment where default had been entered, but no final judgment had been entered on default at time notice of appeal was served.—*Rauer's Law & Collection Co. v. Standley*, 3 Cal. App. 44, 84 Pac. 214.

100. Same—Order denying motion for judgment by default, and for removal of guardian as prayed in defendant's cross-complaint, is not appealable.—*Broadribb v. Goddcell*, 60 Cal. 412; *Broadribb v. Tibbetts*, 62 Cal. 614, 616.

101. Same—Order denying motion to set aside default judgment is appealable.—*McCormick v. Belvin*, 96 Cal. 182, 183, 31 Pac. 16.

102. Order denying motion to set aside default of defendant and to fix time for her to plead, made after order vacating judgment had been granted, is appealable, order entering her default ordinarily not being appealable order.—*Thompson v. Alford*, 128 Cal. 227, 228, 60 Pac. 686.

103. Order denying motion to be relieved from default in not serving notice of intention to move for new trial within statutory time is appealable.—*Steen v. Santa Clara V. M. & L. Co.*, 145 Cal. 564, 565, 79 Pac. 171.

As to appeal from findings on motion to set aside judgment for surprise, mistake, or excusable neglect, see note 58 Am. Dec. 394.

As to relief from order entered through accident, inadvertence, surprise, or excusable neglect, see, ante, § 473 and note.

104. Demurrer—Judgment on in favor of sureties in action against justice of peace and sureties on his official bond is not final judgment so as to be appealable, where action is still pending against the justice.—*Nolan v. Smith*, 137 Cal. 360, 361, 70 Pac. 166.

105. Same—Order overruling demurrer is not appealable.—*Foster v. Bowles*, 138 Cal. 449, 451, 71 Pac. 495.

106. **Demurrer to amended complaint—Sustained without leave to amend—Absence of judgment.**—In a case in which there was served and filed a third amended complaint, to which a general demurrer was interposed and sustained without leave to amend, but no judgment was given, made or entered, the order sustaining the demurrer is not an appealable order under the provisions of the above section as amended in 1917.—*Pacific Seaside Home for Children v. Newbert Protection*, — Cal. App. —, 193 Pac. 169.

107. **Discharge of executor or administrator—Motion to vacate—Minutes of court.**—An appeal under the provisions of subdivision 3 of the above section from an order refusing to vacate an order discharging an executrix where, after an order discharging the administratrix had been granted certain persons who had unsuccessfully claimed heirship in the estate served notice of a motion to vacate and set aside the decree of discharge, on the ground "that the administratrix was not as yet entitled to her discharge and that the condition of the estate was such that it required an administratrix," and stating in the notice that such motion to be made, upon the "minutes of the court," where the "minutes of the court" were entirely wanting in any facts from which the court could derive authority to set aside the decree of discharge on the ground stated in the notice of motion, the appeal will be dismissed.—*Nason v. Superior Court*, 39 Cal. App. 448, 179 Pac. 454.

108. **Dismissal of action—Order dismissing action for failure to return summons within three years, entered in minutes of court, is final judgment for purposes of appeal.**—*Pacific Pav. Co. v. Vizelich*, 141 Cal. 4, 7, 74 Pac. 352.

109. **Same—As to part of defendants.**—Order dismissing cause as to part of defendants is not appealable.—*Gates v. Walker*, 35 Cal. 289, 290.

110. **Same—Order refusing to dismiss action for want of prosecution is not appealable.**—*Garthwaite v. Bank of Tulare*, 134 Cal. 237, 243, 66 Pac. 326.

111. **Same—Order refusing to vacate order setting aside order of dismissal as to part of defendants is not appealable order.**—*Gates v. Walker*, 35 Cal. 289, 290.

112. **Same—Order setting aside order of dismissal as to part of defendants is not an appealable order.**—*Gates v. Walker*, 35 Cal. 289, 290.

113. **Dismissal of appeal—Order appealed from and pleadings may be considered on motion to dismiss appeal on ground that order is not appealable.**—*Grey v. Brennan*, 147 Cal. 355, 81 Pac. 1014.

114. **Dissolution—Order refusing to dissolve injunction is appealable.**—*Neumann v. Moretti*, 145 Cal. 31, 32, 79 Pac. 512.

115. **Order refusing to dissolve injunction was not appealable order under Practice Act.**—*Allender v. Fritts*, 24 Cal. 447, 448.

116. **Divorce—Alimony—Order directing payment of alimony made pendente lite is appealable.**—*Sharon v. Sharon*, 67 Cal. 185, 215, 7 Pac. 456, 635, 8 Pac. 709.

117. **Order directing a defendant in divorce proceedings to pay alimony or counsel fees and costs to contest motion for new trial is appealable order as special order made after final judgment in equitable proceeding.** Jurisdiction of supreme court is not dependent on amount involved.—*Harron v. Harron*, 123 Cal. 508, 510, 56 Pac. 334.

118. **Same—Same—Sale by receiver.**—Order made after judgment, directing receiver of property of husband to sell it for purpose of satisfying judgment for alimony, is appealable—it being special order made after final judgment, and hence can not be reviewed by certiorari.—*White v. Superior Court*, 110 Cal. 54, 57, 42 Pac. 471.

119. **Same—Decree of superior court granting divorce is appealable.**—*Sharon v. Sharon*, 67 Cal. 185, 215, 7 Pac. 456, 635, 8 Pac. 709.

120. **Same—Vacated judgment.**—Appeal by defendant from judgment against her in divorce proceedings will be dismissed where prior to such appeal lower court on her application made order vacating or setting aside such judgment.—*Storke v. Storke*, 111 Cal. 514, 515, 44 Pac. 173.

121. **Eminent domain—Final judgment in condemnation proceedings is appealable—it being special proceeding.**—*Sacramento P. & N. R. Co. v. Harlan*, 24 Cal. 334, 337.

122. **Same—Order of final condemnation in proceedings to condemn land for public street, reciting that amount of damages awarded had been deposited in court, is order made after final judgment, and therefore appealable.**—*City of Alameda v. Cohen*, 133 Cal. 5, 65 Pac. 127.

123. **Final order of condemnation made after judgment of condemnation, on affidavit showing that amount of damages had been paid, is special order made after final judgment, and appealable.**—*City of Los Angeles v. Pomeroy*, 132 Cal. 340, 341, 64 Pac. 477. See *California S. R. Co. v. Southern Pacific R. Co.*, 67 Cal. 59, 63, 7 Pac. 123.

124. **Estate of decedent—Rejection of claim.**—In a case in which the personal representative of a decedent rejects a claim, the remedy by which the claimant is by petition to the probate court for an order directing the administrator to pay the claim; should the court refuse to make such an order, such refusal is an appealable order under the provisions of subdivision 3 of the above section.—*Benning v. Superior Court*, 34 Cal. App. 296, 167 Pac. 291.

125. **Execution—Labor claims.**—Appeal from judgment in action to enforce disputed claims of employees of execution-debtor for wages, brought originally in justices' court, and taken by appeal to superior court, does not lie to supreme court under the first clause of this section.—*Edsall v. Short*, 122 Cal. 533, 534, 55 Pac. 327.

126. **Same—Order refusing to quash execution is an appealable order, being special order made after judgment.**—*Gilman v. Contra Costa Co.*, 8 Cal. 52, 57, 68 Am. Dec. 290.

127. **Ex parte order—Refusal to vacate.**—Where order is granted ex parte, appeal lies from order denying application to vacate or restrain enforcement of such ex parte order, since in such case order refusing to vacate order is first order from which applicant can appeal.—*Pignaz v. Burnett*, 119 Cal. 157, 163, 51 Pac. 48.

128. **Refusal to vacate order granting writ of assistance is appealable where such writ was granted ex parte without notice to owner of mortgaged premises who desired to redeem from foreclosure sale, since in such case he had no opportunity to appeal from order granting writ.**—*Pignaz v. Burnett*, 119 Cal. 157, 161, 51 Pac. 48.

129. **Findings—Order denying motion for entry of different judgment on findings is appealable—it being special order made after final judgment.**—*Rahmel v. Lehndorff*, 142 Cal. 681, 682, 100 Am. St. Rep. 154, 76 Pac. 659.

130. **Guardianship—Appointment.**—Order appointing guardian of minor is appealable order.—*In matter Get Young*, 90 Cal. 77, 78, 27 Pac. 158; *Ex parte Miller*, 109 Cal. 643, 646, 42 Pac. 428.

131. **Same—Same—Incompetent.**—Provision that appeal may be taken from judgment or order granting or refusing to grant letters of guardianship, authorizes appeal from order appointing guardian after an adjudication of incompetency—such adjudication being but preliminary steps to appointment of guardian.—*In matter of Moss*, 120 Cal. 695, 697, 53 Pac. 357.

132. **Same—Same—Nonresident sister of incompetent—Not party aggrieved, within the meaning of the provision, where her petition for guardianship denied, because none of her rights are infringed; she having no right to control the custody conduct of an alleged incompetent, nor any right to support from, and being under no legal duty to care for him, and no legal right in or to his property.**—*Carpenter v. Sanborn*, 140 Wis. 572, 25 L. R. A. (N. S.) 155, 123 N. W. 144.

As to who is a "person aggrieved" within a statute allowing an appeal by such a person in a proceedings for the appointment of a guardian for an incompetent, see note 25 L. R. A. (N. S.) 155.

133. **Same—"Ad litem" guardian, not included.**—Provision authorizing appeal from judgment or order revoking letters of guardianship refers to guardianship of estate of minor, or to insane or incompetent person, for which provision is made in chapter 14, title 11, of this code, and does not include order appointing guardian ad litem to represent infant or incompetent person, and hence order removing guardian ad

litem is not appealable.—*Estate of Hathaway*, 111 Cal. 270, 271, 43 Pac. 754.

134. **Same—Aggrieved party—Incompetent, in proceedings for appointment of guardian, on ground of his incompetency, is aggrieved party and entitled to appeal from decision appointing guardian.**—*In matter of Moss*, 120 Cal. 695, 698, 53 Pac. 357.

135. **Same—Order for payment of money.**—Order directing one who has been appointed guardian for estate of minors, but who has never qualified by giving bond, to pay money for maintenance of minors, is appealable.—*Murphy v. Superior Court*, 84 Cal. 592, 598, 24 Pac. 310.

136. **Same—Restoration to capacity.**—Order dismissing petition for restoration to legal capacity of one who had been adjudged insane by superior court of another county, is appealable, and hence mandamus will not lie to compel court to consider such application.—*Aldrich v. Superior Court*, 135 Cal. 12, 14, 66 Pac. 846.

137. **Same—Revocation of letters—Order refusing to revoke order granting letters of guardianship of minor is not appealable.**—*In matter Get Young*, 90 Cal. 77, 78, 27 Pac. 158.

138. **Inferior courts—Practice of first appealing from justices' court to superior court, in case in which supreme court has appellate jurisdiction, construed proper practice.**—*Edsall v. Short*, 122 Cal. 533, 534, 55 Pac. 327.

139. **Same—Judgment of superior court on appeal from justice of peace is not appealable to supreme court.**—*Pool v. Superior Court*, 2 Cal. App. 533, 84 Pac. 53.

140. **Inheritance-tax—Writ of prohibition to prevent order directing payment out of the estate on the ground that the statute under which the court is proceeding has been repealed, will not issue, for the reason that if such order were made it would be reviewable under subdivision 3 of above section.**—*Cross v. Superior Court*, 2 Cal. App. 342, 83 Pac. 815.

141. **Injunctions (subdivision 2)—As to generally.**—In an action brought by a minority stockholder of a corporation which had forfeited its charter for failure to pay its license tax, to enjoin the directors from carrying on the business of the corporation, and to compel them, as trustees, to wind up its affairs, and pay its debts and distribute its assets among the stockholders, interlocutory orders made directing a sale of the property and distribution of the proceeds, are appealable.—*Rossi v. Caire*, 174 Cal. 74, 161 Pac. 1161.

142. **There is no distinction made between temporary and permanent injunctions, and a restraining order or temporary injunction is within the meaning of this section and is appealable.**—*Laam v. McLaren*, 28 Cal. App. 632, 153 Pac. 985.

143. **An order granting a temporary restraining order and an order to show cause**

why an injunction should not be granted is an appealable order, as such order in its effect is an injunction and the statute gives an appeal from an order "granting or refusing to grant an injunction."—*Laam v. McLaren*, 28 Cal. App. 68, 632, 151 Pac. 290, 153 Pac. 985.

144. Same—As to order granting being appealable, and hence supreme court will not annul injunction on writ of review.—*Golden Gate C. H. M. Co. v. Superior Court*, 65 Cal. 187, 189, 3 Pac. 628.

145. Same—Same—Ex parte order.—Order granting injunction ex parte is appealable.—*Sullivan v. Triunfo G. & S. M. Co.*, 33 Cal. 385, 392.

146. Same—Bank—Injunction against in proceedings by bank commissioners, made as part of judgment in such action, declaring that affairs of corporation shall be closed, etc., is final judgment, and hence appealable so that lower court has no power to modify such judgment after time for appeal has expired.—*People v. Bank of Mendocino Co.*, 133 Cal. 107, 108, 65 Pac. 124.

147. Same—Declaratory order that injunction is no longer in force is not appealable order where it appears from face of writing that judge did not intend that injunction should be dissolved by reason of this order.—*Devlin v. Rydberg*, 132 Cal. 324, 325, 64 Pac. 396.

148. Same—Finality of judgment.—Fact that injunction restrained defendants from doing business until further order of court did not affect finality of judgment, so as to render it not appealable.—*People ex rel. Bank Commissioners v. Bank of Mendocino*, 133 Cal. 107, 65 Pac. 124.

149. Same—Preliminary—Order striking out mandatory portion of preliminary injunction is appealable.—*Wolf v. Board of Supervisors*, 143 Cal. 333, 334, 76 Pac. 1108.

150. Same—Refusal of application for order to show cause why injunction should not issue is not appealable, it not being order refusing to grant injunction.—*Grant v. Johnston*, 45 Cal. 243, 245.

151. Same—Sale—Order made after judgment restraining sale of property pending appeal is appealable either as special order made after final judgment or as order granting injunction.—*Stoddard v. Superior Court*, 108 Cal. 303, 305, 41 Pac. 278.

152. Insolvency—Discharge of debtor in bankruptcy proceeding is appealable.—*Fisk v. His Creditors*, 12 Cal. 281.

153. Same—Homestead—Order setting aside in insolvency proceedings, and setting apart personal property as exempt, is appealable.—*Noble v. Superior Court*, 109 Cal. 523, 526, 42 Pac. 155.

154. Same—Settlement of accounts.—Order setting aside order settling account of referee in proceeding against insolvent debtor is not special order made after final judgment within meaning of this section.

and is not appealable.—*Etchebarne v. Roeding*, 89 Cal. 517, 521, 26 Pac. 1079.

155. Same—Same—Order setting aside.—Order settling account of assignee of insolvent is not final judgment within meaning of this section, and hence order setting aside such order is not special order made after final judgment.—*Etchebarne v. Roeding*, 89 Cal. 517, 521, 26 Pac. 1079.

156. Interlocutory decree—For sale in partition, and confirmation thereof.—One who is adjudged a tenant in common, and who is in possession of the premises has the right to oppose the confirmation of the sale, and have it vacated, if not made in conformity with the law, and also the corresponding right to prosecute an appeal from the order of confirmation.—*Gordan v. Graham*, 153 Cal. 298, 95 Pac. 145.

See pars. 54 and 72, this note.

157. Interlocutory judgment—In action to enforce trust, establishing trust and directing accounting, is not appealable—appeals from interlocutory judgments being limited to those in actions for partition of real property.—*Duff v. Duff*, 71 Cal. 513, 518, 12 Pac. 570.

158. Interlocutory order determining that defendant held certain property in trust, and ordering account in action to establish resulting trust for defendant, is not appealable order, and appeal therefrom must be dismissed.—*Grey v. Brennan*, 147 Cal. 355, 81 Pac. 1014.

159. Interlocutory order—Subjecting trust-fund to payment of claim, is not appealable under provision that appeal may be had from interlocutory order or decree for accounting in action to redeem real or personal property from mortgage or other lien.—*Grey v. Brennan*, 147 Cal. 355, 81 Pac. 1014.

160. Same—In cases other than partition, is not appealable, but will be reviewed on appeal from final judgment.—*Watson v. Sutro*, 77 Cal. 609, 611, 20 Pac. 88. See *Thompson v. White*, 63 Cal. 505.

161. Interpleader—Order amending order dismissing complaint in interpleader by limiting such dismissal to defendants who demurred to such complaint is appealable.—*Kaufman v. Superior Court*, 108 Cal. 446, 450, 41 Pac. 476. See *Livermore v. Campbell*, 52 Cal. 75.

162. Intervention—Interlocutory decree finding that plaintiffs in intervention in action to have distributee of an estate declared trustee, holding that such interveners were not entitled to any relief, is appealable.—*Lorenz v. Jacobs*, 53 Cal. 24.

163. Judgment—Appeal lies from judgment entered by trial court in conformity with directions of appellate court.—*Randall v. Duff*, 107 Cal. 33, 36, 40 Pac. 20; *Tuffree v. Stearns R. Co.*, 124 Cal. 306, 310, 57 Pac. 69; *Lambert v. Bates*, 148 Cal. 146, 82 Pac. 767.

164. Same—Correction—Order denying motion to correct judgment, or filing mark

thereon, is appealable, where appeal on judgment-roll would not present facts on which motion was based.—*Tuffree v. Stearns Ranchos Co.* 6 Cal. Unrep. 134, 54 Pac. 826.

165. **Same—Costs—Fee of guardian ad litem—Order adding to judgment provision requiring plaintiff to pay guardian ad litem of minor defendant sum of two hundred dollars for his services is not appealable as special order made after judgment, it being merely for costs or expenses taxable against defendant. Not amounting to three hundred dollars, it was therefore insufficient to confer jurisdiction on supreme court.**—*Aronson v. Levison*, 148 Cal. 364, 83 Pac. 154.

166. **Same—Motion to vacate or set aside—Order refusing to set aside and vacate judgment is appealable, it being special order made after final judgment.**—*McCourtney v. Fortune*, 42 Cal. 387, 390; *Hibernia Sav. & L. Soc. v. Cochran*, 6 Cal. Unrep. 821, 66 Pac. 732.

167. Order refusing to set aside judgment on ground that findings had not been waived, and there were no findings to support it, is not appealable order.—*Gregory v. Gregory*, 3 Cal. Unrep. 336, 32 Pac. 531.

168. Order refusing to set aside judgment is appealable where appeal on judgment-roll would not present all facts on which motion is based; this is exception to ordinary rule that no appeal lies from order refusing to set aside former ruling on same facts.—*De La Montanya v. De La Montanya*, 112 Cal. 101, 118, 53 Am. St. Rep. 165, 32 L. R. A. 82, 44 Pac. 345.

169. Order refusing to vacate judgment is not appealable where appeal does not present any facts other than those which are presented on appeal from judgment itself.—*Kent v. Williams*, 146 Cal. 3, 79 Pac. 527.

170. Order refusing to set aside judgment and enter different judgments or findings is not appealable.—*Birch v. Cooper*, 136 Cal. 636, 637, 69 Pac. 420.

171. Order refusing to set aside judgment on ground that no findings or conclusions of law were filed, and that there was no waiver thereof, is not appealable, where such ground existed before judgment was entered, and would have been reviewable on appeal from judgment.—*Mantel v. Mantel*, 135 Cal. 315, 67 Pac. 758.

172. **Same—New trial granted—Appeal pending.**—Appeal from judgment will not be dismissed because new trial has been granted where order granting such new trial has been appealed from.—*Pierce v. Birkholm*, 110 Cal. 669, 671, 43 Pac. 205.

173. **Jurisdictional amount—Special orders made after final judgment are appealable, though they involve no question of money value.**—*Southern Cal. R. Co. v. Superior Court*, 127 Cal. 417, 422, 59 Pac. 789.

174. **Juvenile court proceedings—Appeal from—Limitation of right of.**—The right of appeal, under subdivision 1 of the above

section, from orders made in proceedings in a juvenile court are restricted to the cases enumerated in section 23 of the Juvenile Court Act which provides that "Every judgment or decree of a juvenile court assuming jurisdiction and declaring any person to be a ward of the juvenile court or a person free from the custody and control of his parents may be appealed from in the same manner as any final judgment, and any subsequent order may be appealed from as from any other judgment." Applying the maxim, *expressio unius est exclusio alterius*, it follows that the legislature did not intend thereby to provide for appeals from judgments or orders within the scope of that act other than those specifically enumerated.—*Moch v. Superior Court*, 39 Cal. App. 471, 179 Pac. 440, applying the doctrine in *Peralta v. Castro*, 15 Cal. 511; *Frandsen v. County of San Diego*, 101 Cal. 317, 321, 35 Pac. 879.

175. **Modification of judgment—Order that judgment entered be reduced amount of defendant's cost bill is appealable—it being special order made after final judgment in direct terms modifying judgment previously given, though cost bill is referred to as basis of action.**—*Elledge v. Superior Court*, 131 Cal. 279, 63 Pac. 360.

176. **Same—As directed by appellate court.**—Order modifying judgment as directed by supreme court, and judgment as amended, are appealable.—*Randall v. Duff*, 104 Cal. 126, 127, 43 Am. St. Rep. 79, 37 Pac. 803.

177. **Mandamus—Judgment of superior court granting or denying application for writ of mandamus is appealable.**—*Palache v. Hunt*, 64 Cal. 473, 475, 2 Pac. 245.

178. Judgment of superior court denying writ of mandate is appealable.—*Knowles v. Thompson*, 133 Cal. 245, 248, 65 Pac. 468. See *Palache v. Hunt*, 64 Cal. 473, 474, 2 Pac. 245; *People v. Perry*, 79 Cal. 109, 21 Pac. 423; *Heinlen v. Phillips*, 88 Cal. 557, 559, 26 Pac. 366.

179. **Moot question—Appeal from judgment which raises merely moot question, will not be considered.**—*Bradley v. Voor-sanger*, 143 Cal. 314, 315, 76 Pac. 1031.

As to appeal raising academic question only, see, ante, §§ 53, 936 and notes.

180. **New-trial order.**—Where new trial is authorized, order granting or refusing new trial is appealable.—*People v. Oakland*, 123 Cal. 145, 55 Pac. 772.

As to orders denying new trials since amendment of 1915, see pars. 200-211, this note.

181. **Same—Affidavits—Order striking out.**—Order striking amended affidavit on motion for new trial from files is not appealable.—*Meide v. Reynolds*, 120 Cal. 234, 238, 52 Pac. 491.

182. Order striking competent affidavits used on motion for new trial on ground of irregularity is special order made after

final judgment, and hence appealable under this section.—*Gay v. Torrance*, 145 Cal. 144, 147, 78 Pac. 540.

183. Order striking affidavits filed on hearing of motion for new trial is not appealable.—*Melde v. Reynolds*, 120 Cal. 234, 237, 52 Pac. 491.

184. **Same—Dismissal of motion.**—Order dismissing motion for new trial for want of prosecution, amounts to denial of it, and hence is appealable.—*Voll v. Hollis*, 60 Cal. 569, 572.

185. Order refusing to dismiss motion for new trial is not appealable, since it does not finally dispose of motion.—*Griess v. State Inv. & Ins. Co.*, 93 Cal. 411, 413, 28 Pac. 1041.

186. **Same—Divorce—Order denying motion for new trial in action for divorce**, in case where no answer was filed, is not appealable, motion for new trial not being authorized in such action.—*Foley v. Foley*, 120 Cal. 33, 36, 65 Am. St. Rep. 147, 52 Pac. 122.

As to divorce, see, also, pars. 116-120, this note.

187. **Same—Of motion not authorized.**—Appeal authorized from order denying new trial is limited to those cases in which new trial is authorized, and hence order denying new trial of motion will be dismissed.—*Harper v. Hildreth*, 99 Cal. 265, 270, 33 Pac. 1103.

188. **Same—Settlement of statement on motion for new trial** does not constitute special order made after judgment, and hence is not appealable.—*Henry v. Merguire*, 106 Cal. 142, 145, 39 Pac. 599, distinguishing *Stonesifer v. Kilburn*, 94 Cal. 33, 29 Pac. 332, which held that order refusing to settle bill of exceptions was appealable.

189. **Same—Same—Order denying motion to settle statement on motion for new trial** is appealable as special order made after final judgment.—*Clark v. Crane*, 57 Cal. 629, 634.

190. **Same—Same—Order striking statement from files** is appealable as special order made after judgment.—*Symons v. Bunnell*, 101 Cal. 223, 35 Pac. 770.

191. Order striking statement on motion for new trial from files is appealable order—being special order made after final judgment.—*Calderwood v. Peyser*, 42 Cal. 110, 113, 119, overruling *Quivey v. Gambert*, 32 Cal. 304; *Leffingwell v. Griffing*, 29 Cal. 192, 193; *Ketchum v. Crippen*, 31 Cal. 365, and following *Kimball v. Semple*, 31 Cal. 657; *Morris v. De Cells*, 41 Cal. 381; *Dooley v. Norton*, 41 Cal. 439.

192. **Same—Same—Order refusing to strike out statement on motion for new trial** is not special order made after judgment, but interlocutory order in proceedings to obtain new trial, and is in different line of proceeding in which order granting

or refusing new trial is final and equitable order, hence it is not appealable order.—*Ketchum v. Crippen*, 31 Cal. 365, 367. See *De Barry v. Lambert*, 10 Cal. 503; *Leffingwell v. Griffing*, 29 Cal. 192, 193.

193. **Same—Same—Order refusing to vacate order striking statement on motion for new trial from files** is not appealable.—*Symons v. Bunnell*, 101 Cal. 223, 35 Pac. 770.

194. **Same—Transcript.**—Where transcript was certified by parties to motion for new trial in court below, it was sufficient where motion was denied.—*Watson v. Sutro*, 77 Cal. 609, 612, 20 Pac. 88.

As to what are appealable orders, see, ante, § 939.

As to appealable orders and judgments, see note 20 Am. St. Rep. 173.

195. **Nonappealable orders—Appeal from judgment pending.**—Appeals from nonappealable orders will not be dismissed where there is also appeal from judgment on which other orders appealed from may be reviewed.—*Wadleigh v. Phelps*, 147 Cal. 135, 81 Pac. 418, 420. See *Williams v. Dennison*, 86 Cal. 430, 25 Pac. 244.

196. **Same—Same—Motion to dismiss.**—On motion to dismiss appeal from order on ground that it is not appealable, order itself must be examined, and if it is order which is not authorized it does not become appealable by reason of its purporting to do that which court was not authorized to do.—*Harper v. Hildreth*, 99 Cal. 265, 269, 33 Pac. 1103.

197. **Same—Same—Merits of appeal can not be examined into on motion to dismiss appeal** because taken from nonappealable order.—*Steen v. Santa Clara V. M. & L. Co.*, 145 Cal. 564, 565, 79 Pac. 171.

198. **Nonsuit—Order of nonsuit** is not appealable.—*Kimple v. Conway*, 69 Cal. 71, 72, 10 Pac. 189.

199. **Order confirming sale in partition.**—An interlocutory order directing sale in partition is to be regarded as a final judgment with respect to subsequent orders in aid of its execution; and, if so, an order confirming such sale, and an order refusing to confirm it, are orders after final judgment, and appealable as such, the one by the purchaser and the other by the tenant in common.—*Gordan v. Graham*, 153 Cal. 299, 95 Pac. 145.

200. **Order denying new trial (subdivision 2)—Not appealable order.**—Motion for new trial having been denied, no appeal lies from the order under the above section as amended in 1915.—*Friedman v. Southern Cal. Trust Co.*, 179 Cal. 266, 176 Pac. 442; *Waterson v. Cruse*, 179 Cal. 379, 176 Pac. 870; *Rockey v. Vieux*, 179 Cal. 681, 178 Pac. 712; *Timmons v. Coonley*, 39 Cal. App. 35, 179 Pac. 429; *Nadeau v. Lynch*, 41 Cal. App. 755, 183 Pac. 278; *Saylor v. Taylor*, 42 Cal. App. 474, 183 Pac. 843; *Anderson v. Adler*, 42 Cal. App. 776, 184 Pac. 42; *San Joaquin*

Light & Power Co. v. Barlow, 43 Cal. App. 241, 184 Pac. 899.

201. Same—Same—Appeal from order and from judgment.—In a case in which a defendant appeals from the judgment in favor of the plaintiff, and also from an order denying a motion for a new trial, the appeal from the order will be dismissed as unauthorized under the provisions of the above section.—*Gillons v. Turner Oil Co.*, — Cal. App. —, 190 Pac. 185; *McCahan v. McCahan*, — Cal. App. —, 190 Pac. 460; *Bhumgara v. Gazvinli*, — Cal. App. —, 190 Pac. 854.

202. Same—Same—Dismissal.—An appeal from an order refusing new trial will be dismissed where the notice of appeal was filed after the amendment of 1915 to the above section; since such amendment the only relief is by appeal from the final judgment.—*Marsh v. Lapp*, 180 Cal. 231, 180 Pac. 533; *Heine Piano Co. v. Bloomer*, 183 Cal. 398, 191 Pac. 900, following the doctrine in *Roberts v. Colyear*, 179 Cal. 669, 180 Pac. 937; *Rockey v. Vieux*, 179 Cal. 681, 178 Pac. 712; *Marsh v. Lapp*, 180 Cal. 231, 180 Pac. 533; *Felsenthal v. Warring*, 40 Cal. App. 119, 180 Pac. 67; *Anderson v. Adler*, 42 Cal. App. 776, 184 Pac. 42.

203. An appeal from an order on motion for new trial dated August 17, 1915, should be dismissed, subject to renewal under the appeal from the judgment.—*Hockerston v. Hockerston*, 41 Cal. App. 195, 182 Pac. 325.

204. An attempted appeal from an order denying a motion for a new trial must be dismissed where the notice of appeal was filed subsequent to the 1915 amendment.—*Dorris v. McKamy*, 40 Cal. App. 267, 180 Pac. 645; *Runyon v. City of Los Angeles*, 40 Cal. App. 383, 180 Pac. 837; *Roberts v. Colyear*, 179 Cal. 669, 180 Pac. 937.

205. Where an attempted appeal from an order denying a motion for new trial was filed after the effective date of the 1915 amendment, it must be dismissed.—*Hammond v. Hazard*, 40 Cal. App. 45, 180 Pac. 46.

206. Same—Same—Effect of amendment of 1915.—The amendment of 1915 to above section does not allow an appeal from an order denying a motion for new trial.—*San Francisco-Oakland Terminal Rys. v. Superior Court*, 172 Cal. 541, 157 Pac. 604; *Schmitt v. White*, 172 Cal. 554, 158 Pac. 216; *Gray v. Cotton*, 53 Cal. Dec. 98, 162 Pac. 1019.

207. A statute denying a right of appeal from an order denying a new trial is applicable to every case where such order was made subsequent to the date of the taking effect of the amendment. As to the right of appeal from an order granting or refusing a new trial it is the condition of the law at the time of the denial of the motion for a new trial that controls regarding whether the proceeding was initiated prior or subsequent to the change in the law.—

Hirsch v. All Persons, 173 Cal. 268, 159 Pac. 712.

208. This was amended in 1915 by taking away the right theretofore existing to appeal from an order refusing a new trial. An appeal from an order denying a new trial taken after the amendment became effective will be dismissed even though the proceedings for a new trial were instituted prior thereto.—*Hester v. McMullan*, 29 Cal. App. 664, 157 Pac. 521.

209. The amendment of 1915 to the above section takes away the right to an appeal from an order denying a motion for a new trial and makes such order reviewable upon an appeal from the final judgment; and where a motion for a new trial was made before the amendment went into effect, but the order denying a new trial was made after the amendment went into effect, the right of appeal was lost.—*Nathan v. Porter*, 36 Cal. App. 356, 172 Pac. 170.

210. The amendment of 1915 to the above section takes away the right of appeal from orders denying motions for new trials, and is applicable in every case where the order was made subsequent to the date of the taking effect of the amendment, notwithstanding the fact that the right to appeal from the judgment in such case had expired prior to the amendment.—*Watt v. Bekins Van & Storage Co.*, 35 Cal. App. 766, 171 Pac. 583, following the doctrine in *Hirsch v. All persons, etc.*, 173 Cal. 268, 159 Pac. 712.

211. Same—Same—Reviewable on appeal from judgment.—Under the above section as amended in 1915, an order denying a motion for a new trial is not an appealable order; the order is to be reviewed on an appeal from the final judgment only.—*Friedman v. Southern Cal. Trust Co.*, 179 Cal. 266, 176 Pac. 442; *Waterson v. Cruse*, 179 Cal. 379, 176 Pac. 870; *Jones v. Baxter*, — Cal. App. —, 197 Pac. 361, following the doctrine in *Roberts v. Colyear*, 179 Cal. 669, 180 Pac. 937; *Millar v. Millar*, — Cal. App. —, 197 Pac. 811; *United Casting Co. v. Duncan*, 44 Cal. App. 384, 186 Pac. 403, following the doctrine in *Gray v. Cotton*, 174 Cal. 256, 162 Pac. 1019; *Anderson v. Adler*, 42 Cal. App. 776, 184 Pac. 42.

212. Order directing manner of disposing of the body of deceased or the particular place in which it shall be interred and setting apart out of the estate a sum of money to be expended for that purpose is not appealable.—*Estate of Seymour*, 15 Cal. App. 287, 114 Pac. 1023.

213. Order directing payment of attorney's fee incurred by unsuccessful proponent of will is an order directing payment of a claim against an estate, and is appealable.—*Mousnier v. Superior Court*, 159 Cal. 664, 115 Pac. 221.

214. Order directing payment of money by defendant into court, and directing that proceedings be had for purpose of deter-

mining whether plaintiff, or guardian of his assignor, was entitled to money, is special order made after final judgment, and is appealable, and hence certiorari will not lie.—*Slavonic I. M. B. Assoc. v. Superior Court*, 65 Cal. 500, 501, 4 Pac. 500.

215. Order directing sale of land outside of state—Appealable order.—An order of the superior court directing the executors of a will, which will has been probated in California, to sell all the lands of the testator situated in another state, and to transmit the proceeds to California for distribution, or to show cause in case of neglect to do so, why they should not be removed as executors, is an appealable order within the meaning of the provisions of subdivision 3 of the above section, and an objection that such an order is not appealable is frivolous.—*Estate of Loyd*, 175 Cal. 639, 167 Pac. 157.

216. Order dismissing action—Constitutes a final judgment within the meaning of the provisions of this code, touching appeals.—*Dempsey v. Underhill*, 156 Cal. 718, 719, 106 Pac. 73.

217. Order dissolving an attachment—An appealable order and therefore excepted from matters which may be reviewed on appeal from judgment.—*Kennedy v. Merckel*, 8 Cal. App. 378, 384, 97 Pac. 81.

218. Order for family allowance—Constructed to authorize an appeal from such an order.—*Estate of Fretwell*, 152 Cal. 574, 93 Pac. 283.

219. Order for sale of perishable property—Made under section 949, ante, is appealable as an order made after final judgment.—*Rogers v. Superior Court*, 158 Cal. 467, 111 Pac. 357.

220. Order for sale of real estate of deceased person.—Such order is appealable, and when no appeal is taken it becomes final; and the questions involved can not be reopened and again litigated upon the hearing of the return of sale.—*Estate of Baz-zuro*, 161 Cal. 75, 118 Pac. 434.

221. Order granting new trial—Appealable order.—A right of appeal exists from an order granting a new trial, and if upon such appeal the order is reversed, the judgment will remain or be restored to its original condition as if the order vacating it had not been made. The order, in such case, is vacated and the original judgment stands. An order granting a new trial does not absolutely vacate the judgment; it is absolutely vacated only when such an order becomes a finality.—*Sherwin v. Southern Pacific Co.*, 168 Cal. 722, 145 Pac. 92.

222. During the time within which an appeal may be taken from such an order, and while the appeal therefrom, if taken, is pending, the order is subject to the condition that if it is reversed its effect to vacate the judgment will be annulled, and the judgment will then stand as if no order granting a new trial had been made, or as

if the motion had been denied and such denial had become final or had been affirmed on appeal.—*Sherwin v. Southern Pacific Co.*, 168 Cal. 722, 145 Pac. 92.

223. Except where an abuse of discretion appears, the ruling of the trial court on a motion for new trial will not be reviewed on appeal.—*Estate of Emerson*, 170 Cal. 81, 148 Pac. 523.

224. Upon an appeal from a judgment and order denying a motion for a new trial statements made in affidavits taken after the judgment was entered can not be considered in determining the sufficiency of the evidence to justify the decision.—*Kurze v. Douglas*, 26 Cal. App. 186, 146 Pac. 197.

225. Order denying motion for execution for alimony—Not appealable.—An entry upon the minutes reading, "Plaintiff's prayer for a divorce is denied. Defendant's prayer for a divorce is denied," where findings were not waived and not signed and filed, is not a final judgment, and an order thereafter made denying execution for alimony is not an order after final judgment.—*Cuneo v. Cuneo*, 40 Cal. App. 564, 181 Pac. 229.

226. Order denying motion to strike—Not appealable.—An order denying a motion to strike out is not appealable.—*California Portland Cement Co. v. Boone*, 181 Cal. 35, 183 Pac. 447.

227. Order on supplementary proceedings—Review of.—An appeal lies from an order made on proceedings supplemental to an execution on the part of any party to the record, after final action in the proceedings.—*Stensland v. Superior Court*, 39 Cal. App. 172, 178 Pac. 549, following doctrine in *Elliott v. Superior Court*, 144 Cal. 501, 103 Am. St. Rep. 102, 77 Pac. 1109.

228. Order refusing to vacate—Appointment of receiver is not appealable and such order must be reviewed if at all upon appeal from the final judgment.—*Title Insurance & T. Co. v. California Devel. Co.*, 159 Cal. 484, 114 Pac. 838.

229. Same—Ex parte order.—Where a writ of assistance to put the purchaser at partition sale in possession was made ex parte, the tenant in common had the right, for the purpose of securing an available record on appeal, to move to vacate the same, and the order refusing such motion was, with respect to the decree of sale, an order after final judgment, and appealable as such.—*Gordan v. Graham*, 153 Cal. 299, 95 Pac. 145.

230. Order relating to transcript—Subsequent order refusing to set aside—"Special order after judgment."—In the case of an appeal in which an order had been made by the court respecting the transcript, and a motion was thereafter made under the provisions of section 473, ante, for an order to set aside such order theretofore made regarding the transcript of

the record on appeal, which motion was denied on conflicting affidavits upon the point as to whether the appellant had strictly complied with the statute, although the matter was addressed to the discretion of the trial court, under the circumstances of the instance case the order refusing relief was a special order made after judgment from which an appeal may be prosecuted under subdivision 2 of the above section.—*W. J. Somers Co. v. Smith*, 45 Cal. App. 703, 188 Pac. 311.

231. Order requiring sureties upon stay-bond to justify within two days even if void is an order made after final judgment and appealable, and therefore the writ of prohibition can not be invoked.—*Holt v. James*, 10 Cal. App. 360, 361, 101 Pac. 1065.

232. Order setting aside default in action where no judgment has been entered upon the defendant is not subject to an appeal but may be reviewed upon appeal from the judgment.—*Savage v. Smith*, 154 Cal. 325, 97 Pac. 821.

233. Order settling accounts of administrator—Effect of revocation of letters.—The right of an administrator to prosecute an appeal from an order settling his accounts is statutory, and such right can not be affected by an order revoking his letters.—*Estate of McPhee*, 154 Cal. 392, 97 Pac. 878. See par. 51, this note.

234. Order vacating a default—Where no judgment has been entered.—An order setting aside a default in an action where no judgment has been entered upon such default, is in no sense an order after judgment, and is not one of the interlocutory orders enumerated in this section, and is in no sense an appealable order.—*Savage v. Smith*, 154 Cal. 325, 97 Pac. 821.

235. Order vacating dismissal after transfer—Appealable order.—An order vacating a dismissal after transfer of a cause on change of venue for failure to pay costs within one year is an order made after final judgment and is appealable.—*Davis v. Superior Court*, — Cal. —, 195 Pac. 390, 393.

236. Order vacating judgment of dismissal—"Order after judgment"—Appealable—Prohibition.—In a case in which an order was entered vacating a judgment of dismissal which was theretofore made, is a special order made after final judgment and is appealable under the terms of subdivision 2 of the above section, and where on the last day to serve notice of appeal proceeding in prohibition is begun in the district court by filing a petition upon which that court issued an order to show cause, a writ of prohibition will issue to prevent the superior court from proceeding further in the action, notwithstanding the existence at the time of the commencement of the action of the right of appeal from the order vacating the dismissal, the superior court being then and ever since without power or jurisdiction to proceed further

in the action, except to dismiss the proceedings, but nevertheless proposed to do so.—*Davis v. Superior Court*, 184 Cal. 691, 195 Pac. 390.

237. Partnership accounting—Interlocutory decree—Appealable order.—In an action for an accounting and dissolution of a partnership in an interlocutory decree or judgment, so called, is a final judgment from which, and from each of the special orders followed, an appeal may be taken under the provisions of the above section.—*Williams v. Reed*, 43 Cal. App. 425, 185 Pac. 515, following the doctrine in *Zappettini v. Buckles*, 167 Cal. 27, 138 Pac. 696.

238. Partition—Confirmation of sale.—Order refusing to confirm sale of property in partition proceedings is special order made after final judgment, and hence appealable.—*Dunn v. Dunn*, 137 Cal. 51, 56, 69 Pac. 847. See *Hammond v. Cailleaud*, 111 Cal. 206, 52 Am. St. Rep. 167, 43 Pac. 607.

239. Order confirming, in part, and denying confirmation, in part, of sale made under interlocutory decree in partition, is special order made after final judgment, and hence appealable.—*Dunn v. Dunn*, 137 Cal. 51, 56, 69 Pac. 847.

240. Same—Interlocutory decree of partition finally determining rights of parties and directing sale of property, is appealable.—*Holt v. Holt*, 131 Cal. 610, 612, 63 Pac. 912.

241. Interlocutory decree in partition proceedings, determining rights of several parties, is appealable.—*Barry v. Barry*, 56 Cal. 10, 11.

242. Construed to authorize appeal from interlocutory judgment in partition proceedings.—*Dore v. Klumpke*, 140 Cal. 356, 73 Pac. 1064.

As to appeals from interlocutory decrees in partition proceedings, see note 40 Am. Dec. 122.

243. Same—Same—Character of.—Appeal from interlocutory judgment in partition is one from such interlocutory judgment as determines rights and interests of respective parties, and directs partition to be made, and not from interlocutory decree directing property to be sold, which does not become final until sale is confirmed, when an appeal may have been had.—*Hammond v. Cailleaud*, 111 Cal. 206, 214, 52 Am. St. Rep. 167, 43 Pac. 607.

244. Interlocutory decree in partition proceedings, to be appealable, must definitely ascertain rights and interests of parties in subject-matter, and hence conclusions which were furnished as basis for such decree can not be appealed from.—*Lorenz v. Jacobs*, 53 Cal. 24, 26; *Emeric v. Alvarado*, 64 Cal. 529, 611, 2 Pac. 418.

245. Same—Receiver—Order appointing in partition proceedings is not appealable.—*Emeric v. Alvarado*, 64 Cal. 529, 625, 2 Pac. 418.

246. Same—Reference—Order vacating order of and proceedings thereunder, in action of partition, is not appealable order.—*Hastings v. Cunningham*, 35 Cal. 549, 553.

247. Pleadings—Order striking out portion of complaint is not appealable.—*Swain v. Burnette*, 76 Cal. 299, 302, 18 Pac. 394.

248. Decision striking out complaint is not appealable.—*Clifford v. Allman*, 84 Cal. 528, 531, 24 Pac. 292.

249. Same—Order directing that complaint be made more definite and certain, is not appealable.—*McFarland v. Holcomb*, 123 Cal. 84, 88, 55 Pac. 761.

250. Probate proceedings—Appeals can only be taken from such judgments and orders as are mentioned in this section.—*Estate of Moore*, 86 Cal. 58, 59, 24 Pac. 816; *Estate of Walkerly*, 94 Cal. 352, 353, 29 Pac. 719; *Estate of Hickey*, 121 Cal. 378, 379, 53 Pac. 818; *Estate of Cahill*, 142 Cal. 628, 629, 76 Pac. 383.

251. Appellate court has jurisdiction in such probate matters only as are provided by law.—*Estate of Hathaway*, 111 Cal. 270, 271, 43 Pac. 754; *Estate of Winslow*, 128 Cal. 311, 312, 60 Pac. 931.

252. Appeals from probate courts are limited to those enumerated in section 969, post, prior to its repeal.—*Blum v. Brownstone Bros.*, 50 Cal. 293.

253. Same—Account, settlement of—Appeal from order.—Order settling account of administrator is appealable.—*Estate of Rose*, 80 Cal. 166, 170, 22 Pac. 86; *Estate of Grant*, 131 Cal. 426, 429, 63 Pac. 731.

254. Same—Same—Findings and decree settling account of administrator, but not discharging him from his trust, is appealable.—*Estate of Rose*, 80 Cal. 166, 168, 22 Pac. 88.

255. Same—Same—Irrespective of amount involved.—Order settling account of executor, and decreeing partition, is appealable, irrespective of amount involved.—*Estate of Delaney*, 110 Cal. 563, 567, 42 Pac. 981.

256. Same—Same—Not final judgment.—Order settling account of executor is not final judgment within meaning of subdivision 1.—*Estate of Franklin*, 133 Cal. 584, 588, 65 Pac. 1081.

257. Same—Same—Time for appeal.—Appeal from order settling account is allowed within sixty days.—*Estate of Sanderson*, 74 Cal. 199, 205, 15 Pac. 753.

258. Same—Same—Vacating order settling.—Order vacating prior order settling final account of administrator is not appealable.—*Estate of Hickey*, 121 Cal. 378, 379, 53 Pac. 818.

259. Order setting aside decree settling final account of executor is not appealable.—*Estate of Cahalan*, 70 Cal. 604, 607, 12 Pac. 427. See *Estate of Calahan*, 60 Cal. 232.

260. Order of probate court, setting aside order by which annual account of executor was settled, is not appealable.—*Estate of Dunne*, 53 Cal. 631, 632.

261. Same—Administrator—Right of appeal.—Whenever order or decree involves construction of proper exercise of duties of trustee or administrator, or whenever it presents question as to right or power of trustee to comply with it, or whenever obedience of it might subject him to liability, he may appeal.—*Estate of Welch*, 106 Cal. 427, 431, 39 Pac. 805.

262. Right of administrator to appeal arises, where order is merely for payment of funds, and personal liability will attach, and hence special administrator may appeal from order directing him to pay arrearages in family allowance which had accrued since suspension of general administrator, and also may appeal from decree of partial distribution.—*Estate of Welch*, 106 Cal. 427, 431, 39 Pac. 805.

263. Same—Attorney's fees—Order allowing attorney's fees to attorney of executor is appealable order.—*Estate of Kruger*, 123 Cal. 391, 392, 55 Pac. 1056.

264. Same—Claim—Allowance of.—Order allowing claim against estate, directing its payment, in due course of administration, is appealable.—*Estate of Smith*, 117 Cal. 505, 507, 49 Pac. 453.

265. Same—Same—Order directing payment of claim for services against estate which has been allowed and ordered paid, as claim against estate in due course of administration, is appealable.—*Stuttmeister v. Superior Court*, 72 Cal. 487, 489, 14 Pac. 35.

266. Same—Same—Same—After appeal.—Order requiring administrator to pay claim forthwith, made after appeal had been taken from order allowing claim against estate and directing it to be paid in due course of administration, and giving of appeal and stay-bond, was in excess of jurisdiction, and void.—*Stuttmeister v. Superior Court*, 72 Cal. 487, 489, 14 Pac. 35.

267. Same—Same—Same—Amount immaterial.—Order directing payment of claim by administratrix is appealable, and no limitation as to amount of debt or claim is made, and hence fact that claim is less than three hundred dollars does not impair right of appeal.—*Ex parte Orford*, 102 Cal. 656, 657, 36 Pac. 928.

268. Same—Same—Same—Dismissal of petition for.—Order dismissing petition to have administrator show cause why claim which has been allowed should not be paid, is appealable.—*Estate of McKinley*, 49 Cal. 152, 153.

269. Same—Same—Same—Preferred claim.—Order directing payment of preferred claim is appealable, notwithstanding appraisers' adjudication that it is preferred claim from which no appeal has been taken.—*Estate of Smith*, 117 Cal. 505, 507, 49 Pac. 456.

270. Same—Compensation of executor.—Order denying motion to vacate order denying petition of executor for compensation for extraordinary services, and to restore cause to calendar, is not appealable.—Estate of Walkerly, 94 Cal. 352, 353, 29 Pac. 719.

271. Order in probate proceedings refusing compensation for extraordinary services by executor is not special order made after final judgment.—Estate of Walkerly, 94 Cal. 352, 353, 29 Pac. 719.

272. Same—Contempt—Order adjudging executor or administrator in for disobedience to decree of distribution, is not appealable.—Estate of Wittmeier, 118 Cal. 255, 256, 50 Pac. 393. See Tyler v. Connolly, 65 Cal. 28, 2 Pac. 414; Sanchez v. Newman, 70 Cal. 210, 11 Pac. 645; In matter of Vance, 88 Cal. 262, 26 Pac. 101; Ex parte Clancy, 90 Cal. 553, 27 Pac. 411; Cosby v. Superior Court, 110 Cal. 45, 42 Pac. 460.

273. Provisions relative to appeals from orders made after final judgment are not applicable to probate proceedings, and hence appeal from order adjudging administrator or executor in contempt for disobedience to decree of jurisdiction is not appealable under this section.—Estate of Wittmeier, 118 Cal. 255, 256, 50 Pac. 393.

274. Same—Contest—Dismissal.—Order dismissing contest of proved will is appealable, it not being in effect order refusing to revoke probate of will.—Mahoney v. Superior Court, 140 Cal. 513, 514, 74 Pac. 13.

275. Only appealable orders of probate matters are those designated by this subdivision, and order dismissing contest of will after probate is not appealable.—Estate of Edelman, 148 Cal. 233, 113 Am. St. Rep. 231, 82 Pac. 962.

276. Same—Same—New trial—Order granting.—Appeal lies from order denying motion for new trial in contest over probate of will, where there is appeal from judgment or order in such contest.—Hartman v. Smith, 140 Cal. 461, 467, 74 Pac. 7. See Estate of Spencer, 96 Cal. 448, 31 Pac. 453.

277. Order granting new trial in will contest is appealable.—Estate of Smith, 98 Cal. 636, 640, 33 Pac. 744.

278. Same—Same—Same—Order denying.—Order denying new trial in contest for probate of will is appealable.—Estate of Doyle, 68 Cal. 132, 133, 8 Pac. 691.

279. Same—Same—Same—Statement on.—Order permitting amendment to statement on motion for new trial in will contest is not appealable.—Estate of Smith, 98 Cal. 636, 640, 33 Pac. 744.

280. Order permitting amendment to statement on motion for new trial in will contest is not appealable as special order made subsequent to judgment.—Estate of Smith, 98 Cal. 636, 640, 33 Pac. 744.

281. Same—Same—Setting aside orders, etc.—Order denying motion of contestants of

will to set aside and vacate all orders and decrees made by late probate court is not appealable.—Estate of Sbarboro, 70 Cal. 147, 149, 11 Pac. 563.

282. Same—Conveyance—Order for.—Construed to contain no limitation on character of proceeding in which order directing conveyance is made, and court will not limit it.—Estate of Pearsons, 98 Cal. 603, 605, 33 Pac. 451.

283. Order directing or refusing to direct conveyance of real estate by executor or administrator is appealable.—Estate of Corwin, 61 Cal. 160, 163.

284. Same—Decree of final distribution is appealable.—Estate of Wiard, 83 Cal. 619, 620, 24 Pac. 45.

As to appeal from decree of distribution, see note 63 L. R. A. 97.

285. Same—Same—Postponement—Order refusing to postpone decree of final distribution is not appealable.—Estate of Burdick, 112 Cal. 387, 396, 44 Pac. 734.

286. Same—Same—Partial distribution—Order decreeing partial distribution of estate on petition of legatees is appealable order.—Estate of Mitchell, 121 Cal. 391, 393, 53 Pac. 810.

287. Same—Same—Relief in equity not granted.—Decree of distribution is appealable, and hence relief from erroneous decree can not be had in equity.—Daly v. Pennie, 86 Cal. 552, 553, 21 Am. St. Rep. 61, 25 Pac. 67.

288. Same—Same—Right of executor to appeal.—Executor or administrator has in general no such interest in conflicting claims of heirs and devisees as will warrant his appeal from adjudications fixing their rights and distributing estate accordingly.—Estate of Welch, 106 Cal. 427, 429, 39 Pac. 805.

289. Same—Same—Order refusing to set aside and vacate order of distribution and settlement of final account of executor is not appealable.—Estate of Lutz, 67 Cal. 457, 8 Pac. 39.

290. Order refusing to vacate and set aside decree of final distribution, and denying new trial, is not appealable.—Estate of Wiard, 83 Cal. 619, 620, 24 Pac. 45.

291. Same—Same—Order vacating decree of final distribution is not appealable order.—Estate of Murphy, 128 Cal. 339, 340, 60 Pac. 930.

292. Order vacating decree of distribution and settlement of final account of executor is not appealable.—Estate of Calahan, 60 Cal. 232, 233.

293. Same—Dismissal of action—Order commanding dismissal of action brought against executor of estate, and directing discharge of an administrator upon settlement of account not yet filed, is not appealable.—Estate of Bullock, 75 Cal. 419, 421, 17 Pac. 540.

294. Same—Execution—Order of probate court refusing to quash execution is not appealable.—Blum v. Brownstone Bros., 50 Cal. 293.

295. Same—Family allowance—Order granting an allowance to widow is appealable, and should be regarded as final.—Estate of Stevens, 83 Cal. 322, 326, 17 Am. St. Rep. 252, 23 Pac. 379.

296. Order granting family allowance is appealable, and hence becomes conclusive on failure to appeal.—Estate of Nolan, 145 Cal. 559, 561, 562, 79 Pac. 428.

297. Same—Same—Order refusing to grant family allowance or set aside homestead to alleged widow being made appealable, legislature has treated such order as final judgment.—Estate of Harrington, 147 Cal. 124, 109 Am. St. Rep. 118, 81 Pac. 546.

298. Same—Final orders in special probate proceedings are not appealable under provision that appeal lies from final judgment under special proceedings commenced in superior court.—Estate of Ohm, 82 Cal. 160, 162, 22 Pac. 927.

299. Same—Homestead—Order setting apart homestead is appealable, and right to have such order reviewed is lost if no appeal is taken therefrom.—Gruwell v. Seybolt, 82 Cal. 7, 10, 22 Pac. 938.

300. Order setting apart homestead to widow is appealable.—Estate of Burns, 54 Cal. 223, 228.

301. Same—Same—Setting aside proceedings.—Order of probate court setting aside its own proceedings on petition to set apart certain property as homestead for widow, made before final order, is not appealable. —Estate of Johnson, 45 Cal. 257, 259.

302. Same—Same—Vacating order—Order denying motion to vacate part of order setting apart homestead is not appealable.—Estate of Cahill, 142 Cal. 628, 629, 76 Pac. 383.

303. Same—Mortgage—Order authorizing execution of on lands of decedent is appealable under this section; mortgage amounting to conveyance.—Estate of McConnell, 74 Cal. 217, 218, 15 Pac. 746.

304. Same—New trial—Order denying in probate proceedings, where new trial is authorized, is appealable.—Estate of Bauquier, 88 Cal. 302, 313, 26 Pac. 178, 532.

As to orders denying new trial, see pars. 200 et seq., this note.

305. Same—Probate of will—Order refusing is appealable under this subdivision 3, and not under subdivision 1.—Estate of Fay, 145 Cal. 82, 87, 78 Pac. 340.

306. Same—Restoration of property—Order requiring distributee of estate to restore property received under final decree of distribution is not appealable as special order made after final judgment.—Iversen v. Superior Court, 115 Cal. 27, 28, 46 Pac. 817.

307. Same—Revocation of probate—Appeal lies from order refusing to revoke pro-

bate of will.—Estate of Houston, 133 Cal. 321, 65 Pac. 742.

308. Amendment of 1891, authorizing appeals from orders refusing to revoke probate of will, is not retroactive and does not apply to judgments or orders already made.—Estate of Hughston, 133 Cal. 321, 322, 65 Pac. 742, 1039.

309. Order refusing to revoke probate of will is appealable, since amendment of 1901.—Hartmann v. Smith, 140 Cal. 461, 467, 74 Pac. 7.

310. Same—Same—Prior to amendment of this section appeal did not lie from order refusing to revoke probate of will.—Estate of Montgomery, 55 Cal. 210, 211; Estate of Sbarboro, 70 Cal. 147, 149, 11 Pac. 563; Estate of Hathaway, 111 Cal. 270, 271, 43 Pac. 754; Estate of Winslow, 128 Cal. 311, 312, 60 Pac. 931.

311. Same—Sale of property—Order of probate court directing is appealable.—Stuttmeister v. Superior Court, 71 Cal. 322, 323, 12 Pac. 270. See Estate of Corwin, 61 Cal. 161.

312. Same—Same—Order of probate court directing executor to proceed with sale of real property previously ordered to be made is not appealable.—Estate of Martin, 56 Cal. 208, 209.

313. Same—Same—Order confirming sale by an executor without order of court and directing conveyance to be made is appealable.—Estate of Pearsons, 98 Cal. 603, 605, 33 Pac. 451.

314. Same—Same—Same—Order refusing to hear evidence or to confirm sale by administrator is in effect an order against directing sale or conveyance of real estate, and hence appealable under this subdivision.—Estate of Leonis, 138 Cal. 194, 196, 71 Pac. 171.

315. Same—Same—Resale—Order of court directing of property of estate which had been sold by administrator and sale confirmed is appealable.—Estate of Boland, 55 Cal. 310, 311.

316. Same—Same—Return of purchase-money—Order dismissing petition for order that executor of estate return to petitioner purchase-money paid for real estate of testator, in pursuance of order of court confirming sale of such estate, is not appealable, it not being order refusing to allow or refusing to direct payment of debt or claim against estate.—Estate of Williams, 3 Cal. Unrep. 788, 32 Pac. 241.

317. Same—Same—Setting aside—Order of probate court refusing to set aside sale of property previously ordered is not appealable.—Estate of Smith, 51 Cal. 563, 565.

318. Same—Special administrator—Order appointing.—Provision that judgment or order granting, refusing, or revoking letters testamentary or of administration, construed to refer only to orders appointing general administrators and not to orders appointing special administrators, and

hence order appointing special administrator is not appealable.—Estate of Carpenter, 73 Cal. 202, 203, 14 Pac. 677.

319. Order appointing special administrator is appealable order.—Estate of Krozier, 65 Cal. 332, 333, 4 Pac. 109. See Estate of Carpenter, 73 Cal. 202, 204, 14 Pac. 677.

320. Same.—Suit in name of administratrix.—Order directing administratrix to allow her name to be used in suit against estate for recovery of money is not appealable.—Estate of Ohm, 82 Cal. 160, 162, 22 Pac. 927.

321. Quo warranto.—Decision of judge at chambers in quo warranto proceedings is judgment which is appealable.—Brewster v. Hartley, 37 Cal. 15, 23, 99 Am. Dec. 237.

322. Receiver—Accounts of.—Order approving is not appealable where made before judgment.—Rochat v. Gee, 91 Cal. 355, 356, 27 Pac. 670.

323. Order settling account of receiver and directing one of parties to pay his compensation is not order appealable under this subdivision 2.—Los Angeles v. Los Angeles C. W. Co., 134 Cal. 121, 122, 66 Pac. 198.

324. Order approving account of receiver and allowing certain claims against receiver in advance of payment is not appealable, it not being one of interlocutory orders enumerated in subdivision 2.—Illinois T. & S. Bank v. Pacific R. Co., 99 Cal. 407, 411, 33 Pac. 1132.

325. Order approving account of receiver, appointed in dissolution of partnership proceedings, made during pendency of action, or made before judgment, is not appealable as special order made after judgment, though plaintiff had filed abandonment of cause, which had been entered by clerk.—Rochat v. Gee, 91 Cal. 355, 356, 27 Pac. 670.

326. Order allowing account of receiver in proceedings for dissolution of partnership is not appealable under subdivision 4, as it relates solely to probate orders.—Rochat v. Gee, 91 Cal. 355, 356, 27 Pac. 670.

327. Same.—Amendment to section allowing appeal from order appointing receiver affords adequate remedy for unwise and unwarranted appointments of receivers, and hence prohibition will not lie to arrest proceedings under order appointing receiver.—Jacobs v. Superior Court, 133 Cal. 364, 365, 85 Am. St. Rep. 204, 65 Pac. 826.

328. Same.—Prior to amendment of section, order appointing receiver was not appealable.—Emeric v. Alvarado, 64 Cal. 529, 623, 2 Pac. 418.

329. Order appointing receiver before judgment was not appealable prior to amendment of code.—French Bank Case, 53 Cal. 495.

330. Same.—Compensation.—Order fixing receiver's compensation and taxing such compensation as costs against all parties.

and directing receiver to apply towards its payment balance of funds remaining in his hands as such receiver, is appealable, being in legal effect final judgment on collateral matter arising out of action.—Grant v. Los Angeles Pac. R. Co., 116 Cal. 71, 72, 47 Pac. 872. See Grant v. Superior Court, 106 Cal. 324, 39 Pac. 604.

331. Same.—Order that receiver take property.—Order authorizing receiver appointed during pendency of action to take charge of property involved in suit is not appealable as interlocutory order.—Free Gold M. Co. v. Spiers, 135 Cal. 130, 132, 67 Pac. 61.

332. Order authorizing receiver appointed to take charge and control of property involved in suit to purchase property, being made during pendency of action, is not special order made after final judgment or final judgment on collateral matter so as to be appealable.—Free Gold M. Co. v. Spiers, 135 Cal. 130, 132, 67 Pac. 61.

333. Order authorizing receiver appointed to have charge and control of property involved in suit during pendency of action to purchase property can not be regarded as final judgment on collateral matter arising out of action.—Free Gold M. Co. v. Spiers, 135 Cal. 130, 132, 67 Pac. 61.

334. Redemption.—Order adjudging that plaintiff is barred from all equity of redemption or other right to property and dismissing action is final judgment with respect to right of plaintiff, and is appealable.—Byrne v. Hudson, 127 Cal. 254, 257, 59 Pac. 597.

335. Refusal to set aside appealable order.—Order refusing to set aside order dismissing action as to certain defendants is not appealable, rule being that court will not take jurisdiction of order refusing to set aside judgment or order itself appealable.—Tripp v. Santa Rosa St. R. Co., 69 Cal. 631, 632, 11 Pac. 219.

336. Order denying motion to vacate order which is appealable is not appealable.—Harper v. Hildreth, 99 Cal. 265, 269, 33 Pac. 1103. See Holmes v. McCleary, 63 Cal. 497; Tripp v. Santa Rosa St. R. Co., 69 Cal. 631, 11 Pac. 219; Eureka & T. R. Co. v. McGrath, 74 Cal. 49, 15 Pac. 360; Larkin v. Larkin, 76 Cal. 323, 18 Pac. 396; Goyhinech v. Goyhinech, 80 Cal. 409, 22 Pac. 175.

337. Orders dismissing action as to certain defendants, denying leave to file amended and supplemental complaint, and denying motion to introduce certain evidence, are not appealable, hence orders denying motions to vacate these orders are not appealable.—Harper v. Hildreth, 99 Cal. 265, 269, 33 Pac. 1103.

338. Order denying motion to set aside appealable order which presents no new features not before court when it exercises its judgment on original matter, is not appealable.—Deering & Co. v. Richardson-Kimball Co., 109 Cal. 73, 79, 41 Pac. 801.

339. Same—Writ of assistance.—Order refusing to set aside order for writ of assistance is not appealable, as order itself was appealable.—*Davis v. Donner*, 82 Cal. 35, 92 Pac. 879.

340. Order refusing to vacate order to permit defendant to answer after default judgment is not appealable, since subsequent order refusing to vacate appealable order which has been regularly made is not appealable.—*Doyle v. Republic L. I. Co.*, 125 Cal. 15, 16, 57 Pac. 667.

341. Refusal to set aside nonappealable order.—Order refusing to vacate order which is nonappealable, is not appealable.—*Harper v. Hildreth*, 99 Cal. 265, 269, 33 Pac. 1103. See *Estate of Keane*, 56 Cal. 407, 409.

342. Removal of cause—Order refusing to move cause to circuit court of United States was not appealable under Practice Act.—*Hopper v. Kalkman*, 17 Cal. 517.

343. Order refusing to set aside order refusing to transfer cause to United States circuit court is not appealable.—*Tripp v. Santa Rosa St. R. Co.*, 69 Cal. 631, 632, 11 Pac. 219.

344. Report of referee—Confirmation of, and order that judgment be entered for plaintiff, is not rendition of judgment so as to be appealable where court had not pronounced judgment on facts found or determined on particular relief to which they entitled plaintiff.—*Harris v. San Francisco S. R. Co.*, 41 Cal. 393, 407.

345. Same—Order overruling exceptions to referee's report is not appealable order.—*Peck v. Courtis*, 31 Cal. 207, 208.

As to refusal to vacate ex parte order, see pars. 127, 128, this note.

346. Revocation of probate of will—Order dismissing proceedings—Appealability.—In the case of the probate of the will of a deceased person, an order dismissing the proceeding for the revocation of that probate, is in effect one refusing to revoke the probate of the will, and is for that reason an appealable order under the amendment of 1901 to the above section.—*Estate of Plumb*, 177 Cal. 300, 170 Pac. 609, following the doctrine in *Mahoney v. Superior Court*, 140 Pac. 513, 74 Pac. 13; *Estate of Baker*, 170 Cal. 578, 583, 150 Pac. 989.

347. Separate appeals—Every judgment and order subsequent to judgment entered against party is subject of distinct and separate appeal, and must be appealed from as an entirety. No separate appeal lies from parts of two judgments. Each should be appealed from by notice and undertaking of its own.—*People v. Center*, 61 Cal. 190, 194.

348. Same—No separate appeal lies from parts of two judgments.—Each should be appealed from by notice and undertaking of its own.—*Sharon v. Sharon*, 68 Cal. 326, 332, 9 Pac. 187.

349. Specific performance—Interlocutory decree in action to compel conveyance of real property is not appealable.—*Kofoed v. Gordon*, 122 Cal. 314, 323, 54 Pac. 1115.

350. Stay of execution—Order striking undertaking to stay execution from files and directing sheriff to pay moneys collected under garnishment in satisfaction of judgment is special order after judgment and appealable.—*Southern Cal. R. Co. v. Superior Court*, 127 Cal. 417, 419, 59 Pac. 789.

351. Substitution of parties—Order denying application to vacate order substituting person as plaintiff is not appealable.—*Grant v. Los Angeles & Pac. R. Co.*, 116 Cal. 71, 72, 47 Pac. 872.

352. Same—Order granting motion to substitute parties plaintiff is not appealable order.—*Welsh v. Allen*, 54 Cal. 211, 212.

353. Summary proceedings—All judgments rendered in special civil proceeding of summary character are appealable, and hence judgment in action to remove board of supervisors can be reviewed on appeal.—*Morton v. Broderick*, 118 Cal. 474, 484, 50 Pac. 644.

354. Same—Removal from office.—Action brought in district court to oust sheriff because of misdemeanors in office is special proceeding from judgment, in which an appeal lies.—*Livermore v. Campbell*, 52 Cal. 75, 77.

355. Supplementary proceedings—In general.—Order on supplementary proceedings that garnishee pay to plaintiff amount of his indebtedness, being in effect judgment, may be appealed from.—*Bronzan v. Drobaz*, 93 Cal. 647, 651, 29 Pac. 254.

356. Same—Rulings on evidence on—Not an appealable order.—In a case in which there was no judgment entered in the matter, within the contemplation of section 719, ante, the rulings of a court on questions of evidence in a supplementary proceeding, and there was no final order determining any right or liability, such rulings do not constitute "special orders made after judgment" within the provisions of the above section and no appeal lies therefrom.—*Watson v. Pryor*, — Cal. App. —, 193 Pac. 797, applying the doctrine in *McGuire v. Drew*, 83 Cal. 225, 23 Pac. 312.

357. Trustee—Order vacating order substituting trustee for one appointed in will is not appealable.—*Estate of Moore*, 86 Cal. 58, 59, 24 Pac. 816.

358. Void judgment—Rendered by court without jurisdiction or coram non iudice is appealable where it is in form of judgment entered in records of court on which final process might be issued.—*Merced Bank v. Rosenthal*, 99 Cal. 39, 43, 31 Pac. 849, 33 Pac. 732.

See par. 361, this note.

359. Same—On appeal from inferior court.—Void judgment of superior court on appeal from justice of peace is appealable.

—De Jarnatt v. Marquez, 127 Cal. 558, 560, 78 Am. St. Rep. 90, 60 Pac. 45.

360. Same—Order setting aside.—Order setting aside judgment on ground that it was in fact void, is appealable.—Livermore v. Campbell, 52 Cal. 75, 77.

361. Void orders may be appealable.—Estate of Bullock, 75 Cal. 419, 421, 17 Pac. 540. See par. 358, this note.

362. Writ of assistance—In general.—Order that writ of assistance issue, is special order made after final judgment and therefore appealable.—Davis v. Donner, 82 Cal. 35, 22 Pac. 879.

363. Same—In sale in partition.—Such writ is, with respect to the interlocutory decree in partition, an order after final

judgment, and is appealable as such.—Gordan v. Graham, 153 Cal. 299, 95 Pac. 145.

364. Same—Order refusing to restrain sheriff from executing writ of assistance is not appealable.—Pignaz v. Burnett, 119 Cal. 157, 161, 51 Pac. 48.

365. Writ of error—Will not be granted in proceedings where appeal lies, appeal being made exclusive in such cases.—Sacramento P. & N. R. Co. v. Harlan, 24 Cal. 334, 336.

366. Writ of possession—Error in granting writ of possession or any subsequent order refusing to set it aside may be reviewed on appeal, and is not ground for mandamus.—Gutierrez v. Superior Court, 106 Cal. 171, 172, 39 Pac. 530.

§ 964. APPEALS; IN WHAT CASES APPEALED FROM JUSTICES' COURTS. The foregoing section does not apply in cases appealed from justices', police, or other inferior courts, except cases of forcible entry and detainer, and cases involving the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars.

History: Enacted March 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 15; repeal by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 174, held unconstitutional, see history, § 5 ante.

See, ante, §§ 936 and 963 and notes.

As to appeals to superior court, see, post, §§ 974 et seq.

§ 965. APPEALS BY EXECUTORS AND ADMINISTRATORS. When an executor, administrator, or guardian, who has given an official bond, appeals from a judgment or order of the superior court made in the proceedings had upon the estate of which he is executor, administrator, or guardian, his official bond shall stand in the place of an undertaking on appeal; and the sureties thereon shall be liable as on such undertaking.

History: Enacted March 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 15; repeal by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 174, held unconstitutional, see history, § 5 ante.

ADMINISTRATORS AND EXECUTORS— APPEALS BY.

1. Construction of section—As not applying, when.
2. Same—Applies to orders in probate proceedings.
3. Conveyance—Order for—Bond of administrator is sufficient undertaking on appeal.
4. Distribution—Construed not to authorize appeal by executor of deceased heir, without bond.
5. Revocation of letters—Appeal by administrator of estate from order.
6. Settlement of account after resignation—In general.

See, ante, §§ 936 and 963 and notes.

As to right of appeal by executor or administrator, see 3 Church's New Probate Law and Practice, 2d ed. pp. 2609-2639, § 1062.

1. Construction of section—As not applying, when.—The above section is construed not to apply where there was nothing in record to show that executors who appealed ever gave any official bond and where appeal was not from order made in proceeding had upon estate.—Pacific Pav. Co. v. Bolton, 89 Cal. 154, 155, 26 Pac. 650.

2. Same—Applies to orders in probate proceedings.—Construed to apply to appeals from judgments and orders made in probate proceedings, and hence bond of administratrix stands in place of undertaking on appeal, not only for purpose of perfecting appeal, but also to stay proceedings under order appealed from, directing payment of

claim.—Ex parte Orford, 102 Cal. 656, 657, 36 Pac. 928. See In matter of Sharp, 92 Cal. 577, 579, 28 Pac. 733.

3. **Conveyance—Order for—Bond of administrator is sufficient undertaking on appeal from an order directing him to make conveyance of certain real estate.**—Estate of Corwin, 61 Cal. 160.

4. **Distribution—Construed not to authorize appeal by executor of deceased heir, without bond, from order distributing portion of estate to legatee, such order not being order made in proceedings for settlement of estate in which he is executor.**—Estate of Skerrett, 80 Cal. 62, 63, 22 Pac. 85.

5. **Revocation of letters—Appeal by administrator of estate from order revoking his letters is not proceeding had upon estate of which he is executor within meaning of this section, providing that no bond need be given in such cases.**—Estate of Danielson, 88 Cal. 480, 481, 26 Pac. 505.

6. **Settlement of account after resignation—In general.**—Appeal by special administratrix after her resignation, from order disallowing accounts, does not come within this section, providing that official bond of administratrix shall stand in place of undertaking on appeal.—Estate of McDermott, 127 Cal. 450, 451, 59 Pac. 733.

§ 966. ACTS OF EXECUTORS AND ADMINISTRATORS, WHERE APPOINTMENT VACATED. When the judgment or order appointing an executor, or administrator, or guardian, is reversed on appeal, for error, and not for want of jurisdiction of the court, all lawful acts in administration upon the estate performed by such executor, or administrator, or guardian, if he have qualified, are as valid as if such judgment or order had been affirmed.

History: Original section enacted March 11, 1872, founded upon § 359 Practice Act as amended 1853 (Stats. 1853, p. 277), 1854 (Stats. 1854, pp. 65, 73); and 1866 (Stats. 1865-6, p. 846); amended March 24, 1874, Code Amdts. 1873-4, p. 340; repeal approved March 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 14; enactment of present section approved March 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 15; repeal by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 174, held unconstitutional, see history, § 5 ante.

1. **Construction — Power of guardian, pending appeal from order of appointment.**—This section does not give the guardian authority to take possession of the property of an incompetent person, or otherwise act under the authority of such appointment, pending an appeal from the order, duly perfected under the provisions of section 941, ante, and supersedeas will issue to prevent such acts, upon his threat to do so. Such

construction is not contrary to a sound public policy.—Coburn v. Hynes, 161 Cal. 687, 120 Pac. 26.

See, ante, §§ 936 and 963 and notes.

As to appeal from appointment of executor, etc., see, ante, § 693 subdivision 3 and note.

As to restitution on reversal, see, ante, § 957 and note.

§§ 967, 968. [No such sections.]

§ 969. WHO MAY TAKE APPEAL FROM PROBATE COURT. [Repealed.]

History: Enacted March 11, 1872; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 341; March 9, 1878, Code Amdts. 1877-8, p. 104; repeal approved April 15, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 64.

APPEAL FROM PROBATE COURT.

1. As to repeal of section—Academic now.
 2. Construction—Amendment of code.
 3. Statute only gives right of appeal—Order refusing to quash execution.
 4. Same—Conveyance; order granting or refusing to grant petition for.
 5. Same—Homestead—Order setting apart.
 6. Same—New trial orders.
 7. Same—Revocation of letters—Order denying petition.
 8. Same—Sale—Order refusing to set aside.
- See, ante, §§ 936 and 963 and notes.

As to appealable and nonappealable orders in probate proceedings, see, ante, § 963 and note.

1. **As to repeal of section—Academic now.**—The above section was repealed in 1880, and the cases under it are thought to be purely academic; but as they may have a possible interest or value, the annotation is retained.

2. **Construction — Amendment of code.**—In 1880, in order to adapt provisions of code to constitution, which had given superior court jurisdiction previously exercised by district and probate courts, legislation repealed this section and added subdivision 3

to section 963, ante, in which is contained provisions of this section, excepting subdivision 8. The provision in subdivision 2 of section 963, ante, which authorizes an appeal to be taken "from an order granting or refusing a new trial," embraces all such orders, whether made in probate proceedings or in civil actions. In all cases in which superior court when sitting as court of probate is authorized to entertain motion for new trial, an appeal will lie from its order thereon.—Estate of Bauquier, 88 Cal. 302, 314, 26 Pac. 178, 532.

3. Statute only gives right of appeal—Order refusing to quash execution.—Appeal from probate court was proceeding regulated by statute, and subjects of such appeal were enumerated in this section. Order of probate court refusing to quash execution was not there enumerated, and is therefore not appealable.—Blum v. Brownstone Bros., 50 Cal. 293, 294.

4. Same—Conveyance; order granting or refusing to grant petition for conveyance of real estate under sections 1597 et seq.

post is appealable.—Estate of Corwin, 61 Cal. 160, 163.

5. Same—Homestead—Order setting apart homestead is appealable.—Estate of Burns, 54 Cal. 223, 228.

6. Same—New trial orders.—Appeal will not lie from order overruling motion for new trial in case or proceeding where appeal is prohibited from order or judgment sought to be reviewed, as such would be accomplishing indirectly what is forbidden to be done directly.—Estate of Keane, 56 Cal. 407, 409.

As to order denying a new trial not being an appealable order, see, ante, § 963, note pars. 200-211.

7. Same—Revocation of letters—Order denying petition for revocation of letters of administration is not included in enumeration of this section and is therefore not appealable.—Estate of Montgomery, 55 Cal. 210, 211; Estate of Keane, 56 Cal. 407, 408.

8. Same—Sale—Order refusing to set aside.—Order of probate court refusing to set aside order of sale is not appealable.—Estate of Smith, 51 Cal. 563, 565.

§ 970. EXECUTORS AND ADMINISTRATORS NOT REQUIRED TO GIVE UNDERTAKING ON APPEAL. [Repealed.]

History: Enacted March 11, 1872; repeal approved April 15, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 64.

§ 971. ACTS OF ACTING ADMINISTRATOR, ETC., NOT INVALIDATED BY REVERSAL OF ORDER APPOINTING HIM. [Repealed.]

History: Enacted March 11, 1872; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 341; repeal approved March 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 14, and by Act April 15, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 64.

[By Act March 26, 1880, Chapter III is declared "amended," but in fact repealed, and a new Chapter III substituted therefor. See Code Amdts. 1880 (C. C. P. pt.), p. 14.]

CHAPTER III.

APPEALS TO SUPERIOR COURTS.

§ 974. Appeal from judgment of justices' or police court.

§ 975. Appeal on questions of law; statement.

§ 976. Appeal on questions of fact, or law and fact.

§ 977. Transmission of papers to appellate court.

§ 978. Undertaking on appeal.

§ 978a. Time of filing appeal. Exception to sureties. Justification.

§ 979. Stay of proceedings on filing undertaking.

§ 980. Powers of superior court on appeal.

§ 981. No appeal effective unless fees for filing are paid.

§ 982. Papers returned on dismissal of appeal.

§ 974. APPEAL FROM JUDGMENT OF JUSTICES' OR POLICE COURT.

Any party dissatisfied with the judgment rendered in an civil action in a police or justice's court, may appeal therefrom to the superior court of the county, at any time within thirty days after notice of the rendition of the

judgment. The appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party. The notice must state whether the appeal is taken from the whole or a part of the judgment, and if from a part, what part, and whether the appeal is taken on questions of law or fact or both.

History: Original section enacted March 11, 1872, substantial re-enactment of § 624 Practice Act as amended 1853 (Stats. 1853, p. 280), and 1854 (Stats. 1854, pp. 70, 73, 84); repeal approved March 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 14; enactment of present section approved March 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 15; repeal by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 175, held unconstitutional, see history, § 5 ante; amendment approved May 20, 1921, Stats. and Amdts. 1921, p. 211. In effect July 29, 1921.

APPEALS TO SUPERIOR COURT.

1. Adverse parties—Are those who by record appear to be interested in judgment.
2. Same—Intervener and defendant.
3. Same—Nominal defendants.
- 4, 5. Appeal from judgment by default.
6. Appeal heard on statement.
- 7-9. Appeal upon questions of law and fact.
10. Same—Relation of parties.
11. Appeal taken from the whole judgment—Notice to state what.
12. Attorney of record—Need not sign notice of appeal.
13. Civil actions in police court—An appeal will lie from.
14. Construction of section—As to generally.
15. Same—Legislative intent.
- 16, 17. Same—Above section and sections 978 and 978a, post, construed together.
- 18, 19. Same—Section 978a, post.
20. Same—Section 978½, post.
21. Date of rendition of judgment—Incorrect recital as to.
22. Default—Judgment by in justices' court is appealable.
- 23-25. Deposit on appeal.
26. Dismissal—Appeal not taken within thirty days.
27. Same—Effect of.
28. Effect of appeal from justices' court.
- 29-31. Effect of transmission of papers on appeal.
32. Erroneous dismissal—Liability of sureties.
33. Essentials to effect an appeal—In general.
- 34, 35. Excepting to the sufficiency of the sureties.
- 36, 37. Same—Five days allowed respondent for exception to the sureties.
38. Extension of time to appeal.
39. Failure of sureties to justify—Effect of.
40. Filing appeal—Evidence of.
41. Same—What constitutes.
42. Jurisdiction—Entry of judgment.
43. Jurisdiction of justice—Devested on.
44. Jurisdiction of superior court on appeal—Notice of filing of undertaking.
- 45-48. Jurisdictional prerequisites.
49. Justices' court—Excess of jurisdiction—Remedy by appeal.
- 50-52. Justification of sureties.
53. Liability of sureties—Assignment of judgment.
54. Same—Failure to file undertaking.
55. Nature of appeal—Determination of.
56. Notice of appeal from judgment of justices' court—In general.
57. Same—Mistake in date of judgment.
- 58-60. Same—Order of service and filing.
61. Same—Service of notice on adverse party.
62. Same—Same—Corporation respondent.
- 63, 64. Notice of filing of undertaking on appeal.
65. Orders—No appeal from.
66. Same—Vacating judgment.
67. Same—Vacating order.
68. Premature appeal—As to generally.
69. Same—Necessity for entry of judgment.
70. Same—"Rendition" and "entry" of judgment.
71. Reversal of judgment—When proper.
72. Trial de novo—Extent of.
- 73-75. Undertaking on appeal necessary—In general.
76. Same—Defective.
77. Same—Same—Cure of defective undertaking.
- 78, 79. Same—Filing of undertaking within the time.
80. Same—New undertaking.
81. Same—Parties can not waive.
- 82, 83. Same—Sufficiency of undertaking.

84, 85. Waiver of service of notice—Appearance is.

86. Waiver of entry of judgment—Appearance by respondent.

See, also, ante, §§ 936 and 963 and notes.

1. Adverse parties—Are those who by record appear to be interested in judgment so that they will be affected by its reversal or nullification, and hence parties not served with summons in justices' court and not having appeared are not parties to judgment, and are not adverse parties on appeal so as to necessitate service of notice of appeal on them.—*Terry v. Superior Court*, 110 Cal. 85, 87, 42 Pac. 464; *Bullock v. Taylor*, 112 Cal. 147, 149, 44 Pac. 457.

2. Same—Intervener and defendant in action in justices' court are adverse parties and must be served with notice of appeal.—*Rossi v. Superior Court*, 114 Cal. 371, 374, 46 Pac. 177.

3. Same—Nominal defendants who were merely served with summons because they were husbands of other defendants, and against whom no judgment was asked or rendered, judgment being taken against separate property of their wives, are not adverse parties to be served with notice of appeal.—*Terry v. Superior Court*, 110 Cal. 85, 88, 42 Pac. 464.

4. Appeal from judgment by default.—On such an appeal, where no trial was had and no evidence introduced, there is no evidence to be embodied in a statement, and where there is no statement, the court is authorized to reverse the judgment and remand for trial, if error appears in the papers and files, without regard to the fact that the appeal was on both law and fact, and the superior court ordered a new trial.—*Miklauschutz v. Superior Court*, 16 Cal. App. 227, 116 Pac. 376.

5. Where no trial was had in the justices' court, no evidence introduced, and a judgment by default rendered, an appeal on a question of law alone is permissible without a statement, and if error is found in the papers and files, the case may be remanded for trial on the merits, notwithstanding the appeal was nominally on both law and fact and the order of the court was for a new trial.—*Miklauschutz v. Superior Court*, 16 Cal. App. 227, 116 Pac. 376.

6. Appeal heard on statement the court is given power to review certain enumerated orders, but where the statute provides for a new trial as a matter of right no provisions are made for the review of either intermediate or subsequent orders or rulings. The principal action is by the appeal restored to the same position it occupied before the trial as to all matters leading to the judgment and the superior court tries the case the same as if there had been no trial in the justices' court.—*Nail v. Superior Court*, 11 Cal. App. 27, 30, 103 Pac. 902.

7. Appeal upon questions of law and fact no provision is made for a review of an order of the justice refusing to dissolve an

attachment.—*Nail v. Superior Court*, 11 Cal. App. 27, 31, 103 Pac. 902.

8. On such appeal duly perfected, the case is removed to the superior court for trial de novo, and the superior court must try it as though no trial had taken place in the lower court.—*Kraker v. Superior Court*, 15 Cal. App. 653, 115 Pac. 663.

9. Where there has, in fact, been no trial in the lower court, and the justice erroneously renders a judgment by default, the superior court has jurisdiction to remand the case for trial on the merits. It is immaterial that the appeal was nominally on law and fact, and that the superior court remands the case for a new trial.—*Miklauschutz v. Superior Court*, 16 Cal. App. 227, 116 Pac. 376.

10. Same—Relation of parties.—The trial on such appeal being de novo, and as though no previous trial had been had, the plaintiff is the actor, as he was in the lower court and it is error for the court to dismiss an appeal by defendant for want of prosecution and render judgment against defendant and in plaintiff's favor.—*Kraker v. Superior Court*, 15 Cal. App. 654, 115 Pac. 663.

11. Appeal taken from the whole judgment—Notice to state what.—The notice is not required to state whether it is upon questions of law or fact, and the appellant is entitled to a trial de novo.—*Rauer's Law & C. Co. v. Superior Court*, 10 Cal. App. 423, 425, 102 Pac. 547.

As to bond on appeal, see pars. 73-83, this note.

12. Attorney of record—Need not sign notice of appeal.—Notice of appeal from justices' court, signed by appellant personally or by some one who may be selected for that purpose, is sufficient. Attorney of record need not sign it.—*Totton v. Superior Court*, 72 Cal. 37, 38, 13 Pac. 72.

13. Civil actions in police court—An appeal will lie from a judgment of a police court in a civil action.—*Simpson v. Police Court*, 160 Cal. 531, 117 Pac. 553.

14. Construction of section—As to generally.—Construing the several provisions of the code relating to justices' courts and the practice therein together a party excepting to the sufficiency of sureties on an undertaking on appeal must file his notice of exception with the justice and no such exception will be deemed to be complete until such notice is filed.—*Budd v. Superior Court*, 14 Cal. App. 256, 111 Pac. 628.

15. Same—Legislative intent.—If the purpose of the legislature in requiring notice of the filing of the undertaking to be given respondent was to remedy an abuse as to exceptions to sureties, by making such notice one of the steps necessary to perfect the appeal, there was a failure thereof by the provision expressly requiring that the sureties must be excepted to within five days after filing the undertaking.—*Blake v. Superior Court*, 17 Cal. App. 53, 118 Pac. 448.

16. Same—Above section and sections 978, and 978a, post, construed together.—Construing above section and sections 978 and 978a, post, together, an appeal can be taken within thirty days from the rendition of the judgment. The first step is the filing of a notice of appeal and service thereof on the adverse party; to make the appeal effectual an undertaking must be filed within five days after the filing of the notice of appeal; the respondent must be given notice of the filing of the undertaking and all of these things must be done within the thirty days.—*Golden Gate Title Co. v. Superior Court*, 159 Cal. 474, 114 Pac. 978.

17. Under section 978, post, as amended in 1909, the time of filing an undertaking on appeal from a judgment of a justices' court does not begin to run at the time of the rendition of the judgment. It begins to run from the time of the filing of the notice of appeal and continues for five days after the filing of such notice.—*Rigby v. Superior Court*, 162 Cal. 334, 336, 337, 339, 122 Pac. 958.

18. Same—Section 978a, post.—Section 978a, post, applies to appeals from recorders' courts (Stats. 1907, p. 272).—*Regan v. Superior Court*, 14 Cal. App. 572, 114 Pac. 53, 72.

19. Enactment of this section in 1909 did not change the rule that all the steps necessary to the taking of the appeal must be taken within thirty days as provided in above section. It adds a further condition, but was not intended to extend any further rights to the appellant. Now, as formerly, the undertaking must be filed within thirty days after rendition of the judgment.—*Regan v. Superior Court*, 14 Cal. App. 572, 114 Pac. 53, 72.

20. Same—Section 978½, post.—The enactment of section 978½, post, in 1909 did not change the rule that all steps necessary to take the appeal, including filing of the undertaking, must be taken within thirty days after rendition of the judgment.—*Regan v. Superior Court*, 14 Cal. App. 572, 114 Pac. 53, 72.

21. Date of rendition of judgment—Incorrect recital as to.—An incorrect recital in the notice of appeal of the date of the rendition of the judgment is not fatal, and does not affect the jurisdiction of the superior court, where the judgment is otherwise correctly described.—*Judd v. Superior Court*, 29 Cal. App. 671, 157 Pac. 566.
See, also, par. 57, this note.

22. Default—Judgment by in justices' court is appealable.—*Tucker v. Justices' Court*, 120 Cal. 512, 514, 52 Pac. 808.

23. Deposit on appeal.—Where evidence is conflicting upon the question as to whether a deposit for costs on appeal made with a justice was made for that purpose, the supreme court will not interfere with

the decision of the superior court by writ of review.—*Thomas v. Hawkins*, 12 Cal. App. 327, 333, 107 Pac. 578.

24. Although sum deposited with justice as security for costs on appeal greatly exceeds the required amount, the superior court acquires jurisdiction.—*Thomas v. Hawkins*, 12 Cal. App. 327, 333, 107 Pac. 578.

25. Although this section contains no provision for depositing of money in lieu of undertaking for costs on appeal, section 926, ante, does make such provision and the two sections must be construed together and therefore where appellant deposits to cover cost of the appeal the appellate court acquires the jurisdiction the same as if an undertaking had been given.—*Pacific Window Glass Co. v. Smith*, 8 Cal. App. 762, 766, 97 Pac. 898.

26. Dismissal—Appeal not taken within thirty days after judgment rendered will be dismissed.—*Hollenbeak v. McCoy*, 127 Cal. 21, 23, 59 Pac. 201.

27. Same—Effect of.—Dismissal of appeal from justice of peace affirms judgment of justice where judgment was merely erroneous and not void.—*Ritzman v. Burnham*, 114 Cal. 522, 525, 46 Pac. 379.

28. Effect of appeal from justices' court is to vacate judgment against appellant and to leave all issues of fact between him and defendant to be tried anew in superior court, and if on trial superior court shall determine these issues in favor of plaintiff, judgment will be authorized in favor of plaintiff, notwithstanding intervention.—*Rossi v. Superior Court*, 114 Cal. 371, 374, 46 Pac. 177.

29. Effect of transmission of papers on appeal.—If the transmission of all the papers in a cause to the superior court on appeal be to vest that court with jurisdiction of an attachment proceeding in connection therewith such jurisdiction is not for the purpose of reviewing the rulings of the justices' court in connection with the attachment, but is incidental to the execution of the judgment which may be rendered in the principal action.—*Nail v. Superior Court*, 11 Cal. App. 27, 31, 103 Pac. 902.

30. There is no warrant for the superior court to dismiss an appeal after the same is once fully perfected upon the motion of the plaintiff because the appellant has failed to prosecute the appeal with diligence. Where the appeal is upon questions of both law and fact, the plaintiff is the actor in the superior court and it is his duty to cause the prosecution of the action to a final determination, and no duty in that regard devolves upon the defendant who is the appellant, although he may be invoking the jurisdiction of the appellate court.—*Rabin v. Pierce*, 10 Cal. App. 734, 736, 103 Pac. 771.

31. Papers once properly filed in superior court, the justice has no power to recall them for any purpose, nor has the superior court authority to cause the papers to be

returned to the justice.—*Budd v. Superior Court*, 14 Cal. App. 256, 111 Pac. 628.

As to "entry" and "rendition" of judgment, see par. 70, this note.

32. Erroneous dismissal—Liability of sureties.—Error in dismissing appeal does not affect liability of sureties on undertaking on appeal from justices' court.—*Nolan v. Fidelity & Deposit Co.*, 2 Cal. App. 1, 82 Pac. 1119.

33. Essentials to effect an appeal—In general.—(1) The filing of the notice of appeal, (2) the service of a copy of the notice upon the adverse party, and (3) the filing of a written undertaking. And all these things must be done within thirty days after rendition of the judgment. All of them are jurisdictional prerequisite, and until all of them are completed, the appeal is not effectual for any purpose.—*Crowley Launch & Tug Boat Co. v. Superior Court*, 10 Cal. App. 342, 344, 101 Pac. 935.

34. Excepting to the sufficiency of the sureties, their justification may be waived, but this waiver must be made within five days or else the superior court will lose jurisdiction.—*Crowley Launch & Tug Boat Co. v. Superior Court*, 10 Cal. App. 342, 346, 101 Pac. 935.

As to justification of sureties, see pars. 50-52, this note.

35. Where the exception is made more than twelve days after the filing of the bond it is too late, and the dismissal of the appeal for failure of the sureties to qualify is error.—*Widrin v. Superior Court*, 17 Cal. App. 94, 118 Pac. 550.

36. Same.—Five days allowed respondent for exception to the sureties, question whether time begins to run only after the service of notice upon him, raised but not decided.—*Golden Gate Title Co. v. Superior Court*, 159 Cal. 474, 114 Pac. 978.

37. While the undertaking on appeal must be filed within five days after the filing of notice of appeal, no time is specified during which notice of the filing of the undertaking must be given to the respondent.—*Golden Gate Title Co. v. Superior Court*, 159 Cal. 474, 114 Pac. 978.

38. Extension of time to appeal.—Time within which to appeal from judgment of justices' court can not be prolonged by any proceedings before such court.—*Hollenbeak v. McCoy*, 127 Cal. 21, 23, 59 Pac. 201.

39. Failure of sureties to justify—Effect of.—Appeal is taken by filing notice of appeal with justice and serving copy on adverse party, and hence fact that sureties did not justify does not prevent appeal from having been taken.—*Moffat v. Greenwalt*, 90 Cal. 368, 371, 27 Pac. 296.

40. Filing appeal—Evidence of.—Marking of filing of notice of appeal by justice is not exclusive evidence of filing of paper. In absence of entry in justices' docket, it is not conclusive proof that it had been filed.—

Williams v. Superior Court, 5 Cal. Unrep. 598, 47 Pac. 783.

41. Same.—What constitutes.—Failure to file undertaking from justice of peace within thirty days after rendition and entry of judgment will not be ground for dismissal of appeal where undertaking was left at office of justice within thirty days, but was not received by him or marked "filed" until two days after that time because of his absence from his office and from county.—*Perkins v. Superior Court*, 4 Cal. 788, 37 Pac. 780.

42. Jurisdiction—Entry of judgment.—Superior court has jurisdiction of appeal from justice of peace where justice entered verdict of jury in docket, though such docket did not show formal entry of judgment.—*Montgomery v. Superior Court*, 68 Cal. 407, 411, 9 Pac. 720.

43. Jurisdiction of justice—Devested on.—When notice of appeal and undertaking on appeal is filed, and the fees of the justice paid, he is divested of all jurisdiction except that under section 977, post.—*Farrisee v. Superior Court*, — Cal. —, 181 Pac. 73.

44. Jurisdiction of superior court on appeal.—Notice of filing of undertaking, as herein prescribed, is not essential to the jurisdiction of the superior court.—*Blake v. Superior Court*, 17 Cal. App. 52, 118 Pac. 448; *Widrin v. Superior Court*, 17 Cal. App. 94, 118 Pac. 550.

45. Jurisdictional prerequisites.—To effectuate appeal from judgment of justice of peace three things are necessary: filing of notice of appeal with justice, service of copy of notice on adverse party, and filing of written undertaking,—all of which must be done within thirty days after rendition of judgment. All these are jurisdictional prerequisites, none of which can be dispensed with, nor supplied; or if fatally defective, be remedied after time limited by statute.—*McKeen v. Naughton*, 88 Cal. 462, 465, 466, 26 Pac. 354.

46. To render appeal from justices' court effectual three things are necessary—filing of notice of appeal with justice, service of copy of notice on adverse party, and filing of written undertaking,—all of which must be done within thirty days after rendition of judgment.—*McCracken v. Superior Court*, 86 Cal. 74, 75, 24 Pac. 845.

47. Service of notice of appeal on adverse party is necessary to render appeal effectual and to give appellate court jurisdiction, and hence judgment of affirmance without such service is erroneous.—*Trobock v. Caro*, 60 Cal. 301, 303.

48. Filing and service of notice of appeal within thirty days is jurisdictional prerequisite to taking of appeal.—*Coker v. Superior Court*, 58 Cal. 177, 178.

49. Justices' court—Excess of jurisdiction—Remedy by appeal.—Under the provisions of the above section in a case where a justices' court or a police court has jurisdiction of the subject-matter of an action instituted

therein, and has regularly acquired jurisdiction of the person of the defendant any errors occurring at the trial are to be corrected on appeal therefrom and not be certiorari.—*Camm v. Justices' Court*, 35 Cal. App. 293, 170 Pac. 409.

50. Justification of sureties.—Failure of the sureties to justify places the case in contemplation of law the same as if no undertaking had been given. It was a mere nullity and conferred no jurisdiction of the appeal upon the superior court, and if that court attempts to proceed with the case, prohibition will lie.—*Crowley Launch & Tug Boat Co. v. Superior Court*, 10 Cal. App. 342, 344, 101 Pac. 935.

As to exception to sufficiency of sureties, see pars. 34, 35, this note; also, ante, § 936 and note.

51. The requirement that the sureties are to justify within the time specified is jurisdictional, and if they do not so justify, the superior court acquires no jurisdiction of the appeal.—*Crowley Launch & Tug Boat Co. v. Superior Court*, 10 Cal. App. 342, 344, 101 Pac. 935.

52. Proceedings to justify can not extend the time only for the purpose of justification and do not operate to give additional time within which a new and independent undertaking may be filed. Where the sureties fail to justify the appeal must be regarded as if no such undertaking had been given and the superior court has no jurisdiction of the appeal.—*Lane v. Superior Court*, 5 Cal. App. 762, 764, 91 Pac. 405.

53. Liability of sureties.—Assignment of judgment without assignment of undertaking on appeal therefrom does not pass assignee any right of action on undertaking on appeal, whether judgment be assigned pending appeal or after it had become final.—*Chilstrom v. Eppinger*, 127 Cal. 326, 327, 78 Am. St. Rep. 46, 59 Pac. 696.

54. Same.—Failure to file undertaking on appeal from justice of peace within thirty days after rendition of judgment is good ground for dismissing appeal, but will not defeat recovery on stay-bond given at any time before dismissal of appeal.—*Nolan v. Fidelity & Deposit Co.*, 2 Cal. App. 1, 82 Pac. 1119.

55. Nature of appeal.—Determination of.—Where record on appeal from justice of peace contained statement of case, superior court was called upon to determine nature of appeal.—*Smith v. Superior Court*, 2 Cal. App. 259, 84 Pac. 54.

56. Notice of appeal from judgment of justices' court.—In general.—A notice of appeal from judgment of a justices' court may be filed, under this section, at any time within thirty days after the rendition of the judgment appealed from, it necessarily follows that the time for filing the undertaking does not stop with the expiration of such thirty days, as was held to be the case, prior to the amendments of 1909, but may in some cases be filed as much as five days
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after the thirty-day period has elapsed.—*Rigby v. Superior Court*, 162 Cal. 334, 336, 337, 339, 122 Pac. 958.

57. Same.—Mistake in date of judgment in notice of appeal served on respondent is not material where judgment is otherwise correctly described.—*Sherman v. Rolberg*, 9 Cal. 17, 18.

See, also, par. 21, this note.

58. Same.—Order of service and filing.—Notice of appeal need not be filed prior to service of copy on adverse party, order of filing and service being immaterial provided they are done within thirty days after rendition of original judgment.—*Hall v. Superior Court*, 71 Cal. 550, 551, 12 Pac. 672.

59. Service of notice of appeal before filing thereof is immaterial, providing that both are done within time limited by statute.—*Hall v. Superior Court*, 68 Cal. 24, 25, 8 Pac. 509.

60. Construed not to require filing of notice of appeal on same day or prior to service of notice, provided it is done within thirty days.—*Coker v. Superior Court*, 58 Cal. 177, 178.

61. Same.—Service of notice on adverse party.—Copy of notice of appeal from judgment of justices' court must be served "on the adverse party."—*Green v. Rogers*, 18 Cal. App. 572, 574, 123 Pac. 974.

See, also, ante, § 936, note pars. 157, 268-283.

62. Same.—Same.—Corporation respondent.—Service of notice of appeal from justices' court on manager of corporation respondent, instead of on its attorney, is sufficient under this section.—*Pacific Coast R. Co. v. Superior Court*, 79 Cal. 103, 104, 21 Pac. 609.

63. Notice of filing of undertaking on appeal from a judgment of a justices' court must be "given to the respondent."—*Green v. Rogers*, 18 Cal. App. 572, 574, 123 Pac. 974.

As to giving notice of filing of undertaking not being essential to confer jurisdiction on the superior court, see par. 44, this note.

64. As no time is specified within which such notice must be given, it must be regarded as an act not essential to the perfecting of the appeal, and the omission to give it not jurisdictional, but a mere irregularity.—*Blake v. Superior Court*, 17 Cal. App. 53, 118 Pac. 448; *Widrin v. Superior Court*, 17 Cal. App. 94, 118 Pac. 550.

65. Orders.—No appeal from.—Construed not to authorize appeal from order by justice under proceedings supplemental to execution—word "judgment" not including orders.—*Wells v. Torrance*, 119 Cal. 437, 439, 440, 51 Pac. 626.

66. Same.—Vacating judgment.—Order of justice vacating judgment is not appealable.—*Weimmer v. Sutherland*, 74 Cal. 341, 344, 15 Pac. 849.

67. Same—Vacating order.—Order of justice vacating order granting motion to open judgment is not appealable.—*Merriman v. Walton*, 105 Cal. 403, 408, 45 Am. St. Rep. 50, 30 L. R. A. 786, 38 Pac. 1108.

68. Premature appeal—As to generally.—Under the provisions of this, and other sections of this code relating to appeals from the justices' courts, an appeal taken after entry of verdict, but before entry of judgment, is premature, and confers no jurisdiction upon the superior court.—*Thomson v. Superior Court*, 161 Cal. 332, 119 Pac. 98.

69. Same—Necessity for entry of judgment.—When judgment not entered as required by section 891, ante, jurisdiction can not be acquired on appeal by the superior court hereunder.—*June v. Superior Court*, 16 Cal. App. 128, 116 Pac. 293.

70. Same—"Rendition" and "entry" of judgment.—The only way of "rendering" a judgment, within the meaning of this section, as a prerequisite to an appeal therefrom, is by "entry" in the justices' docket, and until such entry, there is no rendition within the meaning of this section.—*Thomson v. Superior Court*, 161 Cal. 333, 119 Pac. 98.

71. Reversal of judgment—When proper.—On appeal from justice of peace on questions of law alone, where it appeared that title to property was involved in action in justices' court, court should have reversed judgment instead of ordering new trial, as justices' judgment was void.—*King v. Kuttner-Goldstein Co.*, 135 Cal. 65, 69, 67 Pac. 10.

72. Trial de novo—Extent of.—On appeal from judgment in favor of intervener and defendant, plaintiff has right, not only to have court pass on sufficiency of his demurrer to complaint in intervention without any statement of case, but also to have all issues of fact that have been presented in justices' court tried anew in superior court.—*Rossi v. Superior Court*, 114 Cal. 371, 374, 46 Pac. 177.

73. Undertaking on appeal necessary—In general.—An undertaking filed before the trial and at the time of application for an attachment, purporting or attempting to comply with the requirement of section 860, ante, requiring an undertaking on attachment, and also section 1036, post, providing for security for costs where the plaintiff is a foreign corporation, and section 978, post, in reference to costs on appeal, can not be regarded as a bond on appeal and confers no jurisdiction upon the superior court.—*Stimpson Computing Scale Co. v. Superior Court*, 12 Cal. App. 536, 539, 107 Pac. 1013.

As to notice of filing of undertaking, see pars. 61, 63, 64, this note.

74. Superior court has no jurisdiction to entertain plea in absence of the giving of an undertaking to pay costs. The bond for costs is one of the essential and indispen-

sable prerequisites to the conferring of jurisdiction.—*Stimpson Computing Scale Co. v. Superior Court*, 12 Cal. App. 536, 538, 107 Pac. 1013.

75. Undertaking for the payment of costs on appeal is an essential and indispensable prerequisite to the conferring of jurisdiction of appeals from justices' or police courts on the superior court, and where that necessary formality is not complied with the superior court is as powerless to hear or try the cause as it would be to try and determine one within its own jurisdiction on oral pleadings or to try to decide and conclude the rights of a party where summons had not been served and returned by any of the methods authorized by law.—*Thomas v. Hawkins*, 12 Cal. App. 327, 330, 107 Pac. 578.

76. Same—Defective because no separate bond to cover costs on appeal. Question raised but not decided.—*June v. Superior Court*, 16 Cal. App. 128, 116 Pac. 293.

77. Same—Same—Cure of defective undertaking.—On an appeal from a justices' court, prosecuted by the plaintiff, an undertaking to pay all costs and damages that may be awarded against the defendant, instead of the plaintiff or appellant, is defective merely and not a nullity; and such defective undertaking may be cured by filing a corrected undertaking in the superior court, after leave obtained.—*Werner v. Superior Court*, 161 Cal. 210, 118 Pac. 709.

78. Same—Filing of the undertaking within the time and the giving of the notice required by this section are essential to jurisdiction of the superior court.—*Stimpson Computing Scale Co. v. Superior Court*, 12 Cal. App. 536, 538, 107 Pac. 1013.

79. Undertaking not filed within thirty days after rendition of judgment is ineffectual for any purpose and does not therefore perfect appeal.—*Lane v. Superior Court*, 5 Cal. App. 762, 764, 91 Pac. 405.

80. Same—New undertaking.—There is no provision similar to section 954, ante, for the filing of a new bond in the superior court upon an appeal from the justices' court.—*Bergevin v. Wood*, 11 Cal. App. 643, 649, 105 Pac. 935.

81. Same—Parties can not waive jurisdiction of subject-matter nor confer it by consent. Whenever the court's attention is called to the fact that no undertaking for costs has been filed or served, it is its duty to dismiss the plea, and it has no legal power to proceed with the trial.—*Stimpson Computing Scale Co. v. Superior Court*, 12 Cal. App. 536, 538, 107 Pac. 1013.

82. Same—Sufficiency of undertaking.—An undertaking on appeal from a money judgment for an adequate amount conditioned that appellant "will pay the amount of the said judgment . . . and all costs," etc., is sufficient. The phrase "all costs" in such undertaking, includes the costs on appeal.—*Jones v. Superior Court*, 151 Cal. 590, 91 Pac. 505.

83. An undertaking in more than the sum of one hundred dollars, and conditioned for the payment of the costs on appeal is sufficient to confer jurisdiction on appeal from a justice court; and the validity of such an appeal bond is not destroyed by the fact that it also purports to be given to stay execution.—*Edwards v. Superior Court*, 159 Cal. 714, 115 Pac. 649.

84. **Waiver of service of notice—Appearance is.**—Service of notice of appeal is necessary to give appellate court jurisdiction, but such service may be waived by appearance.—*Matthews v. Superior Court*, 70 Cal. 527, 528, 11 Pac. 665.

85. Appearance in superior court on appeal from judgment of justice of peace of attorney of record of respondent amounts to waiver of service of notice of appeal.—*Matthews v. Superior Court*, 70 Cal. 527, 528, 11 Pac. 665.

86. **Waiver of entry of judgment—Appearance by respondent** and proceeding to trial in superior court without questioning jurisdiction of court because of failure of justice to enter judgment before appeal was taken waives such defect.—*Montgomery v. Superior Court*, 68 Cal. 407, 410, 9 Pac. 720.

§ 975. APPEAL ON QUESTIONS OF LAW; STATEMENT. When a party appeals to the superior court on a question of law alone, he must, within ten days after notice of the rendition of judgment, prepare a statement of the case and file the same with the justice or judge. The statement must contain the grounds upon which the party intends to rely upon the appeal, and so much of the evidence, as may be necessary to explain the grounds, and no more. Within ten days after receiving notice that the statement is filed, the adverse party, if dissatisfied with the same, may file amendments. The proposed statement and amendments must be settled by the justice or judge, and if no amendment be filed the original statements stand as adopted. The statement thus adopted or as settled by the justice or judge, with a copy of the docket of the justice or judge, and all motions filed with him by the parties, during the trial and the notice of appeal, may be used on the hearing of the appeal before the superior court.

History: Original section enacted March 11, 1872, re-enactment of § 625 Act of 1854 (Stats. 1854, p. 84) as amended 1855 (Stats. 1855, p. 198); repeal approved March 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 14; enactment of present section approved March 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 16; repeal by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 175, held unconstitutional, see history, § 5 ante; amendment approved May 20, 1921, Stats. and Amdts. 1921, p. 211. In effect July 29, 1921.

QUESTIONS OF LAW—APPEAL ON—STATEMENT.

- 1-3. As to statement of case on—Is not required where alleged errors appear in copy of justice's docket.
- 4-7. Same—Statement of grounds of appeal.
8. Amendment in superior court—Power to allow.
9. Appeal on law and fact—As to generally.
- 10, 11. Same—Disposition of cause—Certiorari to review order.
12. Same—Filing undertaking before notice of appeal.
13. Same—Notice of appeal.
14. Same—Procedure where plaintiff has failed to establish cause.
- 15, 16. Same—Rules applicable to appeals on questions of fact.

17. Same—Trial de novo.
18. Construction of section—To give superior court jurisdiction to order transfer of copy of justice's docket.
- 19-22. Default judgment—Setting aside.
- 23-27. Dismissal of action—As to generally.
- 28-30. Judgment of superior court final, when.
31. Special objection to jurisdiction—Right to appeal on law and facts.
- 32-34. Undertaking on appeal—As to necessity of.
35. Same—"Any costs."
36. Same—Justification of sureties.
37. Same—Time of filing.

1. As to statement of case on—Is not required where alleged errors appear in copy of justice's docket, or in copy of paper sent out by justice, as required by this sec-

tion and section 977, post.—*Southern Pac. R. Co. v. Superior Court*, 59 Cal. 471, 474.

As to settlement of statement on appeal. see, ante, § 650 and note.

2. A statement is not necessarily an essential part of the record on appeal to the superior court from the justices' court on questions of law, and if the point upon which the appellant depends may be shown by the docket a statement would be useless; and where there is no such statement filed the record before the superior court is a copy of the docket and the motions and notices, if any, described in above section.—*Rauer's Law & Coll. Co. v. Superior Court*, 169 Cal. 296, 146 Pac. 866.

3. In such a case a writ of mandate will issue to compel the superior court to set aside and vacate an order of dismissal made by it upon the ground that no statement was ever prepared or filed, and to compel it to proceed with the trial and determination of the appeal.—*Rauer's Law & Coll. Co. v. Superior Court*, 169 Cal. 296, 146 Pac. 866.

4. **Same—Statement of grounds of appeal.**—A statement is not necessarily an essential part of the record on appeal to the superior court on questions of law. On such an appeal, where there is no statement, the record before the superior court is a copy of the docket. If the point upon which the appellant depends may be shown by the docket a statement on appeal would be useless.—*Rauer's Law & Col. Co. v. Superior Court*, 26 Cal. App. 289, 146 Pac. 866.

5. In the event of an appeal from the justices' to the superior court upon questions of law and loan, it is error to dismiss the appeal on the ground of an omission to file a statement of the case.—*Rauer's Law & Col. Co. v. Superior Court*, 26 Cal. App. 289.

6. In such a case a writ of mandate will issue to compel the superior court to set aside and vacate an order of dismissal made by it upon the ground that no statement was ever prepared or filed, and to compel it to proceed with the trial and determination of the appeal.—*Rauer's Law & Col. Co. v. Superior Court*, 26 Cal. App. 289.

7. Appellate jurisdiction is not lost by the failure to state the grounds upon which the appellant intends to rely in his statement.—*Fletcher Collection Agency v. Superior Court*, 31 Cal. App. 193, 159 Pac. 1049.

8. **Amendment in superior court—Power to allow.**—The superior court upon the trial of a justices' court appeal has power to allow the plaintiff to amend the title of his action by changing the same from "San Jacinto Packing House, Plaintiff, v. I. N. Miller, Defendant," to "Arthur S. Holden, doing business under the name and style of San Jacinto Packing House, Plaintiff, v. I. N. Miller, Defendant," where it appears by an affirmative allegation in the complaint that the plaintiff designated as San Jacinto Packing House was represented in

the person of Arthur S. Holden as the owner of the business transacted under that name.—*Miller v. The Superior Court*, 26 Cal. App. 41, 146 Pac. 72.

9. **Appeal on law and fact.**—As to generally.—In a case in which the defendant appealed from the justices' court judgment, on questions both of law and of fact, to the superior court, and appeared specially therein to object to the want of jurisdiction, either in the justices' court or in the superior court to try the cause, and moved the superior court to remand the case to the justices' court, with directions to sustain the demurrer, and to dismiss the action for want of jurisdiction to try the same, which motion the superior court overruled and directed that the trial proceed, whereupon the defendant refused to submit to the jurisdiction of the superior court and absented himself, the case tried and judgment rendered, in his absence, for the plaintiff, it was held that such judgment of the superior court must be reversed, with direction to dismiss the action for want of jurisdiction.—*Bates v. Ferrier*, 19 Cal. App. 79, 124 Pac. 889.

See, also, par. 31, this note; and, post, § 976, note par. 11.

10. **Same—Disposition of cause—Certiorari to review order.**—On certiorari to review an order made in a justices' court setting aside a default judgment, the superior court made its determination in the form of an order dismissing the same. Upon return being made to the writ and hearing had thereon, judgment should have been entered, affirming the order of the justices' court. However, as counsel have not presented any objections to the procedure taken, we have treated the order in the light of a judgment, and considered the questions presented upon their merits, and assumed that an appeal was proper to be taken from the order as made by the superior court.—*Fast v. Young*, 19 Cal. App. 577, 126 Pac. 854, 856.

11. In a proceeding in certiorari to review an order made in a justices' court setting aside a default judgment, the record presented does not contain a complete statement of all of the proceedings had in the superior court, and it is not shown by the record what, if anything, was made to appear to the superior court regarding the matter of costs which might have been assessed by the justice in favor of the petitioner here, who was the plaintiff in the justice court action, in support of the order of the superior court, it must be assumed, in the absence of a record showing the contrary to be true, that evidence was heard which would furnish facts in support of the order; and that therefore the superior court was satisfied from such evidence, either that there were no costs assessable against the defendant in the justice court action at the time her motion to vacate the default judgment was granted, or that such evidence showed that if there

were such costs which were properly so assessable they had been paid by the moving party.—*Fast v. Young*, 19 Cal. App. 577, 126 Pac. 854, 856.

12. Same—Filing undertaking before notice of appeal.—Upon appeal from a justices' court to the superior court, where the undertaking on appeal was prematurely filed before the filing of the notice of appeal, the superior court acquired no jurisdiction of the appeal, and properly dismissed the same; and a writ of mandate will not lie directing the superior court and the judge thereof to vacate and set aside the order dismissing the appeal.—*Goodman v. Superior Court*, 19 Cal. App. 457, 126 Pac. 185.

See, also, pars. 19-22, this note.

13. Same—Notice of appeal.—Declarations in the notice of appeal from a judgment rendered in a justices' court that it is taken both upon questions of law and fact are not conclusive.—*Peacock v. Superior Court*, 163 Cal. 701, 126 Pac. 976, 977.

As to the sufficiency of notice of appeal from justices' courts with respect to the description of the judgment appealed from, see note 21 Ann. Cas. 1309.

14. Same—Procedure where plaintiff has failed to establish cause.—Since by section 925, ante, justices' courts are declared to be courts of peculiar and limited jurisdiction, and since such courts have not power, under section 581, ante, to enter a judgment of dismissal where the plaintiff has failed to establish his case by satisfactory evidence, it follows that upon appeal from such justice's judgment to the superior court, the rule of procedure is not applicable which declares that, when an appeal to the superior court is based on questions of law alone, the proper procedure is to remand the cause for trial in the justices' court if the justice has fallen into error upon a material question of law, or to affirm the judgment of the justices' court if the justice has not erred.—*Peacock v. Superior Court*, 163 Cal. 701, 126 Pac. 976.

15. Same—Rules applicable to appeals on questions of fact.—When appeals are taken from justices' courts to the superior court on questions both of law and fact, although the justices' court may in fact be without jurisdiction, yet if no such objection is urged on that ground in the superior court, it can not be urged upon appeal from its judgment; but if, on the other hand, when such appeals are taken, the want of jurisdiction in the justices' court is also disclosed in the record of the court as having been seasonably urged on that ground, such objection is good, especially when, as in this case, the objecting party refuses to submit to the jurisdiction of the superior court in the trial of any mere questions of fact.—*Bates v. Ferrier*, 19 Cal. App. 79, 124 Pac. 889.

16. Where an appeal from the justices' court is taken both upon questions of law

and of fact, but its want of jurisdiction to try the case appears upon the face of the record, and a seasonable objection to the want of jurisdiction is urged in the superior court, the appellant is entitled to an order dismissing the action for want of jurisdiction to try it upon its merits.—*Barnett v. Hull*, 19 Cal. App. 91, 124 Pac. 885.

17. Same—Trial de novo.—Where a justice erroneously entered a judgment of dismissal against plaintiff, on the ground that the evidence was not sufficient to entitle him to judgment, when the sole judgment which he was authorized to render under the circumstances was a judgment for defendant upon the merits, such erroneous form of the judgment which the justice actually rendered can not deprive the plaintiff of his right to appeal upon questions both of law and fact (for, under the circumstances and after a trial upon the merits, questions of both law and fact are involved), and so to have his cause tried de novo in the superior court.—*Peacock v. Superior Court*, 163 Cal. 701, 126 Pac. 976, 978.

18. Construction of section—To give superior court jurisdiction to order transfer of copy of justice's docket where appeal has been perfected and all papers except last docket transferred.—*Burgess v. Superior Court*, 2 Cal. Unrep. 741, 13 Pac. 166.

19. Default judgment—Setting aside.—The justice, as a condition to the granting of the motion to set aside a default judgment, need not require the moving party to pay costs, where it is not made to appear that there were any costs claimed on the part of petitioner, or that, if any were claimed, they were not paid at the time the order was made by the justice.—*Fast v. Young*, 19 Cal. App. 577, 126 Pac. 854, 856.

20. It is not necessary that the amount of costs be specified in the order granting the motion to vacate the default judgment.—*Fast v. Young*, 19 Cal. App. 577, 126 Pac. 854, 856.

21. The amendment to section 859, ante, of 1905, which provided that a motion to set aside a default judgment should be made within ten days after notice of the entry of such judgment, allows a motion to vacate a judgment rendered in the justices' court on September 28, 1911, where the motion to vacate was heard on October 13, 1911, and was supported by an affidavit showing that the counsel for the defendant in the justices' court did not have notice that judgment had been entered against his client until October 3, 1911.—*Fast v. Young*, 19 Cal. App. 577, 126 Pac. 854.

22. A judgment entered in a justices' court after demurrer, and upon failure of defendant to answer, is a default judgment, and may be set aside, under the provisions of section 859, ante, allowing ten days after notice of entry of such judgment to move to set aside the judgment.—*Fast v. Young*, 19 Cal. App. 577, 126 Pac. 854.

23. Dismissal of action—As to generally.—The right of the superior court to dismiss a justices' court appeal for the failure to prosecute it with reasonable diligence does not depend upon either subdivision 1 of section 890, ante, or upon section 583, ante, but is a matter within its inherent power limited only by a sound discretion.—*Pistolesi v. Superior Court*, 26 Cal. App. 403, 147 Pac. 104.

24. Subdivision 1 of section 890, post, which provides when a justices' court in its discretion may dismiss an action pending before it for failure to prosecute the same to judgment, applies to an action pending in the justices' court, and not to an appeal pending in the superior court in such action.—*Pistolesi v. Superior Court*, 26 Cal. App. 403, 147 Pac. 104.

25. Section 583, ante, which provides "an action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, or to which it may be transferred on motion of the defendant, after due notice to the plaintiff, or by the court of its own motion, unless such action is brought to trial within five years after the defendant has filed his answer," is inapplicable to a justices' court appeal, as such action is not commenced in the superior court, nor can it be regarded as having been "transferred" thereto on "motion of the defendant."—*Pistolesi v. Superior Court*, 26 Cal. App. 403, 147 Pac. 104.

26. Where a defendant who has appealed to the superior court subsequently moves that court to dismiss the action on account of the failure of the plaintiff to prosecute it or bring it to trial for more than five years, the superior court may resort to its inherent power to pass on the motion and grant or deny it. It has no need of statutory authority in this respect.—*Pistolesi v. Superior Court*, 26 Cal. App. 403, 147 Pac. 104.

27. Whether or not an action pending on appeal to the superior court shall be dismissed for lack of diligence in its prosecution does not depend upon what the law is as to actions pending in the justices' court.—*Pistolesi v. Superior Court*, 26 Cal. App. 403, 147 Pac. 104.

28. Judgment of superior court final, when.—A judgment of the superior court on appeal, in an action originally brought in the justices' court to recover the sum of one hundred dollars, alleged to have been paid as part of the purchase-price of certain lots of land, which defendant agreed to transfer to plaintiff, the contract being evidenced by a writing in the form of a receipt, which provided the balance of the purchase-price should be paid upon a showing within fifteen days from date that the title of the property was free from all encumbrances, upon the execution of a good deed, and providing further that the deposit should be returned to the purchaser if the

certificate of title showed the property not to be free from encumbrances, is final, and no appeal lies from the judgment of the superior court.—*Hillger v. Yenrick*, 25 Cal. App. 604, 144 Pac. 980.

29. Such an action is one at law for the recovery of money only, and a verified answer and counter-claim, upon which defendant took issue on the facts alleged in plaintiff's complaint and sought to recover the balance of seven hundred dollars, which plaintiff had agreed to pay upon the conditions of the contract in his favor being performed, and on which defendant moved to have the case certified to the superior court, upon the ground that it raised a question as to the title or right to the possession of real property, does not raise such question, and the fact that the defendant sought by counter-claim to recover more than the amount fixed as the limit of the jurisdiction of the justices' court could not oust that court of jurisdiction. While the alleged counter-claim might have been stricken from the files, no error was committed by the justice in proceeding to trial without taking such action.—*Hillger v. Yenrick*, 25 Cal. App. 604, 144 Pac. 980.

30. A judgment rendered by the superior court upon an appeal from the justices' court will not be annulled and set aside for want of jurisdiction on the ground that there was no trial of the issues in the latter court, where it is shown that the plaintiff failed to appear at the time fixed for trial in the justices' court and after waiting for one hour the defendant proceeded with the trial on the issue involved as to whether or not he was indebted to the plaintiff as alleged in the complaint, and thereafter upon the evidence introduced the court gave judgment for the defendant.—*Winnett v. Superior Court*, 26 Cal. App. 332, 146 Pac. 1050.

31. Special objection to jurisdiction—Right to appeal on law and facts.—Where defendant has objected to jurisdiction of justices' court by motion to dismiss action, and specially demurred on ground that action was not brought in proper county, and afterwards, without waiving such objection, has answered to merits, he is entitled to appeal on questions of both law and fact, and is not required to appeal merely on question of law, and hence fact that no statement is brought up will not prevent consideration of appeal.—*Holbrook v. Superior Court*, 106 Cal. 589, 593, 39 Pac. 936.

See, also, par. 9, this note; and, post, § 976, note par. 11.

32. Undertaking on appeal—As to necessity of.—An undertaking on appeal from a justices' court is a jurisdictional prerequisite to a justices' court appeal.—*Cohen v. Connick*, 26 Cal. App. 491, 147 Pac. 479.

33. There is a vital difference between the case where a bond, merely defective in

matter in form, has been filed and the instance where there is no undertaking at all, or where it is so defective as to be entirely invalid. In the first mentioned case another bond may be filed in the appellate court.—Cohen v. Connick, 26 Cal. App. 491, 147 Pac. 479.

34. An undertaking on appeal from the justices' court, prepared on a regularly printed form designed for use as an undertaking for costs and also to stay execution, which contains no promise in that part thereof for costs on the part of the sureties to pay the costs of the appeal, and which is not filled out in that part for staying execution, is nevertheless sufficient to bind the sureties and give the superior court jurisdiction of the appeal, when consideration is given to the latter portion of the printed form providing "that appellant will pay any judgment and costs that may be recovered against him in the said action in the said superior court, not exceeding one hundred dollars, as fixed by the justice of said court."—Cohen v. Connick, 26 Cal. App. 491, 147 Pac. 479.

35. *Same*—"Any costs," referred to in an undertaking on an appeal from a justices' court, embrace all costs that might be

incurred by reason of the appeal.—Cohen v. Connick, 26 Cal. App. 491, 147 Pac. 479.

36. *Same*—*Justification of sureties*.—The affidavit required by section 1057, post, of sureties on undertakings that they are householders or freeholders, constitutes no part of the contract of the sureties, and an undertaking on appeal from a justices' court accompanied by an affidavit which omits such recital, is sufficient to confer jurisdiction of the appeal upon the superior court, where the undertaking is sufficient in all other respects as required by the provisions of section 978, post, of such code.—Rauer's Law & Collection Co. v. Superior Court, 169 Cal. 296, 146 Pac. 866.

37. *Same*—*Time of filing*.—Where it appeared that a judgment was rendered on the seventh day of March in the justices' court, and on the fourteenth day of March an undertaking was filed in the justices' court staying execution, and also an undertaking on appeal, and that on the third day of April following a notice of appeal was filed and the amount required by law was paid for filing the papers on appeal, it was held that an order dismissing the appeal was proper.—Goodman v. Superior Court, 19 Cal. App. 457, 126 Pac. 185.

§ 976. APPEAL ON QUESTIONS OF FACT, OR LAW AND FACT. When a party appeals to the superior court on questions of fact, or on questions of both law and fact, no statement need be made, but the action must be tried anew in the superior court.

History: Original section enacted March 11, 1872, re-enactment of § 626 Practice Act as amended 1853 (Stats. 1853, p. 280) and 1854 (Stats. 1854, pp. 70, 73, 84); repeal approved March 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 14; enactment of present section approved March 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 16; repeal by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 175, held unconstitutional, see history, § 5 ante.

APPEAL ON QUESTIONS OF FACT—OR LAW AND FACT.

1. Amendment of answer on—Setting up counter-claim.
2. *Same*—*Same*—Less than three hundred dollars—Jurisdiction.
3. *Same*—*Same*—*Same*—Payment of costs.
4. Law—Appeal on question of.
5. *Same*—Motion to dismiss cause for failure to prove cause of action.
- 6, 7. Law and fact—Effect of appeal on questions of.
8. *Same*—Dismissal.
9. *Same*—Procedure.
10. Notice of appeal—Is not conclusive of nature.
11. Special appearance in superior court.
12. Trial de novo—In general.
13. *Same*—On appeal from judgment of justices' court on questions of both law and fact.

14. *Same*—Remanding cause to justices' court for trial de novo, is in excess of jurisdiction.

1. **Amendment of answer on—Setting up counter-claim.**—Upon appeal from the justices' court, the parties may amend their pleadings, and the defendant may set up a defense which was not presented at all in the justices' court.—Stephan v. Superior Court, 183 Cal. 673, 192 Pac. 1083, following Ketchum v. Superior Court, 65 Cal. 494, 4 Pac. 492; Baker v. Southern Cal. Ry. Co., 114 Cal. 501, 46 Pac. 604.

2. ***Same*—*Same*—Less than three hundred dollars—Jurisdiction.**—In those cases in which the counter-claim is less than three hundred dollars, and within the jurisdiction of the justices' court appealed from, the superior court has jurisdiction to try and determine the issues raised by such counter-claim, for the reason that the jurisdiction of the superior court to try the issues presented by the pleadings of the defendant in such a case must depend upon the state of the pleadings at the time of

the trial. At that time the counter-claim presented by the defendant was one within the jurisdiction of the justices' court, and one which the superior court had therefore the right to hear on appeal in a justices' court action.—*Stephan v. Superior Court*, 183 Cal. 673, 192 Pac. 1083.

3. Same—Same—Same — Payment of costs.—It is to be noted, however, that in case of such an amendment being asked for, it is within the discretion of the superior court to exact the payment of costs from the party seeking to amend, so as to afford the other party relief from costs which he might not have incurred, had a proper pleading been presented in the first instance. The matter of permitting amendments and the matter of costs are of course almost entirely within the discretion of the trial court.—*Stephan v. Superior Court*, 183 Cal. 673, 192 Pac. 1083.

4. Law—Appeal on question of.—On appeal to superior court on questions of law alone, proper procedure on reversal is to remand cause for trial in justices' court.—*Smith v. Superior Court*, 2 Cal. App. 529, 84 Pac. 54.

5. Same—Motion to dismiss cause for failure to prove cause of action being in effect motion for nonsuit.—Question presented was question of law, and hence appeal from order granting such motion was appeal from questions of law.—*Smith v. Superior Court*, 2 Cal. App. 529, 84 Pac. 54.

6. Law and fact—Effect of appeal on questions of.—Appeal on questions of both law and fact absolutely vacates judgment in justices' court, and judgment of superior court is executed just as though case had been originally brought therein, and not remitted to justices' court for any purpose.—*Bullard v. McArdle*, 98 Cal. 355, 35 Am. St. Rep. 176, 33 Pac. 193.

7. An appeal to the superior court on questions of law and fact operates to vacate and set aside the judgment rendered in the justices' court.—*Judd v. Superior Court*, 29 Cal. App. 671, 157 Pac. 566.

8. Same—Dismissal.—Superior court has jurisdiction to dismiss action on motion on appeal taken on questions of both law and fact.—*Holbrook v. Superior Court*, 106 Cal. 589, 593, 39 Pac. 936.

9. Same—Procedure.—On appeal taken on both questions of law and fact, where there has been no trial on issues of fact in justices' court, superior court must entertain and decide appeal as upon questions of law alone, and hence affirmance of judgment of justice in overruling demurrer to complaint was proper method of procedure.—*Fabretti v. Superior Court*, 77 Cal. 305, 307, 19 Pac. 481.

10. Notice of appeal—Is not conclusive of nature or character of appeal.—*Smith v. Superior Court*, 2 Cal. App. 529, 84 Pac. 54.

11. Special appearance in superior court.—Where defendant who had not been served with process appeared specially in superior court to move dismissal of appeal, superior court could not entertain appeal on matters of law and fact, since on such appeal there must be trial de novo, and jurisdiction of defendant had never been obtained.—*Southern Pacific R. Co. v. Superior Court*, 59 Cal. 471, 474.

As to special appearance, see, ante, § 975, note pars. 9 and 31.

12. Trial de novo—In general.—On appeal from justices' court on questions of both law and fact, superior court has jurisdiction to try action de novo.—*Ketchum v. Superior Court*, 65 Cal. 494, 4 Pac. 492.

13. Same—On appeal from judgment of justices' court on questions of both law and fact, superior court has jurisdiction to try case de novo, though there had been no trial in justices' court.—*Armantage v. Superior Court*, 1 Cal. App. 130, 81 Pac. 1033.

14. Same—Remanding cause to justices' court for trial de novo, is in excess of jurisdiction of superior court on appeal taken on questions of both law and fact.—*Acker v. Superior Court*, 68 Cal. 245, 246, 9 Pac. 109, 10 Pac. 416.

§ 977. TRANSMISSION OF PAPERS TO APPELLATE COURT. Upon receiving the notice of appeal, and on payment of the fees of the justice or judge, payable on appeal and not included in the judgment, and filing and undertaking as required in the next section, and after settlement or adoption of statement, if any, the justice or judge must, within five days, transmit to the clerk of the superior court, if the appeal be on questions of law alone, a certified copy of his docket, the statement as admitted or as settled, the notice of appeal, and the undertaking filed; or, if the appeal be on questions of fact, or both law and fact, a certified copy of his docket, the pleadings, all notices, motions, and all other papers filed in the cause, the notice of appeal, and the undertaking filed; and the justice or judge may be compelled by the superior court, by an order entered upon motion, to transmit such papers, and may be fined for neglect or refusal to transmit the same. A certified copy of such order may be

served on the justice or judge by the party or his attorney. In the superior court, either party may have the benefit of all legal objections made in the justices' or police court.

History: Original section enacted March 11, 1872, re-enactment of § 627 Practice Act as amended 1853 (Stats. 1853, p. 280), 1854 (Stats. 1854, pp. 70, 73, 84), and 1855 (Stats. 1855, p. 198); repeal approved March 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 14; enactment of present section approved March 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 16; amendment approved March 27, 1897, Stats. and Amdts. 1897, p. 210; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 175, held unconstitutional, see history, § 5 ante.

SUBMITTING PAPERS TO APPELLATE COURT, ETC.

- 1, 2. Payment of costs of action—One of conditions upon which appeal is allowed.
3. Same—Waiver.
4. Duty of justice is to send up notice of appeal.
5. Same—Dismissal of appeal.

1. Payment of costs of action—One of conditions upon which appeal is allowed.—McDermott v. Douglass, 5 Cal. 89.

2. Construed not to repeal act requiring that all fees of justice of peace, including those on trial and those on appeal, must be paid before justice shall be compelled to forward any papers on appeal, and where appellant has paid only his own fees, he can not compel justice to forward papers to clerk of superior court.—Webster v. Hanna,

102 Cal. 177, 178, 179, 180, 181, 183, 36 Pac. 421, distinguishing McDermott v. Douglass, 5 Cal. 89, and Bray v. Redman, 6 Cal. 287.

3. Same—Waiver.—Provision relating to payment of fees refers to making out of papers. Payment or tender of fees does not strictly constitute condition of appeal, but condition precedent of sending up papers, and this condition may be waived by justice, or fees paid at any time, so as to bring case up before county court within period limited by rules of that court.—People ex rel. Hamilton v. Harris, 9 Cal. 571, 572, 573.

4. Duty of justice is to send up notice of appeal received by him.—Sherman v. Rolberg, 9 Cal. 17, 18.

5. Same—Dismissal of appeal by county court instead of ordering justice to send up notice of appeal was error.—Sherman v. Rolberg, 9 Cal. 17, 18.

§ 978. UNDERTAKING ON APPEAL. An appeal from a justices' or police court is not effectual for any purpose, unless an undertaking be filed with two or more sureties in the sum of one hundred dollars for the payment of the costs on the appeal; or, if a stay of proceedings be claimed, in a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money; or twice the value of the property, including costs, when the judgment is for the recovery of specific personal property, and must be conditioned, when the action is for the recovery of money, that the appellant will pay the amount of the judgment appealed from, and all costs, if the appeal be withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against him in the action in the superior court. When the action is for the recovery of or to enforce or foreclose a lien on specific personal property, the undertaking must be conditioned that the appellant will pay the judgment and costs appealed from, and obey the order of the court made therein, if the appeal be withdrawn or dismissed, or any judgment and costs that may be recovered against him in said action in the superior court, and will obey any order made by the court therein. When the judgment appealed from directs the delivery of possession of real property, the execution of the same can not be stayed unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the appeal be dismissed or withdrawn, or the

judgment affirmed, or judgment be recovered as against him in the action in the superior court, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof; or that he will pay any judgment and costs that may be recovered against him in said action in the superior court, not exceeding a sum to be fixed by the justice of the court from which the appeal is taken, and which sum must be specified in the undertaking. A deposit of the amount of the judgment, including all costs appealed from or of the value of the property, including all costs in actions for the recovery of specific personal property, with the justice or judge, is equivalent to the filing of the undertaking, and in such cases, the justice or judge must transmit the money to the clerk of the superior court, to be by him paid out on the order of the court.

History: Original section enacted March 11, 1872, substantial re-enactment of § 628 Practice Act as amended 1853 (Stats. 1853, p. 280), 1854 (Stats. 1854, pp. 70, 73, 84), 1855 (Stats. 1855, p. 198), and 1860 (Stats. 1860, p. 305); repeal approved March 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 14; enactment of present section approved March 26, 1880 (C. C. P. pt.), p. 16; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 175, held unconstitutional, see history, Kerr's Cyc. C. C. § 4; amendment approved April 22, 1909, Stats. and Amdts. 1909, p. 1064.

Editorial Note: The word "undertaken" in the original bill was obviously meant for "undertaking." A portion only of the original section was amended and re-enacted in this section; the remainder of the section was stricken out and re-enacted as § 978a, which see.

UNDERTAKING ON APPEAL.

- 1-4. As to construction of section—In general.
5. Same—Failure of sureties to justify—Effect of.
6. Same—Filing of undertaking—Effect of.
7. Same—"Or" to be read "and."
- 8-12. Bond on appeal—Sufficiency of.
- 13-15. Same—Jurisdictional prerequisites.
16. Same—Same—Failure to file written waiver—Superior court without jurisdiction.
- 17, 18. Same—Justification of sureties.
19. Same—Same—Waiver of justification.
- 20, 21. Same—Waiver of by respondent.
22. Same—Same—By notice of motion to set for hearing.
23. Same—When filing of to be made.
- 24, 25. Deposit of money to pay costs on appeal.
26. Same—Amount of deposit.
27. Extension of time.
- 28-31. Filing of undertaking—Time of.
32. Justification—Failure of sureties to justify—Effect of.
33. Same—Failure of respondent to appear.
34. Jurisdictional prerequisite—Giving of notice of appeal is.
35. Same—Undertaking on appeal.
36. New surety—Signing of undertaking on appeal by, in place of one who refused to justify.
- 37, 38. New undertaking in place of undertaking for costs—Insufficient in form.
- 39, 40. Same—Must be on notice of justification.
41. Order requiring sureties to justify before superior judge.
42. Rejection must be prompt.
43. Service of exception essential.
44. Stay-bond—Liability of sureties on.
45. Waiver of justification of sureties.

See, also, ante, §§ 936, 963, and 974 and notes.

1. **As to construction of section—In general.**—It is difficult to read this section without being forced to the conclusion that within its provisions complete statutory warrant is to be found for the allowance of costs in the superior court on an appeal from the justices' court.—*Healey v. Superior Court*, 167 Cal. 22, 138 Pac. 687.

2. This section seems to exact the specification "if the appeal be withdrawn or dismissed" only when the undertaking is for a stay of execution.—*Cohen v. Connick*, 26 Cal. App. 491, 147 Pac. 479.

3. "Any costs," referred to in an undertaking on an appeal from a justices' court, embraces all costs that might be incurred by reason of the appeal.—*Cohen v. Connick*, 26 Cal. App. 491, 147 Pac. 479.

4. The provision that unless an undertaking is filed for the payment of costs on appeal the appeal shall be ineffectual for any purpose, is mandatory and the requirement peremptory.—*Johnson v. Superior Court*, 28 Cal. App. 618, 153 Pac. 404.

5. **Same—Failure of sureties to justify—Effect of.**—Provision that unless sureties justify within five days after exception has been taken to their sufficiency, appeal must be regarded as if no undertaking had been given, is to be construed not to have effect *ipso facto* to vacate appeal already completed, but as giving respondent right to move for its dismissal on ground that since it was taken it had become ineffectual.—*Moffat v. Greenwalt*, 90 Cal. 368, 372, 27 Pac. 296.

6. **Same—Filing of undertaking—Effect of.**—Provision that appeal is not effectual for any purpose, unless undertaking is filed, implies that when undertaking is filed appeal is effectual.—*Moffat v. Greenwalt*, 90 Cal. 368, 372, 27 Pac. 296.

7. **Same—"Or" to be read "and."**—"Or" in provision that appeal is not effectual for any purpose unless undertaking is filed for payment of costs on appeal, or if stay of proceedings be claimed, in sum equal to twice amount of judgment, is to be read "and." Where stay of proceedings was required, former undertaking is essential as well as latter.—*McConky v. Superior Court*, 56 Cal. 83.

8. **Bond on appeal—Sufficiency of.**—An undertaking on appeal from the justices' court, prepared on a regularly printed form designed for use as an undertaking for costs and also to stay execution, which contains no promise in that part thereof for costs on the part of the sureties to pay the costs of the appeal, and which is not filled out in that part for staying execution, is nevertheless sufficient to bind the sureties and give the superior court jurisdiction of the appeal, when consideration is given to the latter portion of the printed form providing "that appellant will pay any judgment and costs that may be recovered against him in the said action in the said superior court, not exceeding one hundred dollars, as fixed by the justice of said court."—*Cohen v. Connick*, 26 Cal. App. 491, 147 Pac. 479.

9. An undertaking on appeal is not invalidated by the inadvertent omission of the word "house" from the phrase "is a householder."—*Martha Washington Council No. 2, Daughters of Liberty v. Superior Court*, 29 Cal. App. 45, 154 Pac. 298.

10. An incorrect recital in the undertaking accompanying the notice of appeal does not invalidate the undertaking nor affect the jurisdiction of the appeal.—*Judd v. Superior Court*, 29 Cal. App. 671, 157 Pac. 566.

11. Under above section, an undertaking on appeal from the justices' court from a judgment for the payment of money in a sum equal to twice the amount of the judg-

ment and costs, and conditioned that if proceedings be stayed the appellant will pay the amount of the judgment appealed from, and all costs if the appeal be withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against him in the action in the superior court, is sufficient as a bond for the payment of costs on the appeal, regardless of its sufficiency to stay proceedings.—*Rich v. Superior Court*, 31 Cal. App. 689, 161 Pac. 291.

12. The recitals in an undertaking on appeal must identify the appeal which it is intended to support, and if they fail to do so, the error is incurable.—*Brownell v. Superior Court*, 32 Cal. App. 227, 162 Pac. 419.

13. **Same—Jurisdictional prerequisites.**—An undertaking on appeal from a justices' court is a jurisdictional prerequisite to a justices' court appeal.—*Cohen v. Connick*, 26 Cal. App. 491, 147 Pac. 479.

14. There is a vital difference between the case where a bond, merely defective in matter of form, has been filed and the instance where there is no undertaking at all, or where it is so defective as to be entirely invalid. In the first mentioned case another bond may be filed in the appellate court.—*Cohen v. Connick*, 26 Cal. App. 491, 147 Pac. 479.

15. The superior court has the right and the power to pass upon and decide a motion to dismiss an appeal taken thereto, and where the motion is based upon the ground that the undertaking required by above section for the indemnification of the costs accruing by reason of the appeal has not been filed, it is not only within the power, but it is the duty of the court to dismiss the attempted appeal.—*Rich v. Superior Court*, 31 Cal. App. 689, 161 Pac. 291.

16. **Same—Same—Failure to file written waiver—Superior court without jurisdiction.**—In case the written waiver is not filed as required in above paragraph, the superior court has no jurisdiction of the appeal and any action which the parties may thereafter take which may be treated as a waiver of these mandatory provisions of the statute can not confer upon the court jurisdiction to hear the appeal.—*Mathis v. Superior Court*.—Cal. App. —, 195 Pac. 711, applying doctrine in *Perkins v. Cooper*, 87 Cal. 241, 25 Pac. 411; *Niles v. Gonzalez*, 152 Cal. 90, 92 Pac. 74; *Crowley Launch & Tug Boat Co. v. Superior Court*, 10 Cal. App. 342, 101 Pac. 935.

17. **Same—Justification of sureties.**—No jurisdiction is acquired of a justices' court appeal where the sureties on the undertaking, or other sureties, fail to justify after notice and within the time specified in the statute, and the finding of a new undertaking within such time under the erroneous impression that the first undertaking was void because of the failure to declare in the affidavit accompanying it that the sureties were freeholders or householders does not render the appeal effectual.—*Mar-*

tha Washington Council No. 2, Daughters of Liberty v. Superior Court, 29 Cal. App. 45, 154 Pac. 298.

18. Where the sureties on the undertaking on such appeal are required to justify, the substitution for a surety, who fails to appear, of a new surety who signs the same bond and justifies, is an unobjectionable procedure, where the names of the original sureties were not inserted in the body of the instrument.—*Judd v. Superior Court*, 29 Cal. App. 671, 157 Pac. 566.

19. Same—Same—Waiver of justification.—The failure of the party excepting to the sufficiency of the sureties to appear at the time and place mentioned in the notice of justification is a waiver of such justification, and the affidavit of the sureties before the justice, as shown on the undertaking itself establishes a prima facie justification.—*Fletcher Collection Agency v. Superior Court*, 81 Cal. App. 193, 159 Pac. 1049.

20. Same—Waiver of by respondent.—On an appeal from the judgment of a justices' court, the undertaking for the payment of costs on appeal required by the above section, is not based upon any grounds of public policy, but is clearly for the sole benefit of the respondent in the action and under the provisions of section 3513 of the Civil Code, the respondent may waive the giving of such undertaking.—*Robert v. Superior Court*, 38 Cal. App. 199, 75 Pac. 800, approving the doctrine in *Santom v. Ballard*, 133 Mass. 464; *Brown v. Chicago M. & St. P. R. Co.*, 10 S. D. 633, 66 Am. St. Rep. 730, 75 N. W. 198, and distinguishing as not applicable because not involving the question of waiver, *Thomas v. Hawkins*, 12 Cal. App. 327, 107 Pac. 578; *Stimpson v. Superior Court*, 12 Cal. App. 536, 107 Pac. 1013.

As to waiver of undertaking by respondent, see Civil Code § 3513, note par. 5, also Civil Code § 3517, note par. 1.

21. On an appeal from a justices' court the respondent may waive filing of undertaking, for payment of costs by appellant, under provisions of the above section.—*Mathis v. Superior Court*, — Cal. App. —, 195 Pac. 711.

22. Same—Same—By notice of motion to set for hearing.—While it is true that a respondent may waive his right to have the undertaking filed required by the above section, under the provisions of section 3513 of the Civil Code yet the mere fact that the respondent has served notice of motion to set the cause for trial in the superior court, even though it could be treated as a waiver of failure to serve notice of appeal, it can not excuse the failure to file a valid undertaking within the time required.—*Mathis v. Superior Court*, — Cal. App. —, 195 Pac. 711.

23. Same—When filing of to be made.—To be effective such a waiver must, however, be made within the time within which such an undertaking might have been filed.—*Mathis*

v. Superior Court, — Cal. App. —, 195 Pac. 711.

24. Deposit of money to pay costs on appeal, as authorized by section 926, ante, is sufficient to give superior court jurisdiction, and such money need not be transmitted to superior court as provided by this section.—*Laws v. Troutt*, 147 Cal. 172, 81 Pac. 401.

25. Deposit of money with justice of peace in lieu of undertaking on appeal gave superior court jurisdiction of cause, and it may proceed to trial of it.—*Laws v. Troutt*, 147 Cal. 172, 81 Pac. 401.

26. Same—Amount of deposit is regulated by the provision in above section; deposit of less than one hundred dollars is ineffectual, even though that amount be more than enough to cover the amount of the judgment and costs.—*Swem v. Monroe*, 148 Cal. 741, 83 Pac. 1074.

27. Extension of time.—Superior court has no power to extend time within which sureties on undertaking on appeal from justices' court may justify.—*McCracken v. Superior Court*, 86 Cal. 74, 76, 24 Pac. 845.

28. Filing of undertaking—Time of.—Construed not to require undertaking on appeal to be filed before or at time of service and filing of notice of appeal.—*Coker v. Superior Court*, 58 Cal. 177, 178.

29. Filing of undertaking four days after filing of notice of appeal is immaterial, provided that such undertaking is filed within thirty days within which appeal must be taken—order of filing notice and undertaking being immaterial.—*Hall v. Superior Court*, 68 Cal. 24, 25, 8 Pac. 509.

30. Undertaking on appeal need not be filed simultaneously with notice of appeal, provided it is done within thirty days after rendition of original judgment.—*Hall v. Superior Court*, 71 Cal. 550, 551, 12 Pac. 672.

31. Where undertaking on appeal was not filed within thirty days after rendition of judgment in justices' court, appeal was not perfected, and fact that it was filed thereafter would not help appeal.—*McKeen v. Naughton*, 88 Cal. 462, 465, 466, 26 Pac. 354.

32. Justification—Failure of sureties to justify—Effect of.—Failure of sureties on undertaking on appeal from justices' court to justify, renders appeal ineffectual.—*McCracken v. Superior Court*, 86 Cal. 74, 76, 24 Pac. 845.

As to justification, see, ante, § 948 and note.

33. Same—Failure of respondent to appear at time set for justification of sureties to whom he had excepted, waives such justification.—*Escondido v. Superior Court*, 106 Cal. 43, 48, 39 Pac. 211.

34. Jurisdictional prerequisite—Giving of notice of appeal is jurisdictional prerequisite to appeal.—*Coker v. Superior Court*, 58 Cal. 177, 178.

35. Same—Undertaking on appeal from justices' court is jurisdictional prerequisite to appeal.—*McKeen v. Naughton*, 88 Cal. 462, 465, 466, 26 Pac. 354.

36. New surety—Signing of undertaking on appeal by, in place of one who refused to justify, does not render undertaking sufficient where his name is not inserted in body of undertaking.—*Bennett v. Superior Court*, 113 Cal. 440, 442, 45 Pac. 808.

37. New undertaking in place of undertaking for costs—Insufficient in form, may be authorized by superior court.—*Gray v. Superior Court*, 61 Cal. 337, 338.

38. New undertaking permitted by superior court on appeal from justice of peace is not authorized where original undertaking is fatally defective and such new undertaking will not give appellate court jurisdiction.—*Bennett v. Superior Court*, 113 Cal. 440, 442, 45 Pac. 808.

39. Same—Must be on notice of justification.—New undertaking filed without notice to adverse party after exception had been taken to sureties on former undertaking is of no avail.—*Wood v. Superior Court*, 67 Cal. 115, 7 Pac. 200.

40. New undertaking filed without notice of justification of new surety in place of undertaking, sureties to which had been excepted to, does not perfect appeal or give superior court jurisdiction.—*Herting v. Superior Court* (Cal. March 31, 1886), 10 Pac. 514, following doctrine in *Wood v. Superior Court*, 67 Cal. 115, 7 Pac. 200.

41. Order requiring sureties to justify before superior judge, where it appeared that court commissioner before whom they had justified had not taken oath of office,

was within its jurisdiction.—*Gray v. Superior Court*, 61 Cal. 337, 338.

42. Rejection must be prompt.—Failure to reject appeal-bond promptly rendered disapproval of it thereafterwards ineffectual.—*People ex rel. Hamilton v. Harris*, 9 Cal. 571, 572.

43. Service of exception essential.—Filing exception to sureties with justice of peace after appeal taken is not sufficient to require surety to justify, since such exception must be served on appellant.—*Reynolds v. County Court*, 47 Cal. 604, 606.

44. Stay-bond—Liability of sureties on.—Undertaking on appeal to superior court to stay execution is independent contract on part of sureties and on dismissal of appeal they become liable to pay judgment, and to discharge themselves from such liability they must show that judgment has been satisfied, either by return of property as provided or by payment of amount of judgment and costs, and it is not necessary to allege in complaint on such undertaking issuance and return of execution unsatisfied, or that notice of dismissal of appeal was given, or that demand was made prior to commencement of action, or that delivery of property could not be had, or that any order was made by superior court which appellant in that case failed or refused to obey.—*Pleper v. Peers*, 98 Cal. 42, 44, 32 Pac. 700. Reversing: *Pleper v. Peers*, 3 Cal. Unrep. 646, 31 Pac. 562.

45. Waiver of justification of sureties may be made by respondent, and hence where such waiver exists motion to dismiss appeal was properly denied.—*Blair v. Hamilton*, 32 Cal. 49, 50.

§ 978a. TIME OF FILING APPEAL. EXCEPTIONS TO SURETIES. JUSTIFICATION. The undertaking on appeal must be filed within five days after the filing of the notice of appeal and notice of the filing of the undertaking must be given to the respondent. The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given.

History: Enactment approved April 22, 1909, Stats. and Amdts. 1909, p. 1065. See history, § 978 ante.

TIME OF FILING APPEAL—ACCEPTION TO SURETIES—JUSTIFICATION.

1. Appeal from justices' court judgment—Undertaking not excepted to—Dismissal by superior court error.
- 2-4. Construction of section—In general.
5. Exceptions to sureties on undertaking—Continuance of justification—Jurisdiction.
6. Same—Service and filing of notice.

7. Filing of undertaking jurisdictional—Subsequent waiver ineffective.
8. Filing papers—When accomplished.
9. Justification of sureties—As to waiver of.
10. Same—Same—Review of action of superior court—Mandamus.
11. Same—Failure of sureties to justify—Dismissal.
12. Notice of exception to sureties need not be served.

13-16. Second bond filed—Justification of sureties.

17. Same—When second bond invalid.

18. Payment of fees—Time when to be made.

See, ante, §§ 936, 963 and 974 and notes.

1. Appeal from justices' court judgment—Undertaking not excepted to—Dismissal by superior court error.—Where a justice of the peace, in exercise of his jurisdiction, approves the sufficiency of sureties upon an undertaking given on an appeal from his court, the objection that he did so upon improper or insufficient evidence raises a question of error, and not of jurisdiction; his order approving the bond is final until set aside by some appropriate procedure, and the superior court is without power to dismiss the appeal on motion based solely on the ground that the evidence heard by the justice was insufficient.—*San Francisco-Oakland Terminal Railways v. Superior Court*, — Cal. App. —, 192 Pac. 116.

2. Construction of section—In general.—That part of this section relating to the justification of sureties is but a re-enactment of the same matter which theretofore was a part of section 978, ante, and hence the early cases construing that language are unaffected by the amendment.—*Martha Washington Council No. 2, Daughters of Liberty v. Superior Court*, 29 Cal. App. 45, 154 Pac. 298.

3. It is the duty of the appellant, after the exception to the sufficiency of the sureties was duly taken, to cause those sureties—or others in their place—to justify after notice and within the time specified; and a failure to do so makes the appeal unavailing.—*Martha Washington Council No. 2, Daughters of Liberty v. Superior Court*, 29 Cal. App. 45, 154 Pac. 298.

4. The time for filing the undertaking is now fixed as running from the date of the filing of the notice of appeal and not from the date of service of such notice. The filing of a notice of appeal and an undertaking on the same day is a compliance with the statute notwithstanding that the notice of appeal was served seven days before it was filed.—*Judd v. Superior Court*, 29 Cal. App. 671, 157 Pac. 567.

5. Exceptions to sureties on undertaking—Continuance of justification—Jurisdiction.—In the case of an appeal from a justices' court, on exception to the sureties on the appeal on the undertaking given on appeal, the justices' court is without jurisdiction to continue the matter of the justification of sureties on the undertaking, where the sureties appear within the statutory time and are found to be insufficient, and the superior court acquires no jurisdiction of the appeal by the acceptance by the justice, on the day to which the matter was continued, of a sum of money in lieu of the undertaking.—*O'Donnell v. Superior Court*, 34 Cal. App. 208, 167 Pac. 187.

6. Same—Service and filing of notice.—Notice of exception to sureties on an undertaking on an appeal from a justices' court must be served upon the appellant as well as filed with the justice and the exception is not complete until both acts are performed.—*Consolidated Lumber Co. v. Superior Court*, 33 Cal. App. 126, 164 Pac. 612, following doctrine in *Reynolds v. County Court*, 47 Cal. 604, explaining and distinguishing *Budd v. Superior Court*, 14 Cal. App. 256, 111 Pac. 628; *McCarty v. Superior Court*, 30 Cal. App. 1, 159 Pac. 736.

7. Filing of undertaking jurisdictional—Subsequent waiver ineffective.—Under the provisions of the above section a party taking an appeal from the judgment of the justices' court must within five days after filing the notice of appeal, and if this is not done the superior court has no jurisdiction of the appeal, and any action which the parties may thereafter take that may be treated as a waiver of the mandatory provision of the above section can not confer upon the court jurisdiction to hear the appeal.—*Mathis v. Superior Court*, — Cal. App. —, 195 Pac. 711, following the doctrine in *Perkins v. Cooper*, 87 Cal. 241, 25 Pac. 411; *Niles v. Gonzalez*, 152 Cal. 90, 92 Pac. 74; *Crowley Launch & Tugboat Co. v. Superior Court*, 10 Cal. App. 342, 101 Pac. 935.

8. Filing papers—When accomplished.—A paper is deemed to be filed when presented at the proper office with directions to file the same, and the remissness of the filing officer in the performance of his duty can not endanger the rights of the filing party.—*Dillon v. Superior Court*, 24 Cal. App. 760, 142 Pac. 503.

9. Justification of sureties—As to waiver of.—On an appeal from a justices' court where an undertaking on appeal is filed which is on its face in due form and duly executed, and notice thereof is served, and plaintiff demands that the sureties justify, but before day of justifications stipulate that defendant might justify at a time unauthorized by the above section, the superior court will treat the stipulation as a waiver of justification and entertain the appeal on the assumption that a sufficient undertaking has been filed.—*Fest v. Superior Court*, 37 Cal. App. 95, 173 Pac. 610.

10. Same—Same—Review of action of superior court—Mandamus.—The remedy of mandamus is available as one of the means of determining whether the superior court was justified in dismissing an appeal from a justices' court for failure of the sureties on the undertaking to justify, as provided in the above section.—*Fest v. Superior Court*, 37 Cal. App. 95, 173 Pac. 610.

11. Same—Failure of sureties to justify—Dismissal.—The jurisdiction of the superior court after an appeal has been perfected is not divested by failure of sureties to justify, but such failure is merely ground for dismissing the appeal.—*Farrisee v. Superior Court*, — Cal. App. —, 181 Pac. 73.

12. Notice of exception to sureties need not be served.—A notice of exception to the sufficiency of sureties on an undertaking on appeal from a judgment of a justices' court must be filed with the justice, and it is not essential to serve it upon the party or his attorney.—*McCarty v. Superior Court*, 30 Cal. App. 1, 159 Pac. 737.

13. Second bond filed—Justification of sureties.—Upon a justices' court appeal, where other sureties justify in place of the original sureties and such justification takes place within five days after the filing of exceptions to the sufficiency of the sureties, named in the undertaking, the substitution of new sureties and their justification is within due time, even though it be more than five days after the filing of the notice of appeal.—*Clay v. Superior Court*, 32 Cal. App. 189, 162 Pac. 416.

14. The fact that such undertaking was re-written and signed a second time by one of the sureties on the original undertaking, together with the new surety does not make the document a new and different undertaking within the meaning of above section, or deprive the superior court of jurisdiction of the appeal.—*Clay v. Superior Court*, 32 Cal. App. 189, 162 Pac. 416.

15. The naming of the surety in the body of the second undertaking as "J. J. Hutchinson," and the signing thereof in the name of "John J. Hutchinson," does not constitute

a defect impairing the sufficiency of the undertaking.—*Clay v. Superior Court*, 32 Cal. App. 189, 162 Pac. 416.

16. Further justification of sureties is waived where the party excepting to their sufficiency fails to appear at the time and place designated in the notice of justification after service of such notice upon him.—*Clay v. Superior Court*, 32 Cal. App. 189, 162 Pac. 416.

17. Same—When second bond invalid.—Where appellant files a second undertaking within the time specified in the statute for the purpose of supplying the inadvertent omission of a word which he supposed rendered the bond void no jurisdiction is acquired of the appeal. This procedure may have been correct if the first bond had been absolutely void.—*Martha Washington Council No. 2, Daughters of Liberty v. Superior Court*, 29 Cal. App. 45, 154 Pac. 298.

18. Payment of fees—Time when to be made.—In the case of an appeal from judgment of a justices' court the fees required to be paid under the above section need not be paid at the time when the notice of appeal is given, but at any time prior to the time when the papers are required to be transmitted to the superior court.—*Simmons v. Superior Court*, 37 Cal. App. 676, 174 Pac. 670, following the doctrine in *Simmons v. Superior Court*, 30 Cal. App. 252, 157 Pac. 817.

§ 970. STAY OF PROCEEDINGS ON FILING UNDERTAKING. If an execution be issued on the filing of the undertaking staying proceedings, the justice or judge must, by order, direct the officer to stay all proceedings on the same. Such officer must, upon payment of his fees for services rendered on the execution, thereupon relinquish all property levied upon and deliver the same to the judgment debtor, together with all moneys collected from sales or otherwise. If his fees be not paid, the officer may retain so much of the property or proceeds thereof as may be necessary to pay the same.

History: Original section enacted March 11, 1872, re-enactment of § 629 Practice Act; repeal approved March 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 14; enactment of present section approved March 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 17.

STAY OF PROCEEDINGS.

1, 2. Bond to stay execution.

3. Clerical error in judgment—Effect of.

4. Dismissal—Liability of sureties.

1. Bond to stay execution.—Where in form the undertaking constitutes a bond on appeal as well as an attempted undertaking to stay execution, if the undertaking is sufficient as an appeal bond, jurisdiction of the cause is acquired, regardless of the sufficiency of the bond to stay execution.—*Judd v. Superior Court*, 29 Cal. App. 671, 157 Pac. 566.

2. An undertaking to stay execution is a separate and different agreement from an undertaking for costs, although both are

contained in the same document.—*Clay v. Superior Court*, 32 Cal. App. 189, 162 Pac. 416.

3. Clerical error in judgment—Effect of.—Liability of sureties on undertaking to stay proceedings pending appeal from justices' court is not affected by clerical misprision of justices' clerk in entering judgment, where such undertaking correctly described judgment.—*Adler v. Staude*, 136 Cal. 182, 184, 68 Pac. 599.

4. Dismissal—Liability of sureties.—Sureties on undertaking on appeal from justices' court are liable on their undertaking on dismissal of appeal, though they failed to justify.—*Moffat v. Greenwalt*, 90 Cal. 368, 372, 27 Pac. 296.

§ 980. POWERS OF SUPERIOR COURT ON APPEAL. Upon an appeal heard upon a statement of the case, the superior court may review all orders affecting the judgment appealed from, and may set aside, or confirm, or modify any or all of the proceedings subsequent to and dependent upon such judgment, and may, if necessary or proper, order a new trial.

When the action is tried anew, on appeal, the trial must be conducted in all respects as other trials in the superior court. The provisions of this code as to changing the place of trial, and all the provisions as to trials in the superior court, are applicable to trials on appeal in the superior court.

For a failure to prosecute an appeal, or unnecessary delay in bringing it to a hearing, the superior court, after notice, may order the appeal to be dismissed, with costs; and if it appear to such court that the appeal was made solely for delay, it may add to the costs such damages as may be just, not exceeding twenty-five per cent of the judgment appealed from.

Judgments rendered in the superior court on appeal shall have the same force and effect and may be enforced in the same manner as judgments in actions commenced in the superior court.

History: Original section enacted March 11, 1872, re-enactment of § 367 Practice Act as amended 1854 (Stats. 1854, pp. 66, 84); repeal approved March 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 14; enactment of present section approved March 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 17.

POWERS OF SUPERIOR COURT ON APPEAL.

1. Change of venue—Constitutional law.
2. Execution—Order of justice of peace refusing to set aside sale.
3. Fees—Dismissal of appeal for failure to pay.
- 4-8. Jurisdiction—Appeal on questions of law.
9. Municipal court—Had jurisdiction to dismiss appeal.
10. New trial of trial on appeal.
11. New trial on appeal.
12. Same—Practice.
- 13, 14. Same—Where had.
15. Record—Failure to produce.
16. Rehearing—Petition for.
17. Remittitur—Certified copy of judgment of superior court.
18. Reversal—Appeal on question of law.
- 19, 20. Want of prosecution—Dismissal for.

As to powers in appealed cases generally, see, ante, § 53 and note.

1. Change of venue—Constitutional law.—Order of superior court refusing to change place of trial of action appealed from justices' court was proper where defendants had appeared in justices' court and thereby waived objection to jurisdiction of such court, this section being in conflict with section 9 of Art. VI state constitution.—*Luco v. Superior Court*, 71 Cal. 555, 557, 12 Pac. 677. See *Gross v. Superior Court*, 71 Cal. 382, 12 Pac. 264.

2. Execution—Order of justice of peace refusing to set aside sale of property under execution may be reviewed by superior court on appeal from judgment.—*Peterson v. Weissbein*, 65 Cal. 42, 45, 2 Pac. 730.

3. Fees—Dismissal of appeal for failure to pay fees and file transcript within ten days after perfection of appeal under rule of superior court, was proper.—*McKay v. Superior Court*, 86 Cal. 431, 432, 25 Pac. 10.

4. Jurisdiction—Appeal on questions of law.—Provision that on appeal on questions of law alone, superior court may review all orders affecting judgment appealed from, and may set aside or confirm or modify any and all other proceedings subsequent to, and dependent on, such judgment, and may, if necessary or proper, order new trial, confers upon superior court plenary appellate jurisdiction, and there are no other provisions which limit it in exercise of that jurisdiction.—*Maxson v. Superior Court*, 124 Cal. 468, 473, 57 Pac. 379.

5. On appeal from order setting aside service of summons in justices' court, superior court could not order new trial because action had not been tried at all, and hence court had jurisdiction only to affirm or reverse justices' judgment.—*Southern Pac. R. Co. v. Superior Court*, 59 Cal. 471, 475.

6. Superior court on appeal from justices' court on questions of law alone has jurisdiction to review rulings of justices' court and to remand cause, with directions to lower court to proceed in accordance with decision of appellate court.—*Maxson v. Superior Court*, 124 Cal. 468, 474, 57 Pac. 379.

7. Affirmance of judgment which had been vacated by subsequent judgment of justice at same time with reversal of judgment vacating original judgment is unauthorized, superior court being limited to orders affecting judgment appealed from and hence its power was limited to reversal of judgment appealed from and granting of new trial.—*Sherer v. Superior Court*, 94 Cal. 354, 356, 29 Pac. 716.

8. On appeal from judgment, after refusal to certify pleadings and cause to county court, because possession of real estate was involved, county court may review all orders affecting judgment appealed from, and hence may review order refusing to transfer cause, and may, in proper case, direct justice to enter order transferring cause.—*Clark v. Minnis*, 50 Cal. 509, 510.

9. Municipal court—Had jurisdiction to dismiss appeal from justices' court.—*Alexander v. Municipal Court*, 2 Cal. Unrep. 390, 4 Pac. 961.

10. New trial of trial on appeal.—New trial in case of nonsuit on trial of appeal to superior court from justices' court is within jurisdiction of superior court to grant.—*Massman v. Superior Court*, 71 Cal. 582, 12 Pac. 685.

11. New trial on appeal.—New trial of cause in superior court on appeal can not be had unless there has been trial of issues of fact in justices' court.—*Maxson v. Superior Court*, 124 Cal. 468, 471, 57 Pac. 379. See *People v. County Court*, 10 Cal. 19; *Funkenstein v. Elgutter*, 11 Cal. 328; *Southern Pac. R. Co. v. Superior Court*, 59 Cal. 471; *Rickey v. Superior Court*, 59 Cal. 661; *Myrick v. Superior Court*, 68 Cal. 98, 8 Pac. 648.

As to trial de novo, see, ante, § 976, note par. 12.

12. Same—Practice.—All provisions of this code relative to trial of cases which have been commenced within original jurisdiction of superior court are made applicable to trial de novo of cases within its appellate jurisdiction, and hence allowance of amendments to pleadings is matter within its discretion.—*Ketchum v. Superior Court*, 65 Cal. 494, 4 Pac. 492.

13. Same—Where had.—New trial on appeal on question of law alone was properly ordered to take place in superior court.—*Curtis v. Superior Court*, 63 Cal. 435.

14. New trial, when awarded on questions of law alone, should be had in appellate court instead of on remand to justices' court.—*People ex rel. Hitchcock v. Freelon*, 8 Cal. 517, 518.

15. Record—Failure to produce in appellate court due and certified copy of docket of justice of peace is failure to prosecute within meaning of this section and is ground for dismissal of appeal.—*People v. Elkins*, 40 Cal. 642, 647.

16. Rehearing—Petition for after judgment on appeal from justice of peace is unknown to practice of superior court.—*Fabretti v. Superior Court*, 77 Cal. 305, 307, 19 Pac. 481.

17. Remittitur—Certified copy of judgment of superior court is sufficient for transmission of judgment to justice court.—*Maxson v. Superior Court*, 124 Cal. 468, 475, 57 Pac. 379.

18. Reversal—Appeal on question of law.—On appeal to superior court on question of law alone, where there has been no trial of issues of fact, but ruling of justices' court upon demurrer to complaint, is held erroneous, superior court, on reversing cause, can not retry case. Such reversal does not have effect of dismissing action, and superior court may remand cause, with instructions to justice court to overrule demurrer, with leave to plaintiff to amend if so advised.—*Maxson v. Superior Court*, 124 Cal. 468, 471, 57 Pac. 379.

19. Want of prosecution—Dismissal for.—Superior court has power to dismiss appeal for failure to prosecute it or unnecessary delay in bringing it to hearing, and hence its decision dismissing appeal for want of prosecution is within its jurisdiction and will not be reviewed on certiorari.—*Alexander v. Municipal Court*, 66 Cal. 387, 388, 5 Pac. 675.

20. Failure to prosecute appeal or unnecessary delay in bringing it to hearing arises where appellant has failed to do any acts required by section 977, ante, in perfecting his appeal or in causing papers in case to be transmitted and filed in appellate court, and dismissal of appeal because appellant failed to appear at the trial after the cause had been placed on calendar by stipulation of parties is unauthorized.—*Alexander v. Municipal Court*, 2 Cal. Unrep. 390, 4 Pac. 961.

§ 981. NO APPEAL EFFECTIVE UNLESS FEES FOR FILING ARE PAID. No appeal taken from a judgment rendered in a police or justice court in civil matters shall be effectual for any purpose whatever unless the appellant shall, at the time of filing the notice of appeal, pay in addition to the fee payable to the justice of the peace on appeal, the fees provided by law to be paid to the county clerk for filing the appeal and for placing the action on the calendar in the superior court. Upon transmitting the papers on appeal, the justice or judge shall transmit to the county clerk the sum thus deposited for filing the appeal in the superior court and for placing the action on the calendar. C. P.—145

der. No notice of appeal shall be filed unless the fees herein provided for are paid in accordance with the provisions of this section.

History: Enactment approved April 27, 1915, Stats. and Amdts. 1915, p. 236. In effect August 8, 1915.

FILING-FEES NECESSARY TO PERFECT APPEAL.

1. Construction of section—As to meaning.
2. Same—As to purpose.
- 3, 4. Same—Payment of fee jurisdictional.
5. Constitutionality of section.
6. Fees for filing—Deposit in former ineffectual appeal.
7. Prohibition to restrain trial for want of payment of filing-fees.

As to time when filing-fees are to be paid in an appeal from a justices' court to the superior court, see, ante, § 978a, note par. 18.

1. **Construction of section—As to meaning.**—The language is so plain and unambiguous that its meaning can not be mistaken or misapprehended. It is mandatory, it being inconceivable that language could be more mandatory or peremptory.—*Johnson v. Superior Court*, 28 Cal. App. 618, 153 Pac. 404.

2. **Same—As to purpose.**—The purpose of the enactment of this section was to provide for the payment of the clerk's fees at the time of transmitting to the superior court the papers on appeal. Where the fees, though not paid to the justice at the time of presenting for filing the notice of appeal, are nevertheless paid within the thirty days allowed for taking the appeal so as to enable him to transmit the fees, together with the papers on appeal, there is a sufficient compliance with the statute. It is not intended to hold that the justice is required to accept for filing any notice of appeal not accompanied with payment of the fees.—*Simmons v. Superior Court*, 30 Cal. App. 252, 157 Pac. 817.

3. **Same—Payment of fee jurisdictional.**—The payment of the fees required by law to be paid at the time the notice of appeal is filed is a jurisdictional prerequisite; in other words no jurisdiction can be conferred on the superior court in the absence of the payment of such fees at the time designated.—*Johnson v. Superior Court*, 28 Cal. App. 618, 153 Pac. 404.

4. In a case where an appeal was attempted the day after this section went into effect, the plea that neither the defendant nor his attorney knew of the existence of the section is no valid excuse for not observing its requirements.—*Johnson v. Superior Court*, 28 Cal. App. 618, 153 Pac. 404.

5. **Constitutionality of section.**—It is within the legitimate power of the legislature to prescribe the terms upon which appeals may be taken, for the right of appeal is purely statutory. When the language of the statute is perfectly plain and unequivocal the courts will require a substantially strict compliance with the mode prescribed for exercising the right.—*Johnson v. Superior Court*, 28 Cal. App. 618, 153 Pac. 404.

6. **Fees for filing—Deposit in former ineffectual appeal.**—In a case in which a party attempts to appeal from the judgment of a justices' court, and on such attempted appeal deposits with the court the fees required by statute, but the appeal fails for the reason that it is prematurely taken, or for any other technical reason, the money deposited as fees required under the statute is presumed to remain in the hands of the justice and on a second, and effective attempted appeal, the fees deposited on the first and ineffectual appeal may be applied upon the second and effective appeal, the party not being required to redeposit the fees required by statute.—*Shriver v. Superior Court*, — Cal. App. —, 192 Pac. 124.

7. **Prohibition to restrain trial for want of payment of filing-fees.**—Prohibition will not lie to restrain the superior court from proceeding with the trial of a case on appeal from a justices' court on the ground that the appellant did not, at the time of filing the notice of appeal, pay to the justice of the peace the fees provided by law to be paid to the county clerk for filing the appeal and placing the action on the calendar of the superior court, where he did pay the same a few days thereafter, and within the time specified by law for perfecting the appeal.—*Simmons v. Superior Court*, 30 Cal. App. 252, 157 Pac. 817.

§ 982. PAPERS RETURNED ON DISMISSAL OF APPEAL. Upon dismissal of the appeal the clerk of the superior court shall return all the papers to the court from which the appeal was taken, and the justice of said court shall have jurisdiction the same as if no appeal had been taken.

History: Enactment approved May 3, 1919, Stats. and Amdts. 1919, p. 179. In effect July 22, 1919.

CHAPTERS IV and V.

[These chapters of this title and part, including original §§ 969 to 980, both inclusive, regulating appeals from probate courts and from county courts, were repealed by act adopted April 15, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 64.]

TITLE XIV.

OF MISCELLANEOUS PROVISIONS.

- Chapter I. PROCEEDINGS AGAINST JOINT DEBTORS, §§ 989-994.
- II. OFFER OF THE DEFENDANT TO COMPROMISE, § 997.
- III. INSPECTION OF WRITINGS, § 1000.
- IV. MOTIONS AND ORDERS, §§ 1003-1007.
- V. NOTICES, AND FILING AND SERVICE OF PAPERS, §§ 1010-1019.
- VI. OF COSTS, §§ 1021-1039.
- VII. GENERAL PROVISIONS, §§ 1045-1059.

CHAPTER I.

PROCEEDINGS AGAINST JOINT DEBTORS.

- § 989. Parties not summoned in action on joint contract may be summoned after judgment.
- § 990. Summons in that case, what to contain, and how served.
- § 991. Affidavit to accompany summons.
- § 992. Answer, when filed and what it may contain.
- § 993. What constitute the pleadings in the case.
- § 994. Issues, how tried. Verdict, what to be.

§ 989. PARTIES NOT SUMMONED IN ACTION ON JOINT CONTRACT MAY BE SUMMONED AFTER JUDGMENT. When a judgment is recovered against one or more of several persons, jointly indebted upon an obligation, by proceeding as provided in section four hundred and fourteen, those who were not originally served with the summons, and did not appear to the action, may be summoned to show cause why they should not be bound by the judgment, in the same manner as though they had been originally served with the summons.

History: Enacted March 11, 1872, re-enactment of § 368 Practice Act.

PARTIES NOT SUMMONED — SUMMONING AFTER JUDGMENT.

1. Amendments in original action — Not allowed—Demurrer.
2. Same—Nature of proceeding.
3. Same—Voluntary appearance, effect of.
4. Exclusive remedy.
5. Judgment—Amount and form of.
6. Nature of proceedings and defense.
7. Object of statute.
8. Partnership — Dormant partner not served—Service after judgment.
- 9-11. Parties who may be bound.
12. Similar judgment of sister state—Action on.

13. Statutory proceeding — Amendments — Defenses.

14. Summoning party after judgment.

As to cognate provisions of this code, see, ante, §§ 383, 414, 579 and notes.

As to complaint, see, ante, § 426 and note.

As to effect on judgment against partnership or joint debtors of service on one, see note 44 Am. Dec. 570.

As to form of civil actions, see, ante, §§ 307 et seq. and notes.

As to judgment against one party leaving action to proceed as to others, see, ante, § 579 and note.

As to plaintiff suing in one action different parties to commercial paper or insurance policies, see, ante, § 383 and note.

As to proceedings where there are several defendants, and part only are served, see, ante, § 414 and note.

As to release of one joint-debtor not discharging others, see Kerr's Cyc. Civ. Code, 2d ed., § 1543 and notes.

As to suing associates by name of association, see, ante, § 388 and note.

As to summons served on one defendant only where there are several, and plaintiff's right to proceed against him alone, see, ante, § 414 and note.

1. **Amendments in original action—Not allowed—Demurrer.**—Demurrer to the original complaint by incoming defendant is not provided for by statute, and defendant is by express terms denied right to plead statute of limitations. This is perfectly proper if complaint is to remain intact for all purposes, but no good reason could be suggested for it if it might be amended, because as amendment might change cause of action from suit upon written instrument to one on parol contract, opportunity would then for first time be open, either to defendant or his co-obligors, to avail themselves of benefit of statute.—Cooper v. Burch, 140 Cal. 548, 552, 74 Pac. 37.

2. **Same—Nature of proceeding** is action on judgment where pleadings in former action can not be amended, nor can judgment therein be amended.—Waterman v. Lipman, 67 Cal. 26, 27, 6 Pac. 875.

3. **Same—Voluntary appearance, effect of.**—Only jurisdiction court can acquire over defendant and only purpose for which he can be brought in by summons after judgment, or voluntarily appear, is to show cause why he should not be bound to same extent as his co-obligors by judgment already entered against them. Mere fact that defendant appeared voluntarily in action does not give court jurisdiction to open up original case upon which judgment was rendered; to set entire matter at large and permit amendment to complaint which had become fixed by judgment, and upon which judgment was based.—Cooper v. Burch, 140 Cal. 548, 551, 74 Pac. 37.

See par. 11, this note.

4. **Exclusive remedy.**—Proceedings under this chapter furnish exclusive mode by which defendant who was not served with summons may be bound by judgment. They necessarily imply that he is not already bound, and he is not proper party to action on judgment. Were it not for statute, no action could be maintained against him on original contract, for reason that it would be merged in first judgment, and merger is restrained only for purpose and to extent of enabling proceedings to be had as prescribed in statute. Those provisions would be useless if action could be maintained on judgment against defendant not served in former action.—Tay v. Hawley, 39 Cal. 93, 98.

5. **Judgment—Amount and form of.**—Separate judgment against defendant is erro-

neous. It, with previous judgment, makes two judgments in same action against persons jointly liable. Under section 994, post, the only judgment which could be rendered against incoming defendants is for such amount as remains unsatisfied on original judgment.—Cooper v. Burch, 140 Cal. 548, 553, 74 Pac. 37.

6. **Nature of proceedings and defense.**—Proceedings under this chapter are really an action on original joint contract, and matters of defense in respect to judgment are merely incidental to action.—Tay v. Hawley, 39 Cal. 93, 98.

7. **Object of statute.**—Where plaintiff proceeds against defendants served, judgment is entered against them, but not against those who were not served. Defendants not served are not bound by judgment, nor are they personally liable for its satisfaction, but statute provides that property in which they are jointly interested with other defendants may be taken in execution for satisfaction of judgment; hence, provision here made for bringing in those defendants who were not served, and having them bound by judgment, as are defendants who were served.—Kleinschmidt v. Barkley, 4 Mont. 400, 407, 2 Pac. 275.

8. **Partnership—Dormant partner not served—Service after judgment.**—Under the express provisions of section 2442 of the Civil Code the liability of copartners is joint, and there is no provision permitting several judgments to be recovered in several actions upon joint obligations; the rigor of the common-law rule being in force in this state except as changed by the provisions of section 414 permitting an action brought against joint-debtors, but in which the summons has not been served on all to proceed to judgment against those served, and the provisions of the above section permitting a person not served to be brought in after judgment by an order to show cause why he should not be bound by the judgment.—Iwanaga v. Hagopian, 39 Cal. App. 584, 179 Pac. 523, applying the doctrine in Kelly v. Pandini, 50 Cal. App. 530, 532; Bailey Loan Co. v. Hall, 110 Cal. 490, 42 Pac. 962; Dobbs v. Purington, 136 Cal. 70, 68 Pac. 323.

See, also, par. 14, this note.

As to merger of partners' obligation in judgment against less than all, see, ante, § 414, note par. 25.

9. **Parties who may be bound.**—Judgment against defendants served in action against several defendants jointly may be entered; and those not served, brought in and bound by proceedings under this chapter.—Roberts v. Donovan, 70 Cal. 108, 114, 9 Pac. 180, 11 Pac. 599.

10. **Judgment on three promissory notes:** two signed by one defendant alone, and third by him and two other defendants, who were not served, is, to extent of note signed by all three, judgment for which two not

served, may be brought in and bound.—*Sneath v. Griffin*, 48 Cal. 438, 439.

11. In suit against two defendants alleged to be copartners in which summons is served on one only, judgment against other can not be rendered. Remedy of plaintiff is by proceedings under this chapter.—*Feder v. Epstein*, 69 Cal. 456, 458, 10 Pac. 785.

12. **Similar judgment of a sister state—Action on.**—Judgment recovered in state of Nevada against several defendants as copartners, directing it be enforced against joint property of all defendants, and against separate property of one, who was only one served, is not void as to such defendant, and action may be maintained thereon in this state.—*Stewart v. Spaulding*, 72 Cal. 264, 267, 13 Pac. 661.

13. **Statutory proceeding—Amendments—Defenses.**—Entire proceedings is statutory and exclusive, and in nature of action upon judgment of which pleadings upon which judgment rests can not be amended. Only purpose of complaint is to disclose obligation upon which original judgment was rendered. Statute provides but two defenses which can be interposed—denial of judgment or denial of obligation. Upon first, complaint serves no purpose whatever; under second, it is pertinent only to show what was nature of obligation upon which judgment was rendered. If amendment to original complaint were permitted, changing cause of action upon which judgment

was rendered, sole and only defense permitted by statute—to show non-liability “on obligation upon which judgment was recovered”—would not be available to the defendant; but, on contrary, he would be required to interpose defense not so accorded him, and show non-liability on cause of action upon which no judgment was ever recovered.—*Cooper v. Burch*, 140 Cal. 548, 551, 74 Pac. 37.

14. **Summoning party after judgment.**—In a proceeding under above section, which provides that when a judgment is recovered against one or more of several persons, jointly indebted upon an obligation, those who were not originally served with summons and did not appear in the action may be summoned to show cause why they should not be bound by the judgment, evidence that the defendant thus summoned was associated with the defendant against whom judgment was obtained in the ownership of certain placer claims, and that the latter bought supplies from the plaintiffs for the purpose of developing such claims, and that the former never at any time repudiated liability for such supplies, but on the other hand endeavored to raise money to pay for the same, sufficiently shows a joint indebtedness, in view of the presumption created by section 1431 of the Civil Code that an obligation imposed upon several persons is joint.—*Colquhoun v. Pack*, 32 Cal. App. 97.

As to summoning dormant partner after judgment, see par. 8, this note.

§ 990. SUMMONS IN THAT CASE, WHAT TO CONTAIN, AND HOW SERVED. The summons, as provided in the last section, must describe the judgment, and require the person summoned to show cause why he should not be bound by it, and must be served in the same manner, and returnable within the same time as the original summons. It is not necessary to file a new complaint.

History: Enacted March 11, 1872, re-enactment of § 369 Practice Act.

As to summons, how issued, directed, and what to contain, see, ante, § 407 and note.

As to summons, how served and returned, see, ante, §§ 410-416 and notes.

§ 991. AFFIDAVIT TO ACCOMPANY SUMMONS. The summons must be accompanied by an affidavit of the plaintiff, his agent, representative, or attorney, that the judgment, or some part thereof, remains unsatisfied, and must specify the amount due thereon.

History: Enacted March 11, 1872, re-enactment of § 370 Practice Act.

§ 992. ANSWER, WHEN FILED AND WHAT IT MAY CONTAIN. Upon such summons, the defendant may answer within the time specified therein, denying the judgment, or setting up any defense which may have arisen subsequently; or he may deny his liability on the obligation upon which the judg-

ment was recovered, by reason of any defense existing at the commencement of the action.

History: Enacted March 11, 1872, re-enactment of § 371 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 176, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 600, Kerr's Stats. and Amdts. 1906-7, p. 473.

As to answer generally, see, ante, § 437 and note.

§ 993. WHAT CONSTITUTES THE PLEADINGS IN THE CASE. If the defendant, in his answer, denies the judgment, or sets up any defense which may have arisen subsequently, the summons, with the affidavit annexed, and the answer, constitute the written allegations in the case; if he denies his liability on the obligation upon which the judgment was recovered, a copy of the original complaint and judgment, the summons, with the affidavit annexed, and the answer, constitute such written allegations, subject to the right of the parties to amend their pleadings as in other cases.

History: Enacted March 11, 1872, re-enactment of § 372 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 176, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 600, Kerr's Stats. and Amdts. 1906-7, p. 473.

§ 994. ISSUES, HOW TRIED. VERDICT, WHAT TO BE. The issues formed may be tried as in other cases; but when the defendant denies, in his answer, any liability on the obligation upon which the judgment was rendered, if a verdict be found against him, it must be for not exceeding the amount remaining unsatisfied on such original judgment, with interest thereon.

History: Enacted March 11, 1872, re-enactment of § 373 Practice Act.

1. Only judgment that can be rendered against incoming defendant in these proceedings is for such amount as remains unsatisfied on original judgment.—Cooper v. Burch, 140 Cal. 548, 553, 74 Pac. 37.

As to judgments generally, see, ante, §§ 577 et seq. and notes.

As to trial generally, see, ante, §§ 607-645 and notes.

CHAPTER II.

OFFER OF THE DEFENDANT TO COMPROMISE.

§ 997. Proceedings on offer of the defendant to compromise after suit brought.

§ 997. PROCEEDING ON OFFER OF THE DEFENDANT TO COMPROMISE AFTER SUIT BROUGHT. The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof within five days, he may file the offer, with proof of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and can not be given in evidence upon the trial; and if the plaintiff fail to obtain a more favorable judgment, he can

not recover costs, but must pay the defendant's costs from the time of the offer.

History: Enacted March 11, 1872, re-enactment of § 390 Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 342; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 177, held unconstitutional, see history, § 5 ante.

OFFER OF DEFENDANT TO COMPROMISE.

1. As to construction—Action must be pending.
2. Same—Time allowed plaintiff to accept.
3. Consideration—Necessity for.
4. Costs accruing prior to offer.
5. Entry of judgment by clerk—Is ministerial act.
6. In action to foreclose mortgage.
7. In action of tort.
8. Same—Recovery of costs.
- 8a. Interest stopped—Mortgage.
9. Same—Judgment.
- 10, 11. Judgment—Form of.
12. Lien of mortgage—Not discharged.
13. Party to whom made.
14. Pleading—Tender must be pleaded.
- 15-17. Taxes—Offer in action to recover.
18. Time where offer is of effect.
19. Trial—Effect of tender.
20. Withdrawal of offer—When deemed made.

See, post, § 1025 and note.

As to agreement for compromise of debt without seal being obligatory, see, post, § 1934.

As to costs where tender made before suit, see, post, § 1030.

As to judgment by confession, see, post, § 1132 and note.

As to offer of compromise not being admission that anything is due, see, post, § 2078.

As to right of public authorities to enter into a compromise of tax, see note Ann. Cas. 1912A, 754.

1. As to construction—Action must be pending.—True construction of this section is that judgment can be rendered only when offer is made, after action is brought, and while pending. Where plaintiff hands clerk for filing, complaint together with offer of compromise by defendant, entry of judgment is not authorized, as thereby safeguards which law has thrown around confession of judgment by debtor, and which cautionary provisions are for security of creditors, would be rendered nugatory.—*Crane v. Hirshfelder*, 17 Cal. 582, 584.

2. Same—Time allowed plaintiff to accept.—Clear meaning of statute is plaintiff shall have five days to consider proposal made by defendant. And if in mean time—without

acceptance by plaintiff in manner prescribed—trial shall have regularly progressed and been concluded, offer of compromise as against plaintiff simply goes for naught. Whether or not in such case after trial had progressed and plaintiff discovers his case to be much weaker than he supposed, he could stop at any time within five days and accept offer, not decided.—*Scammon v. Denio*, 72 Cal. 393, 396, 14 Pac. 98.

3. Consideration—Necessity for.—An agreement to settle a claim upon which suit has not been begun is not supported by a sufficient consideration if the party seeking to enforce it knew his claim to be groundless and did not assert it in good faith.—*Snowball v. Snowball*, 164 Cal. 476, 129 Pac. 784, 785.

4. Costs accruing prior to offer by defendant may be recovered by plaintiff.—*Douthitt v. Finch*, 84 Cal. 214, 215, 24 Pac. 929. See *Burnett v. Westfall*, 15 How. Pr. (N. Y.) 430, 432; *Magnin v. Dinsmore*, 15 Abb. Pr. N. S. (N. Y.) 331.

5. Entry of judgment by clerk—Is ministerial act and he must follow closely the forms provided by law for the exercise of the power conferred upon him, otherwise his acts will be invalid.—*Old Settlers Inv. Co. v. White*, 158 Cal. 236, 110 Pac. 922.

6. In action to foreclose mortgage tender in answer can not defeat attorney's fees where no money is deposited in court and no averment of defendant's ability to make the tender good, or offer to allow judgment for the amount due with accrued cost, is made.—*McCoy v. Buckley*, 11 Cal. App. 241, 245, 104 Pac. 705.

As to tender stopping running of interest, see par. 8, this note.

7. In action of tort defendant may make the offer contemplated by this section.—*Basler v. Sacramento Gas & El. Co.*, 158 Cal. 514, 111 Pac. 530.

8. Same—Recovery of costs where compromise judgment for less than three hundred dollars, is rendered, as to, see note section 1025, post; also *Murphy v. Casey*, 13 Cal. App. 781, 785, 110 Pac. 956.

8a. Interest stopped—Mortgage.—That tender of amount due on mortgage will stop running of interest, intimated, but not decided.—*Himmelman v. Fitzpatrick*, 50 Cal. 650, 651.

As to tender not defeating attorney's fee, see par. 6, this note.

9. Same—Judgment.—Interest is stopped by tender of full amount due on judgment made while appeal is pending.—*Ferrea v. Tubbs*, 125 Cal. 687, 692, 58 Pac. 308.

10. Judgment—Form of.—In case of tender before suit of full amount due, which tender is kept good, judgment should be for plaintiff for amount tendered, and for defendant for costs.—*Curlic v. Abadie*, 25 Cal. 502, 504.

11. In action for specific performance of agreement to issue stock where defendant before suit tenders such stock as court finds it was under terms of contract to deliver and keeps tender good, judgment should be for plaintiff for such stock and for defendant for costs.—*Williams v. Ashurst Oil L. & D. Co.*, 144 Cal. 619, 624, 78 Pac. 28.

12. Lien of mortgage—Not discharged by tender of amount due. If tender was made in good faith and intended to be kept good, defendant could have commenced proceeding to compel mortgagee to accept it, and satisfy mortgage, and upon commencement of such action could have paid money into court.—*Himmelmänn v. Fitzpatrick*, 50 Cal. 650, 651.

13. Party to whom made.—Tender pending litigation may be made to party. It need not be made to attorney.—*Ferrea v. Tubbs*, 125 Cal. 687, 689, 58 Pac. 308.

14. Pleading—Tender must be pleaded.—Tender of amount due before suit must be pleaded, and averment of tender must be followed by averment that same has been kept good, and that defendant is willing and ready to pay same.—*Bryan v. Maume*, 28 Cal. 238, 243.

15. Taxes—Offer in action to recover.—In action to recover state and county taxes, brought by district attorney of county, he can not by accepting offer to allow judgment for less than amount of state taxes fixed by state board of equalization estop state from claiming such amount. Rule of presumption as to authority of attorney has no application to public officer whose powers and duties are defined by law.—*County of Sacramento v. Central Pac. R. Co.*, 61 Cal. 250, 255.

16. Clerk can not enter judgment upon acceptance by district attorney of offer of

general sum less than that claimed in action to recover state and county taxes.—*County of Sacramento v. Central Pac. R. Co.*, 61 Cal. 250, 255, 257.

17. In action to recover state and county taxes, offer may be made to allow judgment for one of such sums or for sums less than respective sums claimed in complaint, but in order to authorize clerk to enter judgment for amounts offered, offer must specify in what sum judgment will be allowed for state, and in what sum for county taxes.—*County of Sacramento v. Central Pac. R. Co.*, 61 Cal. 250, 258.

18. Time where offer is of effect.—Offer has no effect whatever until after expiration of five days, unless before that plaintiff accepts in mode provided. No affirmative action on part of plaintiff is required unless he elects to accept offer, and then he must give and file notice of acceptance. There is no provision for affirmative refusal to accept, and he may give and file notice at any time within five days.—*Scammon v. Denio*, 72 Cal. 393, 396, 14 Pac. 98.

19. Trial—Effect of tender.—Plaintiff may proceed to trial on day set, without regard to respondent's offer, where such offer is made within five days prior to time, as at that time offer is of no avail, and defendant can not by making offer on eve of trial when plaintiff is all prepared, and his expenses nearly all incurred, compel him on spur of moment to determine whether he shall yield part of what he considers just and legal claim, or run hazard of losing his costs and necessary disbursements, and having judgment against him for costs of other party.—*Scammon v. Denio*, 72 Cal. 393, 396, 14 Pac. 98.

20. Withdrawal of offer—When deemed made.—Offer of obligee to accept in full satisfaction less than amount due him, made before commencement of suit on obligation, is deemed withdrawn by commencement of suit, if not accepted before that time.—*Peachy v. Witter*, 131 Cal. 316, 319, 63 Pac. 468.

CHAPTER III.

INSPECTION OF WRITINGS.

§ 1000. A party may demand inspection and copy of a book, paper, etc.

§ 1000. A PARTY MAY DEMAND INSPECTION AND COPY OF A BOOK, PAPER, ETC. Any court in which an action is pending, or a judge thereof may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of entries of accounts in any book, or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein. If compliance with the order be refused, the court may exclude the entries of accounts of the book, or the document, or paper from being given in evidence, or if wanted as evidence by the party applying, may direct the jury to presume them to be such as he alleges them to be; and the court may also punish the party refusing for a contempt. This section is not to be construed to prevent a party from compelling another to produce books, papers, or documents when he is examined as a witness.

History: Enacted March 11, 1872, re-enactment of § 446 Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 342; April 15, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 72.

INSPECTION OF BOOKS AND WRITINGS.

1. Application for order requiring corporation to exhibit books.
2. Answer—Inspection to enable.
3. Cross-examination—Inspection to enable.
4. Documents admitted in evidence—May be inspected by counsel.
5. Exclusive provisions—As to generally.
- 6-8. Extent of inspection allowed.
9. Extent of rule—Showing necessary for order.
10. Liability of stockholder—Evidence—Resistance of motion for inspection of books.
11. Original of contract sued on—May be inspected.
12. Production of books—Refusal of order for—Not error, when.
13. Showing necessary to obtain order.
14. Witness—Production of papers by.

As to, contempt of court, see, post, §§ 1209 et seq. and notes.

As to demanding copy of account sued on or bill of particulars, see, ante, § 454 and note.

As to examination of party suspected of concealing or embezzling papers or property of deceased person, see, post, §§ 1459, 1460 and notes.

As to how writings are proved, see, post, §§ 1940 et seq. and notes.

As to inspection of public writings, see, post, § 1892.

As to notice to produce writing in custody of adverse party, see, post, § 1938.

As to original writing being produced or accounted for, see, post, § 1855 and note.

As to subpoenas and means of production of evidence, see, post, § 1985 and note.

As to subpoena duces tecum, see, post, § 1985.

As to writings called for and inspected may be withheld from evidence, see, post, § 1939.

As to writings, in general, see, post, §§ 1887 et seq. and notes.

As to writing shown witness may be inspected by adverse party, see, post, § 2054.

As to right to review of order granting or denying motion for inspection of books or papers apart from an appeal from final judgment, see note 28 L. R. A. (N. S.) 516.

1. Application for order requiring corporation to exhibit books to a plaintiff to enable him to ascertain the names of the stockholders and number of shares owned by each, if the court has jurisdiction to make such an order, it must be on hearing under notice served in pursuance of the requirements of above section.—Favorite v. Superior Court, — Cal. App. —, 198 Pac. 1004.

2. Answer—Inspection to enable.—Inspection may be had where necessary to enable defendant to answer, as where he has forgotten execution of instrument alleged, or doubts correctness of description

of copy contained in complaint.—*Curtis v. Richards*, 9 Cal. 34, 38.

3. Cross-examination—Inspection to enable.—Where witness is called to identify papers for purpose of their being introduced in evidence, counsel for adverse party has right to inspect same, both for purpose of cross-examining witness, and to enable him to produce testimony in explanation thereof or to disprove their authenticity, and to deny his motion for such inspection, upon refusal of his adversary to grant it, is clearly error.—*Campbell v. Jones*, 41 Cal. 515, 518.

4. Documents admitted in evidence.—May be inspected by counsel for adverse party at any time during progress of trial, and to deny counsel such right is error too patent to require discussion. It will not be inferred that no damage resulted from such ruling, as there may have been most satisfactory reasons why it was necessary to have inspection of documents.—*Pope v. Dalton*, 40 Cal. 638

5. Exclusive provisions.—As to generally.—Only provision in nature of bill of discovery, other than sections 1459 and 1460, post, applying to probate proceedings, of law of this state, is found in this section.—*Levy v. Superior Court*, 105 Cal. 600, 613, 29 L. R. A. 811, 38 Pac. 965.

6. Extent of inspection allowed.—Court is bound to protect party against undue inquisition into his affairs, and it would be difficult to imagine more striking instance of undue inquisition than order compelling defendant to produce for inspection all his books, upon mere suspicion that they might possibly contain some evidence favorable to plaintiff, and without pointing to any particular part of books over which suspicion was supposed to harbor.—*Ex parte Clarke*, 126 Cal. 235, 241, 77 Am. St. Rep. 176, 46 L. R. A. 835, 58 Pac. 546.

7. Party can not by aid of this section draw dragnet of inspection through all books of other party under ostensible motive of trying to catch something which other side had testified was not there, in meantime exposing all private business of defendant, his dealings with persons other than plaintiff, his method of conducting his affairs, perhaps his financial condition, and other matters vitally important to his welfare. There is no warrant in law for such forcible wholesale violation of person's privacy.—*Ex parte Clarke*, 126 Cal. 235, 241, 77 Am. St. Rep. 176, 46 L. R. A. 835, 58 Pac. 546.

8. Originally, order for production of paper or book was made only when document was declared on in bill and set up as defense, or where party asking had interest in document itself, as where it was contract between parties and only one copy existed; or where instrument in very nature of things was material evidence, as where it was alleged to be forged or altered, and that it would on its face show

facts alleged, or where books belonging to both parties, as in case of suit between partners, or principal and agent, or trustee and beneficiary. Rule has been extended so as to include other grounds for production of papers, but principles applicable generally to forced production of papers are as above stated.—*Ex parte Clarke*, 126 Cal. 235, 241, 242, 77 Am. St. Rep. 176, 46 L. R. A. 835, 58 Pac. 546.

9. Extent of rule—Showing necessary for order.—This section does not give unbridled license for examination or production of all such private papers as caprice, curiosity, or ulterior design of party might suggest. Section 1985, post, provides for what is usually called subpoena duces tecum, by which witness is required to bring with him books, documents, etc., "which he is bound by law, to produce in evidence." We have no express affirmative statutory provision as to what things witness is "bound by law to produce," but it may be assumed when witness is in court, no matter how brought there, and discloses that he has paper, document, or book which would be evidence in favor of party desiring it, it would in proper case be rightful for party to produce it. But we must look to general principles of law applicable to subject when it is to be determined in what instances court has power to compel witness to give up his books and papers, and disclose his private business to world. Before order can be made there must be showing by affidavit or otherwise that books or papers in question contain evidence material to party desiring them. It is not enough that party believes or is advised that papers contain material evidence. Facts must be shown in support of such belief.—*Ex parte Clarke*, 126 Cal. 235, 239, 77 Am. St. Rep. 176, 46 L. R. A. 835, 58 Pac. 546.

10. Liability of stockholder—Evidence—Resistance of motion for inspection of books.—In an action against persons alleged to be stockholders of a corporation for the purpose of enforcing their liability as such, the matters of fact in controversy being peculiarly within the knowledge of the defendants they are competent witnesses to testify as to the number of shares they own respectively; and where the plaintiff endeavored to have the books of the corporation produced that the matter might be set at rest by the official record and encountered serious and persistent opposition, and steps were taken for the purpose, as provided by the above section, the court was justified in holding that its order in reference to an inspection of the books had not been complied with, and in assuming the facts to be as claimed by the plaintiff.—*Robinson v. Rispin*, 33 Cal. App. 536, 540, 165 Pac. 979.

11. Original of contract sued on.—May be inspected on demand of defendant, whether same is set out in complaint in hæc verba

or alleged according to its legal effect; and if it appear that complaint misrepresents contract or has omitted substantial part of it, such misrepresentation or omission is matter of defense, but not available as ground of general demurrer, because it does not appear upon face of complaint.—*Byrne v. Lunning Co.*, 4 Cal. Unrep. 895, 38 Pac. 454.

12. Production of books—Refusal of order for—Not error, when.—Under the provisions of the above section a defendant being entitled to an inspection of the books of the plaintiff in relation to the subject-matter of the litigation, but such inspection has not been demanded, it is not error for the trial court to refuse an order requiring the production of the books of the plaintiff, where the action has been pend-

ing more than a year and the demand for production is made after the action has been on trial sixteen days, and the books wanted are located in New York.—*Avery v. Wiltsee*, 177 Cal. 484, 171 Pac. 95.

13. Showing necessary to obtain order.—Substantial showing must be made that document or book sought for contains material evidence for party asking; inquisitorial examination was not contemplated by framers of statute.—*Ex parte Clarke*, 126 Cal. 235, 242, 77 Am. St. Rep. 176, 46 L. R. A. 835, 58 Pac. 546.

14. Witness—Production of papers by.—Production of documents by witness when his examination discloses possession of or control over same is not regulated or controlled by this section.—*Morehouse v. Morehouse*, 136 Cal. 332, 337, 88 Pac. 976.

CHAPTER IV.

MOTIONS AND ORDERS.

§ 1003. Order and motion defined.

§ 1004. Motions and orders, where made.

§ 1005. Notice of motion, at what time to be given.

§ 1006. Transfer of motions and orders to show cause.

§ 1007. Order for payment of money, how enforced.

§ 1003. ORDER AND MOTION DEFINED. Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion.

History: Enacted March 11, 1872, re-enactment of § 515 Practice Act.

MOTIONS AND ORDERS—DEFINED.

1. Absence of counsel.
2. Amendment of order—Notice of.
3. Amendment of proof of service of summons.
4. Amendment of record—When made.
5. Artifice or trick—In procuring order.
- 6, 7. Certified copies of orders.
8. Chambers of judge—What considered as.
- 9, 10. Change of order by court.
11. Construction of section—As to meaning of.
12. Contempt of court.
13. Same—Denial of right to move.
14. Correction of record—To conform to actual facts.
- 15, 16. Same—When notice required.
17. Court—Order of, distinguished from that of judge.
18. Court's own motion—Amendment of judgment.
- 19, 20. Definition of motion.
21. Same—Petition to court of equity.
22. Same—Verified petition for order.
- 23-25. Definition of order—In general.
26. Same—Filing not essential.
27. Same—Mere declaration by judge.
28. Same—Probate.
29. Same—Ruling on evidence.
30. Same—Sale on foreclosure.
31. Same—Supplementary proceedings.
32. Same—What controls.
- 33, 34. Discretion of court—Definition of.
35. Doctrine of *res judicata*.
36. Same—Where renewal of motion allowed.
- 37-39. Effect of entry or non-entry of order.
40. Same—Duty of clerk.
41. Same—Form of entry.
42. Same—Should be made matter of record.
43. Equity—Intermediate orders.
44. Evidence of orders.
45. *Ex parte* orders—Substitution of executors.
46. Same—Intervention.
- 47, 48. Grounds of the motion—Must be stated.
49. Same—As to disregard of some.
50. Same—Appeal—Review of motion.
51. Same—Judgment on pleadings.
52. Same—New trial.
53. Same—Particular reasons.

- 54. Same—Provision of statute.
- 55. Same—Statement by reference.
- 56. Improvidently and unintentionally made orders.
- 57. Same—Findings.
- 58, 59. Interlocutory decree.
- 60. Same—Probate.
- 61. Judgment pro confesso—On cross-bill in equity.
- 62. Jurisdiction of cause of action.
- 63-66. Justices' courts—Notice of setting trial.
- 67. Same—"Order" of defined.
- 68, 69. Knowledge of judge.
- 70. Mandamus—Will lie to compel court to hear and determine motion.
- 71. New trial of motion—Not permitted.
- 72. Notice and motion—Distinguished.
- 73. Nunc pro tunc entry of order.
- 74. Same—After appeal—Certifying up.
- 75. Same—Evidence on motion for.
- 76. Same—Must have been actually made.
- 77. Same—Record of.
- 78. Same—Showing necessary—Not made at chambers.
- 79. Same—Waiver of notice of motion.
- 80. Orders made without notice.
- 81. Practice—In general.
- 82. Same—Motion, how made.
- 83. Presumption of regular proceedings.
- 84. Relief granted.
- 85. Renewal of motion—In general.
- 86, 87. Same—As to being discretionary with court.
- 88, 89. Same—Appeal—Abuse of discretion.
- 90, 91. Same—When leave may be granted.
- 92. Setting aside order — Inadvertence, etc.
- 93. Separate and distinct motions.
- 94. Stranger to record.

As to contempt committed by disobeying lawful order of court, see, post, § 1209.

As to court commissioners hearing motions, etc., see, ante, § 259 and note.

As to judgment on pleadings, and motion therefor, see, ante, § 582 and note.

As to motion, and notice of motion, for injunction, see, ante, § 528 and note.

As to motion, and notice thereof, for sale of property held under attachment, see, ante, § 548 and note.

As to motion, and notice thereof, to vacate or modify injunction, see, ante, § 532 and note.

As to motion, and order thereon, not being part of judgment-roll, see, ante, § 670 and note.

As to motion for new trial, see, ante, §§ 656 et seq. and notes.

As to motion to amend pleadings, see, ante, § 473 and note.

As to motion to discharge attachment, see ante, §§ 556-558 and notes.

As to motion to modify or correct award of arbitrators, see, post, § 1288.

As to motion to open default and set aside judgment, see, ante, § 473 and note.

As to motion to release attachment, see, ante, § 554 and note.

As to motion to strike out sham or irrelevant pleadings, see, ante, § 453 and note.

As to orders and decrees in probate proceedings, see, post, § 1704 et seq. and notes.

As to proceedings to be in English language, see, ante, § 185 and note.

As to provisions as to motions and orders in civil actions being applicable to special proceedings, see, post, § 1064.

As to review of orders by certiorari, see, post, § 1067.

As to use of abbreviations and figures, see, ante, § 186 and note.

As to use of depositions and affidavits on motions, see, post, § 2009.

1. Absence of counsel for opposing party at time set for hearing of motion which resulted in certain order does not cure or waive error therein.—Lybecker v. Murray, 58 Cal. 186, 190.

2. Amendment of order—Notice of.—Conditional order vacating sale by assignee in insolvency can not without notice to purchaser be amended so as to become absolute.—Thompson v. Superior Court, 119 Cal. 538, 543, 51 Pac. 863.

3. Amendment of proof of service of summons may be amended after judgment by inserting fact omitted from affidavit and order allowing such amendment entered nunc pro tunc as of date before judgment.—Woodward v. Brown, 119 Cal. 283, 299, 63 Am. St. Rep. 108, 51 Pac. 2, 542.

4. Amendment of record—When made.—During term, when terms of court were held, record might be amended in any manner so as to be made conformable to facts. But when term is past it can only be amended in cases where record itself shows error. In such cases there must be record evidence to amend by.—Branger v. Chevalier, 9 Cal. 172, 173.

5. Artifice or trick—In procuring order.—Court which makes order procured by artifice or trick has ample power to vacate and set it aside.—Page v. Page, 77 Cal. 83, 85, 19 Pac. 183.

6. Certified copies of orders required to be furnished on appeals should be furnished and certified by clerk of court which made order and in whose minutes it is entered.—Mansfield v. O'Keefe, 133 Cal. 362, 363, 65 Pac. 825.

7. Clerk has no authority to enter upon minutes certified copy of order without any

direction of court therefor.—*Devlin v. Rydberg*, 132 Cal. 324, 325, 64 Pac. 396.

8. **Chambers of judge—What considered as.**—Judges' chambers are not confined to some particular room in courthouse or other place for usual transaction of judicial business not required to be done in open court. Chamber business may be done, and often is done, on street, in judge's own house, at hotel where he stops when absent from home, or it may be done in transitu on cars, in going from one place to another, within proper jurisdiction of court.—*Estate of Lux*, 100 Cal. 593, 601, 33 Pac. 341. See *Von Schmidt v. Widber*, 99 Cal. 511, 34 Pac. 109; *In re neagle*, 14 Sawy. C. C. 232, 265, 39 Fed. 833.

9. **Change of order by court.**—Court having made order upon which parties have acted can not without any statutory authority change his mind and discharge his order, as such would lead to great uncertainty, in convenience, and in some cases perhaps to wrong and injustice, e. g. court having directed stay of execution upon giving of undertaking can not arbitrarily set aside his order after stay is perfected.—*Lee Chuck v. Quan Wo Chong Co.*, 81 Cal. 222, 228, 15 Am. St. Rep. 50, 22 Pac. 594.

10. After granting trial it is irregular for judge to immediately proceed to render contrary judgment without hearing or notice.—*Mitchell v. Hackett*, 14 Cal. 661, 667.

11. **Construction of section—As to meaning of.**—Section is taken from New York Code of Procedure, and codifiers of that state thus explain their purpose in employing the phraseology they did: "To avoid the confusion incident to use of word 'judgment' in two senses, one as interlocutory and other as final, we have thought it better to use it only in latter sense and to designate all other written directions of court or judge as orders." In the purpose thus expressed no intent is perceived to abolish power of court of equity to pronounce what in equity practice was called interlocutory decree or decretal order, but only a provision to effect that that which finally determined rights of parties should be called judgment, and that every other direction of court or judge made or entered in writing should be denominated an order.—*Thompson v. White*, 63 Cal. 505, 508.

12. **Contempt of court** is not committed by disobeying unauthorized or unlawful order.—*Hennessy v. Nicol*, 105 Cal. 138-141, 38 Pac. 649.

13. **Same—Denial of right to move to dissolve an injunction** is not authorized on ground that party is in contempt, where no contempt proceedings have been brought against him.—*State ex rel. Gemmell v. Clancy*, 24 Mont. 359, 363, 61 Pac. 987.

14. **Correction of record—To conform to actual facts and speak truth** is ordinarily made on notice to all parties interested, but court has power to make correction

without notice.—*Crim v. Kessing*, 89 Cal. 478, 486, 23 Am. St. Rep. 491, 26 Pac. 1074.

15. **Same—When notice required.**—Clerical misprisions in judgment, record affording evidence thereof, may be corrected at any time by court upon its own motion or motion of interested parties, either with or without notice; but where inspection of record does not show error, notice of motion to amend judgment will be required to be given parties affected thereby.—*Scamman v. Bonslett*, 118 Cal. 93, 62 Am. St. Rep. 226, 50 Pac. 272.

16. Courts of record have inherent power to correct their records so that they shall conform to actual facts and speak truth of case, and such correction may be made at any time, either upon motion of court itself or at instance of any party interested in the matter. Ordinarily court would require notice of motion to be given by parties interested, but it has power to make correction without such notice.—*Crim v. Kessing*, 89 Cal. 478, 486, 23 Am. St. Rep. 491, 26 Pac. 1074.

17. **Court—Order of, distinguished from that of judge.**—That order was made by court, and not made by judge at chambers, sufficiently appears where it is entitled and filed in court and is under its seal, though in drafting order judge employs phrase "it appearing to me" and testatum clause says "In witness whereof, I have hereunto set my hand."—*Oaks v. Rodgers*, 48 Cal. 197, 200.

18. **Court's own motion—Amendment of judgment** to correct mere clerical misprision may be made by court of its own motion and with or without notice.—*Dickey v. Gibson*, 113 Cal. 26, 34, 54 Am. St. Rep. 321, 45 Pac. 15.

19. **Definition of motion.**—Motion is properly application for ruling or order, made viva voce to court or judge. It is distinguished from more formal applications for relief by petition or complaint. Grounds of motion are often required to be stated in writing and filed. In practice, form of application itself is often reduced to writing and filed. But making up and filing application itself is not to make motion. If nothing more were done it would not be error in court to entirely ignore proceeding.—Attention of court must be called to it. Court must be moved to grant order.—*People v. Ah Sam*, 41 Cal. 645, 650.

20. Motion is application for order or direction of court not included in judgment.—*Estate of Harrington*, 147 Cal. 124, 128, 81 Pac. 546.

21. **Same—Petition to court of equity** for payment of money in hands of receiver is motion, and it matters not whether sworn statement of petitioner be termed complaint, petition in nature of complaint, or affidavit. It is showing of petitioner as basis of order.—*California T. Ins. & T. Co. v. Consolidated P. C. Co.*, 117 Cal. 237, 240, 49 Pac. 1.

22. Same—Verified petition for order, upon which order to show cause is issued, is motion; and allegations thereof are admissible in evidence on hearing.—*California T. Ins. & T. Co. v. Consolidated P. C. Co.*, 117 Cal. 237, 239, 49 Pac. 1.

23. Definition of order—In general.—Order may be defined to be judgment or conclusion of the court upon any motion or proceeding. It means where court or judge grants affirmative relief or where relief is denied.—*Gilman v. Contra Costa Co.*, 8 Cal. 52, 57, 68 Am. Dec. 290.

24. Order is decision made during progress of cause, either prior or subsequent to final judgment, settling some point of practice, or some question collateral to main issue presented by pleadings and necessary to be disposed of before such issue can be passed upon by court, or necessary to be determined in carrying into execution final judgment.—*Loring v. Illsley*, 1 Cal. 24, 27; *Estate of Smith*, 98 Cal. 636, 640, 33 Pac. 744.

25. Order, as distinct from final judgment, is judgment or conclusion of court upon any motion or proceeding.—*Estate of Rose*, 80 Cal. 166, 170, 22 Pac. 36.

26. Same—Filing not essential.—Paper signed by justices of supreme court, extending time to file transcript, is order of court before filing thereof.—*Desmond v. Faus*, 83 Cal. 134, 135, 22 Pac. 303.

27. Same—Mere declaration by judge, e. g., that injunction is no longer in force—not being "direction"—does not constitute "order."—*Devlin v. Rydberg*, 132 Cal. 324, 325, 64 Pac. 396.

28. Same—Probate.—Judgment of court refusing to admit will to probate is not final judgment, but order of court, and therefore orders made thereafter are not orders made after final judgment.—*Estate of Smith*, 98 Cal. 636, 638, 641, 33 Pac. 744.

29. Same—Ruling on evidence.—Ruling made during course of trial admitting or excluding evidence is not an order within meaning of this section.—*McGuire v. Grew*, 83 Cal. 225, 232, 23 Pac. 312.

30. Same—Sale on foreclosure.—Direction for further sale of mortgaged premises after decree of foreclosure under provisions of section 728, ante, is order after judgment, being decision in proceeding taken upon application or motion of plaintiff after notice to defendant, and based upon affidavit setting forth matters that had occurred subsequent to entry of judgment.—*Byrne v. Hoag*, 126 Cal. 283, 287, 58 Pac. 688.

31. Same—Supplementary proceedings.—Decision of justice of peace under proceedings supplementary to execution is mere order and does not constitute judgment within meaning of section 974, ante.—*Wells v. Torrance*, 119 Cal. 437, 439, 51 Pac. 626.

32. Same—What controls.—Character of the court's action or direction is to be de-

termined by the nature of action itself, considered in light of its authority in premises, rather than what it has been designated by court; e. g. direction for further sale of mortgaged premises under section 728, ante, is an order, although designated by court a decree of foreclosure and order of sale.—*Byrne v. Hoag*, 126 Cal. 283, 287, 58 Pac. 688.

33. Discretion of court—Definition of.—Order lying in discretion of court must in great degree depend upon special circumstances of each case and be so governed as to prevent delays and to promote justice, and where no meritorious defense is asserted, and no leave to answer is asked in court below, appellate court will not interfere with order overruling demurrer.—*Thornton v. Borland*, 12 Cal. 439, 440.

34. Granting of certain motions and making of certain orders lie in discretion of court, but under no circumstances is this discretion to be exercised arbitrarily. It is discretion governed by legal rules to do justice according to law, or analogies of law, as near as may be. It must be within these limitations to promote substantial justice in case.—*Lybecker v. Murray*, 58 Cal. 186, 189. See *Ex parte Hoge*, 48 Cal. 3, 5; *Ex parte Marks*, 49 Cal. 680, 681.

35. Doctrine of res judicata in its strict sense does not apply to mere orders made on motion in pending proceedings.—*Estate of Harrington*, 147 Cal. 124, 128, 81 Pac. 546.

As to res judicata, see, ante, § 33, note pars. 35-43; § 53 note Part XXV.

36. Same—Where renewal of motion allowed.—Doctrine of res judicata in its strict sense does not apply to motions made in course of practice, as, for instance, issuance of alias writ of possession; and court may upon proper showing allow renewal of motion of this kind once decided. But this leave will rarely be given upon ground that moving party can produce additional evidence in support of his motion, unless it also appears that new state of facts has arisen since former hearing, or that then existing facts were not presented by reason of surprise or excusable neglect of moving party.—*Ford v. Doyle*, 44 Cal. 635, 637; *Bowers v. Cherokee Bob*, 46 Cal. 279, 285; *Kenney v. Kelleher*, 63 Cal. 442, 444.

37. Effect of entry or non-entry of order.—Validity of order does not depend upon entry by clerk, but upon fact that order has been made; and whenever it is shown, order has been made by court it is as effective as if it had been entered of record by clerk.—*Von Schmidt v. Widber*, 99 Cal. 511, 515, 34 Pac. 109.

38. No provision of law requires all orders of court to be entered at length in its minutes, in order that they may be effective, and direction of court or judge is order, whether it be merely made in writing or entered in minutes. If not entered it should be filed, in order that it may form

part of records in case.—*Von Schmidt v. Wildber*, 99 Cal. 511, 514, 34 Pac. 109.

39. Action of court does not depend upon entry of its orders by clerk, but upon fact that orders have been made; and whenever it is shown that order has been made by court it is as effective as if it had been entered of record by clerk.—*Von Schmidt v. Wildber*, 99 Cal. 511, 515, 34 Pac. 109. See *Niles v. Edwards*, 95 Cal. 41, 47, 30 Pac. 134.

40. **Same—Duty of clerk** is to enter motion and order made thereon in minutes of court, and entry should state grounds on which motion is based, in substance, as stated by counsel making it. These grounds need not in all cases be entered in minutes in full. If reference to any document filed is made in statement of grounds, the entry may, and for sake of brevity should, refer to same document.—*Williams v. Hawley*, 144 Cal. 97, 100, 77 Pac. 762.

41. **Same—Form of entry.**—Order should be entered in such terms as to express with precision the object to be attained.—*Jenkins v. Frink*, 27 Cal. 337, 340.

42. **Same—Should be made matter of record.**—With exception of orders in matters of probate, there is no provision in this code which requires the clerk to enter in his minutes any order of court during trial of cause, or at any time after issue and before judgment. It is essential, however, that action of court be made matter of record in order that there may be no uncertainty as to action, and for this purpose it is customary as well as expedient to have its acts entered in minutes; but if order is formally prepared and signed by judge and made matter of record by filing with clerk, same end is attained as if it were spread at length upon minutes of its daily transactions.—*Von Schmidt v. Wildber*, 99 Cal. 511, 514, 34 Pac. 109.

43. **Equity—Intermediate orders.**—No prohibition of intermediate determinations by a court of equity as exigencies of case may demand is made by this section, and it is not in conflict with section 187, ante.—*Thompson v. White*, 63 Cal. 505, 508.

44. **Evidence of orders.**—Records of court are best and only evidence of its orders made.—*Clark v. Crane*, 57 Cal. 629, 636.

45. **Ex parte orders—Substitution of executor** upon suggestion of death of party may be made upon ex parte application.—*Campbell v. West*, 93 Cal. 653, 656, 29 Pac. 219.

46. **Same—Intervention.**—Order allowing intervention may be properly made.—*Kimball v. Richardson-Kimball Co.*, 111 Cal. 386, 396, 43 Pac. 1111.

47. **Grounds of the motion—Must be stated.**—Notices should specify ground of motion and give information to adverse party as to character of objections which will be taken, e. g., notice of motion to dissolve attachment "because said writ was improperly issued" is insufficient; it should

specify, as grounds of motion, wherein it would be urged that writ was improperly issued.—*Freeborn v. Glazer*, 10 Cal. 337, 338.

48. Notice of motion must state the grounds thereof; hence appeal will not be dismissed for failure to file undertaking, where such is not made ground of motion, as, had such ground been stated, it might have been made to appear that undertaking was waived.—*Clarke v. Mohr*, 125 Cal. 540, 543, 58 Pac. 176.

49. **Same—As to disregard of some.**—Where granting of motion is proper upon one of grounds stated, court may disregard other grounds.—*Toy v. Haskell*, 128 Cal. 558, 561, 79 Am. St. Rep. 70, 61 Pac. 89.

50. **Same—Appeal—Review of motion.**—Grounds not stated in motion for nonsuit can not be reviewed on appeal from order denying motion.—*Bronzan v. Drobaz*, 93 Cal. 647, 650, 29 Pac. 254.

51. **Same—Judgment on pleadings.**—Grounds of motion for judgment on pleadings are sufficiently stated as follows: That motion will be made "upon pleadings, papers, files, and records in said action, and upon ground that answer on file herein constitutes no defense to cause of action or any portion thereof stated in complaint."—*Hearst v. Hart*, 128 Cal. 327, 328, 60 Pac. 846.

52. **Same—New trial.**—Where specifications of error and insufficiency of evidence in bill of exceptions contain and show grounds of motion for new trial, reference thereto is sufficient statement of grounds of motion.—*Williams v. Hawley*, 144 Cal. 97, 101, 77 Pac. 762.

53. **Same—Particular reasons** upon which it will be based should be stated in motion for new trial, as there may be ample grounds for granting it for one reason and none whatever for another.—*Williams v. Hawley*, 144 Cal. 97, 99, 77 Pac. 762.

54. **Same—Provision of statute** indicating general ground or reason upon which parties may proceed, or ground upon which motion may be based, e. g., that attachment may be discharged upon ground that writ was improperly issued, does not obviate necessity of specifying points of objection upon which moving party will rely. If point be stated, it may be possible for opposite party to answer it, and object of the statement of grounds is to give him fair opportunity to do so.—*Freeborn v. Glazer*, 10 Cal. 337, 339.

55. **Same—Statement by reference.**—Grounds need not be stated at length in making oral motion, but the court must in some way be informed thereof; this may be done by reference to some paper on file.—*Williams v. Hawley*, 144 Cal. 97, 100, 77 Pac. 762.

56. **Improvidently and unintentionally made orders** may be set aside, but parties interested have right to notice, and to be heard on question; and that orders were so made will not be presumed on appeal, but

such fact must be affirmatively shown.—*Wunderlin v. Cadogan*, 75 Cal. 617, 619, 17 Pac. 713.

57. Same—Findings can not be set aside, even as having been improvidently and unintentionally made, without notice to parties interested.—*Wunderlin v. Cadogan*, 75 Cal. 617, 619, 17 Pac. 713.

58. Interlocutory decree or decretal order may be entered in equity cases and in cases other than those in partition. It is not conclusive, but may be modified by final decree, as law and evidence may require.—*Thompson v. White*, 76 Cal. 381, 383, 18 Pac. 399.

59. Interlocutory decree is order, and not judgment, in so far that, except where expressly provided by statute, appeal will not lie; but it may be reviewed on appeal from judgment.—*Watson v. Sutro*, 77 Cal. 609, 611, 20 Pac. 88.

60. Same — Probate.—Interlocutory decree in probate settling administrator's accounts is not final judgment, but mere order.—*Estate of Rose*, 80 Cal. 166, 169, 22 Pac. 86.

61. Judgment pro confesso—On a cross-bill in equity in federal court is interlocutory and not final, and may be set aside after adjournment of term and the bill dismissed for want of equity, such dismissal carrying with it the entire fabric of the cross-bill, and thereafter no action thereon can be maintained in the state court, nor has such court the power to annul the order vacating the same.—*Blythe Co. v. Bankers' Investment Co.*, 147 Cal. 95, 81 Pac. 281.

62. Jurisdiction of cause of action.—Mere giving of notice is not proceeding in court, and it is not necessary to validity of motion to dissolve injunction that court in which notice is to be made have jurisdiction at time of giving notice. If it have jurisdiction, by reason of change of venue, at time of hearing motion, it is sufficient.—*Younglove v. Steinman*, 80 Cal. 375, 376, 22 Pac. 189.

63. Justices' court—Notice of setting trial.—In a justices' court notice of setting cause for trial is jurisdictional and must be in writing.—*Elder v. Justices' Court*, 136 Cal. 364, 366, 68 Pac. 1022.

64. Notice of time set for trial in justices' court must be in writing, and such notice, with mode and proof of service thereof, must be entered on docket and made part of record, or court is without jurisdiction.—*Jones v. Justices' Court*, 97 Cal. 523, 526, 32 Pac. 575.

65. Distinguished: *City of Los Angeles v. Young*, 118 Cal. 295, 297, 62 Am. St. Rep. 234, 50 Pac. 534.

66. Where record of justices' court shows service of written notice of time of trial, it can not upon certiorari be contradicted by evidence dehors record.—*City of Los Angeles v. Young*, 118 Cal. 295, 297, 62 Am. St. Rep. 234, 50 Pac. 534.

67. Same—"Order" of defined.—An "order" of a justices' court is defined by above section as being "every direction of the court or judge, made or entered in writing," other than a judgment; hence it must be shown to have been "in writing"; moreover, an order, in a legal sense, means a decision given in an action pending, and during the progress thereof.—*Nellis v. Justices' Court*, 20 Cal. App. 394, 129 Pac. 472.

68. Knowledge of judge.—Where the judge had knowledge of matters involved in decision of motion, it will be presumed, if necessary to support judgment or order, that he acted upon such knowledge.—*Southern California M. R. Co. v. San Bernardino Nat. Bank*, 100 Cal. 316, 321, 34 Pac. 711; *Allen v. Rielly*, 15 Nev. 452, 456.

69. In all motions before judge during progress of trial he may act on his own knowledge in regard to things which are in their nature better known to himself than they could be to others.—*Southern Cal. M. R. Co. v. San Bernardino Nat. Bank*, 100 Cal. 316, 321, 34 Pac. 711; *Table Mountain G. & S. M. Co. v. Waller's Defeat S. M. Co.*, 4 Nev. 218, 97 Am. Dec. 526.

As to judicial knowledge, see, post, § 1875.

70. Mandamus—Will lie to compel court to hear and determine motion for change of venue to county of defendant's residence.—*Hennessy v. Nicol*, 105 Cal. 138, 142, 38 Pac. 649.

71. New trial of motion—Not permitted.—If after decision of motion it is desired to present any new facts for consideration to court, proper practice is to ask leave to renew motion. If it is desired to review action of court upon appeal, it is sufficient to present order, in connection with bill of exceptions, containing matter upon which the court based its action.—*Harper v. Hildreth*, 99 Cal. 265, 270, 33 Pac. 1103.

72. Notice and motion—Distinguished.—Notice of motion is distinct from motion itself, and notice alone is not sufficient, on appeal, to show making of motion.—*Herrlich v. McDonald*, 80 Cal. 472, 474, 22 Pac. 299.

73. Nunc pro tunc entry of order substituting parties plaintiff may be made, and when so made is conclusive upon collateral attack.—*Crim v. Kessing*, 89 Cal. 478, 486, 23 Am. St. Rep. 491, 26 Pac. 1074.

74. Same—After appeal—Certifying up.—Order actually made, and after appeal taken entered nunc pro tunc, may be certified up to appellate court, and if it be proper order it is sufficient.—*Lee Chuck v. Quan Wo Chong Co.*, 81 Cal. 222, 15 Am. St. Rep. 50, 22 Pac. 594.

75. Same — Evidence on motion for.—Order substituting plaintiff actually made, but not entered, may be entered nunc pro tunc, and upon motion for such entry court making order is sole judge of proofs offered to support motion, and its action is conclu-

sive, except in direct proceeding to attack order.—*Crim v. Kessing*, 89 Cal. 478, 486, 23 Am. St. Rep. 491, 26 Pac. 1074.

76. Same—Must have been actually made.—Order resting in discretion of court can have no existence until such discretion is exercised, and order can not be entered after right to do certain act has expired, nunc pro tunc, as prior to time right lapsed.—*Estate of Skerrett*, 80 Cal. 62, 64, 22 Pac. 85.

77. Same—Record of.—Where all conditions upon which entry of judgment or order depends exist, and making of entry of order is mere ministerial duty or matter of course, and performance of duty is neglected or delayed, or where order has actually been made and its entry omitted, it may be subsequently entered, and if justice requires it, may be made to take effect nunc pro tunc, as of date when it was actually made, or at any time when existing conditions imposed upon court or its officer duty of entering it; but entry itself should show existence of facts upon which nunc pro tunc entry was ordered.—*Estate of Skerrett*, 80 Cal. 62, 63, 64, 22 Pac. 85.

78. Same—Showing necessary.—Not made at chambers.—Order to clerk to enter in minutes nunc pro tunc an order alleged to have been made in open court can not properly be made by judge at chambers, where there is nothing in record to show such order was made.—*Hegeler v. Henckell*, 27 Cal. 491, 494.

79. Same—Waiver of notice of motion.—Notice of motion to enter order nunc pro tunc is made by party to whom notice should have been given being present in court at making of motion and without objection taking part in and arguing same.—*Herman v. Santee*, 103 Cal. 519, 525, 42 Am. St. Rep. 145, 37 Pac. 509.

80. Orders made without notice may be set aside without notice; hence, if order made without notice setting aside order also made without notice is void, it follows that first order was void also.—*Coburn v. Pacific L. & M. Co.*, 46 Cal. 32, 33.

81. Practice—In general.—Proper practice is to prepare and file motion in writing stating grounds thereof, or to have same entered in minutes of court. This is not necessary, however. Motion may be made orally, but in every case, whether motion is made in writing, entered on minutes, or stated orally, same should be preserved by bill of exceptions, where it is sought to have ruling thereon reviewed, in order that appellate court may see from record that motion was made, and ground upon which it was made.—*Herrlich v. McDonald*, 80 Cal. 472, 474, 475, 22 Pac. 299.

82. Same—Motion, how made.—Attention of court must be called to relief asked. Mere filing of written application is not

sufficient as motion.—*Wallace v. Lewis*, 9 Mont. 403, 24 Pac. 22.

83. Presumption of regular proceedings.—Where order of court does not appear upon face of record to have been beyond jurisdiction of court to make, although it may be irregular and in some respects erroneous, it will be presumed in collateral attack that parties were before court and that proper proceedings were had to authorize court to make the order.—*Clark v. Sawyer*, 48 Cal. 133, 139.

84. Relief granted may be any compatible with facts presented where moving party in his notice of motion prays specific and also general relief.—*People ex rel. Field v. Turner*, 1 Cal. 152, 156.

85. Renewal of motion—In general.—Leave to renew motion may be given after original motion has been denied.—*Hitchcock v. McElrath*, 69 Cal. 634, 635, 11 Pac. 487. See *Kenney v. Kelleher*, 63 Cal. 442.

86. Same—As to being discretionary with court.—Leave to renew motion once denied lies in discretion of court.—*Mace v. O'Reilly*, 70 Cal. 231, 235, 11 Pac. 721.

87. In ordinary motions where jurisdiction is not limited by statute it is discretionary with court or judge hearing and denying motion to grant leave for its renewal, and this discretion will not be interfered with by appellate court, except in cases of palpable abuse.—*Hitchcock v. McElrath*, 69 Cal. 634, 635, 11 Pac. 487. See *Bowers v. Cherokee Bob*, 46 Cal. 279.

88. Same—Appeal—Abuse of discretion must be shown before appellate court will interfere with order granting leave to renew motion.—*Bowers v. Cherokee Bob*, 46 Cal. 279, 286.

89. Granting or refusing of leave to renew motion rests in discretion of court, and appellate court will not interfere with exercise of such discretion, except upon clear showing of abuse.—*Kenney v. Kelleher*, 63 Cal. 442, 444.

90. Same—When leave may be granted.—Leave to renew motion may be given after original motion has been denied.—*Kenney v. Kelleher*, 63 Cal. 442, 444.

91. It is quite usual, when motion is denied which moving party desires to renew, to have entry showing it was denied without prejudice. Leave to renew need not, however, be given at time of denial. It may be given at any time afterwards as well, and when given may be acted upon.—*Bowers v. Cherokee Bob*, 46 Cal. 279, 286.

As to subsequent application for order refused, see, ante, §§ 182, 183 and notes.

92. Setting aside order—Inadvertence, etc.—Order made through inadvertence or mistake may be set aside, and if question of mistake or inadvertence is disputed, decision of judge is not open to review.—*People v. Curtis*, 113 Cal. 68, 71, 45 Pac. 180.

93. Separate and distinct motions.—Motion to open default and motion to vacate judgment may be separate and distinct from each other; depending upon a different record, and seeking different relief. Party is not precluded from making one of these motions because other has been denied.—

Thompson v. Alford, 128 Cal. 227, 229, 60 Pac. 686.

94. Stranger to record has no standing, and is not entitled to come into court and make motion in proceeding, even though he be surety on bond of party interested.—*Estate of Aveline*, 58 Cal. 259, 261.

§ 1004. MOTIONS AND ORDERS, WHERE MADE. Motions must be made in the county, or city and county, in which the action is pending. Orders made out of court may be made by the judge of the court in any part of the state.

History: Enacted March 11, 1872, founded upon § 518 Practice Act; amendment approved March 10, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 12.

MOTIONS AND ORDERS—WHERE MADE.

1. Alimony and custody of children.
- 2-4. Application of section.
5. Court—Constitution and place of.
6. Same—Definition of term "court."
7. Extension of time—Leave to renew motion is not.
8. General rule.
9. Judgment—Rendition of.
10. Order of court—How may be made.
11. Order extending time.

As to courts of justice in general, see, ante, §§ 33 et seq. and notes.

As to orders extending time in general, see, post, § 1054 and note.

As to place of trial of civil actions, see, ante, §§ 392 et seq. and notes.

As to powers of judges out of court, see, ante, § 176 and note.

As to powers of superior judge at chambers, see, ante, § 166 and note.

1. **Alimony and custody of children** pendente lite in divorce cases is required to be provided for by order made in court, and can not be made except by court in which action is pending.—*Bennett v. Southard*, 35 Cal. 688, 691.

2. **Application of section.**—Section applies to cases provided by section 166, ante, that judge "may at chambers grant all orders and writs which are usually granted in first instance upon ex parte application."—*Von Schmidt v. Widber*, 99 Cal. 511, 513, 34 Pac. 109.

3. Section applies only to such matters and orders as judge is by statute authorized to transact at chambers or out of court.—*Bond v. Pacheco*, 30 Cal. 530, 532; *Bennett v. Southard*, 35 Cal. 688, 691.

4. **Venue of such motions** only as may be made out of court is prescribed by this section. It does not undertake to say what such motions are.—*Larco v. Casaneuava*, 30 Cal. 560, 564.

5. **Court—Constitution and place of.**—Under present constitution, whenever judge of superior court is present at place designated for transaction of judicial business,

and there assumes to transact such business, his acts may be considered as acts of court of which he is judge.—*Von Schmidt v. Widber*, 99 Cal. 511, 514, 34 Pac. 109.

6. **Same—Definition of term "court."**—Term "court" as used in this code, means sometimes place where court is held; sometimes tribunal itself, and sometimes individual presiding over tribunal, and in many cases is used synonymously as well as interchangeably with "judge," and whether act to be performed by one or other is generally to be determined by character of act rather than by such designation.—*Von Schmidt v. Widber*, 99 Cal. 511, 513, 34 Pac. 109.

As to provisions respecting places of holding courts, see, ante, §§ 142 et seq. and notes.

7. **Extension of time—Leave to renew motion is not.**—Denial of motion without prejudice to removal before another court to which action is removed does not operate to extend time for making motion which is required to be made before time for answering expires.—*Wallace v. Lewis*, 9 Mont. 403, 24 Pac. 22.

8. **General rule** is that all judicial business must be transacted in court, and authority to transact such business out of court is exceptional, and does not exist unless expressly authorized by statute.—*Carpenter v. Nutter*, 127 Cal. 61, 64, 59 Pac. 301.

9. **Judgment—Rendition of.**—It is absolutely essential to validity of judgment that it be rendered by court of competent jurisdiction, at time and place and in form prescribed by law.—*Norwood v. Kenfield*, 34 Cal. 329, 333.

10. **Order of court—How may be made.**—Order dispensing with bond on appeal by municipal officer may be made by judge of superior court from which appeal is taken by writing signed by him during progress of another trial and filed in case, but not entered in minutes of court.—*Von Schmidt v. Widber*, 99 Cal. 511, 514, 34 Pac. 109.

11. **Order extending time for preparation of statement or bill of exceptions** should be made by judge who tries case. It need not be made in court, and may be made by judge in any part of state.—*Matthews v. Superior Court*, 68 Cal. 638, 641, 10 Pac. 128.

§ 1005. NOTICE OF MOTION, AT WHAT TIME TO BE GIVEN. When a written notice of a motion is necessary, it must be given, if the court is held in the county in which at least one of the attorneys of the party notified has his office, five days before the time appointed for the hearing; otherwise, ten days.

When the notice is served by mail, the number of days before the hearing must be increased one day for every twenty-five miles of distance between the place of deposit and the place of service; such increase, however, not to exceed in all thirty days; but in all cases the court, or a judge thereof, may prescribe a shorter time.

History: Enacted March 11, 1872, founded upon § 517 Practice Act as amended 1853 (Stats. 1853, pp. 276, 278); amendment approved March 10, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 13; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 177, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 601, Kerr's Stats. and Amdts. 1906-7, p. 473; May 6, 1919, Stats. and Amdts. 1919, p. 289. In effect July 22, 1919.

NOTICE OF MOTION—AT WHAT TIME TO BE GIVEN.

1. Application of section—In general.
2. Same—Written notice intended.
3. Contribution by surety.
4. Decree of divorce—Custody of children—Notice of proceedings to change decree.
5. Granting time to file counter-affidavits.
6. Indorsement of "due service admitted."
7. Insufficient time of notice.
8. Jurisdiction to determine question of notice.
9. Motion to change place of trial.
10. Necessity of notice under above section conceded.
11. Order to show cause.
12. Shortening time of notice.
13. Same—Order to show cause.
14. Statute directory.
15. Time of notice of motion to tax costs.

As to extension of time, see, post, § 1054.

As to limitation imposed, see, post, § 1054 and note.

As to propriety of consideration of second motion to change the place of trial in personal actions, when notice of first motion was insufficient under the above section, see, ante, § 397 and note.

As to time allowed to amend pleading on sustaining of demurrer thereto, see, ante, § 476 and note.

As to time within which any act provided by law is to be done is computed by excluding first day and including last, see, ante, § 12; and Kerr's Cyc. Civ. Code, § 10; Kerr's Cyc. Pol. Code, § 12.

As to waiver of right to change place of trial in personal actions to the county of defendants residence by failure to invoke action, see, ante, § 396, note par. 137.

1. Application of section—In general.—Section does not apply to matters of which

party receiving notice is not legally entitled thereto, and in such cases court may prescribe any notice it sees fit, notice being in any event matter of favor.—Mudd v. Mudd, 98 Cal. 320, 322, 33 Pac. 114.

As to order made without notice, see, ante, § 937 and note.

2. Same—Written notice is intended when statute speaks of notice, and is essential to protection of rights of party affected by it. Any other practice would, in many instances, be attended with mischievous results, and hence should be discountenanced, and statute does not provide for any other than written notice, but if notice be in open court, entered in minutes of clerk, it can properly serve as substitute for notice contemplated by statute, it should contain all substantive elements of statutory notice, and should be brought to attention of party entitled to notice; and all this should appear by proper entry in minutes of court.—Fleteau v. Lubeck, 24 Cal. 364, 365.

As to necessity for notice being written, see, post, § 1010 and note.

3. Contribution by surety.—Notice to surety who has paid more than his share of judgment, for execution under provisions of section 709, ante, should be given in accordance with this section, there being no other provision of code upon subject.—Davis v. Helmbach, 75 Cal. 261, 264, 17 Pac. 199.

4. Decree of divorce—Custody of children—Notice of proceedings to change decree.—Where an action was brought in the state of California by a wife against her husband for a divorce, and an interlocutory decree was duly thereafter entered in the cause, and in such interlocutory decree the custody of the two children of the marriage were awarded to the mother, with permission to the father to visit them at stated times but providing that the children should not be removed from nor leave the jurisdiction of the court in Del Norte county,

California, until their majority, unless upon the written permission of that court and thereafter a written permission was given by the court for the removal of the children from the jurisdiction of the court and they were taken by the mother to the home of her father in Oregon; the father thereafter filed a petition in the California court for an order modifying the original interlocutory decree in so far as it related to the custody of the children, service of his petition and a citation from the court were attempted to be made on the wife in Yamhill county, Oregon, as proved by the certificate of the sheriff of Yamhill county, requiring the wife to appear in Del Norte county, California, and answer the petition within ten days after the service thereof. A hearing was had by the California court in the absence of the wife and a modification of the interlocutory decree was made giving the care, custody and control of the children to the father. On habeas corpus proceedings brought in Oregon to recover the custody of the children the Oregon court held that the notice attempted to be served in Oregon upon the divorced wife, who was a bona fide resident of Oregon, was without extraterritorial force, and not having been served upon her attorney, and she not appearing at the hearing, and that the ten days' notice in the citation requiring her to appear and answer within that time not being in accordance with the spirit of the above section of the California code and of section 410, ante, the decree rendered at the hearing upon such citation awarding the custody of the children to the father instead of the mother was invalid.—Griffin v. Griffin, 95 Oreg. 78, 187 Pac. 598.

5. **Granting time to file counter-affidavits** on motion, is matter within discretion of court.—Pierson v. McCahill, 22 Cal. 127, 130.

6. **Indorsement of "due service admitted"** upon paper may waive objection that it was not served in time, indorsement "due service admitted this — day of —" (stating time) admits only that paper was duly served on that day, and is not waiver of objection that service was made too late.—Towdy v. Ellis, 22 Cal. 650, 657.

As to service of papers, generally, see, post, §§ 1010 et seq. and notes.

7. **Insufficient time of notice** being given, party not appearing, may treat motion as having been made without notice, and may, ex parte, apply to court to set aside order made.—Johnson v. Wide West Min. Co., 22 Cal. 479, 480.

8. **Jurisdiction to determine question of notice.**—Change of attorney by order of court under subdivision 2 of section 284, ante, involves judicial action, and requirement of notice as basis of such order necessarily implies, at least, exercise of sufficient jurisdiction to determine that notice has been given. Notice must be in writing, and contain statement of relief sought, and be served as required by this section.—Rundberg v. Belcher, 118 Cal. 589, 590, 50 Pac. 670.

9. **Motion to change place of trial** based on the ground that the county where the action was commenced is not the proper county, accompanied with a demand that the place of trial be changed to the proper county, is not such a motion within the meaning of this section that requires to be made on notice (Shaw, J., con. op.).—Bohn v. Bohn, 16 Cal. App. 182, 116 Pac. 568.

As to change of place of trial generally, see, ante, § 397 and note.

10. **Necessity of notice under above section conceded,** it is held that by appearing and contesting, the want of proper notice was waived.—Bohn v. Bohn, 16 Cal. App. 181, 116 Pac. 568.

11. **Order to show cause why commission to take testimony should not issue,** when served upon adverse party, is equivalent to notice of motion, and no further notice is required.—Dambmann v. White, 48 Cal. 439, 440.

12. **Shortening time of notice by judge will,** in absence of showing to contrary, be deemed made for sufficient cause.—California M. & S. Bank v. Graves, 129 Cal. 649, 650, 62 Pac. 259.

13. **Same—Order to show cause why motion to take testimony should not issue,** returnable at certain time less than that prescribed by this section, is equivalent of motion and order shortening time for hearing thereof.—Dambmann v. White, 48 Cal. 439, 451.

14. **Statute directory.**—Statutes fixing time for filing papers in cause are merely directory, and court has it always in its power, in exercise of proper discretion, to extend time fixed by law, whenever ends of justice would seem to demand such extension.—Wood v. Fobes, 5 Cal. 62.

15. **Time of notice of motion to tax costs** may be shortened under the provisions of this section.—Furtinati v. Butterfield, 14 Cal. App. 25, 110 Pac. 963.

§ 1006. TRANSFER OF MOTIONS AND ORDERS TO SHOW CAUSE.

When a notice of motion is given, or an order to show cause is made returnable before a judge out of court, and at the time fixed for the motion, or on the return day of the order, the judge is unable to hear the parties, the matter may

be transferred by his order to some other judge, before whom it might originally have been brought.

History: Enacted March 11, 1872, re-enactment of § 518 Practice Act.

1. **Transfer from one department to another** of superior court of certain county, upon application of party, should be upon notice to opposite party, but such rule does not apply where judges, for more convenient dispatch of business, or for other reason they may deem necessary, make order assigning or transferring cases for trial to

any one or more of several departments of such court.—*Bell v. Peck*, 104 Cal. 35, 38, 37 Pac. 766.

As to disqualifications of judges, see, ante, § 170 and note.

As to notice of motion, see, ante, § 1005 and note.

§ 1007. ORDER FOR PAYMENT OF MONEY, HOW ENFORCED. Whenever an order for the payment of a sum of money is made by a court, pursuant to the provisions of this code, it may be enforced by execution in the same manner as if it were a judgment.

History: Enacted March 11, 1872.

ORDER FOR PAYMENT OF ALIMONY— ENFORCEMENT OF.

1. Alimony—Execution may issue.
2. Appeal—Order allowing execution for alimony.
3. Contempt—Imprisonment in satisfaction of fine.
4. Same—Payment of fine by imprisonment.
5. Decree of distribution.
6. Fine imposed for contempt of court—Is judgment or order.
7. Order to show cause.

1. **Alimony—Execution may issue** in divorce case upon order allowing alimony or counsel fees.—*Robinson v. Robinson*, 79 Cal. 511, 514, 21 Pac. 1095.

As to enforcement of decree for alimony by execution, see, ante, §§ 681 et seq. and notes. .

2. **Appeal—Order allowing execution for alimony.**—Order allowing alimony and counsel fees pendente lite in divorce case, and providing for enforcement thereof by execution, is appealable.—*Sharon v. Sharon*, 75 Cal. 1, 38, 16 Pac. 345.

3. **Contempt—Imprisonment in satisfaction of fine.**—This section offers the only method authorized by law for the enforcement of a fine under contempt proceeding

of sections 1209 et seq., post, if section 1205 Penal Code is inapplicable (*Angellotti, J., dis. op.*).—*Ex parte Karlson*, 160 Cal. 385, 117 Pac. 447.

As to fine imposed for contempt, see par. 6, this note.

As to contempts generally, see, post, §§ 1209 et seq. and notes.

4. **Same—Payment of fine by imprisonment.**—Common-law powers to enforce not intended to be taken away by this section, which are not intended to be exclusive, but cumulative as a remedy for that purpose (*Angellotti, J., dis.*).—*Ex parte Karlson*, 160 Cal. 383, 117 Pac. 447.

5. **Decree of distribution** is not such judgment or order for payment of money against administrator as may be enforced by execution.—*Estate of Kennedy*, 129 Cal. 384, 388, 62 Pac. 64.

6. **Fine imposed for contempt of court—Is judgment or order** for payment of money, and may be enforced by execution.—*Matter of Tyler*, 64 Cal. 434, 438, 1 Pac. 884.

See, also, pars. 3 and 4, this note.

7. **Order to show cause.**—Execution for alimony in divorce case may issue under this section without first giving defendant opportunity to show cause why he had not made payment.—*Van Cleave v. Bucher*, 79 Cal. 600, 602, 21 Pac. 954.

[See Act June 16, 1906, "relating to the restoration of court records which have been lost, injured or destroyed by conflagration or other public calamity," Stats. and Amdts. 1907, Extraordinary Session 1906, p. 73, 1 Henning's General Laws, 3d ed., p. 295, as affecting the sections of this chapter.]

CHAPTER V.

NOTICES, AND FILING AND SERVICE OF PAPERS.

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| § 1010. Notices and papers, how served. | § 1016. Preceding provisions not to apply to proceeding to bring party into contempt. |
| § 1011. When and how served. | § 1017. Service by telegraph. |
| § 1012. Service by mail, when. | § 1018. [No such section.] |
| § 1013. Service by mail, how. | § 1019. Service of papers and pleadings in action of divorce. |
| § 1014. Appearance. Notices after appearance. | |
| § 1015. Service on nonresidents. Where a party has an attorney, service shall be on such attorney. | |

§ 1010. NOTICES AND PAPERS, HOW SERVED. Notices must be in writing, and the notice of a motion, other than for a new trial, must state when, and the grounds upon which it will be made, and the papers, if any, upon which it is to be based. If any such paper has not previously been served upon the party to be notified and was not filed by him, a copy of such paper must accompany the notice.

Notices and other papers may be served upon the party or attorney in the manner prescribed in this chapter, when not otherwise provided by this code.

History: Enacted March 11, 1872, founded upon § 519 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 177, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 601, Kerr's Stats. and Amdts. 1906-7, p. 473.

NOTICES AND PAPERS—HOW SERVED.

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| 1. Actual knowledge or notice—As to effect of. | 16. Party to whom notice is to be given. |
| 2. Admission of "due service." | 17. Sheriff is not only person who may serve papers. |
| 3. Affidavit served along with motion—Sufficiency. | 18, 19. Statement of grounds in notice. |
| 4. Appeal—Conflict in evidence as to notice. | 20-22. Waiver of notice—As to generally. |
| 5. Attorney—Service of notice on. | 23. Same—Appearing and arguing, etc., constitutes a. |
| 6. Character of notice—Written notice. | 24. Same—Asking stay of execution. |
| 7. Convict—Proceedings to forfeit allowances—Written notice essential. | 25. Same—By taking appeal. |
| 8. Decision—Sufficient notice of. | 26. Same—Defendant giving notice of motion to dismiss. |
| 9, 10. Default—Notice of motion to open—Contents of. | 27. Same—Evidence of waiver—Examples. |
| 11. Notice—As to writing required. | 28. Same—Not waived by appearance in court, and hearing order. |
| 12. Same—Same—Notice overruling demurrer must be in writing. | 29. Same—Stipulation extending time to answer—Waives written notice. |
| 13. Same—Form of—Personal notice when form not prescribed. | 30. Written notice—Necessity of—Waiver of—Actual knowledge is equivalent—Conflict of decisions. |
| 14. Objections to the service of process. | 31. Same—Criminal cases—Notices must be written. |
| 15. Order overruling demurrer—Notice of decision—Service upon party not required, when. | 32. Same—Express notice necessary to forfeit right. |
| | 33, 34. Same—Knowledge equivalent to notice, when. |

35, 36. Same—Knowledge not equivalent to notice, when.

37-39. Same—Notice of overruling of demurrer.

40. Same—Object of—Estoppel.

41. Same—Verbal notice to clerk.

42, 43. Same—Written notice of decision necessary.

As to citation, and service thereof, to person suspected of having embezzled estate of deceased person, etc., see, post, §§ 1458 et seq. and notes.

As to law neither does nor requires idle acts, see Kerr's Cyc. Civ. Code, 2d ed., § 3532.

As to law respects form less than substance, see Kerr's Cyc. Civ. Code, 2d ed., § 3528.

As to notices, and service thereof, in cases of unlawful detainer, see, post, §§ 1161, 1162 and notes.

As to notice by claimant of escheated estate, see, post, § 1271.

As to notices in cases of contempt of court, see, post, § 1212.

As to notices in probate proceedings, see, post, §§ 1704 et seq. and notes.

As to notice in proceeding to declare life estate terminated, see, post, § 1723.

As to notice in proceeding to perpetuate testimony, see, post, §§ 2084 et seq. and notes.

As to notice of application for discharge of person imprisoned on civil process, and notice thereof, see, post, §§ 1144, 1145.

As to notice of award of arbitrators, see, post, § 1286.

As to notice of change of attorney, see, ante, § 285 and note.

As to notice of intention to move for new trial, see, ante, § 659.

As to notice of motion to change the place of trial of personal actions under §§ 395 et seq., see, ante, §§ 396, 397 and notes.

As to notice of pendency of action, see, ante, § 409 and note.

As to notice of setting case for trial, see, ante, § 594 and note.

As to notice of taking deposition out of state, see, post, § 2024.

As to notice of taking depositions within the state, see, post, § 2031.

As to notice on application for appointment of guardian, see, post, §§ 1747, 1763.

As to notice on application for change of name, see, post, §§ 1276, 1277 and notes.

As to notice on application for voluntary dissolution of corporations, see, post, § 1230.

As to notice on application for writ of review, see, post, § 1069.

As to notice on application to become sole trader, see, post, § 1812.

As to notice on writ of mandate, see, post, § 1088.

As to service and filing of notice of appeal, see, ante, § 940.

As to service and filing of pleadings, see, ante, § 465 and note.

As to service of amendments to pleadings and amended pleadings, see, ante, § 472 and note.

As to service of citation in cases of contested elections, see, post, § 1119.

1. Actual knowledge or notice—As to effect of.—Where written notice is required by the statute, actual notice or actual knowledge does not take the place of the statutory notice.—Timmons v. Coonley, 39 Cal. App. 35, 179 Pac. 429.

2. Admission of "due service" upon an answer served after a default and judgment had been entered furnishes no reason for allowing a motion to open the default.—Victor Power & M. Co. v. Cole, 11 Cal. App. 497, 503, 105 Pac. 758.

3. Affidavit served along with motion—Sufficiency.—Where the notice of motion to set aside a default judgment does not state that the affidavit of one of the defendants would be used at the hearing, but it appears that a copy of such affidavit was served on the attorney for the plaintiff along with the notice of motion, he will be sufficiently apprised that this affidavit will be relied on at the hearing of the proceeding to satisfy this section.—Broderick v. Cochran, 18 Cal. App. 202, 204, 122 Pac. 972.

4. Appeal—Conflict in evidence as to notice.—Finding or ruling as to notice, made upon conflicting evidence, will not be disturbed by appellate court.—Rauer v. Silva, 128 Cal. 42, 44, 60 Pac. 525.

5. Attorney—Service of notice on.—Service must be made on attorney of all written notices, and all other papers, except original and final process, subpoenas, writs, etc.—People v. Alameda T. R. Co., 30 Cal. 182, 183.

6. Character of notice—Written notice, or notice in open court of which minute is made by clerk, is intended when statute speaks of notice.—Borland v. Thornton, 12 Cal. 440, 448.

7. Convict—Proceedings to forfeit allowances—Written notice essential.—In a proceedings against a convict to forfeit his credits for good behavior, there is no requirement that there shall be served upon him a written notice of hearing in a proceedings for the purpose of forfeiture under section 1588 of the Penal Code, for the reason that the notice referred to in that section is not imperatively required to be in writing; and the provisions of the above section have no application to such a proceeding.—In re McDonald, 45 Cal. App. 480, sub nom. Ex parte McDonald, 187 Pac. 991.

8. Decision—Sufficient notice of.—Copy of findings and judgment served upon plain-

tiff's attorneys after entry of judgment upon which they indorse "received copy of within memorandum of copies, together with copy of findings in and final decree in within mentioned action, after filing of said findings and filing of entry of decree, this day, June 12, 1889," is sufficient notice of entry of judgment. Being in substance and effect written notice of judgment, law respects form less than substance.—*Kelleher v. Creclat*, 89 Cal. 38, 40, 26 Pac. 619.

9. Default—Notice of motion to open—Contents of.—In a proceeding under the provisions of section 473, ante, to be relieved from a default judgment order or other proceedings taken against the party through his mistake, inadvertence, surprise, or excusable neglect, the notice of motion to open such default should state the grounds upon which it will be made under the requirements of the provisions of the above section, and an affidavit of merits is essential to relief from a default judgment.—*Ross v. San Diego Glazed Cement Pipe Co.*, — Cal. App. —, 194 Pac. 1059, applying rule in *Parkside Realty Co. v. MacDonald*, 167 Cal. 342, 345, 139 Pac. 805.

10. Thus where the notice of motion does not purport to state the grounds upon which the application will be made, but merely states that it will be based upon two certain affidavits, which are served without notice, and upon the records and files in the action, is insufficient within the requirements of the above section.—*Ross v. San Diego Glazed Cement Pipe Co.*, — Cal. App. —, 194 Pac. 1059.

11. Notice—As to writing required.—There is no doubt that where, under the various provisions of the code, notice of a fact is required to be given, written notice is usually intended, as indicated by the provisions of the above section. It is also true that in the case of the entry of judgment actual knowledge of such entry is never sufficient to start the time running within which notice of intention to move for a new trial must be filed; and unless facts appear or record which constitute a waiver thereof, the written notice required under the provisions of section 659, ante, must be given.—*Jansson v. National Steamship Co.*, 34 Cal. App. 483, 168 Pac. 151, following the doctrine in *Forni v. Yoell*, 99 Cal. 173, 33 Pac. 887; *Gardener v. Stare*, 135 Cal. 118, 67 Pac. 5; *Hughes Mfg. & Lumber Co. v. Elliott*, 167 Cal. 494, 140 Pac. 17.

12. Same—Same—Notice overruling demurrer must be in writing.—A notice of an order overruling a demurrer and giving time to answer must be in writing.—*Timmons v. Coonley*, 39 Cal. App. 35, 179 Pac. 430.

13. Same—Form of — Personal notice when form not prescribed.—Where a statute or contract requires the giving of notice, and there is nothing in the context, or in the circumstances of the case, to show

that any other form of notice was intended, personal notice will be required.—*Stockton Automobile Co. v. Confer*, 154 Cal. 408, 97 Pac. 881.

14. Objections to the service of process not specified in notice of motions to quash service of summons, will be deemed waived.—*Dickinson v. Zubiate Mining Co.*, 11 Cal. App. 656, 662, 106 Pac. 123.

15. Order overruling demurrer—Notice of decision—Service upon party not required, when.—In those cases in which a party to an action is represented by counsel a notice of the overruling of a demurrer need not be served upon the adverse party where such party is represented by counsel in court at the time the order overruling a demurrer is made, notwithstanding the fact that the above section and section 476, ante, contemplates the service of notice of such order upon the adverse party.—*Jones v. Baxter*, — Cal. App. —, 197 Pac. 361, following the doctrine in *Wall v. Held*, 95 Cal. 364, 30 Pac. 551.

16. Party to whom notice is to be given.—Where notice is provided to be given, and person to receive it be not indicated, plain inference is that party intended is person interested—one who is to be proceeded against.—*Davis v. Heimbach*, 75 Cal. 261, 264, 17 Pac. 199.

17. Sheriff is not only person who may serve papers in pending action. Section 4176 Political Code, providing that sheriff must serve all process and notices in manner prescribed by law is found in chapter defining duties of sheriff, and does not give to or impose upon him exclusively duty of serving all process and notices, but requires him to serve all process and notices directed to him or placed in his hands for service which law commands him to serve when addressed or handed to him.—*Hibernia Sav. & L. Soc. v. Clarke*, 110 Cal. 27, 31, 42 Pac. 425.

18. Statement of grounds in notice.—A notice of motion to dismiss an appeal on the ground that the appellant has failed to furnish the requisite papers is insufficient where it fails to designate what particular papers are claimed to have been omitted from the record.—*Garrett v. Garrett*, 31 Cal. App. 173, 159 Pac. 1050.

19. Whereas it is provided that the notice of motion must state the grounds upon which it will be made it follows that only such grounds as are specified can be considered by the court in support of the motion. Where the motion was to strike out the item of attorney fees on the ground that they were "unlawful and not properly taxable as costs," the only inquiry which the court could make was whether the defendant was entitled as costs to any sum as attorney fees.—*Mojave & B. R. Co. v. Cuddeback*, 28 Cal. App. 439, 152 Pac. 943.

20. Waiver of notice—As to generally.—A waiver of notice may be made by party

entitled to it.—*Forni v. Yoell*, 99 Cal. 173, 175, 177, 33 Pac. 887.

As to right of any one to waive the advantage of a law intended for his benefit, see *Kerr's Cyc. Civ. Code*, 2d ed., § 3513.

21. Object of notice and only purpose it can subserve is to bring home to attorney knowledge of fact upon which he is called upon to act. Right to written notice, like any other civil right, may be waived.—*Barron v. Deleval*, 58 Cal. 95, 97, 98.

22. Provision of statute requiring notice is subject to rule that any one may waive advantage of law intended solely for his benefit, and when party acts or proceeds as if he had formal notice of decision, such acts will constitute waiver of such formal notice.—*Mallory v. See*, 129 Cal. 356, 359, 61 Pac. 1123. See *Gray v. Winder*, 77 Cal. 525, 527, 20 Pac. 47.

23. Same—Appearing and arguing, etc., constitutes a.—One who appears and argues or submits a brief upon the merits of a motion will not be heard to object that he has not had sufficient notice thereof.—*Naylor v. Adams*, 15 Cal. App. 382, 114 Pac. 997.

24. Same—Asking stay of execution.—Defeated party moving for stay of execution, which is granted, and asking further findings, which are made, and all of which appears in minutes of court, waives formal notice of decision, and by such action must be held to have actual knowledge thereof.—*Gray v. Winder*, 77 Cal. 525, 527, 27 Pac. 47; *Gardner v. Stare*, 135 Cal. 118, 120, 67 Pac. 5.

25. Same—By taking appeal from judgment without waiting for notice of decision, losing party waives such notice, and notice of intention to move for new trial given more than ten days thereafter comes too late.—*People v. Center*, 9 Pac. C. L. J. 776, approved in *Forni v. Yoell*, 99 Cal. 173, 175, 177, 33 Pac. 887.

26. Same—Defendant giving notice of motion to dismiss action upon ground findings and decision of court upon final submission have been entered for more than six months, without entry of judgment, must be held to have waived notice of decision as of time of making such motion. Evidence of waiver should be of such positive and conclusive character as to leave no uncertainty or doubt, but where, as in this instance, it is furnished by party himself, has been placed upon files of court, and made basis upon which to predicate an application for relief which could only be granted upon theory that given fact exists (viz. that findings and decisions were made and filed), there is nothing left to doubt or uncertainty, and no room for suggestion that party may not have comprehended information he received, no room for discussion of really important question as to whether knowledge is and should in all cases be treated as notice, and, if so, as to extent of knowledge which constitutes notice.—*Forni v. Yoell*, 99 Cal. 173, 175, 177, 33 Pac. 887.

27. Same—Evidence of waiver—Examples.—Mere knowledge that decision has been given is not equivalent of notice, but giving of actual notice may be waived by party entitled to it. Evidence of such waiver must be clear and uncontradicted, not dependent upon oral testimony, or ex parte affidavits. The rule would, therefore, seem to be that written notice of filing of decision is in all cases required, unless there be facts appearing in record, files, or minutes of court showing waiver thereof. Written admission of party entitled to notice or knowledge that decision had been made, filed with clerk, or entered upon minutes of court, would dispense with necessity of giving such notice and motion to court or other proceeding by party with reference to decision, which necessarily presumes knowledge that it has been made, and by which he seeks to protect his own interest against rights of other party in decision, will be regarded as waiver of his right to notice of decision.—*Gardner v. Stare*, 135 Cal. 118, 120, 67 Pac. 5.

28. Same—Not waived by appearance in court, and hearing order overruling demurrer announced, does not waive right to notice of order.—*McCord & N. M. Co. v. Glen*, 6 Utah 139, 21 Pac. 500.

29. Same—Stipulation extending time to answer—Waives written notice.—Notice in writing may be waived, and the signing by defendant of a written stipulation allowing further time to answer is a waiver of the written notice required by statute, but such waiver was not retroactive and did not become effective on the date of the order overruling the demurrer and allowing time to answer, but the three-day time allowed began to run on the date the stipulation was signed.—*Timmons v. Coonley*, 39 Cal. App. 35, 179 Pac. 429.

30. Written notice—Necessity of—Waiver of—Actual knowledge as equivalent—Conflict of decisions.—Notice of decision when required to be given, under various provisions of code, means and requires written notice. The principle involved in nearly all cases relating to time within which to perform certain acts, when time is given after notice of decision, is substantially same and seeming discrepancies between few of cases is to be found in fact of confounding question of what is sufficient service of notice with very distinct one of waiver of notice, and what amounts to such waiver.—*Forni v. Yoell*, 99 Cal. 173, 174, 33 Pac. 887.

31. Same—Criminal cases—Notices must be written.—Settlement of bill of exceptions in criminal case must be upon written notice. Section 1171 of Penal Code, providing for settlement of bill upon at least two days' notice, must be construed with this section.—*Page v. Superior Court*, 122 Cal. 209, 211, 54 Pac. 730.

32. Same—Express notice necessary to forfeit right.—Where judgment provides

that right to be forfeited within certain time after "written notice of entry of this judgment," party is entitled to notice expressly intended for purpose of starting that period of time, and mere incidental recital in notice of motion for new trial given for entirely different purpose is not sufficient compliance with terms of judgment.—*Byrne v. Hudson*, 127 Cal. 254, 257, 59 Pac. 597.

33. Same—Knowledge equivalent to notice, when.—Notice of intention to move for new trial and "set aside and vacate decision and judgment heretofore rendered, and entered herein" by plaintiff in whose favor judgment has been rendered, is sufficient notice that decision has been rendered to conclude defendant, who has given like notice of intention to move for new trial, but not within ten days after receiving plaintiff's notice.—*Waddingham v. Tubbs*, 95 Cal. 249, 250, 30 Pac. 527; *Forni v. Yoell*, 99 Cal. 173, 175, 177, 33 Pac. 887. See *Mallory v. See*, 129 Cal. 356, 61 Pac. 1123.

Where the question is further discussed and these decisions commented upon.—See par. 35, this note.

34. Where provision is made for doing act within certain number of days after "notice of decision" it is settled that where it appears affirmatively that party moving had actual notice of decision no formal notice thereof is necessary.—*California Imp. Co. v. Baroteau*, 116 Cal. 136, 139, 47 Pac. 1018. See *Mallory v. See*, 129 Cal. 356, 61 Pac. 1123.

See pars. 35, 36, this note.

35. Same—Knowledge not equivalent to notice, when.—Actual notice or knowledge of fact that decision has been rendered with agreement upon terms to be embodied in written decision and judgment about to be filed, and which were filed accordingly, is not equivalent to written notice of decision to start running time to file notice of intention to move for new trial.—*Mallory v. See*, 129 Cal. 356, 358, 61 Pac. 1123.

As to when knowledge is notice, see pars. 33, 34, this note.

36. Notice of intention to move for new trial must be in writing, and party intending to move has right to wait for such notice of decision from adverse party before giving notice of his intention to move for new trial, and is entitled to such notice of decision before he is called upon to act, although he is present in court when decision is rendered, waives findings, and asks for stay of proceedings on judgment. It is not enough that party have knowledge of judgment or order; and oral communication, presence in court, and hearing decision announced, or order of judgment declared, is not sufficient.—*Blagi v. Howes*, 66 Cal. 469, 470, 471, 472, 6 Pac. 100.

37. Same—Notice of overruling of demurrer is not required, or, if required, is waived where attorney for demurring party

appeared in court at time set for hearing thereof and stated he did not wish to argue demurrer, whereupon court overruled same, and attorney stated he would take usual time to answer, to which court assented.—*Wall v. Heald*, 95 Cal. 364, 367, 30 Pac. 551.

38. Written notice of overruling demurrer is not required, but conceding such was required, it is waived by party appearing in court at hearing and applying for leave to answer within certain time.—*Barron v. Deleval*, 58 Cal. 95, 97, 98.

39. Distinguished: *Blagi v. Howes*, 66 Cal. 469, 472, 6 Pac. 100.

40. Same—Object of—Estoppel.—When party acts as if he had formal notice of decision, such acts constitute waiver of such formal notice. It is a cardinal principle of construction that object to be attained must be kept constantly in view, and object to be attained by giving notice is as fully attained when party entitled to notice has actual knowledge of fact, and acts upon that knowledge, as if he had formal notice. When action is tried by jury, party must give notice of intention to move for new trial within ten days after verdict, without any formal notice. Only reason for not requiring notice in such cases is that it would barely be possible that both parties would not have actual knowledge of result. Where action is tried by court, liability of party to be ignorant of decision for considerable time after it is rendered is much greater. Object of law is to give party certain number of days after he has actual knowledge of decision within which to act.—*Gray v. Winder*, 77 Cal. 525, 527, 20 Pac. 47.

41. Same—Verbal notice to clerk of district attorney of presentation for settlement of bill of exceptions is not sufficient, especially in absence of showing that he assumed to accept it as equivalent to written notice, or had any special authority to bind his principal in this mode.—*Page v. Superior Court*, 122 Cal. 209, 211, 54 Pac. 730.

42. Same—Written notice of decision necessary.—Rule would seem to be that written notice of filing of decision is in all cases required, unless waived by fact appearing in records, files, or minutes of court, and it follows that actual notice or knowledge, other than by written notice, is insufficient, and unless it appears from record that written notice was waived. This is, in effect, held to be rule in *Forni v. Yoell*, 99 Cal. 173, 176, 33 Pac. 887, where distinction between actual notice and waiver is pointed out and explained.—*Mallory v. See*, 129 Cal. 356, 359, 61 Pac. 1123.

43. Written notice of decision must be given. Service and procuring admission of service of copy of findings and judgment is not equivalent to such notice.—*First Nat. Bank v. McCarthy*, 13 S. D. 362, 83 N. W. 423.

§ 1011. WHEN AND HOW SERVED. The service may be personal, by delivery to the party or attorney on whom the service is required to be made, or it may be as follows:

1. **If upon an attorney**, it may be made during his absence from his office, by [1] leaving the notice or other papers with his clerk therein, or [2] with a person having charge thereof; or [3] when there is no person in the office, by [a] leaving them between the hours of nine in the morning and five in the afternoon, in a conspicuous place in the office; or, [4] if it [the office] is not open so as to admit of such service, then by leaving them [a] at the attorney's residence, [b] with some person of not less than eighteen years of age, if his residence is in the same county with his office; and [5] if his residence is [a] not known, or is [b] not in the same county with his office, or [c] being in the same county it is not open, or [d] there is not found thereat any person of not less than eighteen years of age, then [6] by putting the same, inclosed in a sealed envelope, into the post-office directed to such attorney [a] at his office, if known; otherwise [b] to his residence, if known; and if neither his office nor his residence is known, then [c] by delivering the same to the clerk of the court for the attorney;

2. **If upon a party**, it may be made by [1] leaving the notice or other paper at his residence, [a] between the hours of eight in the morning and six in the evening, [b] with some person of not less than eighteen years of age; if at the time of attempted service between the said hours no such person can be found at his residence, [2] the same may be served by mail; and, if his residence is not known, then by [3] delivering the same to the clerk of the court for such party.

History: Enacted March 11, 1872, re-enactment of § 520 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 177, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 602, Kerr's Stats. and Amdts. 1906-7, p. 474; May 6, 1919, Stats. and Amdts. 1919, p. 289. In effect July 22, 1919.

SERVICE OF NOTICE—WHEN AND HOW MADE.

1. Absence from office—Service during.
2. Absence from state—Does not dispense with service of notice.
3. Admission of service—Personal service.
4. Appeal—Service of notice.
5. Conspicuous place in office—Letter-box.
6. Defective proof of service—Cure of.
7. Same—Amendment.
8. Indorsement by person serving.
9. Jurisdiction—Fact of service of notice rather than evidence thereof.
10. Same—Effect of error as to notice.
11. Justices' court—Notice of setting cause for trial.
12. New affidavit of service—May be leave be filed.
13. Objections—Must be made in trial court.

14. Order to show cause.
 15. Personal service—"The delivery."
 16. Same—Receipt of notice sent by mail.
 17. Premature service.
 18. Power of clerk of attorney.
 19. Proof of service—How made.
 - 20-23. Same—Not personal—What must be shown.
 24. Same—Record should contain.
 - 25, 26. Same—Recital of notice.
 27. Service on Sunday.
 - 28, 29. Substituted service—Strict compliance with code.
 30. Time of giving notice.
- As to service of subpoenas**, see, post, § 1987 and note.
- Same—Where witness is prisoner.**—See, post, §§ 1995, 1997 and notes.
- As to service of writ of mandate**, see, post, § 1096.
- As to service of writ of prohibition**, see, post, § 1105.

As to service of writ of review, see, post, § 1073.

1. Absence from office—Service during.—Sufficient service is made during absence from his office by placing notice in conspicuous place upon office desk in office of attorney in presence of person having charge of office at time and after calling his attention to paper thus served. Such person being in charge of office must be understood to be in charge of whole of it, and, therefore, paper placed before his eyes in conspicuous place on desk therein is in contemplation of law left "with person having charge of office."—*People v. Ferris Irr. Dist.*, 142 Cal. 601, 604, 76 Pac. 381.

2. Absence from state—Does not dispense with service of notice.—The absence from state of purchaser at sheriff's sale does not dispense with notice of motion to set aside sale. Personal service is not required. It may be served by leaving it at his residence, if known, with some person of suitable age and discretion, or if his residence is not known, by inclosing it in envelope and depositing it in post-office addressed to him.—*Eckstein v. Calderwood*, 34 Cal. 653, 660.

3. Admission of service—Personal service.—Written indorsement, "service admitted," signed by attorneys, would mean "personal service admitted."—*Brown v. Green*, 65 Cal. 221, 222, 3 Pac. 811.

4. Appeal—Service of notice.—Service of notice of appeal must be made as prescribed by this chapter.—*Columbet v. Pacheco*, 46 Cal. 650, 651.

5. Conspicuous place in office—Letter-box placed on door and thus designated by attorney as proper place for deposit of letters and papers during his absence from office is "conspicuous place" within meaning of this section.—*Dalzell v. Superior Court*, 67 Cal. 453, 454, 7 Pac. 910.

6. Defective proof of service—Cure of.—Proof of service of notice of appeal originally defective may be cured by affidavit filed in pursuance of leave for that purpose.—*Schloesser v. Owen*, 134 Cal. 546, 66 Pac. 726.

7. Same—Amendment.—Fact of service and not proof of service gives court jurisdiction, and where service is regular, but proof thereof defective, court may allow amended return of service to be entered nunc pro tunc as of date of or prior to judgment.—*Herman v. Santee*, 103 Cal. 519, 523, 42 Am. St. Rep. 145, 37 Pac. 509.

8. Indorsement by person serving.—Indorsement, "Service admitted of within notice Nov. 17, 1863, served D. Calderwood, Nov. 17, 1863, by sending notice in envelope (paying postage) directed to D. Calderwood, San Francisco. M. H. Furman," on notice of appeal signed by "W. H. Furman, attorney for defendant," affords no evidence of service for it is not admission by plaintiff of service, and service by mail is not verified by certificate of officer author-

ized to make service nor by affidavit of any person, nor does it appear that plaintiff's residence was unknown and therefore service by mail did not constitute legal service.—*Calderwood v. Brooks*, 28 Cal. 151, 154.

9. Jurisdiction—Fact of service of notice rather than evidence thereof gives court jurisdiction, and service of notice of appeal may be shown in other modes than by being incorporated in transcript.—*Sutter Co. v. Tisdale*, 128 Cal. 180, 181, 60 Pac. 757. See *Heinlen v. Hellbron*, 94 Cal. 636, 30 Pac. 8; *Knowlton v. Mackenzie*, 110 Cal. 190, 42 Pac. 508.

10. Same—Effect of error as to notice.—Court may err as to kind or length of notice required on motion, for e. g. to dismiss appeal, but if appellant have notice in fact, order dismissing appeal can not be said to be void. The notice is not means by which jurisdiction was obtained, for that had already been acquired by appeal.—*People ex rel. Waldon v. Elkins*, 40 Cal. 642, 647.

11. Justices' court—Notice of setting cause for trial in justices' court is jurisdictional and must be served as prescribed in this chapter. Proof of such service should be required. Justice should not accept verbal statement that notice has been served upon defendant, nor can waiver of service of such notice be made by talking over telephone.—*Elder v. Justices' Court*, 136 Cal. 364, 366, 68 Pac. 1022.

12. New affidavit of service—May be leave be filed in appellate court upon motion to dismiss on ground that record does not show proper service.—*Martin v. De Ornelas*, 139 Cal. 41, 43, 72 Pac. 440.

13. Objections—Must be made in trial court.—Service of amended complaint on defendant personally instead of on his attorney must be objected to in lower court and will not be entertained for the first time on appeal.—*Campbell v. West*, 93 Cal. 653, 658, 29 Pac. 219.

14. Order to show cause why judgment should not be set aside must be served upon adverse party or his attorney, and setting aside of judgment upon such order without service is void.—*Vallejo v. Green*, 16 Cal. 160, 161.

15. Personal service—"The delivery," which constitutes personal service, need not be made by individual who is attempting to make service, but can be effected through clerk or messenger or through any agency by which "delivery" can be made, and when notice is so delivered service becomes personal service. Fact that person upon whom service is to be made resides or has his office in different place from that of person making service does not require service to be made by mail or preclude personal service, and person seeking to make service can avail himself of any agency, such as Wells Fargo & Co., or instrumentality of post-office department, with as much effect as if he had employed

any other messenger. Notice through such agency renders service personal, and proof of such delivery establishes personal service.—*Heinlen v. Heilbron*, 94 Cal. 636, 640, 30 Pac. 8.

16. Same—Receipt of notice sent by mail when admitted by party or proved is equivalent to personal service.—*Sherman v. Jorgensen*, 106 Cal. 483, 485, 39 Pac. 863. See *Heinlen v. Heilbron*, 94 Cal. 636, 30 Pac. 8.

17. Premature service of notice of intention to move for new trial, or lack of such service, might be good reason for dismissing motion, but it is not ground for dismissing appeal from order made on motion upon ground that appellate court is without jurisdiction. Matters occurring prior to order appealed from, considered on motion to dismiss appeal.—*Bell v. Staacke*, 137 Cal. 307, 308, 70 Pac. 171.

18. Power of clerk of attorney or person in charge of his office, by leaving notice with whom service may be made, is not by implication sufficient to bind his principal by any agreement with reference to case.—*Page v. Superior Court*, 122 Cal. 209, 211, 54 Pac. 730.

19. Proof of service—How made.—Service of notice, if not shown by official certificate or by admission of parties served, must be proved by affidavit of some competent person. An affidavit of third person is entitled to as much weight as that of party or his attorney.—*Moore v. Besse*, 35 Cal. 183, 186.

20. Same—Not personal—What must be shown.—Affidavit of service in cases other than actual personal service must show all requirements of law to effect that service has been complied with and also existence of conditions authorizing service in mode adopted.—*Mohr v. Byrne*, 131 Cal. 288, 290, 63 Pac. 341.

21. In case of substituted service by leaving notice in conspicuous place in office, proof must show that attorney served was at such time absent from his office.—*Dalzell v. Superior Court*, 67 Cal. 453, 454, 7 Pac. 916.

22. Proof of service not personal must show strict compliance with statute. Where made by leaving at attorney's office, it must appear whether it was left with his clerk or with person in charge of office or in conspicuous place therein, and that at time of service attorney was absent, etc.—*Doll v. Smith*, 32 Cal. 475, 476.

23. Affidavit that affiant "left true copy thereof [the notice] at office of Crane & Boyd, attorneys for defendant," is insufficient as evidence of service of notice.—*Gallardo v. Atlantic & Pac. T. Co.*, 49 Cal. 510, 511.

24. Same—Record should contain.—Evidence of service of notice of intention to move for new trial must be contained in record or it must clearly appear from record that service of notice was waived.—*Calderwood v. Brooks*, 28 Cal. 151, 154.

25. Same—Recital of notice of publication or posting contained in decree is sufficient upon collateral attack.—*Crew v. Pratt*, 119 Cal. 139, 152, 51 Pac. 38.

26. As general proposition, judgment is conclusive not only as to subject-matter in controversy in action in which it is made, but also in all other actions involving same question, and upon all matters involved in issues which may have been litigated and decided in case, presumption being that all such issues were really met and decided. Recital of due service and notice by publication contained in judgment or decree is conclusive upon collateral attack.—*Crew v. Pratt*, 119 Cal. 139, 149, 51 Pac. 38.

27. Service on Sunday of statement on motion for new trial is sufficient, although it need not to have been made until following day. Service of such papers is not "judicial business" within meaning of section 5 of article VII of constitution.—*Reclamation Dist. v. Hamilton*, 112 Cal. 603, 611, 44 Pac. 1074.

As to certain acts not to be done on holidays, see, ante, § 13 and note.

As to holidays, see, ante, §§ 10, 11 and notes.

As to judicial and non-judicial days, see, ante, §§ 133-135 and notes.

As to superior courts being always open, see, ante, § 73 and note.

28. Substituted service—Strict compliance with code.—In all cases in which statute allows substituted service or in which jurisdiction may be obtained by prescribed form of notice, of which real party in interest had no actual notice, and did not appear or subject himself to jurisdiction of court, mode of service prescribed by statute must be strictly pursued.—*Matter of Tracey*, 136 Cal. 385, 390, 69 Pac. 20.

29. Service of notice by posting same upon property affected constitutes exception to rule requiring personal notice, and he who would avail himself thereof must establish by proof facts bringing case within exception.—*Hall v. Capps*, 107 Cal. 513, 516, 40 Pac. 809.

30. Time of giving notice.—Notice of presentation of statement on motion for new trial, and amendments thereto, as provided by section 650, ante, is essential, and notice after such presentation that same have been presented and will be settled at certain time, comes too late, and settlement under such conditions is erroneous.—*Witter v. Andrews*, 122 Cal. 1, 3, 54 Pac. 276.

As to computation of time allowed within which to do a certain act, see note 46 Am. Rep. 410.

As to computation of time of notice of motions, and proceedings in general, see note 49 L. R. A. 222.

As to including and excluding Sunday from time allowed to do certain act, see note 46 Am. Rep. 410.

§ 1012. SERVICE BY MAIL, WHEN. Service by mail may be made, where the person making the service, and the person on whom it is to be made, reside or have their offices in different places, between which there is a regular communication by mail.

History: Enacted March 11, 1872, re-enactment of § 521 Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 343.

SERVICE OF NOTICE—SUFFICIENCY AND RETURN.

1. Parties—Who considered.
2. Service on one of two attorneys.
3. Strict compliance with statute—Necessity for.
4. Same—Proof, what should be shown.
- 5-7. Same—Same—Affidavit of service must show a strict compliance.

1. **Parties—Who considered.**—In case of service by mail, attorney signing notice must be considered party by whom service is made, and not person who, acting for him, actually deposits paper in mail.—*Moore v. Besse*, 35 Cal. 183, 186.

2. **Service on one of two attorneys.**—Where there are two attorneys of record, service by mail of a notice of appeal may be made upon one without also notifying the other.—*Garrett v. Garrett*, 31 Cal. App. 173, 159 Pac. 1050.

3. **Strict compliance with statute—Necessity for.**—Service by mail authorized by this section does not contemplate delivery as part of service, as by provisions of section 1013, post, service is complete at time of deposit in post-office. Such service is termed substituted service and is intended to take place of and to be equivalent in point of law and effect to personal service. As such service is contrary to general rule, it is incumbent upon party who would avail himself thereof to have it clearly appear upon record that case is one in which such service is permitted and that mode pointed out by statute for making service has been

strictly followed.—*Heinlen v. Heilbron*, 94 Cal. 636, 640, 30 Pac. 8.

See, also, post, § 1013, note par. 15.

4. **Same—Proof, what should be shown.**—Service by mail is good only where person making service and person on whom it is to be made reside in different places between which there is regular communication by mail. Party relying upon such service must show strict compliance with requirements of statute, and if affidavit of service does not show there was regular communication by mail between such places, nor that there was any communication whatever by mail between two places, and court can not judicially know or intend that there was, proof of service is insufficient.—*People v. Alameda T. Co.*, 30 Cal. 182, 184.

5. **Same—Same—Affidavit of service must show a strict compliance** with the provisions of this section, or otherwise the evidence is insufficient to establish the fact of service.—*Linforth v. White*, 129 Cal. 191, 61 Pac. 910; *Rubenstein v. Superior Court*, 18 Cal. App. 128, 130, 122 Pac. 820.

6. **Affidavit of service by mail must show that party making service and party upon whom service is made reside or have their offices in different places between which there is regular communication by mail.**—*Hogs Back C. M. Co. v. New Basil C. M. Co.*, 63 Cal. 121, 122.

7. **Affidavit must show where parties resided. Person making service and person served must reside or have their offices in "different places" to justify service by mail.**—*Cunningham v. Karnekey*, 61 Cal. 507, 508.

§ 1013. SERVICE BY MAIL, HOW. In case of service by mail, the notice or other paper must be deposited in the post-office, in a sealed envelope, addressed to the person on whom it is to be served, at his office or place of residence, and the postage paid. The service is complete at the time of the deposit, but if, within a given number of days after such service, a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be done is extended one day for every twenty-five miles distance between the place of deposit and the place of address; such extension, however, not to exceed thirty days in all.

History: Enacted March 11, 1872, founded upon § 522 Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 343; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 178, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 602, Kerr's Stats. and Amdts. 1906-7, p. 474.

SERVICE OF NOTICE BY MAIL—HOW MADE.

1. As to construction of section—Dropping card to defendant in person.
2. Additional time—Not allowed party making service.
3. Same—Not allowed where party is not entitled to notice.
4. Application and object of section.
5. Default entered on insufficient proof of service by mail.
6. Defective proof—Additional showing.
7. Distance between place of mailing notice and place to which it is addressed.
8. Filing—Time for not extended.
- 9-11. Notice of decision—Service of by mail.
12. Same—Same—Acknowledgment of receipt by mail.
13. Place of deposit in mail.
14. Proof of service by mail.
15. Same—Strict compliance necessary.
16. Time—Admission of service.

1. As to construction of section—Dropping card to defendant in person.—Dropping a card to the defendant in person stating that the case was set for a named date is not a compliance with the statute.—*McMunn v. Lehrke*, 29 Cal. App. 298, 155 Pac. 473.

As to application and object of section, see par. 4, this note.

As to service complete when mailed, see par. 9, this note.

2. Additional time—Not allowed party making service.—Service of notice of appeal is complete upon deposit in post-office in case where service may be made by mail, and time to file undertaking on appeal commences to run from time of such deposit.—*Brown v. Green*, 65 Cal. 221, 222, 3 Pac. 811.

3. Same—Not allowed where party is not entitled to notice.—Fact that notice is given by mail does not entitle him to additional time provided by this section.—*Eltzroth v. Ryan*, 91 Cal. 584, 586, 27 Pac. 932.

4. Application and object of section.—Section applies according to its terms where some act is to be done or right exercised within certain number of days after service and not to right to be present at proceeding of which prescribed notice must be given. Hence, it does not apply to notice of time set for justification of surety upon appeal-bond.—*Brown v. Rouse*, 115 Cal. 619, 621, 47 Pac. 601.

See, also, par. 1, this note.

5. Default entered on insufficient proof of service by mail will be vacated and set aside.—*Hogs Back C. M. Co. v. New Basil C. M. Co.*, 63 Cal. 121, 122.

6. Defective proof—Additional showing.—Showing that copy of notice of appeal had been deposited in the post-office addressed to attorney of respondents would be insuffi-

cient for reason that appellant had failed to show any notice of appeal had been served. Jurisdiction, however, does not depend upon proof of service, but upon fact that service has been made, and on motion to dismiss upon ground that record does not show sufficient service of notice, appellant may show by other proof that notice was properly served and affidavit by attorney for respondent that he actually received such notice through post-office is sufficient.—*Heinlen v. Hellbron*, 94 Cal. 636, 641, 20 Pac. 8.

7. Distance between place of mailing notice and place to which it is addressed is question of fact, to be determined by proper evidence, and act of legislature defining legal distances from each county seat to capitol, state prison, etc., does not apply, being made for purpose of ascertaining mileage charges of certain officers.—*Neely v. Naglee*, 23 Cal. 152, 154.

8. Filing—Time for not extended.—Time of filing paper such as notice of appeal where same is forwarded to clerk by mail is not extended by provisions of this section.—*McDonald v. Lee*, 132 Cal. 252, 253, 64 Pac. 250.

9. Notice of decision—Service of by mail.—The service is complete when the deposit is made in post-office.—*Estate of Richards*, 154 Cal. 482, 98 Pac. 528.

As to dropping card to defendant in person, see par. 1, this note.

10. Provisions of section applied to the service by mail of proposed amendments to a bill of exceptions.—*Prefumo v. Russell*, 148 Cal. 453, 83 Pac. 810.

11. Where the distance between the office of deposit and the office of receipt is one hundred and fifty miles, the moving party is entitled to sixteen days from the date the notice was deposited in the post-office, to file and serve his notice of intention to move for a new trial.—*Estate of Richards*, 154 Cal. 482, 98 Pac. 528.

12. Same—Same—Acknowledgment of receipt by mail.—In the case of proposed amendments to a bill of exceptions where service was made by mail, the proponent of the bill is entitled to an extension of one day for each twenty-five miles of distance covered by such service in presenting the bill and the amendments for settlement, and the acknowledgment of the receipt of such amendments, itself forwarded by mail, does not constitute a waiver of his privilege in this respect. Hence where the distance covered was sufficient to authorize an extension of ten days, and section 650, ante, allows presentation within ten days, or twenty days altogether, presentation within thirteen days is held sufficient.—*Prefumo v. Russell*, 148 Cal. 453, 83 Pac. 810.

13. Place of deposit in mail.—Deposit in mail need not be made at place of residence of party making service. Only requirement is that party served and party

making service reside or have their offices at different places between which there is regular communication by mail.—*Luck v. Luck*, 83 Cal. 574, 576, 577, 23 Pac. 1035, overruling *Reed v. Allison*, 61 Cal. 461; *Murdock v. Clarke*, 73 Cal. 25, 14 Pac. 385; *Thompson v. Brannan*, 76 Cal. 618, 18 Pac. 783.

14. **Proof of service by mail** must show party making service and party served reside or have their offices in different places, between which there is regular communication by mail.—*Hogs Back C. M. Co. v. New Basil C. M. Co.*, 63 Cal. 121, 122.

15. **Same—Strict compliance necessary.**—Party relying upon service by mail or otherwise than actual service upon proper party must show strict compliance with all re-

quirements of statute, and proof should show upon its face that person making service and person served resided or had their offices at different places between which there was regular communication by mail.—*People v. Alameda T. Co.*, 30 Cal. 182, 185; *Moore v. Besse*, 35 Cal. 183, 187; *Linforth v. White*, 129 Cal. 188, 191, 61 Pac. 910. See *Cunningham v. Warnekey*, 61 Cal. 507.

As to strict compliance being required. see, ante, § 1012, note pars 3-7.

16. **Time—Admission of service** of notice of appeal as of certain day is admission that service was made on that day, although party making service and party served resided or had their offices in different counties.—*Brown v. Green*, 65 Cal. 221, 222, 3 Pac. 811.

§ 1014. APPEARANCE. NOTICES AFTER APPEARANCE. A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him. After appearance, a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. But where a defendant has not appeared, service of notice of papers need not be made upon him unless he is imprisoned for want of bail.

History: Enacted March 11, 1872, re-enactment of § 523 Practice Act.

APPEARANCE—NOTICE AFTER.

1. Action to annul marriage—Order extending time to plead — Default judgment.
- 2, 3. Answer of defendant to complaint—Is voluntary appearance.
4. Same—Signed by defendant personally.
5. Appearance—As to what constitutes an.
6. Same—As part of judgment-roll.
7. Same—By attorney.
8. Same—Demurrer to statement of contestant in election contest.
9. Same—Excepting to sufficiency of sureties upon attachment bond.
10. Same—How made.
11. Same—Nonresident defendant, of.
12. Same—Securing order extending time to plead—Does not constitute.
13. Same—Writing addressed to the clerk of the court.
14. Appeal—Appearance on.
15. Same—Notice of appeal.
16. Same—Practice—Substitution of attorney.
17. Attachment—Notice of motion to dissolve.
18. Attorney must have authority—In general.
19. Same—Death of party terminates authority of attorney.
20. Same—Trial of question of authority.
21. Same—Unauthorized appearance.
22. Authority of attorney presumed—In general.
- 23, 24. Same—Appearance by licensed attorney prima facie evidence.
25. Same—In absence of statutory requirement that authority of attorney should be evidenced by writing.
26. Change of venue—Effect of special appearance.
27. Same—Jurisdiction only by—Effect of appearance.
28. Consent to judgment.
29. Same—Consent of nonresident defendant.
30. Construction of section—In general.
31. Contempt proceedings, in.
32. Control of course of action.
33. Defective notice—Waiver of objection.
34. Defect in service waived—Voluntary answer or demurrer.
35. Demurrer to complaint—Raising issue of law.
- 36, 37. Same—Demurrer constitutes appearance.
38. Same—For all defendants.
39. Effect of appearance by attorney.
- 40, 41. Same—Defendants included by mistake.
42. Same—Executor may voluntarily appear.
43. Same—Fraud or insolvency of attorney.

44. Entry of appearance—Filing.
- 45, 46. Form of notice of appearance.
47. Intent of section.
48. Misnomer of defendant—Appearance and motion to set aside judgment.
- 49, 50. Motion to set aside judgment—General appearance.
51. New trial—Attorney of record must sign notice.
- 52-54. Notice of appearance—In general.
55. Notices to parties not appearing.
56. Pleadings and proceedings which constitute appearance.
57. Probate proceedings — Executor appearing.
58. Same—Answer to merits.
- 59-61. Special appearance—As to how made—What it is.
62. Same — Becomes general appearance, when.
- 63, 64. Same—For dismissal of action.
65. Same—For dismissal of defective summons.
66. Same—For objecting to void proceedings.
67. Same—For procuring extensions of time on.
68. Same—For quashing service of summons.
69. Same—Same—And dismissal.
70. Same—Same—And proof of service.
71. Same—For setting aside default for particular purpose.
72. Same—For striking out amended complaint.
- 73, 74. Stipulation extending time—Effect of.
75. Stipulation for judgment.
76. Substitution of attorney—Waiver of notice.
77. Supplementary proceedings — Appearance and submitting to examination.
78. Verbal authority to enter judgment.
79. Voluntary appearance — Gives court jurisdiction.
80. Waiver of objections — Voluntary appearance waives all defects.
- 81, 82. Same—Not waived, when.

As to appearance and contest of will, see, post, § 1307.

As to appearance, etc., in cases of cached estates, see, post, § 1271.

As to appearance of defendants not served in action on joint contract, see, ante, § 406 and note.

As to appearance of infant, insane or incompetent person by guardian, see, ante, § 372 and note.

As to appointment of and appearance by guardian ad litem, see, ante, §§ 372, 373 and notes.

As to appointment of attorney for absent or minor heirs, devisees, legatees or creditors, C. C. P.—147

itors in probate proceedings, see, post, § 1718.

As to appointment of attorney to defend action by executor or administrator on claim against estate, see, post, § 1510.

1. Action to annul marriage—Order extending time to plead—Default judgment.—In an action to annul a marriage, the action of attorneys in requesting and obtaining from the court an order extending the time in which the defendant may plead, is not the equivalent of an appearance by such defendant, within the provisions of the above section, and a default judgment annulling the marriage will be set aside.—*Benson v. Benson*, 176 Cal. 649, 169 Pac. 369, following the doctrine in *Vrooman v. Li Po Tai*, 113 Cal. 302, 45 Pac. 470.

2. Answer of defendant to complaint—Is voluntary appearance and is equivalent to personal service of summons and copy of complaint.—*Ghiradelli v. Greene*, 56 Cal. 629.

As to effect of voluntary appearance, see par. 79, this note.

3. Putting in answer is appearance and must be held to waive mere formality of issuing summons, service of which in such case becomes unnecessary.—*Hayes v. Shattuck*, 21 Cal. 51, 55.

4. Same—Signed by defendant personally is irregular where he has previously appeared by attorneys who have not been in any manner displaced.—*Crane v. Crane*, 121 Cal. 99, 100, 53 Pac. 433.

5. Appearance—As to what constitutes an.—Giving notice of motion to be made at a certain time and place for the dissolution of an attachment does not constitute an appearance, but appearing in court pursuant to such notice and making the motion is sufficient to constitute a notice of appearance.—*Salmonson v. Streiffer*, 13 Cal. App. 395, 397, 110 Pac. 144.

As to appearance on appeal, see par. 14, this note.

6. Same—As part of judgment-roll.—The code does not require an appearance to be made a part of the judgment-roll, and where there is a recital in the judgment-roll that the defendant appeared and uncontradicted evidence tending to sustain such recital is found in the bill of exceptions, the contention that the court was without jurisdiction can not be sustained.—*Western Lumber & M. Co. v. Merchants' Amusement Co.*, 13 Cal. App. 4, 9, 108 Pac. 891.

7. Same—By attorney.—Where an attorney appears in an action for a defendant or other party it is presumed that he has authority to do so and the burden of proving want of such authority is upon the party disputing it. However, the unauthorized appearance of an attorney can not constitute an appearance for a party, nor can such party be denied the right of showing that such appearance was with-

out his authority.—*People v. Western Meat Co.*, 13 Cal. App. 539, 545, 110 Pac. 338.

As to attorney's authority to appear presumed, see pars. 22-25, this note.

As to authority of attorney to appear required, see pars. 18-21, this note.

8. *Same*—Demurrer to statement of contestant in election contest is an appearance in that proceeding and waives any neglect of the clerk to issue a citation in proper form.—*Dudley v. Superior Court*, 13 Cal. App. 271, 276, 110 Pac. 146.

9. *Same*—Excepting to sufficiency of sureties upon attachment bond does not require appearance in court and notice of such exception does not even contemplate appearance for any purpose nor an application to the court for any relief whatsoever. The giving of it imposes upon the plaintiff the duty of having the sureties or others in their place justified not before the court, but before a judge or clerk thereof, and in case of failure so to do the judge or clerk must issue an order vacating the writ of attachment. To hold that excepting to the sufficiency of the sureties constituted an appearance would not only violate the express provision of section 539, ante, but impose a penalty upon the defendant whether resident or nonresident by requiring him to subject himself to the jurisdiction of the court as a condition of exercising the right conferred by statute.—*Salmonson v. Streiffer*, 13 Cal. App. 395, 398, 110 Pac. 144.

10. *Same*—How made.—An appearance may be made in an action by acts other than those enumerated in the statute, but they must be of an unequivocal character, showing a submission to the general jurisdiction of the court, such as calling for some affirmative relief.—*Altpeter v. Postal Telegraph-Cable Co.*, 20 Cal. App. Dec. 405, 148 Pac. 241.

11. *Same*—Nonresident defendant, of.—The appearance of a nonresident defendant to demur, the court acquires jurisdiction to render a personal judgment without reference to whether an attachment has or has not been issued.—*Hodgkins v. Dunham*, 10 Cal. App. 690, 700, 103 Pac. 351.

12. *Same*—Securing order extending time to plead—Does not constitute.—In a case in which the presiding judge gives an order to the defendant's attorney extending the time within which defendant might plead to the complaint in the action does not have the effect of a general appearance in the action and does not authorize the court to proceed to enter default against said defendant, there having been no appearances by the defendant in the cause, under the provisions of the above section.—*Davenport v. Superior Court*, 183 Cal. 506, 191 Pac. 911, applying the doctrine in *Steinbach v. Leese*, 27 Cal. 299.

13. *Same*—Writing addressed to the clerk of the court giving notice that the defendant enters his appearance and

coupled thereto a consent that judgment be taken against him is a strict compliance with this section, and while jurisdiction is not acquired until such be filed, the time within which it must be filed is not limited and the principal purpose of this section is served by the giving of such notice to the plaintiff, after which notice of all subsequent steps and proceedings must be given to the defendant.—*Anglo-California Bank v. Griswold*, 153 Cal. 692, 696, 96 Pac. 353.

14. *Appeal*—Appearance on.—Notice of appeal to certain extent corresponds to summons and, like issuance of summons, may be waived. Voluntary appearance will be equivalent to personal service of notice, but mere waiver of service is insufficient. There must in addition be given notice of appearance either in person or by attorney.—*Hibernia Sav. & L. Soc. v. Lewis*, 111 Cal. 519, 522, 44 Pac. 175.

As to appearance generally, see pars. 5-13, this note.

15. *Same*—Notice of appeal need not be served upon defendant who has not been served with summons or appeared in action.—*Clarke v. Mohr*, 125 Cal. 540, 543, 58 Pac. 176.

16. *Same*—Practice—Substitution of attorney after appeal should be followed by like substitution in trial court.—*Reay v. Heazelton*, 128 Cal. 335, 338, 60 Pac. 977.

17. *Attachment*—Notice of motion to dissolve attachment on ground that it was irregularly issued is not such appearance in case as will authorize judgment by default. Upon motion to discharge attachment by giving security, court may require appearance of defendant as condition precedent to making motion, and this shows legislature did not intend mere making of motion to constitute appearance.—*Glidden v. Packard*, 28 Cal. 649, 651.

As to motion to discharge attachment, see, ante, §§ 556-558 and notes.

As to motion to release attachment, see, ante, § 554 and note.

18. *Attorney must have authority*—In general.—Appearance by attorney must be by one authorized to represent defendant, and demurrer signed by attorney employed by one defendant only, but upon its face purporting to be demurrer of all defendants jointly, can not be held appearance for those who never authorized it and were not served with summons in case.—*Merced Co. v. Hicks*, 67 Cal. 108, 109, 7 Pac. 179.

As to attorneys and counselors at law, see, ante, §§ 275 et seq. and notes.

As to authority of attorneys and counselors at law, see, ante, § 283 and note.

As to authority of attorney to appear presumed, see pars. 22-25, this note.

19. *Same*—Death of party terminates authority of attorney.—Notice of appeal served after death of party on attorney who had appeared for him is ineffectual.

—Pedlar v. Stroud, 116 Cal. 461, 462, 48 Pac. 371.

As to attorney continuing to represent client who dies or becomes insane or incompetent pending action for partition, see, ante, § 763.

As to proceedings on death or removal of attorney, see, ante, § 286 and note.

20. Same—Trial of question of authority.—Name of attorney of record appearing at foot of answer in connection with name of other counsel, court on motion to strike out answer, will not try question whether signature is genuine or was put there by associate counsel without express authority.—Willson v. Cleaveland, 30 Cal. 192, 200.

21. Same—Unauthorised appearance of attorney is not sufficient to disturb judgment unless fraud, collusion, or insolvency of attorney could be shown.—Sampson v. Ohleyer, 22 Cal. 200, 211.

22. Authority of attorney presumed—In general.—Authority of attorney at law to appear will be presumed where nothing to contrary is shown.—Hayes v. Shattuck, 21 Cal. 51, 54.

See pars. 18-21, this note.

23. Same—Appearance by licensed attorney prima facie evidence that he has been retained in cause, and it would be dangerous practice to afford litigants opportunity of availing themselves of, or from escaping judgments of courts upon plea of mistake of counsel.—Suydam v. Pitcher, 4 Cal. 280, 281.

24. Authority of attorney appearing in action is presumed, but court may inquire into matter and require proof of his authorization.—San Francisco Sav. Union v. Long, 123 Cal. 107, 113, 55 Pac. 708.

25. Same—In absence of statutory requirement that authority of attorney should be evidenced by writing, it is always presumed that attorney appearing and acting for party to cause has authority so to do, and where appearance is made by attorney without objection from parties for several years thereafter, they will not be heard to say appearance was unauthorized upon hearing of motion to dismiss for want of return of summons.—Pacific Pav. Co. v. Vitzelich, 141 Cal. 4, 8, 74 Pac. 352.

26. Change of venue—Effect of special appearance.—Special appearance of defendant to move to strike out parts of complaint made before or at time of filing demurrer, is not such appearance and submission to jurisdiction as will waive right to move for change of venue.—Wood v. Herman Min. Co., 139 Cal. 713, 717, 73 Pac. 588.

As to demanding change of venue at time of appearance, see, ante, § 396 and note.

27. Same—Jurisdiction only by—Effect of appearance.—Where court can acquire jurisdiction of subject-matter of action or person of defendant only by transfer from another court, voluntary appearance of de-

fendant can not be held equivalent to such transfer.—Descalso v. Municipal Court of Appeals, 60 Cal. 296, 299.

28. Consent to judgment being taken, acknowledged by defendants, constitutes sufficient appearances.—Foote v. Richmond, 42 Cal. 439, 443.

29. Same—Consent of nonresident defendant, signed by attorney that judgment be taken against him, constitutes appearance.—Foote v. Richmond, 42 Cal. 439, 443.

30. Construction of section—In general.—This section defines what shall constitute an appearance. A defendant appears when he answers, demurs or gives written notice of his appearance or when an attorney gives notice of an appearance for him and he can appear in no other way. This statute was intended to settle all disputes on the subject. There can be no chance for argument about equivocal acts. There was no need of a statute to tell us that the acts specified would constitute appearance. The occasion for a rule was to dispose of questions upon which there might be a dispute. There is no ambiguity or uncertainty in the section.—Salmonson v. Streiffer, 13 Cal. App. 395, 397, 110 Pac. 144.

31. Contempt proceedings in, if party appear by counsel, introduce evidence and take part in hearing after order that citation be served upon his counsel by reason of his having concealed himself to avoid service, objection of want of personal service is waived.—Foley v. Foley, 120 Cal. 33, 39, 65 Am. St. Rep. 147, 52 Pac. 122.

32. Control of course of action in court rests exclusively with attorney where party appears by attorney and court has no power or authority to recognize any one else in conduct or disposition of case, and therefore stipulation signed by party himself providing for certain steps in action will be disregarded by the court.—Toy v. Haskell, 128 Cal. 558, 560, 79 Am. St. Rep. 70, 61 Pac. 89.

33. Defective notice—Waiver of objection.—Appearance at hearing of motion and resisting same on merits without objection as to notice given waives want of, or defective notice.—Toy v. Haskell, 128 Cal. 558, 561, 79 Am. St. Rep. 70, 61 Pac. 89.

34. Defect in service waived—Voluntary answer or demurrer to complaint is equivalent to due service of summons and waives right to take advantage of any defect in service or return of summons.—Adams v. Hopkins, 144 Cal. 19, 30, 77 Pac. 712.

As to appearance as waiver of service, see, ante, §§ 406, 416 and notes.

35. Demurrer to complaint—Raising issue of law in case to be tried by court is necessarily appearance and submission to court's jurisdiction over parties, although it states that appearance is made simply and only for purposes of demurrer.—McDonald v. Agnew, 122 Cal. 448, 450, 55 Pac. 125.

36. **Same—Demurrer constitutes appearance,** and where demurrer is on file and not acted upon default can not be entered.—*Hestres v. Clements*, 21 Cal. 425, 426.

37. By demurring to complaint, defendant appears and submits himself to jurisdiction of court, and default and judgment for failure to answer after overruling of demurrer may be regularly entered.—*McDonald v. Agnew*, 122 Cal. 448, 450, 55 Pac. 125.

38. **Same—For all defendants.**—Demurrer commencing, "And now come defendants," etc., and signed by attorneys of court, must under express provisions of statute be held appearance on behalf of all defendants.—*Rowland v. Coyne*, 55 Cal. 1, 3.

39. **Effect of appearance by attorney.**—At common law and by express letter of our statute, appearance by attorney amounts to acknowledgment or waiver of service.—*Suydam v. Pitcher*, 4 Cal. 280, 281.

As to appearance being waiver of service of summons, see, ante, §§ 409, 416 and notes.

Same—Notice of subsequent proceedings—How given.—See, post, § 1015 and note.

40. **Same—Defendants included by mistake.**—Filing of answer by attorney for all defendants, where he was retained by but part of them, which answer was subsequently, on motion, withdrawn and another for part only of defendants substituted, can not be held to constitute appearance for defendants for which first answer was not authorized.—*Forbes v. Hyde*, 31 Cal. 342, 346.

41. Notice of appeal by attorney who represented some of defendants in case, by inadvertence including others which he had no authority to represent, will not be held an appearance for the latter.—*Steinbach v. Leese*, 27 Cal. 295, 299.

42. **Same—Executor may voluntarily appear,** and such appearance has same effect as if he had been served with summons.—*Union Sav. Bank v. Barrett*, 132 Cal. 453, 455, 64 Pac. 713, 1071.

43. **Same—Fraud or insolvency of attorney.**—Appearance entered by attorney, whether authorized or not, is good and sufficient to bind party, except in those cases where fraud has been used, or it is shown that attorney is unable to respond in damages.—*Suydam v. Pitcher*, 4 Cal. 280.

44. **Entry of appearance—Filing.**—A written and signed appearance by the defendants in a suit to foreclose a mortgage, that "we and each of us herewith enter our appearance," directed to the clerk of the court, and given to the plaintiff, is a sufficient entry of appearance within the contemplation of this and section 581 (subd. 7), ante, without the necessity of filing the same.—*Anglo-California Bank v. Griswold*, 153 Cal. 695, 96 Pac. 353.

45. **Form of notice of appearance.**—Written notice signed by attorneys, that "we have been retained by, and hereby appear for above-named defendant in above-entitled action," is sufficient appearance and waiver of summons.—*Dyer v. North*, 44 Cal. 157, 159.

As to notice of appearance, see pars. 52-54, this note.

46. Notice of appearance provided for in this section is document to be drawn up especially for that purpose, service of which is to antedate or be contemporaneous with service of all other notices and papers.—*Steinbach v. Leese*, 27 Cal. 295, 299.

47. **Intent of section.**—This section was intended to settle all disputes upon subject of what is or is not appearance.—*Vrooman v. Li Po Tai*, 113 Cal. 302, 305, 45 Pac. 470; *McDonald v. Agnew*, 122 Cal. 448, 450, 55 Pac. 125.

48. **Misnomer of defendant—Appearance and motion to set aside judgment** upon which it is admitted defendant was actually served with summons cures misnomer of defendant in return of service.—*Thompson v. Alford*, 135 Cal. 52, 54, 66 Pac. 983.

49. **Motion to set aside judgment—General appearance.**—Where motion to set aside judgment shows relief is sought upon ground of excusable neglect appearance is general, and service of notice of appeal upon attorney appearing for party on such motion must be held sufficient service upon attorney for such party, he never having been removed or other counsel substituted.—*Thompson v. Alford*, 128 Cal. 227, 229, 60 Pac. 686.

50. Where appearance is made to challenge judgment or order not merely on jurisdictional grounds, but also on non-jurisdictional grounds, appearance is general no matter what parties may call it in their motion.—*Burdette v. Corgan*, 26 Kan. 102.

51. **New trial—Attorney of record must sign notice of motion for new trial,** and if it be signed by attorney not of record it is ground for denying motion. While attorney other than he of record may take appeal for party and represent him on such appeal, fact that he does so and is recognized as attorney on such appeal is not sufficient to justify his signing notice of motion for new trial in subsequent proceedings without filing substitution as attorney of record.—*McMahon v. Thomas*, 114 Cal. 588, 591, 46 Pac. 732.

52. **Notice of appearance—In general.**—While the statute requires the notice of appearance by defendant in proper person to be a written notice, such requirement is not executed when the notice is given for him by an attorney. In such case it need not necessarily be in writing. It may be by the act of appearing in open court upon an application for affirmative relief which could only be granted upon the hypothesis

that defendant had submitted himself to the jurisdiction of the court.—*Salmonson v. Streiffer*, 13 Cal. App. 395, 397, 110 Pac. 144.

As to form of notice of appearance, see pars. 45, 46, this note.

53. The words "answer" and "demur" are obviously words of enumeration and court can not on received principles interpolate into the text notices of motion for new trials, notices of appeal nor any other paper served incidentally in conduct of judicial proceedings, and the direct and principal purpose of which is not to give notice of appearance, but to give notice of a step taken or about to be taken in the cause.—*Salmonson v. Streiffer*, 13 Cal. App. 395, 398, 110 Pac. 144. See *Steinbach v. Leese*, 27 Cal. 295.

54. The notice by which a defendant may appear as provided in this section, constitutes no part of the judgment-roll, hence the failure to serve a defendant and the absence of an answer, demurrer or other appearance on his part appearing by the judgment-roll is not inconsistent with a recital in the judgment that he did appear in one of the other modes authorized by law, evidence of which under the statute constitutes no part of the judgment-roll, and in the absence of a showing to the contrary, such recital must be taken as at least prima facie true.—*Brown v. Caldwell*, 13 Cal. App. 29, 30, 108 Pac. 874.

55. Notices to parties not appearing.—Notice of motion to change place of trial need not be given defendants who have not appeared in action. If such defendants appear and take part on hearing of motion, they can not be heard to complain and must be deemed to have waived previous service of moving papers.—*Wood v. Herman Min. Co.*, 139 Cal. 713, 717, 73 Pac. 588.

56. Pleadings and proceedings which constitute appearance.—The words "answers" and "demurs," as used in this section, are obviously words of enumeration, and court can not on recognized principles interpolate into text notices of motions for new trial, notices of appeal, or any other papers served incidentally in conduct of judicial proceedings, direct and principal purpose of which is, not to give notice of appearance, but to give notice of step taken, or about to be taken in cause.—*Steinbach v. Leese*, 27 Cal. 295, 299.

57. Probate proceedings—Executor appearing and taking part in proceedings in probate court affecting estate of his testator, waives objection that no citation was issued or served upon him.—*Estate of Johnson*, 45 Cal. 257, 259.

58. Same—Answer to merits.—In probate proceeding, where party appears and moves to dismiss on ground of defective service of citation, and upon overruling of such objection answers to merits, answer gives court jurisdiction and it is im-

material whether citation ever issued.—*Abila v. Padilla*, 14 Cal. 103, 106.

59. Special appearance—As to how made—What it is.—Settled rule is that if party desires to take advantage of want of service of process sufficient to give court jurisdiction of his person by moving to set aside proceedings on that ground he must appear specially for that purpose and keep out of court for all others.—*Gilbert-Arnold L. Co. v. O'Hare*, 93 Wis. 194, 67 N. W. 38.

60. Party intending to appear specially and move to set aside default and judgment upon ground, court has no jurisdiction over his person, because there has been no valid service of summons, must carefully occupy that ground exclusively and must keep out of court for all other purposes if he would refrain from making general appearance.—*Security L. & T. Co. v. Boston & S. R. F. Co.*, 126 Cal. 418, 421, 58 Pac. 941, 59 Pac. 296.

61. If party wishes to insist upon objection that he is not in court he must keep out for all purposes except to make objection to jurisdiction.—*Lowe v. Stringham*, 14 Wis. 222.

62. Same—Becomes general appearance, when.—A special appearance by defendant on motion to quash service of summons, and at the same time demurring for want of jurisdiction of person, the appearance is general.—*Olcese v. Justices' Court*, 156 Cal. 82, 88, 103 Pac. 317.

63. Same—For dismissal of action.—Special appearance for purpose only of making motion to dismiss is not general appearance, which waives right to make motion.—*Linden G. Min. Co. v. Sheplar*, 53 Cal. 245, 246.

64. Service of summons after the three years prescribed by section 851, ante, entry of its default, and appearance solely for purpose of asking the action be dismissed, can not be held voluntary appearance such as will defeat right to dismissal under said section.—*Sharpstein v. Bells*, 132 Cal. 507, 509, 64 Pac. 1080.

65. Same—For dismissal of defective summons.—Defendant has right to appear for purpose of moving to dismiss defective summons, and it is error to refuse him that privilege, and his afterwards appearing and answering does not waive the right or cure the defect.—*Lyman v. Milton*, 44 Cal. 630, 635.

66. Same—For objecting to void proceedings.—Appearance of party for purpose only of objecting to prior void proceeding, can not cure defect in such proceeding.—*Gray v. Hawes*, 8 Cal. 562, 559.

67. Same—For procuring extension of time on.—Specially appearing for purpose of moving to dismiss, and at same time procuring order extending time to plead one day after decision of motion, does not constitute such appearance as will authorize entry of default.—*Kennedy v. Mulligan*, 136 Cal. 556, 557, 69 Pac. 291.

68. Same—For quashing service of summons.—For purpose of quashing service of summons, defendant may move without entering general appearance.—*Eldridge v. Kay*, 45 Cal. 49, 50.

69. Same—Same—And dismissal.—Notice that defendant "appears in said action for sole purpose of making motion to quash summons in and dismiss said action," is sufficient appearance to entitle defendant to be heard upon motion.—*Lander v. Fleming*, 47 Cal. 614, 616.

70. Same—Same—And proof of service.—Special appearance may be made for purpose of quashing summons or proof of service, and such is not general submission to jurisdiction of court.—*McDonald v. Agnew*, 122 Cal. 448, 450, 55 Pac. 125.

71. Same—For setting aside default for particular purpose.—Party ought not be allowed benefit of any proceeding unless he also assumes responsibility of it. Appearance for one purpose is good appearance to action, and party should not be allowed to appear only for purpose of setting aside default, for purpose of first moving dismissal of suit, and if that motion be unsuccessful to answer upon merits.—*Dougllass v. Pacific M. S. Co.*, 4 Cal. 304, 306.

72. Same—For striking out amended complaint.—Special appearance to move to strike out amended complaint, and asking of court extension of time to move or plead, until such motion is disposed of, does not constitute appearance within meaning of this section.—*Powers v. Braly*, 75 Cal. 237, 239, 17 Pac. 197.

73. Stipulation extending time—Effect of.—Taking and filing stipulations extending time to plead, and in consideration thereof making various payments on account of sum sued for, does not constitute appearance.—*Vrooman v. Li Po Tai*, 113 Cal. 302, 305, 45 Pac. 470.

74. Stipulation extending time to plead. If it could in any event be considered an appearance, must be made before expiration of three years prescribed by section 581, ante, or it could not be held bar to dismissal under that section.—*Grant v. McArthur*, 137 Cal. 270, 271, 70 Pac. 88.

75. Stipulation for judgment.—Stipulation that plaintiff might at any time enter default of defendant and take judgment thereon, given in consideration of extension of time for payment of indebtedness sued upon, followed by such extensions and payments, must be held to constitute answer admitting allegations of complaint, and, therefore, appearance, although not filed in case until after defendant had moved for dismissal.—*Cooper v. Gordan*, 125 Cal. 296, 301, 57 Pac. 1006.

76. Substitution of attorney—Waiver of notice.—Notice of change of attorneys required by section 285, ante, is for protec-

tion of adverse party and may be waived by him or his attorney, and where notice of appeal, signed by attorney of whose substitution notice had not been given, was accepted and admission of due service given by attorneys for respondent without objection, notice of substitution will be held to have been waived.—*Livermore v. Webb*, 56 Cal. 489, 490.

As to change or substitution of attorneys, see, ante, §§ 284 et seq. and notes.

As to notice of change of attorney, see, ante, § 285 and note.

77. Supplementary proceedings—Appearance and submitting to examination by person not party to original action sufficiently shows jurisdiction of person in supplementary proceedings.—*Bronzan v. Brobaz*, 93 Cal. 647, 649, 29 Pac. 254.

78. Verbal authority to enter judgment given by defendant to plaintiff is not appearance in action nor power of attorney to confess judgment. It could not take place of answer in the judgment-roll, so as to dispense with summons and return, as part thereof.—*Siskiyou County Bank v. Hoyt*, 132 Cal. 81, 83, 64 Pac. 118.

As to confession of judgment without action, see, post, §§ 1132 et seq. and notes.

79. Voluntary appearance—Gives court jurisdiction over party, same as if he had been brought in by service of summons, and such appearance within three years prescribed by section 581, ante, is equivalent to service and return of summons within that period.—*Union Sav. Bank v. Barrett*, 132 Cal. 453, 455, 64 Pac. 713.

As to answer by defendants to complaint constituting a voluntary appearance, see par. 2, this note.

As to effect of voluntary appearance on right to move dismissal of action, see, ante, § 581 and note.

As to subsequent notice and how given, see, post, § 1015 and note.

80. Waiver of objections—Voluntary appearance waives all defects of process, even when objection is taken in same action. Under our practice plaintiff by filing complaint goes himself into court, and although he does not take out summons, he can not object to defendants coming in and answering, any more than he could object to defendant's appearance after he had taken out summons which he did not choose to serve, and quite as little can defendant in collateral action object that there was no action pending after having voluntarily put in answer to complaint on file.—*Hayes v. Shattuck*, 21 Cal. 51, 55.

81. Same—Not waived, when.—Appearance for purpose of making motion to dismiss upon ground summons was improperly made returnable and was served at time later than that prescribed by law, does not waive right to make such objec-

tion, but had he answered without objection, then he could not afterwards have complained.—*Diedesheimer v. Brown*, 8 Cal. 339, 340.

82. Answer after denial of motion to set aside service of summons does not waive objection upon which motion was based.—*Kent v. West*, 50 Cal. 185, 186.

§ 1015. SERVICE ON NONRESIDENTS. WHERE A PARTY HAS AN ATTORNEY, SERVICE SHALL BE ON SUCH ATTORNEY. When a plaintiff or a defendant, who has appeared, resides out of the state, and has no attorney in the action or proceeding, the service may be made on the clerk for him. But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except service of subpoenas, of writs and other process issued in the suit, and of papers to bring him into contempt. If the sole attorney for a party is [1] removed or suspended from practice, then the party has no attorney within the meaning of this section. If his sole attorney [2] has no known office in this state, notices and papers may be served by leaving a copy thereof with the clerk of the court, unless such attorney shall have filed in the cause an address of a place at which notices and papers may be served on him, in which event they may be served at such place.

History: Enacted March 11, 1872, re-enactment of § 524 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 179, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 602, Kerr's Stats. and Amdts. 1906-7, p. 474.

SERVICE OF NOTICE ON NONRESIDENT—WHERE PARTY HAS ATTORNEY.

1. Appearance necessary.
- 2-4. Construction of section—In general.
5. Notice of appeal—Must be served on attorneys.
6. Same—Same—Service of notice of appeal on attorney of record.
7. Notice of motion to dissolve attachment.
8. Service of cross-complaint upon attorney for plaintiff.
9. Service of notice of decision.
10. Substitution of attorneys.

1. **Appearance necessary.**—Special appearance of attorney for purpose of motion before demurrer or answer is not such appearance as to entitle him, or parties represented by him, to notice of subsequent motions and proceedings.—*Wood v. Herman Min. Co.*, 139 Cal. 713, 717, 73 Pac. 588.

2. **Construction of section—In general.**—Construing above section and section 940, ante, together, they require service of notice of appeal to be made upon attorney of party who has appeared by attorney, and service upon party personally is not authorized.—*Jones v. McGarvey*, 6 Cal. Unrep. 277, 56 Pac. 896.

3. Section 940, ante, providing for service of notice of appeal on adverse party, or his attorney, must be read in connection with this section, and such notice must, therefore, be served upon attorney of party, who has appeared in action, and not upon

party himself.—*Estate of Nelson*, 128 Cal. 242, 244, 60 Pac. 772; *Mohr v. Byrne*, 131 Cal. 288, 289, 63 Pac. 341.

4. Provision of this section is controlling and requires service of notice of appeal to be made upon attorney of adverse party when such party has attorney.—*Abrahms v. Stokes*, 39 Cal. 150, 151. See *Grant v. White*, 6 Cal. 55.

5. **Notice of appeal—Must be served on attorneys** for adverse parties who have appeared in action.—*Linforth v. White*, 129 Cal. 188, 190, 61 Pac. 910.

6. **Same—Same—Service of notice of appeal on attorney of record** for adverse party is insufficient.—*Matthews v. Superior Court*, 70 Cal. 527, 528, 11 Pac. 665.

7. **Notice of motion to dissolve attachment** must be served upon attorney instead of the party, and it would be idle for the law to measure the time of notice by the residence of the litigants when the service is to be made upon his attorney, and therefore so far as the service of notice is concerned, the residence of the party is immaterial.—*Finch v. McVean*, 6 Cal. App. 272, 273, 91 Pac. 1019.

8. **Service of cross-complaint upon attorney for plaintiff** starts the running of the time for pleading thereto.—*Ritter v. Braash*, 11 Cal. App. 258, 260, 104 Pac. 592.

9. **Service of notice of decision** is required to be upon the attorney for the opposite party, instead of the party himself, if he has an attorney.—*Estate of Richards*, 154 Cal. 482, 98 Pac. 528.

10. **Substitution of attorneys.**—Service of notice of appeal on attorney who signed original answer of defendant, although another signed amended answer, where there was never any substitution of attor-

neys, is good, although defendant represented by such attorney was dead at time of service.—*Lacoste v. Eastland*, 117 Cal. 673, 680, 49 Pac. 1046.

§ 1016. PRECEDING PROVISIONS NOT TO APPLY TO PROCEEDING TO BRING PARTY INTO CONTEMPT. The foregoing provisions of this chapter do not apply to the service of a summons or other process, or of any paper to bring a party into contempt.

History: Enacted March 11, 1872, re-enactment of last half of § 519 Practice Act.

PROCEEDING TO BRING PARTY INTO CONTEMPT—SERVICE.

1. Attorney—Service on.
2. Corporation—Service on.
3. Order must be served.

As to judgments and orders in cases of contempt of court, see, post, § 1222.

As to notice in cases of contempt of court, see, post, § 1212.

1. **Attorney—Service on.**—When party charged with contempt for disobeying legal order wilfully conceals himself to avoid service of order to show cause why he shall not be adjudged guilty of contempt, court is not powerless to proceed or to prevent continued disregard of its lawful order. Section 187, ante, provides that when jurisdiction is by constitution or by statute conferred upon court or judicial officer all means necessary to carry it into effect are also given, and in exercise of this jurisdiction, if course of proceedings be not specifically pointed out by statute, any suitable process of mode of proceeding may be adopted which may appear most conformable to code, and, therefore, in case where

party has so concealed himself, and especially if such party be corporation, court may provide for service of such order to show cause upon attorney to whom he has intrusted management of litigation, such being suitable process or mode of proceeding.—*Golden Gate C. H. Min. Co. v. Superior Court*, 65 Cal. 187, 191, 3 Pac. 628.

2. **Corporation—Service on.**—Order to show cause why party should not be punished for contempt is "a paper to bring a party into contempt" within meaning of this section, and ordinarily service of such paper, like that of summons, must, if person cited be corporation, be served upon president or other head of corporation, secretary, cashier, or managing agent thereof.—*Golden Gate C. H. Min. Co. v. Superior Court*, 65 Cal. 187, 191, 3 Pac. 628.

3. **Order must be served.**—Before party can be brought into contempt for not complying with order of court, such order must be served upon him, and mere delivery to person in Missouri of certified copy of order made by court in this state would not be served upon him within meaning of law.—*Johnson v. Superior Court*, 63 Cal. 578, 580; *Hennessy v. Nicol*, 105 Cal. 138, 142, 38 Pac. 649.

§ 1017. SERVICE BY TELEGRAPH. Any summons, writ, or order in any civil suit or proceeding, and all other papers requiring service, may be transmitted by telegraph for service in any place, and the telegraphic copy of such writ, or order, or paper so transmitted, may be served or executed by the officer or person to whom it is sent for that purpose, and returned by him, if any return be requisite, in the same manner, and with the same force and effect in all respects, as the original thereof might be if delivered to him, and the officer or person serving or executing the same has the same authority, and is subject to the same liabilities, as if the copy were the original.

[Original to be filed—Certified copy to be preserved by telegraph company.] The original, when a writ or order, must also be filed in the court from which it was issued, and a certified copy thereof must be preserved in the telegraph office from which it was sent. In sending it, either the original or the certified copy may be used by the operator for that purpose. Whenever any document to be sent by telegraph bears a seal, either private or official, it is not necessary for the operator, in sending the same, to telegraph a description of the seal, or

any words or device thereon, but the same may be expressed in the telegraphic copy by the letters "L. S.," or by the word "seal."

History: Enacted March 11, 1872.

§ 1018. [NO SUCH SECTION.]

§ 1019. SERVICE OF PLEADINGS AND PAPERS IN ACTIONS OF DIVORCE. When in an action of divorce adultery is charged against either party and the person with whom such adultery is alleged to have been committed by such party is named in any of the pleadings, a copy of such pleadings must be personally served on such named person; or, in case such named person can not be found, such notice of the action and of the connection of such person therewith shall be given as shall be offered by the court; the said person so served shall have the right to appear and plead and be heard in such action in the same manner and to the same extent as the parties to the action.

History: Enactment approved April 16, 1909, Stats. and Amdts. 1909, p. 974.

DIVORCE—SERVICE OF PLEADINGS AND PAPERS IN.

1. Construction of section—As to purpose.
2. Divorce action—Adultery charged—Want of service on third person accused—Effect of.
3. Same—Same—Relations with other women charged—Simple betrothal.

1. Construction of section—As to purpose.—The purpose of the above section is to give one whose reputation might be assailed in divorce proceedings an opportunity to appear and object against the offensive charges.—*Kelmer v. Kelmer*, 42 Cal. App. 618, 187 Pac. 85.

2. Divorce action—Adultery charged—Want of service on third person accused—Effect of.—In a case in which a husband sued for divorce upon the grounds of desertion and the wife answered resisting the divorce, and in a cross-complaint for separate maintenance alleged cruelty, failure to support, and desertion on part of the husband, and on the trial the plaintiff is charged with adultery with an individ-

ual named Jane Doe, but no service of the answer and accusation was made upon that individual so as to give the notice required by the above section, upon objection being made to the admission of evidence of the deposition of a person, offered in support of such ground of adultery, for the reason that the defendant had failed to comply with the provisions of the above section, the deposition is properly excluded.—*Klemmer v. Klemmer*, 42 Cal. App. 618, 187 Pac. 85.

3. Same—Same—Relations with other women charged—Simple betrothal.—A divorce action in which a husband is charged with improper relations with another woman to the extent that she became his "fiancee" or "betrothed wife," the requirements of the above section do not apply, and it is not necessary that service of the summons and petition or answer be made upon such other woman, and an objection to the admission of her testimony, founded upon the ground of a failure to comply with the provisions of the above section, is without merit.—*Klemmer v. Klemmer*, 42 Cal. App. 618, 187 Pac. 85.

CHAPTER VI.

OF COSTS.

- § 1021. Compensation of attorneys. Costs to parties.
- § 1022. When allowed of course to the plaintiff.
- § 1023. Several actions brought on a single cause of action can carry costs in but one.
- § 1024. Defendant's costs must be allowed of course, in certain cases.
- § 1025. Costs, when in the discretion of the court.
- § 1026. When the several defendants are not united in interest, costs may be severed.
- § 1027. Costs of appeal discretionary with the court, in certain cases.
- § 1028. Referee's fees.
- § 1029. Continuance, costs may be imposed as condition of.
- § 1030. Costs when a tender is made before suit brought.
- § 1031. Costs in action by or against an administrator, etc.
- § 1032. Costs in a review other than by appeal.
- § 1033. Filing of and affidavit to bill of costs.
- § 1034. Costs on appeal, how claimed and recovered.
- § 1035. Interest and costs must be included by the clerk in the judgment.
- § 1036. When plaintiff is a nonresident or foreign corporation, defendant may require security for costs.
- § 1037. If such security be not given, the action may be dismissed.
- § 1038. Costs when state is a party.
- § 1039. Costs when county is a party.

§ 1021. COMPENSATION OF ATTORNEYS. COSTS TO PARTIES. The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided.

History: Enacted March 11, 1872, substantial re-enactment of § 494 Practice Act as amended 1853 (Stats. 1853, p. 276) and 1855 (Stats. 1855, p. 250); amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 179, held unconstitutional, see history, § 5 ante.

COSTS TO PARTIES—ATTORNEY'S FEES, ETC.

- I. COSTS IN GENERAL, 1-81.
- II. ATTORNEY'S FEES, 82-124.
- III. SUBJECT-MATTER EMBRACED IN TERM "COSTS," 125-171.

I. COSTS IN GENERAL.

- 1-6. As to costs generally.
- 7. Abatement of action—Costs on.
- 8. Action involving right to use certain waters.
- 9. Action to rescind contract for exchange of lands.
- 10-14. Appeal—As to costs on.
- 15, 16. Same—Amount in controversy as affecting.
- 17. Same—Discretion of appellate court—As to generally.
- 18, 19. Same — Same — Determination of trial court conclusive.
- 20. Same—Right of appellant to.
- 21. Arbitration—Estoppel as to award of costs.
- 22. Clerk's fees—Prepayment of.
- 23. Common-law rule — Costs were not recoverable.
- 24. Compromise judgment—Costs on.

- 25. Constitutional law — Discretion of court—Judgment for costs against executor, etc., personally.
- 26. Same—"Due process of law."
- 27-29. Construction of section—In general.
- 30. Same—Words "of course."
- 31-35. Contesting allowance of costs.
- 36. Continuance upon terms—Payment of certain costs — Acceptance of conditions.
- 37. Cost-bill—Right to written notice of filing of.
- 38, 39. Disallowance of costs.
- 40. Dismissal—Appeal as to acts.
- 41. Eminent domain—Allowance or disallowance of costs.
- 42. Equity cases — Action to protect easement.
- 43. Same—Discretionary.
- 44. Same—Practice.
- 45. Final adjudication of subject-matter.
- 46. Former trial—Interest upon costs.
- 47-50. How question reviewed — Appeal from judgment.
- 51. Improper costs—Motion to re-tax.
- 52. Interest—After verdict or decision.
- 53. Same—Interest before judgment.

54. Same—Quantum meruit.
 55. Same—Unliquidated sum.
 - 56-58. Justices' court—In cause appealed from.
 59. Loss of costs.
 60. Mandamus—Will not compel payment of costs.
 - 61, 62. Mandamus proceedings—Costs on.
 63. Married woman—Liable for costs.
 64. Modification of judgment as to costs.
 65. Motion to re-tax.
 - 66, 67. New questions not considered.
 68. Order striking out cost-bill.
 69. Probate proceedings—As to costs in.
 70. Same—General rule.
 71. Referee—Allowance in trial, etc., by.
 72. Retention of appeal to determine costs.
 - 73, 74. Right to statutory costs—Discretion of court.
 75. Statutory warrant for the allowance of costs.
 76. Stay of execution—Undertaking.
 77. Striking out costs.
 78. Time of filing cost-bill.
 79. Time of notice of motion to tax costs.
 80. Transcript—Apportionment of costs of, on reversal.
 81. Same—Of reporter's notes—Order necessary.
- II. ATTORNEY'S FEES.
82. Action to recover.
 83. Agreement to pay—Will not support judgment.
 84. Allowance statutory.
 85. Same—What statute governs.
 86. Bona fides of.
 87. Contest of will—As to generally.
 - 88, 89. Same—Attorney's fees are no part of "costs."
 - 90, 91. Contract for attorney's fees—Valid and enforceable.
 92. Costs—Counsel fees are not.
 93. Same—In foreclosure.
 - 94, 95. Determination of amount—As to generally.
 96. Same—Appeal, conflicting evidence.
 97. Same—In partition.
 98. Dissolution of partnership.
 99. Equity cases.
 100. Exceptions—General rule.
 101. Fencing-bond—Attorney's fees in action on.
 102. Foreclosure—Contract must provide for.
 103. Guardian ad litem—Is officer of court.
 104. Insolvency—Contest of ownership.
 - 105-107. Lien of attorney on judgment.
 108. Maintenance—Offense created by statute.
 109. Mechanics' lien—Attorney's fees and costs.
 110. Modification of final judgment as to.
 111. Pleading—Counsel fees when provided to be allowed.
 112. Promissory notes—Foreclosure of pledge.
 113. Retaining fee.
 - 114-116. Right to attorney's fee—Based upon contract—Not taxable as costs.
 - 117-120. Statute must authorize allowance.
 121. Substitution of attorney—Indebtedness of client.
 122. Trover—In action of.
 - 123, 124. Trust fund—May be charged with costs.
- III. SUBJECT-MATTER EMBRACED IN TERM "COSTS."
125. As to generally.
 126. Acceptance by plaintiff of an offer by defendant to allow judgment.
 127. Accruing costs—Sheriff's fees.
 128. Against mortgagee—Defendant in action to quiet title.
 129. Allowance of costs—Can not be made for witness who refuses to accept fees.
 130. Same—Of counsel fees as costs in action of libel.
 131. Board of jury—Allowance as costs.
 132. Briefs—Printing of.
 - 133, 134. Same—Rule of court.
 135. Charge for extra witness who was not called.
 136. Copies of papers.
 - 137, 138. Depositions—Expenditure for can not be allowed.
 - 139, 140. Experts—Witness fees.
 141. Foreclosure of mortgage—Attorney's fees not costs.
 - 142, 143. Former mistrial—Costs of recoverable.
 - 144, 145. Same—Costs of first trial.
 146. Same—Costs of former mistrial.
 147. Insurance paid by sheriff.
 148. Irrelevant matter in transcript.
 - 149, 150. Same—Cost of printing transcript.
 151. Jury fees—Payment on disagreement.
 152. Same—Requiring deposit of.
 - 153, 154. Percentage Act.
 155. Same—Constitutionality of act imposing ascending scale of fees.
 156. Premium paid surety company for replevin bond.
 157. Printing points and authorities.

- 158. Reporter's fees—Of former trial.
- 159. Same—Equitable action.
- 160-163. Transcription of testimony.
- 164-167. Witness fees—In general.
- 168. Same—As costs to be charged.
- 169. Same—As to witness not sworn.
- 170. Same — Parties — Construction of statute.
- 171. Same—Subpoenaing of witness is not necessary.

I. COSTS IN GENERAL.

As to the allowance of costs in equity and at law, see note 16 Am. Dec. 405.

As to charges recoverable as costs by the prevailing party, see note 88 Am. Dec. 181.

As to the right to tax costs against a stranger to the record who is a real party litigant, see note Ann. Cas. 1912D, 1112.

As to the effect of an order opening a default and granting a new trial on payment of costs as making the payment of costs a condition precedent to the new trial, see note Ann. Cas. 1912D, 249.

1. As to costs generally.—Where one riparian proprietor recovers judgment against another who has diverted water above their lands, he is entitled to his costs, since the action involves the title to real property within the meaning of subdivision 5, section 1022, post.—*Miller & Lux v. Enterprise Canal etc. Co.*, 169 Cal. 405, 147 Pac. 567.

2. Where a plaintiff exercises his right to dismiss in those cases where the code provides that he may do so by filing a request with the clerk, the opposite party is entitled to recover the costs that he may have incurred.—*Spinks v. Superior Court*, 20 Cal. App. Dec. 474, 148 Pac. 798.

3. The rule that the modification of a judgment on appeal carries costs to the appellant is inapplicable, where it is conceded by the respondent that the judgment was excessive to the extent that it is modified, and that the appellant could by a proper motion in the trial court have obtained such modification.—*Conlin v. Emanuel Lewis Investment Co.*, 26 Cal. App. 388, 147 Pac. 472.

4. An order striking a memorandum of costs from the files for failure to serve a copy thereof upon the adverse party within five days after the rendition of the verdict of the jury as required by section 1033, post, will not be disturbed on appeal where the order is made upon conflicting affidavits as to the service of the copy.—*Griffith v. Welbanks*, 26 Cal. App. 477, 147 Pac. 986.

5. The terms of section 1033, post, as to the filing and service of a memorandum of costs, are mandatory, and a substantial strict compliance therewith is required both of the party claiming costs and the party dissatisfied with the costs claimed.—

Griffith v. Welbanks, 26 Cal. App. 477, 147 Pac. 986.

6. The right of respondents on an appeal to have the judgment as made in their favor perfected or completed by the insertion therein of the costs allowed to them on the appeal is not affected by a stipulation entered into after the decision providing that "during the currency of this agreement, all rights finally adjudged to either party by the judgment in the action, as modified and affirmed by the supreme court by its judgment, shall be held in abeyance."—*Burr v. Maclay Rancho Water Co.*, 26 Cal. App. 611, 147 Pac. 990.

7. Abatement of action—Costs on.—Costs are but part and incident of judgment. They can not be recovered until judicial determination is had of action in which they have been incurred, and if action abate and court loses power to render judgment between parties upon issues before it, it is equally powerless to render judgment for costs incurred therein. When suit abates by death of party there can be no judgment for costs in favor of survivor.—*Begbie v. Begbie*, 128 Cal. 154, 155, 49 L. R. A. 141, 60 Pac. 667.

8. Action involving right to use certain waters, at the trial the defendant expressly stated that it had abandoned all claim of right or intention to take water at all except under notice of January, 1909, aforesaid, referring to flood waters only. This entirely eliminated the question of the right and intent of the company to take a part of the usual and ordinary flow of the stream. And, as the judgment gives the company no right at all except to five thousand inches of the additional flood waters coming down the stream in unusual freshets from rains and snows, the evidence as to the other water right once claimed by respondents and errors of law in admitting or excluding evidence of it are, for the purposes of this appeal, wholly immaterial and harmless, except upon the question of costs, which, however, the appellants do not mention in their briefs. The facts that defendants made such a claim before the action was begun and abandoned it at or before the trial might have some bearing upon the right of plaintiffs to recover costs of suit. This is an equitable action in which costs are allowed, apportioned, or withheld in the discretion of the court (§ 1025, post). The headgate was completed a month before the action was begun, and its position showed that the ordinary flow would not reach it. Under all the circumstances, we can not say that the court abused its discretion in giving defendants judgment for costs.—*Gallatin v. Corning Irr. Co.*, 163 Cal. 405, 126 Pac. 864, 868.

9. Action to rescind contract for exchange of lands.—An action to rescind an executed contract for the exchange of lands has for its real purpose the recovery of real

property out of which plaintiff alleged he had been defrauded. Such a case, even though in equity, comes clearly within the purview of section 1022, post, and plaintiff was entitled to his costs as a matter of right.—*Coffman v. Bushard*, 164 Cal. 663, 130 Pac. 425, 426.

10. **Appeal—As to costs on.**—If taken strictly alone would be unconstitutional as allowing property to be taken without notice or an opportunity to be heard; hence, it is to be construed as analogous to the preceding section, and as requiring service of a memorandum of the costs to be taxed, and an opportunity afforded the opposite party to have the proposed costs retaxed before execution issued (*Shaw, J., dis.*).—*Bell v. Superior Court*, 150 Cal. 32, 87 Pac. 1031.

As to costs in appeals from justices' courts, see pars. 55-57, this note.

As to costs of transcript on appeal and apportionment thereof, see pars. 79, 80, this note.

11. On separate appeals from judgment and order denying motion for new trial submitted together and disposed of in a single opinion, which affirms the order and modifies the judgment, the power of the clerk to insert in the remittitur a judgment for costs extends only to the remittitur upon the appeal from the judgment.—*Crittenden v. San Francisco Sav. Union*, 157 Cal. 201, 203, 107 Pac. 103.

12. Since the amendment, in 1913, of section 1027, post, the prevailing party on appeal, except in case of a modification of the judgment, has an absolute right to his costs, and the expense of printing briefs, to the limit of fifty dollars as fixed by that section, is included in the category of taxable costs.—*Estate of Prager*, 167 Cal. 737, 141 Pac. 369.

13. The omission of the existing rules of the supreme court to provide for a judgment, to which the prevailing party is entitled under that section, can not take away his right.—*Estate of Prager*, 167 Cal. 737, 141 Pac. 369.

14. Since the enactment of that amendment, remittiturs on affirmance, as well as on reversal, should include a judgment for costs of appeal in favor of the prevailing party.—*Estate of Prager*, 167 Cal. 737, 141 Pac. 369.

15. **Same—Amount in controversy as affecting.**—Appellate jurisdiction of matter brought in controversy in lower court by order made before or after judgment in case where court had jurisdiction is not controlled or affected by amount involved.—*Sierra Union W. & M. Co. v. Wolff*, 144 Cal. 430, 431, 77 Pac. 1038. See *Harron v. Harron*, 123 Cal. 508, 56 Pac. 334, 128 Cal. 303, 60 Pac. 932; *Southern Cal. R. Co. v. Superior Court*, 127 Cal. 417, 59 Pac. 789; *Elledge v. Superior Court*, 131 Cal. 279, 63 Pac. 360.

16. Appealability of order after judgment in equity case is not controlled by amount

involved.—*Harron v. Harron*, 123 Cal. 508, 509, 53 Pac. 334.

17. **Same—Discretion of appellate court—As to generally.**—An appellate court has discretion to determine what shall be considered as necessary costs and charges incurred upon the appeal.—*Blair v. Brownstone Oil & R. Co.*, 20 Cal. App. 316, 128 Pac. 1022, 1023.

18. **Same—Same—Determination of trial court conclusive.**—A trial judge has discretion in determining what expenses and disbursements have necessarily been incurred in the course of the trial, and his determination of such a question will not be disturbed on appeal except where an abuse of such discretion is shown.—*Blair v. Brownstone Oil & R. Co.*, 20 Cal. App. 316, 128 Pac. 1022.

19. The allowance or disallowance of items of cost for expenses or disbursements incurred upon the trial of the action must be left in nearly every instance to the discretion of the judge where the cause was tried. If it is true as to expenses incurred in the trial court, it is equally true as to expenses incurred in the appellate court. It is competent for the superior court to make a rule in advance of the filing of the transcript on appeal, since such an act is an exercise of a discretion lodged in the court which, by reason of the present condition of the statute law, it is forced to exercise and could not be exercised elsewhere.—*Bond v. United Railroads of San Francisco*, 20 Cal. App. 124, 128 Pac. 786, 789.

20. **Same—Right of appellant to.**—Where it appeared that the appellant was the owner in fee of the property in controversy, and defendant denied her ownership as alleged, upon a decree in her favor upon the issue of such ownership, she becomes entitled as a matter of right to her costs.—*Petitpierre v. Maguire*, 155 Cal. 252, 100 Pac. 690.

21. **Arbitration—Estoppel as to award of costs.**—Estoppel from asserting invalidity of award as to costs (on ground that no authority for such award was conferred) is not created by defendants, where plaintiff has brought several actions against certain defendants which were by several distinct agreements submitted to arbitration and in which awards of several amounts were made against defendants and award of costs against defendants jointly, by submitting to common trial by arbitrators and paying separate amounts awarded against them as damages.—*Springer v. Schultz*, 64 Cal. 454, 2 Pac. 32.

As to arbitrations, see, post, §§ 1281 et seq. and notes.

22. **Clerk's fees—Prepayment of.**—Unless it be clear from language of existing statute prescribing some particular service to be performed by clerk that no fee shall be charged therefor and service required by such statute is one for which by statutes relating to fees a fee is fixed, peremptory

language of statute prescribing service or duty is of no avail in absence of payment or tender of legal fee prescribed. Where fee is required by law to be prepaid for any official service any order or writ of any court requiring or necessitating service must be deemed to have been made or issued upon condition that such fee will be paid or tendered by party requiring service, and such payment or tender is, unless waived by officer, condition precedent to performance of service.—*I. X. L. Lime Co. v. Superior Court*, 143 Cal. 170, 173, 76 Pac. 973.

23. Common-law rule—Costs were not recoverable at common law. The right to their recovery is purely statutory, and, in the absence of statute, no costs could be recovered by either party.—*Bond v. United Railroads of San Francisco*, 20 Cal. App. 124, 128 Pac. 786, 788.

24. Compromise judgment—Costs on.—As to recovery of costs where compromise judgment for less than three hundred dollars is rendered, see notes to section 1025, post; also *Murphy v. Casey*, 13 Cal. App. 781, 785, 110 Pac. 956.

25. Constitutional law — Discretion of court—Judgment for costs against executor, etc., personally.—Held to be in the discretion of the court, under above section and section 1509, post, to render a personal judgment for costs against an executor or administrator.—*Meyer v. O'Rourke*, 150 Cal. 178, 88 Pac. 706.

26. Same—"Due process of law."—Award of costs against an executor or administrator in his personal capacity, as herein authorized, not in contravention of constitutional guarantee as to "due process of law." Such executor or administrator may always, by appropriate proceeding, after award, connect himself with the same in his personal capacity, or he may make a claim against the estate for the costs so awarded as in other matters, and thereby secure due protection, through the regular process of law, for his rights and interests.—*Meyer v. O'Rourke*, 150 Cal. 178, 88 Pac. 706.

27. Construction of section—In general.—This section applies to both parties to the action and forbids the recovery of costs by either of them.—*Frese v. Mutual Life Ins. Co. of New York*, 11 Cal. App. 387, 399, 105 Pac. 265.

28. This section does not require the "party dissatisfied with the costs claimed" to serve a copy of his motion. The statute says he "may . . . file a motion to have the same taxed by the court."—*Furtinat v. Butterfield*, 14 Cal. App. 25, 110 Pac. 963.

29. So far as the recovery of costs where the plaintiff recovers a judgment for less than three hundred dollars is concerned, section 997, ante, subdivision 3 of section 1022, post, and above section must be construed together.—*Murphy v. Casey*, 13 Cal. App. 781, 785, 110 Pac. 956.

30. Same—Words "of course," as used in section 1022, post, mean as matter of right.

and in cases here provided question of costs is not left to discretion of court, but follows judgment.—*Schmidt v. Klotz*, 130 Cal. 223, 224, 62 Pac. 470.

31. Contesting allowance of costs.—The right to recover costs is a matter of statutory regulation, and, in the absence of a statute, no costs can be recovered by either party.—*Kummeth v. Atkisson*, 23 Cal. App. 401, 138 Pac. 116.

32. While it is true that the filing of a verified memorandum of costs establishes the correctness of the charges therein made which prima facie appear to be necessary and proper, nevertheless when the correctness of the memorandum is challenged, either in whole or in part, by the affidavit or other evidence of the contesting party, the burden is then upon the party claiming the costs to show by competent and satisfactory evidence that the items charged were for matters and things necessarily relevant and material to the issues involved in the action.—*Whitaker v. Moran*, 23 Cal. App. 758, 139 Pac. 901.

33. As a general rule, when a plaintiff voluntarily dismisses his action, the defendant will be entitled to his necessary costs; and the mere fact that the testimony of a witness was rendered unnecessary by a dismissal of the action will not operate to deprive the defendant of the expense necessarily incurred in good faith, and within the limit of the fees prescribed by law, to secure the attendance of the witness.—*Whitaker v. Moran*, 23 Cal. App. 758, 139 Pac. 901.

34. The allowance by the trial court of costs for procuring certified copies of documents, on motion where the documents are submitted to the court, will be assumed to be justified on appeal, when the documents are not set forth in the bill of exceptions, notwithstanding the validity, necessity and materiality of the documents as evidentiary matters were controverted on the motion by affidavits of the opposing party.—*Whitaker v. Moran*, 23 Cal. App. 758, 139 Pac. 901.

35. Where in an action to quiet title the plaintiff is adjudged to be the owner and entitled to the possession of a specified portion of the property in controversy, and the defendant the owner and entitled to the possession of the remainder, the plaintiff, as well as the defendant is entitled to his costs as a matter of right.—*Hihn Co. v. Santa Cruz*, 24 Cal. App. 365, 141 Pac. 391.

36. Continuance upon terms—Payment of certain costs—Acceptance of conditions.—When a continuance is granted upon condition that the party asking it pay certain items of costs imposed by the court, the acceptance of the continuance is in effect an agreement to pay the sums imposed, and the party can not thereafter be heard to deny the power of the court to impose any particular item thus imposed.—*Bashore v. Superior Court*, 152 Cal. 3, 91 Pac. 801.

37. Cost-bill—Right to written notice of filing of, like any other right, may be waived, and where the party had actual notice and knowledge of the filing and acted upon it without objection for a long period of time it will be deemed to be waived.—*Bell v. Thompson*, 8 Cal. App. 483, 486, 97 Pac. 158.

As to order striking out cost-bill, see par. 68, this note.

As to time of filing cost-bill, see par. 78, this note.

38. Disallowance of costs in an action in the superior court where the judgment is for the plaintiff in an amount less than three hundred dollars is in the nature of a penalty and manifestly intended to discourage the bringing of actions in the superior court which should be tried in the justices' court.—*Murphy v. Casey*, 13 Cal. App. 781, 784, 110 Pac. 956.

39. On compromise judgment taken under authority of section 997, ante, is no less a judgment than one rendered and entered after a trial, and where such judgment is for a sum less than three hundred dollars there can, under the provisions of section 1022, post, be no recovery of costs.—*Murphy v. Casey*, 13 Cal. App. 781, 785, 110 Pac. 956.

40. Dismissal—Appeal as to acts.—Appeal will not lie from judgment for defendant for costs upon voluntary dismissal by plaintiff, except as to portion relating to costs, and where such amounts to less than three hundred dollars appellate court has no jurisdiction.—*Oullahan v. Morrissey*, 73 Cal. 297, 298, 14 Pac. 864.

41. Eminent domain—Allowance or disallowance of costs will not be reviewed upon appeal on judgment-roll alone.—*Madera Co. v. Raymond G. Co.*, 139 Cal. 128, 136, 72 Pac. 915.

42. Equity cases—Action to protect easement held to be an action involving the title or possession of real estate, as here provided for, and that costs are to be allowed in such an action as of course, though plaintiff's recovery is only partial, the form of the action and the fact that equitable relief is sought being immaterial, and not sufficient ground to invoke the application of the rule as to apportionment of costs in equity in the discretion of the court.—*Hoyt v. Hart*, 149 Cal. 730, 87 Pac. 569.

43. Same—Discretionary in both trial and appellate courts.—*Forsyth v. Butler*, 152 Cal. 405, 93 Pac. 90.

44. Same—Practice.—In equity cases allowance of costs is within discretion of court and such discretion will not be reviewed by appellate court in absence of statement or bill of exceptions.—*Faulkner v. Hendy*, 103 Cal. 15, 26, 36 Pac. 1021.

45. Final adjudication of subject-matter is not made by judgment for costs only for or against one of parties.—*Nolan v. Smith*, 137 Cal. 360, 361, 70 Pac. 166.

46. Former trial—Interest upon costs of first trial should not be allowed in taxing costs of second trial.—*Huellmantel v. Huellmantel*, 124 Cal. 533, 590, 57 Pac. 582.

47. How question reviewed—Appeal from judgment.—Where judgment allows costs but does not state amount thereof, order thereafter made upon motion to retax costs relates and is part of judgment, and therefore can be reviewed upon appeal from judgment and does not require separate appeal, as from order after final judgment.—*Quit-zow v. Perrin*, 120 Cal. 255, 260, 52 Pac. 632.

48. Costs ascertained and adjudged after entry of judgment by clerk is by law considered as having preceded final judgment, and action of court regarding same may therefore be reviewed on appeal from judgment.—*Lasky v. Davis*, 33 Cal. 677, 678.

49. Error regarding allowance of costs, can not be reviewed on appeal from order denying motion for new trial. It can only be reviewed on appeal from judgment.—*Stevenson v. Smith*, 28 Cal. 102, 105, 87 Am. Dec. 107.

50. Judgment-roll, not containing memorandum of costs, order denying motion to retax costs, can not be reviewed on appeal on judgment-roll alone.—*Kelly v. McKibben*, 54 Cal. 192, 194.

51. Improper costs—Motion to re-tax is remedy where items not properly taxable are included in cost-bill, and mere fact that some items of cost-bill are not properly chargeable as costs is not ground for recalling execution and refusal to issue another.—*Meeker v. Harris*, 23 Cal. 285, 286.

52. Interest—After verdict or decision must be computed at the legal rate upon the aggregate amount of the principal and interest due at the contract rate at the time the decision or verdict was rendered. The theory of the law is not that the party recover the particular note or chose in action, but that he recover a fixed and definite sum as damages for the non-performance of the contract, and in cases of failure to pay money due, the true measure of the damage is the amount of money owing and the interest that was agreed upon. The amount of the judgment being ascertained, the statute steps in and regulates the rate at which it shall bear interest.—*United States Nat. Bank v. Waddingham*, 7 Cal. App. 172, 175, 93 Pac. 1046.

53. Same—Interest before judgment.—When, in an action for the reasonable value of work and materials and expenses in the construction of a building, issue is joined and the value thereof controverted, interest can not be allowed before judgment.—*American-Hawaiian Co. v. Butler*, 17 Cal. App. 768, 121 Pac. 709.

54. Same—Quantum meruit.—The general rule in this state is that, in an action of quantum meruit, interest is not allowed until judgment is rendered.—*American-Hawaiian Co. v. Butler*, 17 Cal. App. 768, 121 Pac. 709.

55. Same.—Unliquidated sum.—Where the amount due a materialman, in a proceeding under sections 1183 et seq., post, is unliquidated, and incapable of being made certain by calculation until fixed by the judgment, interest prior to judgment can not be allowed.—*Burnett v. Glas*, 154 Cal. 260, 97 Pac. 432.

56. Justices' court.—In cause appealed from.—Appeal does not lie from order refusing to strike out cost-bill of superior court on appeal from justices' court, although amount thereof exceeds three hundred dollars.—*Henigan v. Ervin*, 110 Cal. 37, 40, 42 Pac. 457.

57. The prevailing party in an action tried anew in the superior court on an appeal from a justices' court is entitled to recover his costs, notwithstanding the judgment rendered on the appeal is for a sum less than three hundred dollars.—*Healey v. Superior Court*, 167 Cal. 22, 138 Pac. 687.

58. Section 1022, post, disallowing costs to the plaintiff in an action for money or damages where the judgment is for less than three hundred dollars, is not intended to apply to an action tried anew in the superior court on appeal from the justices' court.—*Healey v. Superior Court*, 167 Cal. 22, 138 Pac. 687.

59. Loss of costs.—Jurisdiction of the court where the amount involved is the question to be considered must be determined on the pleadings, and where no question is made of the good faith of the plaintiff in bringing the suit for a sum exceeding three hundred dollars the only penalty for recovery of less than the jurisdictional amount is the loss of costs.—*Pratt v. Welcome*, 6 Cal. App. 475, 477, 92 Pac. 500.

60. Mandamus.—Will not compel payment of costs.—Mandamus does not lie to enforce obligation of contracts, but only for performance of act which law specially enjoins, and therefore it will only lie to compel drawing warrant for amount of audited demand exclusive of interest or costs.—*Barber v. Mulford*, 117 Cal. 356, 360, 49 Pac. 206.

61. Mandamus proceedings.—Costs on.—Sections 1022 and 1033, post, authorize the recovery of costs in an original proceeding in an appellate court for a writ of mandate; and the expense of taking a deposition, if necessarily and legally incurred, is within the contemplation of such sections.—*Kummeth v. Atkisson*, 23 Cal. App. 401, 138 Pac. 116.

62. But where depositions in such a proceeding are taken on behalf of the respondent prior to his appearance and the presentation therein of any issue of law or of fact, the expense of taking them is not properly chargeable against the petitioner on the denial of the writ, under section 2021, post, providing that the testimony of a witness may be taken by deposition "in a special proceeding after a question of fact has arisen therein."—*Kummeth v. Atkisson*, 23 Cal. App. 401, 138 Pac. 116.

63. Married woman.—Liable for costs in action by her alone concerning her separate property.—*Leonard v. Townsend*, 26 Cal. 435, 445.

64. Modification of judgment as to costs.—Final judgment can not be modified so as to make allowance to plaintiff for costs and counsel fees in action prosecuted by him as stockholder on behalf of corporation where such judgment provides that it be paid to corporation. If plaintiff have any claim against corporation for money advanced for costs and counsel fees he must prosecute it by ordinary civil action against corporation.—*Wickersham v. Crittenden*, 103 Cal. 582, 584, 37 Pac. 518.

65. Motion to re-tax.—An affidavit is not essential in support of a motion to retax costs.—*Lomita, etc. Co. v. Robinson*, 154 Cal. 53, 97 Pac. 10.

As to time of motion to tax costs, see par. 79, this note.

66. New questions not considered.—Questions regarding costs not made in trial court and embraced in grounds of appeal, as set out in transcript, will not be noticed by appellate court.—*Stoddard v. Treadwell*, 29 Cal. 281, 282.

67. Appellate court will not consider objection to items of costs there made for first time. Party complaining must first move in trial court, and thus obtain distinctly judgment of that court upon disputed items, before resort can be had to higher tribunal.—*Guy v. Franklin*, 5 Cal. 416, 417.

68. Order striking out cost-bill is appealable and can be reviewed without appeal from judgment.—*Yorba v. Dobner*, 90 Cal. 337, 338, 27 Pac. 185.

69. Probate proceedings.—As to costs in.—This and following sections providing for costs generally do not apply to proceedings in probate, for reason that section 1720, post, is provision relating to such proceedings passed in 1880 long after adoption of general provisions in these sections, and by later statute must prevail in proceedings to which it relates.—*Estate of Olmstead*, 120 Cal. 447, 452, 52 Pac. 804.

As to allowance of costs in probate proceedings, see, post, §§ 1718, 1720 and notes.

70. Same.—General rule requires costs to be imposed upon the executor or administrator in his personal capacity, and not upon the estate, nor upon him in his representative character. He may then seek an allowance from the estate, in a proper case; and, if the litigation has been unjust or ill advised, he should, in order to prevent the dissipation of estates in the hands of careless executors or administrators, be compelled to bear the cost individually.—*Meyer v. O'Rourke*, 150 Cal. 179, 88 Pac. 706.

71. Referee.—Allowance in trial, etc., by.—Costs allowed by referee against garnishee, but not allowed in order of court confirming report, can not be collected in action on judgment.—*Bronzan v. Drobaz*, 93 Cal. 647, 652, 29 Pac. 254.

72. Retention of appeal to determine costs.—The court will not retain the appeal and decide alleged errors merely for the purpose of determining who is to pay, and who is entitled to receive, the costs on appeal, which are alone in issue. But as it appears from the record that the trial court abused its discretion in making the order from which the appeal is taken, the costs on appeal should be shared equally between the parties and not all placed on the appellant.—*Wilson v. Chesley*, 23 Cal. App. 630, 138 Pac. 958.

73. Right to statutory costs—Discretion of court.—The right to recover costs is purely statutory, and no costs can be recovered, by either party, in the absence of a statute; and, assuming the constitutional right of the legislature to enact such legislation, the question whether the matter of awarding costs in a given case rests in the discretion of the court must depend upon whether the legislature has committed the discretion to the court, or not.—*Duley v. Peacock*, 17 Cal. App. 420, 119 Pac. 1086.

As to discretion of court in allowing of costs, see pars. 15 and 16, this note.

As to statutory warrant for allowing costs, see par. 74, this note.

74. Right to recover costs is purely statutory and in the absence of a statute no costs can be recovered by either party.—*Williams v. Atchison, T. & S. F. R. Co.*, 156 Cal. 140, 141, 103 Pac. 885.

75. Statutory warrant for the allowance of costs necessary in any case.—*Murphy v. Casey*, 13 Cal. App. 781, 783, 110 Pac. 956.
See pars. 73 and 74, this note.

76. Stay of execution—Undertaking.—Order denying motion to strike out cost-bill is not order for payment of money so as to require undertaking under section 942, ante, in order to stay execution on appeal, and where upon appeal from such order undertaking as provided in section 942, ante, containing stipulation that judgment must be entered against sureties on motion is one given without consideration and not binding upon sureties.—*Reay v. Butler*, 118 Cal. 113, 114, 50 Pac. 375.

77. Striking out costs.—Appeal lies from order made after entry of judgment reducing such judgment by striking out costs allowed defendant.—*Elledge v. Superior Court*, 131 Cal. 279, 63 Pac. 360.

As to in what cases appeals may be taken, see, ante, § 963 and note.

78. Time of filing cost-bill.—The decision referred to in section 1033, post, means a judgment entered upon a motion; hence where a motion for a nonsuit was entered on January 9, judgment thereon entered on the 12th, and the cost-bill filed on the 15th, this was within the time allowed by law.—*In re Purcell's Estate*, 164 Cal. 300, 128 Pac. 932, 938.

As to right to written notice of filing cost-bill, see par. 37, this note.
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79. Time of notice of motion to tax costs may be shortened by the court under the provisions of section 1005, ante.—*Furtinatti v. Butterfield*, 14 Cal. App. 25, 110 Pac. 963.

As to motion to retax costs, see par. 65, this note.

80. Transcript—Apportionment of costs of, on reversal.—Unnecessary costs of transcript will not be charged against respondent on reversal, but will be apportioned, and in the present case respondent will be charged with one-third the cost.—*Estate of Pease*, 149 Cal. 173, 85 Pac. 149.

81. Same—Of reporter's notes—Order necessary.—Where an item was charged as cash paid to the official reporter of the superior court for transcript of evidence, but it does not appear that any application was made to, or order secured from, the superior judge directing the reporter to transcribe his official notes, which order should be made agreeable to the provision of section 274, ante, the party paying such charges can not recover them as costs.—*Blair v. Brownstone Oil & R. Co.*, 20 Cal. App. 316, 128 Pac. 1022, 1023.

II. ATTORNEY'S FEES.

As to allowance of attorney's fees out of fund in action by creditors who sue in behalf of themselves and others, see note 54 L. R. A. 817.

As to attorneys and counselors at law in general, see, ante, §§ 275 et. seq. and notes.

As to attorney's fees as damages in action for conversion of personal property, see *Kerr's Cyc. Civ. Code*, 2d ed., § 3336 and note.

As to attorney's fees in cases of mechanics' liens, see, post, § 1195 and note.

As to attorney's fees on foreclosure of mortgages, see, ante, §§ 726 et. seq. and note.

As to costs, counsel fees, etc., in matter of divorce, see *Kerr's Cyc. Civ. Code*, 2d ed., § 137 and note.

As to recovery of counsel fees in actions of claim and delivery for personal property, see, ante, § 509 and note.

82. Action to recover.—Attorney may have action to recover amount agreed on or value of his services in cases where he is employed by person capable of making contract which shall bind him or those whom he may represent. The fact of existence of contract and amount agreed upon or value may be submitted to jury.—*Cole v. Superior Court*, 63 Cal. 86, 88, 49 Am. Rep. 78.

83. Agreement to pay—Will not support judgment.—Giving note to attorney for services will not support finding for money expended by plaintiff in pursuit of property, nor will agreement to pay attorney.—*Hays v. Windsor*, 130 Cal. 230, 236, 62 Pac. 395.

84. Allowance statutory.—Except where expressly allowed by statute, counsel fees are not as general rule recoverable by successful party in action, either at law or in

equity.—*Miller v. Kehoe*, 107 Cal. 340, 343, 40 Pac. 485.

As to statutory allowance of attorney's fees, see pars. 117-120, this note.

85. Same.—What statute governs.—Right to recover costs is purely statutory, and their recovery is governed by statute in force at time right to have them taxed occurs.—*Begbie v. Begbie*, 128 Cal. 154, 155, 49 L. R. A. 141, 60 Pac. 667.

86. *Bona fides* of.—The power to name the compensation in such case is not plenary, and the matter of good or bad faith is involved. In other words, the defendant was not empowered under the contract arbitrarily to name a fee without any reference to the *bona fides*.—*Foster v. Young*, 172 Cal. 317, 156 Pac. 476.

87. Contest of will.—As to generally.—Conceding that counsel fees allowed executor in probating of will may be regarded as "costs," within meaning of above section, they could not be allowed except as incident to such judgment, or order of court. Probate judge is clothed with discretion to order costs paid "by any parties to proceeding, or out of assets of estate, as justice may require." This discretion can not be exercised until there is something upon which it may be based, and therefore in matter of contest of will, court has no power to appropriate funds of estate to aid either proponent or contestant.—*Henry v. Superior Court*, 93 Cal. 569, 571, 573, 29 Pac. 230.

88. Same.—Attorney's fees are no part of "costs" that may be allowed or taxed against party on contest of will.—*Estate of Olmstead*, 120 Cal. 447, 452, 52 Pac. 804.

As to counsel fees in probate matters, see, post, § 1718 and note.

89. Until will is admitted to probate or probate thereof denied, court has no power to aid either proponent or contestant by award of attorney's fees out of funds of estate.—*Estate of Olmstead*, 120 Cal. 447, 452, 52 Pac. 804. See *Estate of Marrey*, 65 Cal. 287, 3 Pac. 896; *Estate of Parsons*, 65 Cal. 240, 3 Pac. 817; *Estate of Jessup*, 80 Cal. 625, 22 Pac. 260; *Henry v. Superior Court*, 93 Cal. 569, 29 Pac. 230.

90. Contract for attorney's fees.—Valid and enforceable.—A contract for attorney's fees is a valid and enforceable contract.—*Fell v. Frierson*, 171 Cal. 351, 153 Pac. 229.

91. In an action for the foreclosure of a chattel mortgage given to secure the payment of two promissory notes which provided for attorney fees in the event that suit be commenced to enforce their payment, it is error to refuse to allow the plaintiff his costs and attorney fees, on the ground that the defendant had made a tender of the amount which he claimed was due, where the findings show that the tender was not only insufficient in amount, but that it was made after action brought and rejected on the ground of such insufficiency.—*Fell v. Frierson*, 171 Cal. 351, 153 Pac. 229.

92. Costs.—Counsel fees are not, or disbursements, in action allowed by statute to prevailing party; even when provided by terms of contract, and law is not that such charge is deemed part of costs or recoverable as such, but is in nature of special damage expressly authorized by contract to be recovered in addition to general damages, and must be expressly averred with right in defendant to defend specially against its allowance.—*Brooks v. Forington*, 117 Cal. 219, 221, 48 Pac. 1073.

93. Same.—In foreclosure.—Stipulation of mortgage providing for recovery of attorney's fees on foreclosure does not constitute such attorney's fee part of costs in action.—*Brooks v. Forington*, 117 Cal. 219, 222, 48 Pac. 1073.

As to attorney's fees on foreclosure of mechanics' lien, see, post, § 1195 and note.

As to counsel fees in foreclosure of mortgage, see par. 102, this note; also, post, § 1500 and note.

94. Determination of amount.—As to generally.—Court without hearing any testimony may determine what amount will be reasonable as counsel fees in cases where such are recoverable.—*McNamara v. Oakland B. & L. Assoc.*, 131 Cal. 336, 347, 63 Pac. 670.

95. Amount of attorney's fee where it is proper to allow such must be determined by court and no evidence of value of services rendered is necessary.—*Woodward v. Brown*, 119 Cal. 283, 309, 63 Am. St. Rep. 108, 51 Pac. 2, 542.

96. Same.—Appeal, conflicting evidence.—Value of attorney's fees, where allowed, found upon conflicting evidence will not be reviewed on appeal.—*Estate of Levinson*, 108 Cal. 450, 458, 41 Pac. 483, 42 Pac. 479.

97. Same.—In partition, fixing amount of attorney's and referee's fees rests in discretion of court, and order will not be disturbed on appeal unless clear abuse of discretion be shown.—*Treadwell v. Treadwell*, 134 Cal. 158, 66 Pac. 197.

As to attorney's fees in action of partition, see, ante, §§ 796, 798, 801 and notes.

98. Dissolution of partnership.—In some equity cases counsel fees may be allowed in discretion by court. But in action to have certain property declared partnership assets and sold, where judgments are contested, prevailing party is no more entitled to recover counsel fees than would be successive party in ordinary action, and in refusing to allow such court does not abuse discretion.—*Salmina v. Juri*, 96 Cal. 418, 420, 31 Pac. 365.

99. Equity cases.—Courts of equity will in proper cases, and where justice requires it, allow attorney's fees as part of relief granted.—*Estate of Olmstead*, 120 Cal. 447, 453, 52 Pac. 804. See *Aleman v. Wensinger*, 40 Cal. 288; *Wickersham v. Crittenden*, 103 Cal. 582, 584, 37 Pac. 513; *Miller v. Kehoe*, 107 Cal. 340, 40 Pac. 485.

100. Exceptions.—General rule is counsel fees are not recoverable as costs by successful party in action, either at law or in equity. In equity, ordinary costs are awarded or withheld at discretion of court, and there are cases in which court of equity will award counsel fees as part of relief granted, and without which relief would be nugatory, as in case of series of acts to be performed at short intervals through long period of time, if party charged with obligation should contumaciously refuse to perform, necessitating successive actions to compel performance, thereby imposing on opposite party burden and costs of such action, employing counsel, etc., court of equity would award counsel fees as part of relief, not only with view to contumacy of party in default, but for reason that otherwise relief granted would be wholly ineffectual.—*Williams v. MacDougall*, 39 Cal. 80, 85.

101. Fencing-bond.—Attorney's fees in action on.—As to generally, see, post, § 1251 and note.

102. Foreclosure.—Contract must provide for.—Where there is no agreement to pay counsel fees or that property upon which lien is sought to be foreclosed shall be security therefor, court can not allow counsel fees as part of its judgment.—*Commercial Sav. Bank of San Jose v. Hornberger*, 140 Cal. 16, 22, 73 Pac. 625.

As to attorney fees in foreclosure proceedings, see, post, § 1500 and note.

103. Guardian ad litem.—Is officer of court and can not make binding contract with attorney to pay him certain percentage of amount recovered. In such cases both guardian ad litem and attorney, being officers of court, court in which action is pending should fix fees of attorney (*Sharpstein, J.*, dis. op.).—*Cole v. Superior Court*, 63 Cal. 86, 89, 90, 49 Am. Rep. 78.

As to appointment of guardian ad litem, see, ante, § 373 and note.

104. Insolvency.—Contest of ownership.—Counsel fees can not be allowed defeated party in action by assignee of insolvent to recover property upon theory that defendant held such property in trust, where defendant contested action in good faith for purpose of having ownership of property judicially determined.—*Sanger v. Ryan*, 122 Cal. 52, 55, 54 Pac. 522.

105. Lien of attorney on judgment recovered does not exist in this state.—*Ex parte Kyle*, 1 Cal. 331, 332; *Mansfield v. Dorland*, 2 Cal. 507, 509; *Russell v. Conway*, 11 Cal. 93, 103.

106. In this state, attorney has no lien for costs in action and he can not disturb satisfaction of judgment entered by his client.—*Hogan v. Black*, 66 Cal. 41, 42, 4 Pac. 943.

107. Attorney has by law no lien for his services upon judgment recovered in favor of his client, but must recover therefor in

ordinary mode by action.—*Gage v. Atwater*, 136 Cal. 170, 173, 68 Pac. 581.

108. Maintenance.—Offense created by statute in England, is not known to or recognized by law of this state.—*Mathewson v. Fitch*, 22 Cal. 86, 94.

109. Mechanics' lien.—Attorney's fees and costs.—As to generally, see, post, § 1195 and note.

110. Modification of final judgment so as to make allowance of counsel fees in action prosecuted by stockholder on behalf of corporation payable to plaintiff where judgment provides such be paid to corporation.—*Wickersham v. Crittenden*, 103 Cal. 582, 584, 37 Pac. 513.

111. Pleading.—Counsel fees when provided to be allowed by contracts sued on, must be alleged and prayed for in case, or they can not be recovered, being in no sense costs or disbursements of action, as contemplated by this section.—*Brooks v. Forington*, 117 Cal. 219, 221, 48 Pac. 1073.

112. Promissory notes.—Foreclosure of pledge.—In case of note providing for attorney's fees in action thereon, to secure which certain property was pledged, plaintiff is entitled to recover such attorney's fees in action on notes, and in subsequent action to foreclose pledge is entitled to amount so allowed, as against assignee of pledgeor; but is not entitled to counsel fees in second action, they not being provided for by contract of parties.—*Commercial Sav. Bank of San Jose v. Hornberger*, 140 Cal. 16, 21, 73 Pac. 625.

113. Retaining fee.—Attorney is always entitled to his retaining fees in advance, unless he stipulates to contrary. In action against attorney for negligence, it is sufficient to aver that he was retained, but if it be averred that he was retained, in consideration of certain sum, it must also be averred that he was paid same.—*Cavillaud v. Yale*, 3 Cal. 108, 110, 58 Am. Dec. 388.

114. Right to attorney's fee.—Based upon contract.—Not taxable as costs.—The right to an allowance of costs is purely statutory, and while in certain specified cases attorney's fees may by statutes be made allowable as costs in a case not coming within the strict purview of such a statute, the right to attorney's fees is based upon contract and not upon statute and a recovery, if one can be had, must be upon that contract, and such fees can not be taxed as costs under the provisions of the above section.—*City Investment Co. v. Pringle*, — Cal. App. —, 193 Pac. 504; see *Brooks v. Forington*, 117 Cal. 219, 48 Pac. 1073.

115. Attorney's fees provided for in a contract are in the nature of special damages and must be specially pleaded in the complaint in order to admit of their recovery.—*City Investment Co. v. Pringle*, — Cal. App. —, 193 Pac. 504, following the doctrine in *Prescott v. Grady*, 91 Cal. 518, 27 Pac. 755.

116. Thus in a case in which an action was brought to foreclose a mortgage which provided that in the event of foreclosure the mortgagee might retain from the sale costs of suit, "including counsel fees" but the prayer of the complaint simply asked for the principal and the interest "and for costs of suit," but did not in terms ask an award of counsel fees; the trial court having made plaintiff an allowance for counsel fees on appeal it was held that counsel fees were not costs or disbursements in the action allowed under the provisions of the above statute; that, although they were provided for in the terms of the contract, they were not to be deemed as a part of the costs, or recoverable as such, but in the nature of a special damage expressly authorized by the contract requiring to be expressly averred and explicitly demanded.—*Brooks v. Forington*, 117 Cal. 219, 48 Pac. 1073.

117. Statute must authorize allowance.—Counsel fees can not be awarded as part of judgment unless expressly authorized by law.—*Bates v. County of Santa Barbara*, 90 Cal. 543, 548, 27 Pac. 438.

118. Counsel fees are not recoverable by successful party in action at law or in equity, except where expressly allowed by statute.—*Estate of Olmstead*, 120 Cal. 447, 453, 52 Pac. 804. See *Miller v. Kehoe*, 107 Cal. 340, 40 Pac. 485; *Bates v. Santa Barbara County*, 90 Cal. 543, 27 Pac. 438.

119. But may be allowed in equity in action for preservation of fund, all parties having common interest.—*Hays v. Windsor*, 130 Cal. 230, 236, 62 Pac. 395.

120. Counsel fees can not be allowed receiver and successful party in action, either at law or in equity, except in instances enumerated in and expressly authorized by statute.—*Sanger v. Ryan*, 122 Cal. 52, 54, 54 Pac. 522.

121. Substitution of attorney—Indebtedness of client to attorney for services rendered in action can not prevent client substituting another attorney.—*Gage v. Atwater*, 136 Cal. 170, 172, 68 Pac. 581.

122. Trover—In action of.—Attorney's fees are not recoverable either as damages or costs under section 3336 Civil Code in action of trover.—*Nicholls v. Mapes*, 1 Cal. App. 349, 82 Pac. 265.

123. Trust fund—May be charged with costs and counsel fees in action by trustee to obtain decree, authorizing him to sell certain property and reinvest proceeds in other property for benefit of trust.—*Aleman v. Wensinger*, 40 Cal. 288, 294.

124. Where interested party maintains litigation to preserve common trust fund in which he and others are interested counsel fees may be allowed out of fund.—Trustees of the Internal Imp. Fund v. Greenough, 105 U. S. 527, 26 L. ed. 1157.

III. SUBJECT-MATTER EMBRACED IN TERM "COSTS."

125. As to generally.—In general use, the term "costs," when expressed with reference to litigation, embraces both disbursements and specific sums allowed by statutes as indemnity to the prevailing party for his expenses. In a narrower sense, the term "costs" excludes disbursements. Giving the term its liberal signification, it would embrace only the taxable costs and disbursements.—*Bond v. United Railroads of San Francisco*, 20 Cal. App. 124, 128 Pac. 786, 788.

As to premium paid surety company for bond in replevin, see par. 156, this note.

126. Acceptance by the plaintiff of an offer by defendant to allow judgment to be entered against him for a sum less than that sued for is tantamount to a confession by plaintiff that the sum offered is as large as he could expect to obtain judgment for were the issues tried and litigated; and that provisions of section 997, ante, which provides if the plaintiff fails to obtain a more favorable judgment than that involved in an offer of compromise, he can not recover costs, simply and clearly means that even after the refusal of the offer he should receive a judgment for an amount within the superior court's jurisdiction, but less than that for the amount offered, he would not be entitled to costs.—*Murphy v. Casey*, 13 Cal. App. 781, 784, 110 Pac. 956.

127. Accruing costs—Sheriff's fees.—Sheriff's charge for keeper's fee and expenses is part of necessary disbursements incurred in action, but where incurred before judgment plaintiff must include and claim them in cost-bill, or they will be waived. Such are not part of sheriff's "accruing costs" under section 691, ante, chargeable against defendant without being included in judgment. Such accruing costs being such fees and expenses only as are incurred in executing judgment.—*Hotchkiss v. Smith*, 108 Cal. 285, 287, 41 Pac. 304.

As to allowance for cost of boarding jury, see par. 131, this note.

128. Against mortgagee—Defendant in action to quiet title.—Where the defendant did not disclaim all interest, but expressly stated that he had an interest in defendant's land as mortgagee, and claimed and urged that defendant's title carried with the easement contended for a judgment for costs against him was properly rendered.—*Pinheiro v. Bettencourt*, 17 Cal. App. 120, 118 Pac. 941.

129. Allowance of costs—Can not be made for witness who refuses to accept fees from the plaintiff.—*Linforth v. San Francisco Gas & El. Co.*, 9 Cal. App. 434, 436, 99 Pac. 716.

As to witness' fees generally, see pars. 164-167, this note.

130. Same—Of counsel fees as costs in action of libel is not unconstitutional as denying equal protection of the laws by discriminating between the parties, nor is the statute enforced at the adoption of the constitution of 1879 objectionable thereto as special legislation.—*Skrocki v. Stahl*, 14 Cal. App. 1, 110 Pac. 957.

131. Board of jury—Allowance as costs of the board of a jury is without authority.—*Irrgang v. Ott*, 9 Cal. App. 440, 446, 99 Pac. 528.

132. Briefs—Printing of.—The expense of printing briefs to be used in the appellate court is not an expense to be considered as costs which the successful party shall be allowed to recover. Generally speaking, by the term "costs" is understood to be meant those fees and charges which are required by law to be paid to the courts or some of their officers, or the amount of which is expressly fixed by law.—*Blair v. Brownstone Oil & R. Co.*, 20 Cal. App. 316, 128 Pac. 1022. See, also, par. 157, this note.

133. Same—Rule of court.—The supreme court, by Rule XIII (former rule, 219 Pac. xii), has adopted the following regulation affecting the matter of costs incurred for printing papers to be used on appeal: "The expense of printing transcript on appeal in civil causes and pleadings, affidavits, or other papers constituting the record in original proceedings upon which the case is heard, required by these rules to be printed, shall be allowed as costs, and taxed in bills of costs in the usual mode." By necessary construction it follows that printing charges not included within the specifications of the rule, such as for the printing of briefs, are not to be deemed as proper costs or disbursements which the successful party is entitled to collect.—*Blair v. Brownstone Oil & R. Co.*, 20 Cal. App. 316, 128 Pac. 1022, 1023, following 20 Cal. App. 124; *Bond v. United Railroads of San Francisco*, 20 Cal. App. 124, 128 Pac. 786.

134. By Rule XIII [former rule] of the supreme court (160 Cal. 1), the costs allowable to the prevailing party on appeal are precisely defined. The cost of printing briefs is not provided, and, by the inclusion of the items named, the rule excludes other printing costs; hence the cost of printing briefs can not be taxed to the losing party.—*Bond v. United Railroads of San Francisco*, 20 Cal. App. 124, 128 Pac. 786.

135. Charge for an extra witness who was not called by the court nor by agreement of the parties is not a proper item to be charged as costs against the losing party.—*Linforth v. San Francisco Gas & El. Co.*, 9 Cal. App. 434, 436, 99 Pac. 716.

As to fees of witnesses generally, see pars. 144-151, this note.

As to witness subpoenaed in good faith, but not sworn, see par. 169, this note.

136. Copies of papers.—Charges for copies of papers in absence of any explanation to show that in any contingency reasonable to be apprehended they would be needed should be stricken out.—*Senior v. Anderson*, 130 Cal. 290, 300, 62 Pac. 563.

137. Depositions—Expenditure for can not be allowed as damages as in action of trover, but may be included in memorandum of costs.—*Nicholls v. Mapes*, 1 Cal. App. 349, 82 Pac. 265.

138. It is improper to allow costs charged for taking depositions, where the depositions are not offered nor considered in evidence on the hearing of the motion to tax costs, and the only showing made in opposition to the affidavit of the party attacking such items on the ground of irrelevancy and immateriality is an unverified statement concerning the particulars of the cost charged.—*Whitaker v. Moran*, 23 Cal. App. 758, 139 Pac. 901.

139. Experts—Witness fees.—Witnesses called as experts can only be allowed statutory witnesses' fees and mileage and are not entitled to be paid fees as experts, nor for expenses of making maps, surveys, etc., not ordered by court, and such can not be taxed as costs against losing party.—*Bathgate v. Irvine*, 126 Cal. 135, 149, 77 Am. St. Rep. 158, 58 Pac. 442.

As to no allowance allowed for witnesses who refuse to accept fees from party, see par. 129, this note.

As to witness fees, see pars. 144-151, this note.

140. Witness fees are fixed by statute at two dollars per day and allowance of further sum for witness who testified as expert is erroneous in absence of any showing of special circumstances, etc.—*Estate of Levinson*, 108 Cal. 450, 457, 41 Pac. 483, 42 Pac. 479.

141. Foreclosure of mortgage—Attorney's fees not costs.—Where mortgage provides for attorney's fees, but does not purport to secure same, allowance thereof as costs in action of foreclosure is not authorized.—*Irvine v. Perry*, 119 Cal. 352, 357, 51 Pac. 544, 949.

142. Former mistrial—Cost of recoverable.—Provision that prevailing party should recover his costs to be taxed authorizes recovery of all costs in action, including those of prior mistrial, as well as those of last trial.—*Shreve v. Cheesman*, 16 C. C. A. 413, 69 Fed. 785.

143. Upon second trial, prevailing party is entitled to recover costs of first trial, although cause of action upon which recovery was had in such first trial may have been withdrawn upon appeal.—*Fox v. Hale & Norcross S. M. Co.*, 122 Cal. 219, 223, 54 Pac. 731.

144. Same—Costs of first trial where judgment therein has been reversed, may be recovered as costs on second trial.—*Visher v. Webster*, 13 Cal. 58, 60.

145. Costs in first trial in action for money or damages where judgment is reversed on appeal, and new trial granted, may be taxed as costs in second trial.—*Stoddard v. Treadwell*, 29 Cal. 281, 282.

146. Same—Costs of former mistrial may be taxed against party ultimately defeated.—*Senior v. Anderson*, 130 Cal. 290, 299, 62 Pac. 563.

147. Insurance paid by sheriff on property attached by him is not proper item of costs.—*Galinda v. Roach*, 130 Cal. 389, 391, 62 Pac. 597.

148. Irrelevant matter in transcript.—Appellant inserting irrelevant matter in transcript will be taxed with the cost thereof on reversal of judgment.—*Sichel v. Carrillo*, 42 Cal. 493, 507.

As to appointment of costs of printing transcript, see pars. 80, 81, this note.

As to printing of transcript, see pars. 140-143, this note.

149. Same—Cost of printing transcript will not be assessed against respondent for inserting greater part of evidence where such insertion is to show exclusion of testimony sought to be stricken out would not have changed result.—*Duffy v. Duffy*, 104 Cal. 602, 607, 38 Pac. 443.

150. Upon reversal of judgment respondents will not be charged with cost occasioned by insertion of unnecessary matter in record as they will in any event be required to pay costs thereof.—*Estate of Robinson*, 106 Cal. 493, 497, 39 Pac. 862.

151. Jury fees—Payment on disagreement.—Act of 1871-72 providing that in case of disagreement party demanding jury must pay jury fees and until paid no further proceedings might be had in case was not repealed by enactment of codes.—*Carpenter v. Jones*, 121 Cal. 362, 364, 58 Pac. 842.

As to cost of boarding jury as a proper charge in cost-bill, see par. 131, this note.

As to juries in general, see, ante, §§ 190 et seq. and notes.

152. Same—Requiring deposit of.—Upon demand for jury trial court may compel party demanding to deposit fees of jury.—*Bank of Lassen Co. v. Sherer*, 108 Cal. 513, 516, 41 Pac. 415.

153. Percentage Act allowing five per cent, not to exceed one hundred dollars, on judgment recovered in city and county of San Francisco (Stats. 1865-6, p. 68) was not repealed by this code.—*Whitaker v. Haynes*, 49 Cal. 596, 597.

154. Act allowing certain percentage of any judgment recovered in city and county of San Francisco to prevailing party in addition to costs was unconstitutional (Stats. 1858 p. 332 § 7; Stats. 1866 p. 68 § 6); *Corwin v. Ward*, 35 Cal. 195, 198, 95 Am. Dec. 93.

155. Same—Constitutionality of act imposing ascending scale of fees in probate.—*Bloss v. Lewis*, 109 Cal. 493, 41 Pac. 1081.

156. Premium paid surety company for replevin bond procured pendente lite by a plaintiff ultimately successful is not a proper item of costs.—*Williams v. Atchison, T. & S. F. R. Co.*, 156 Cal. 140, 141, 103 Pac. 885.

157. Printing points and authorities on appeal is not proper charge against respondent and should not be included in costs allowed.—*Hibernia Sav. & L. Soc. v. Behnke*, 121 Cal. 339, 343, 53 Pac. 812.

As to cost of printing briefs, see pars. 132-134, this note.

158. Reporter's fees—Of former trial.—Payment of reporter's fees on former trial can not be required as condition of subsequent trial.—*Carpenter v. Jones*, 121 Cal. 362, 364, 58 Pac. 842.

159. Same—Equitable action.—In equitable action court may in its discretion provide that each party pay one-half reporter's fee and each pay costs of maintaining certain issues.—*Bathgate v. Irvine*, 126 Cal. 135, 148, 77 Am. St. Rep. 158, 58 Pac. 442.

160. Transcription of testimony where made by order of court providing expense be borne equally by both sides, may be charged as costs by prevailing party.—*Bell v. Pleasant*, 145 Cal. 410, 418, 78 Pac. 957.

As to fees of official reporters, see, ante, § 274 and note.

As to phonographic reporters of superior courts, see, ante, §§ 269 et seq. and notes.

161. Transcribing reporter's notes of testimony when not ordered by court, although used in preparing record on appeal, is not proper item to be recovered upon reversal of judgment.—*Bank of Woodland v. Hiatt*, 59 Cal. 580, 583.

162. Allowance of costs on appeal includes, in addition to costs and disbursements paid and incurred up to entry of judgment, only such costs and disbursements as he was put to by reason of taking appeal, and therefore transcript of reporter's notes of testimony procured for purpose of preparing statement on motion for new trial can not be recovered.—*Bank of Woodland v. Hiatt*, 59 Cal. 580, 583.

163. Reporter's fees for transcribing notes of testimony, unless transcription be ordered by court, can not be charged as costs by prevailing party.—*Senior v. Anderson*, 130 Cal. 290, 300, 62 Pac. 563.

164. Witness fees—In general.—Power of judge to order payment must be by statute uniform throughout state.—*Turner v. Siskiyou Co.*, 109 Cal. 332, 42 Pac. 434. See Const. 1879 art. XI § 5, I Henning's General Laws, 3d ed. p. lxi.

As to expert witnesses, see pars. 138, 139, this note.

165. Right of a witness to mileage and other fees in civil cases is purely and solely of statutory creation and a court is without the power to saddle on the vanquished party in such cases costs which are not

strictly authorized.—*Naylor v. Adams*, 15 Cal. App. 353, 114 Pac. 997.

As to witnesses in general, see, post, §§ 1878 et seq. and notes.

Allowance can not be made for, where witnesses refuse to accept fees from party calling him, see par. 129, this note.

As to charge for witness who was not called, see par. 134, this note.

As to witnesses subpoenaed in good faith, but not sworn, see par. 149, this note.

166. Where witness is in attendance on the court and testifies voluntarily he is entitled to his per diem and the fact that he has not been subpoenaed is immaterial.—*Naylor v. Adams*, 15 Cal. App. 353, 114 Pac. 997.

167. Witness who can not be legally required to attend, but who does in fact attend the trial in person does so voluntarily and is not entitled to mileage.—*Naylor v. Adams*, 15 Cal. App. 353, 114 Pac. 997.

168. Same—As costs to be charged against the losing party in civil action are recoverable by virtue of the statute alone.—*Linforth v. San Francisco Gas & El. Co.*, 9 Cal. App. 434, 437, 99 Pac. 716.

169. Same—As to witness not sworn.—Fees of witness subpoenaed in good faith, but not sworn, may be allowed as costs, as it may be testimony of such witness was rendered unnecessary by reason of modification of pleadings or exclusion by court of testimony offered.—*Randall v. Falkner*, 41 Cal. 242, 246.

See, also, par. 135, this note.

170. Same—Parties—Construction of statute.—Statute allowing fees and mileage to witnesses, when fairly construed, relates in ordinary cases only to witnesses who may be compelled by subpoena to attend trial, or give their deposition, and in case of a party, to one who has been subpoenaed by opposite party. It may be that witness not party who is subject to subpoena may ordinarily be allowed not only his attendance but mileage, although not actually subpoenaed, but this can not ordinarily apply to party to action who is present and testifies.—*Beal v. Stevens*, 72 Cal. 451, 458, 14 Pac. 186.

171. Same—Subpoenaing of witness is not necessary before fees for his attendance can be charged as costs.—*Linforth v. San Francisco Gas & El. Co.*, 9 Cal. App. 434, 438, 99 Pac. 716.

§ 1022. WHEN ALLOWED OF COURSE TO THE PLAINTIFF. Costs are allowed of course, to the plaintiff, upon a judgment in his favor, in the following cases:

1. In an action for the recovery of real property;
2. In an action to recover the possession of personal property, where the value of the property amounts to three hundred dollars or over; such value shall be determined by the jury, court, or referee by whom the action is tried;
3. In an action for the recovery of money or damages, when plaintiff recovers three hundred dollars or over;
4. In a special proceeding;
5. In an action which involves the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine.

History: Enacted March 11, 1872, substantial re-enactment of § 495 Practice Act (adding paragraph 5) as amended 1853, Stats. 1853, p. 276.

COSTS—ALLOWANCE "AS OF COURSE."

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| <ol style="list-style-type: none"> 1, 2. Action concerning water-rights—Title to land involved — Costs "of course." 3. Action to quiet title—Costs—Defendant entitled to, when. 4. Annulling deed—Costs in action for. 5. Change of rule—As to allowance of costs. 6. Construction of section—In general. 7. Same—Subdivision 1. 8, 9. Same—Subdivision 3 — Nominal damages. 10-12. Same—Subdivision 5. | <ol style="list-style-type: none"> 13. Same — Same — In proceedings under McEnerney Act. 14. Counter-claim—As affecting costs. 15. Same—Amount recovered immaterial. 16. Equitable action—Costs discretionary. 17. Foreclosure of lien — Amount immaterial. 18. Foreclosure of mortgage — Purchaser at probate sale—Liability for costs. 19. Husband and wife — Costs in action against. 20. Intervener, against — Form when allowed. 21, 22. Jurisdictional amount—As to recovery of less than three hundred dollars, as affecting costs. |
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23. Same—Computation of amount of recovery.
24. Same — Concurrent jurisdiction — Amount recovered.
- 25-27. Same—Jurisdiction does not depend upon—Costs do.
- 28, 29. Same—Neither party is entitled to recover costs, when.
30. Same—Nonprejudicial error.
31. Same—Stockholders' liability — Costs in action for.
32. Limitation of right statutory.
33. Nuisance—Costs in action to abate.
34. Priority of water-rights—Costs in action affecting.
- 35, 36. Public officers—Rule that prevailing party should be allowed his costs.
37. Same—In mandamus.
38. Purchaser from mortgageor—Liability of.
39. Quieting title—Judgment for part of property.
40. Same—Recovery on cross-complaint of less than amount required.
41. Right of way—Costs in action to quiet title to.
42. Slander—Counsel fees as costs.
- 43, 44. Specific performance—Costs in action for.
- 45, 46. Same—Unfairness of plaintiff.
47. Substantial recovery—Denial of part of relief asked—Entitled to costs.

See, ante, § 1021 and note.

1. Action concerning water-rights—Title to land involved—Costs "of course."—In the action involving water-rights, in the sum of an injunction, but in fact and effect one for the determination of adverse and conflicting claims to water-rights, it will therefore involve the title to real estate and under the provisions of subdivision 5 of the above section the prevailing party is entitled to his costs as "of course."—*Peak v. Harris*, — Cal. App. —, 192 Pac. 310, following the doctrine in *Hoyt v. Hart*, 149 Cal. 722, 730, 731, 87 Pac. 569; *Northern Cal. Power Co. v. Waller*, 174 Cal. 377, 388, 168 Pac. 214.

See par. 34, this note.

2. In such a case the water-rights involved being an appurtenance to the lands described in the pleadings the action comes within the description of actions mentioned in subdivision 5 of the above section, and where the plaintiff has asked for affirmative relief in his answer, and each of the parties to the action secured in part by the decree some of the relief for which they respectively asked, then and in that case both the plaintiff and the defendant will be entitled to costs as a matter of right.—*Peak v. Harris*, — Cal. App. —, 192 Pac. 310, following the doctrine in *Schmidt v. Klotz*, 130 Cal. 223, 62 Pac. 470; *Hoyt v. Hart*, 149 Cal. 722, 87 Pac. 569; *F. A. Hihn Co. v. City*

of Santa Cruz, 24 Cal. App. 365, 141 Pac. 391.

3. Action to quiet title—Costs—Defendant entitled to, when.—In an action to quiet title to described real estate and an easement in the adjoining lands, where the complaint, which is not verified, does not present, as separate and distinct issues, the title to the property and the title to the easement in the adjoining lands, and defendants deny that plaintiffs are the owners of the land with the easement, and further deny that they claim any interest in the land with the easement, the only material issue raised is as to the existence of the alleged easement, and where the court finds for the defendants on this issue, the defendants are entitled to a judgment for their costs under the provisions of the above section and of section 1024, post.—*Muzio v. Erickson*, 41 Cal. App. 413, 182 Pac. 974, following doctrine in *Weller v. Brown*, 25 Cal. App. 216, 221, 222, 143 Pac. 251.

As to quieting title where judgment is for part of property, see par. 39, this note.

4. Annuling deed—Costs in action for.—Action to annul deed brought by heirs of grantor is action involving title to land, and in which prevailing party is entitled to costs as matter of right.—*Gibson v. Hamman*, 145 Cal. 454, 455, sub nom. *Gibson v. Anderson*, 78 Pac. 953.

5. Change of rule—As to allowance of costs.—Costs are but an incident of a judgment, and the rule pertaining to their allowance in an action may be changed or modified by statute during its pendency.—*Cain v. French*, 29 Cal. App. 725, 156 Pac. 518.

6. Construction of section—In general.—This section was never intended to apply to an action tried anew on appeal in the superior court. If such was the intention it would have been easy to expressly say so. This section must be given a reasonable construction, one that will harmonize with other sections of the code, if possible.—*Healey v. Superior Court*, 167 Cal. 22, 138 Pac. 687.

7. Same—Subdivision 1.—A judgment for costs against one of the defendants in an action of ejectment who claims no interest in the property should not be given.—*Sweet v. Richvale Land Co.*, 29 Cal. App. 111, 154 Pac. 608.

8. Same — Subdivision 3 — Nominal damages.—A judgment for nominal damages will not carry costs.—*Lund v. Lachman*, 29 Cal. App. 31, 154 Pac. 295.

9. To carry costs, a judgment of the superior court must amount to the sum of three hundred dollars; such a judgment can not be considered to be one for nominal damages.—*Lund v. Lachman*, 29 Cal. App. 31, 154 Pac. 295.

10. Same—Subdivision 5.—Where one riparian proprietor recovers judgment against another who has diverted water above their

lands, he is entitled to his costs, since the action involves the title to real property within the meaning of subdivision 5 above section.—*Miller & Lux v. Enterprise Canal etc., Co.*, 169 Cal. 415, 147 Pac. 567.

11. An action to quiet title to the use of waste waters and to enjoin the maintenance of any obstruction interfering with free ingress or egress for the purpose of cleaning and repairing the canal conducting the waters, entitles the plaintiff to costs, even though the suit is in equity and includes the right to an injunction. The right claimed in such an action is a right to real property.—*Imperial Water Co. No. 1 v. Wores*, 29 Cal. App. 253, 155 Pac. 124.

12. The plaintiff in an action concerning water-rights is entitled to its costs, notwithstanding it only recovered a judgment for part of its demand, as such an action is in the nature of a suit to quiet title to real property, and falls, so far as regards costs, within the provisions of subdivision 5 of above section.—*Cuthbert Burrell Co. v. People's Ditch Co.*, 31 Cal. App. 396, 160 Pac. 845.

13. Same—Same—In proceedings under *McEnerney Act*.—Costs may be recoverable in proceedings under the *McEnerney Act* (whether under this section or under § 1022 is not decided) where there is a contest. The action is in substance and effect a simple action to quiet title, and where no costs are included besides those recoverable by the plaintiff in the latter action the court does not err in refusing to grant a motion to retax costs.—*Faxon v. All Persons*, 166 Cal. 707, 137 Pac. 919.

14. Counter-claim—As affecting costs.—In action upon money demand, where one defendant files counter-claim and plaintiff fails to recover against him, but recovers against co-defendant, and defendant interposing counter-claim fails to recover thereon, judgment against him for costs is erroneous. In such case court is allowed no discretion, question being settled by this section and section 1024, post. It may be that costs were nearly all incurred in defending against counter-claim, but even then statute does not authorize court, where plaintiff fails to recover, to charge defendant with any part of costs.—*Benson v. Braun*, 134 Cal. 41, 42, 66 Pac. 1.

15. Same—Amount recovered immaterial.—Defendant is entitled to recover his costs in action for money or damages where judgment is in his favor, and it does not change rule that judgment be in his favor on counter-claim for nominal sum.—*Davis v. Hurgren*, 125 Cal. 48, 49, 57 Pac. 684.

16. Equitable action—Costs discretionary.—In equitable action court may allow or refuse to allow costs to defendants or may apportion costs between them or between them and plaintiff.—*Beal v. Stevens*, 72 Cal. 451, 458, 14 Pac. 186.

17. Foreclosure of lien—Amount immaterial.—Action to foreclose lien is action in

equity, and therefore allowance of costs lies in discretion of court, and costs are properly allowed against necessary parties to action who appear and make affirmative defenses against claim of plaintiff, notwithstanding that judgment is for less than three hundred dollars. In actions of such character where claim is for less than three hundred dollars, superior and justices' courts have concurrent jurisdiction, and plaintiff is entitled to costs, whether he seeks relief in one jurisdiction or other.—*Clark v. Brown*, 141 Cal. 93, 95, 74 Pac. 548.

18. Foreclosure of mortgage—Purchaser at probate sale—Liability for costs.—In action to foreclose mortgage given by heir upon his interest in certain lot owned by deceased which was thereafter sold under order of probate court, purchaser at such probate sale being made party is entitled to recover his costs, having taken property by such sale discharged from encumbrance.—*Gutter v. Dallamore*, 144 Cal. 665, 669, 79 Pac. 383.

19. Husband and wife—Costs in action against.—In action to set aside deed to wife where husband and wife as defendants answer alleging such deed was made for valuable consideration, judgment for costs against both defendants is proper.—*Collins v. O'Laverty*, 136 Cal. 31, 32, 68 Pac. 327.

20. Intervener, against—From when allowed.—In a suit by stockholders in behalf of the corporation, costs should not be awarded against an intervener which accrued before he connected himself with the litigation.—*Whitten v. Dabney*, 171 Cal. 621, 154 Pac. 312.

21. Jurisdictional amount—As to recovery of less than three hundred dollars, as affecting costs.—Where judgment is less than three hundred dollars, court has no authority to allow costs.—*Quitow v. Perrin*, 120 Cal. 255, 259, 260, 52 Pac. 632.

22. Judgment for less than three hundred dollars upon contract for payment of money can not carry costs.—*Edwards v. Crepin*, 68 Cal. 37, 39, 8 Pac. 616.

23. Same—Computation of amount of recovery as controlling costs means damages assessed by jury eo nomine, exclusive of costs, which they may arbitrarily find.—*Shay v. Tuolumne W. Co.*, 6 Cal. 286.

24. Same—Concurrent jurisdiction—Amount recovered or demanded does not control question of costs in cases where superior and justices' courts have concurrent jurisdiction.—*Clark v. Brown*, 141 Cal. 93, 95, 74 Pac. 548.

As to recovery on counter-claim as affecting cost, see par. 4, this note.

As to amount of recovery in equitable actions as affecting costs, see, post, § 1025 and note pars. 9, 10.

As to amount of recovery in action of libel as affecting costs, see, post, § 1025 and note par. 12.

25. Same—Jurisdiction does not depend upon—Costs do.—Recovery of judgment for less than three hundred dollars affects only question of costs, and not jurisdiction of court, where *ad damnum* clause of complaint is for greater amount.—*Sullivan v. California R. Co.*, 142 Cal. 201, 208, 75 Pac. 767.

26. Jurisdiction depends upon amount demanded in complaint. It may be that true amount may sometimes be increased for purpose of bringing case within jurisdiction of superior court, yet inevitable consequence of not being able to recover jurisdictional sum, so as to carry costs, will probably be sufficient to prevent such practice from becoming common, and saving of costs will compensate defendants in rare instances in which they may be first brought into superior instead of justices' courts.—*Greenbaum v. Martinez*, 86 Cal. 459, 461, 25 Pac. 12.

27. Recovery of less than three hundred dollars does not affect question of jurisdiction of superior court, but only that of recovery of costs.—*Greenbaum v. Martinez*, 86 Cal. 459, 461, 25 Pac. 12.

28. Same—Neither party is entitled to recover costs in action for money or damages, where plaintiff recovers less than three hundred dollars.—*Bemmerly v. Smith*, 136 Cal. 5, 6, 68 Pac. 97. See *Anthony v. Grand*, 101 Cal. 235, 237, 35 Pac. 859.

29. Allowance of costs is matter of statutory regulation. Provision that "no costs can be allowed in action for recovery of money or damages when plaintiff recovers less than three hundred dollars," evidently applies to both parties to action and forbids recovery of costs by either of them.—*Anthony v. Grand*, 101 Cal. 235, 237, 35 Pac. 859.

30. Same—Nonprejudicial error.—Plaintiff recovering less than three hundred dollars in action for money is not entitled to costs and allowance of costs in such case is erroneous, but where no costs are entered in judgment error is harmless.—*Boland v. Ashurst Oil L. & Dev. Co.*, 145 Cal. 405, 406, 78 Pac. 871.

31. Same—Stockholders' liability—Costs in action for.—In action to recover several judgments for different amounts against defendants on account of stockholders' liability, there is no authority for joint judgment for costs against all defendants; and if plaintiff recovers no judgment, joint or several, for three hundred dollars or over, he is not entitled to recover any costs.—*Derby v. Stevens*, 64 Cal. 287, 290, 30 Pac. 820.

32. Limitation of right statutory.—The only limitation upon right of prevailing party to recover costs incurred, whether recovery be for whole or portion of claim, or whether claim be made up of one or several causes of action, is that he shall recover three hundred dollars or over. Right to recover costs is purely statutory, and in

absence of statute no costs could be recovered by either party.—*Fox v. Hale & Norcross S. Min. Co.*, 122 Cal. 219, 223, 54 Pac. 731.

33. Nuisance—Costs in action to abate.—In action to abate nuisance, whether it be considered suit in equity or special proceeding by virtue of constitutional provisions and statute, allowance of costs lies in discretion of court.—*McCarthy v. Gaston Ridge M. & Min. Co.*, 144 Cal. 542, 547, 78 Pac. 7.

As to actions to abate nuisance, see, ante, §§ 731 et seq. and notes.

34. Priority of water-rights—Costs in action affecting.—In action to determine priority of water-rights amount of damages recovered is immaterial as affecting costs.—*Marius v. Bicknell*, 10 Cal. 217, 224; *Esmond v. Chew*, 17 Cal. 336, 339.

As to actions concerning water-rights where title to land involved, see par. 1, this note.

35. Public officers—Rule that prevailing party should be allowed his costs applies in actions against public officers.—*United States v. Schurz*, 102 U. S. 378, 407, 26 L. ed. 167, 219.

36. In action against public officer, court dispensing with undertaking on appeal, etc., does not necessarily imply that personal judgment for costs or damages may not be rendered.—*Lamberson v. Jefferds*, 116 Cal. 492, 48 Pac. 485; *Power v. May*, 123 Cal. 147, 157, 55 Pac. 796.

37. Same—In mandamus.—In mandamus against county treasurer, costs of proceeding may be recovered from defendant personally, both by virtue of this section and of section 1095, post.—*Power v. May*, 123 Cal. 147, 152, 55 Pac. 796. See *United States v. Schurz*, 102 U. S. 378, 407, 26 L. ed. 167, 219.

38. Purchaser from mortgagee—Liability of.—In foreclosure of mortgage purchaser from mortgagee who contests his liability to deficiency judgment and is defeated in such defense is liable for costs.—*Tulare Co. Bank v. Madden*, 109 Cal. 312, 315, 41 Pac. 1092.

39. Quietting title—Judgment for part of property.—Allowance of costs does not depend on form or nature of action, but depends upon fact whether case comes within terms of statute relating to costs, and therefore in action to quiet title if plaintiff recover as to any part of property involved, although judgment be in favor of defendant for part, plaintiff is entitled to recover costs.—*Sierra Union W. & M. Co. v. Wolff*, 144 Cal. 430, 433, 77 Pac. 1038.

As to costs in action to quiet title, see par. 3, this note.

40. Same—Recovery on cross-complaint of less than amount required to entitle plaintiff to costs, entitles defendant to his costs.—*Spencer v. Mungus*, 28 Mont. 359, 72 Pac. 663.

41. **Right of way—Costs in action to quiet title to,** being action which involves title or possession of real estate, the prevailing party is entitled to costs, and judgment that each party pay his own costs is erroneous.—*Schmidt v. Klotz*, 130 Cal. 223, 224, 62 Pac. 470.

42. **Slander—Counsel fees as costs.**—In an action for slander where the plaintiff recovers a judgment for two hundred and fifty dollars and in due course thereafter filed a cost bill claiming as costs under the act of 1872 the court held that the plaintiff was not entitled to recover his costs of the action or his attorney's fee, under the provisions of the above section, in any case in which his recovery of damages was less than three hundred dollars.—*Rapfogel v. Klassen*, 185 Cal. 524, 197 Pac. 795.

43. **Specific performance—Costs in action for.**—Suit for specific performance of contract "involves the title" to real estate within meaning of this section, and therefore upon judgment in his favor defendant is entitled to costs against plaintiff as matter of right.—*Kelly v. Central Pac. R. Co.*, 74 Cal. 565, 566, 16 Pac. 390.

44. **Suit for specific performance of contract regarding real estate is one involving title to real estate,** and therefore upon judgment in his favor defendant is entitled to costs as matter of right.—*Kelly v. Central Pac. R. Co.*, 74 Cal. 565, 566, 16 Pac. 390.

45. **Same—Unfairness of plaintiff.**—In equity, where specific performance is denied in consequence of any unfairness on part of plaintiff, costs to defendant follow as matter of course.—*Kelly v. Central Pac. R. Co.*, 74 Cal. 565, 566, 16 Pac. 390.

46. **Where specific performance of contract is denied in consequence of any unfairness on part of plaintiff,** according to practice of courts of equity, defendant is entitled to costs as matter of course.—*Kelly v. Central Pac. R. Co.*, 74 Cal. 565, 566, 16 Pac. 390.

47. **Substantial recovery—Denial of part of relief asked—Entitled to costs.**—In an action seeking a decree reforming a lease, and also for a judgment against the defendant for money due to the plaintiff as his share of the proceeds of the sale by the defendant of certain crops produced upon the premises involved in the lease and recovered a judgment for a sum in excess of five hundred dollars, such judgment carried costs as a "matter of course," in other words, as a matter of right under the provisions of subdivision 3 of the above section, notwithstanding the fact that the reformation of the lease was denied.—*Silva v. Angelo*, — Cal. App. —, 198 Pac. 58, following doctrine in *Stoddard v. Treadwell*, 29 Cal. 281; *Schmidt v. Klotz*, 130 Cal. 233, 62 Pac. 470; *Hoyt v. Hart*, 149 Cal. 722, 87 Pac. 567; *F. A. Hihn Co. v. City of Santa Cruz*, 24 Cal. App. 365, 141 Pac. 391; *Peake v. Harris*, — Cal. App. —, 192 Pac. 311, 317.

§ 1023. SEVERAL ACTIONS BROUGHT ON A SINGLE CAUSE OF ACTION CAN CARRY COSTS IN BUT ONE. When several actions are brought on one bond, undertaking, promissory note, bill of exchange, or other instrument in writing, or in any other case for the same cause of action, against several parties who might have been joined as defendants in the same action, no costs can be allowed to the plaintiff in more than one of such actions, which may be at his election, if the party proceeded against in the other actions were, at the commencement of the previous action, openly within this state; but the disbursements of the plaintiff must be allowed to him in each action.

History: Enacted March 11, 1872, re-enactment of § 496 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 180, held unconstitutional, see history, § 5 ante.

1. **Joint tort-feasors—Costs in action against.**—Case of injury by joint tort-feasors in which plaintiff may sue and recover judgment against one or all of joint tort-feasors, but in which for injury complained of he can have but one satisfaction, is not within this section, and in such case in-

jured party may recover his costs in each action.—*Butler v. Ashworth*, 110 Cal. 614, 620, 42 Pac. 4, 386.

See, ante, § 1021 and note.

As to joining several parties as defendants, see, ante, § 383 and note.

§ 1024. DEFENDANT'S COSTS MUST BE ALLOWED OF COURSE, IN CERTAIN CASES. Costs must be allowed of course, to the defendant upon a

judgment in his favor in the actions mentioned in section ten hundred and twenty-two, and in special proceedings.

History: Enacted March 11, 1872, re-enactment of § 497 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 180, held unconstitutional, see history, § 5 ante.

DEFENDANT'S COST "AS OF COURSE."

1. Determination of title—In action for.
- 2-4. Dismissal—Payment of costs.
5. Discretion—Costs allowed "of course."
6. Injunction—Judgment for defendant.
7. Intervention—Defendant to, may recover.
8. Joint judgment for costs.
9. Judgment—Must be rendered.
10. Nonsuit—Several defendants.
11. Same—Jury fees.
12. Replevin, in.
13. Title to land—Failure to recover.

See, ante, § 1021 and note.

As to attorney's fees as costs, see, ante, § 1021 and note.

As to costs allowed defendant, see, ante, § 1022 and note.

As to costs where plaintiff recovers less than three hundred dollars, see, ante, § 1022 and note pars. 21-31.

1. Determination of title—In action for.—In action to determine title to certain land and enjoin defendant from trespassing upon same, or asserting any title thereto, defendant upon prevailing is entitled to his costs.—*Lawrence v. Getchell*, 2 Cal. Unrep. 267, 2 Pac. 746.

2. Dismissal—Payment of costs.—Payment of defendant's costs is not prerequisite to exercise of plaintiff's right to dismiss action as clerk is not charged with judicial function of taxing costs or settling cost-bill. He can not say what costs of defendant plaintiff is under obligation to pay. The utmost of defendant's right is to present his cost-bill in due time after dismissal, have it settled, and take judgment for his costs against plaintiff accordingly.—*Hopkins v. Superior Court*, 136 Cal. 552, 554, 69 Pac. 299.

3. Upon dismissal of action plaintiff is only required to pay clerk's costs for entering dismissal. Direction to enter judgment of dismissal is mandatory and imposes ministerial duty upon ministerial officer. In proper case if clerk's fee is paid he will on motion either of plaintiff or defendant be compelled to enter judgment of dismissal or nonsuit. Interested party may require act done by order of superior court and will not be compelled to seek his remedy by mandamus.—*Hopkins v. Superior Court*, 136 Cal. 552, 553, 69 Pac. 299.

4. Clerk's fees must be paid or he may refuse to enter judgment of dismissal.—*Hopkins v. Superior Court*, 136 Cal. 552, 553, 69 Pac. 299. See *Page v. Superior Court*, 76 Cal. 372, 18 Pac. 385.

5. Discretion—Costs allowed "of course."

—Where costs are allowed to prevailing party "of course," allowance of them does not rest in discretion of court, but they follow judgment as matter of course. The question of costs rests in discretion of court only in such cases as are so provided in code.—*Stoddard v. Treadwell*, 29 Cal. 281, 282.

6. Injunction—Judgment for defendant.

—In suit for injunction where all findings on issues involved are in favor of defendant he is entitled to recover his costs.—*Van Horn v. Decrow*, 136 Cal. 117, 122, 68 Pac. 473.

7. Intervention—Defendant to, may recover.

—Where intervener makes plaintiff or relator in action defendant in complaint for intervention, such defendant is entitled to recover costs against intervener in case judgment is given in his favor.—*People ex rel. Bledsoe v. Campbell*, 138 Cal. 11, 23, 77 Pac. 918.

8. Joint judgment for costs.—Defendants sued jointly are entitled to joint judgment for costs and such is not erroneous upon ground that separate judgment should have been rendered for each defendant for costs.—*Leadbetter v. Lake*, 118 Cal. 515, 516, 50 Pac. 686.

9. Judgment—Must be rendered.—Defendant can recover cost only "upon judgment in his favor."—*Fox v. Hale & Norcross S. M. Co.*, 122 Cal. 219, 223, 51 Pac. 731.

10. Nonsuit—Several defendants.—Costs by way of indemnity ought not to be taxed in case of nonsuit. Statute looks to actual determination of cause upon merits. So where action has been commenced against several defendants, and there has been judgment in their favor, they are not all entitled to recover costs, but can only recover jointly as though there had been but one defendant.—*Rice v. Leonard*, 5 Cal. 61.

11. Same—Jury fees may be properly made payable by plaintiff upon granting of nonsuit.—*Fairchild v. King*, 102 Cal. 320, 323, 36 Pac. 649.

12. Replevin, in, defendant is entitled to recover costs upon verdict in his favor, although jury fails to find value of property for plaintiff, where complaint declared it to be greater than amount necessary to carry costs.—*Edgar v. Gray*, 5 Cal. 267.

13. Title to land—Failure to recover.—In action involving title to lands where plaintiff fails to recover, the defendant will be entitled to costs as matter of right.—*Lawrence v. Getchell*, 2 Cal. Unrep. 267, 2 Pac. 746.

§ 1025. COSTS, WHEN IN THE DISCRETION OF THE COURT. In other actions than those mentioned in section ten hundred and twenty-two, costs may be allowed or not, if allowed, may be apportioned between the parties, on the same or adverse sides, in the discretion of the court; but no costs can be allowed in an action for the recovery of money or damages when the plaintiff recovers less than three hundred dollars, nor in an action to recover the possession of personal property, when the value of the property is less than three hundred dollars.

History: Enacted March 11, 1872, re-enactment of § 498 Practice Act as amended 1866 (Stats. 1865-6, p. 847); amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 180, held unconstitutional, see history, § 5 ante.

**COSTS IN DISCRETION OF COURT,
WHEN.**

1. As condition of judgment.
2. Discretion—Statute fixes cases of.
3. Divorce.
4. Eminent domain—Payment of interest and costs.
5. Equity—Allowance discretionary.
6. Same—Foreclosure.
- 7, 8. Same—Injunction.
9. Equitable action—Amount of damages immaterial.
10. Same—Amount governs if equitable relief denied.
11. Jury can not award costs—Incident of judgment.
12. Libel and slander.
13. Lost note—Failure to tender indemnity.
14. Mechanics' liens—Payment into court.
15. Same—Percentage.
16. New trial—Conditional on granting.
17. Same—Tender of costs imposed.
18. Quieting title — Disclaimer — Cross-complaint.
19. Setting aside judgment—Costs on.
- 20, 21. Statutory costs only can be allowed.
22. Trust funds.

See, ante, § 1021 and note.

As to costs where plaintiff recovers less than three hundred dollars, see, ante, § 1022 and note pars. 21-31.

1. As condition of judgment.—In action to set aside deed which is found to be in fact a mortgage, payment of which was not tendered, costs of action due defendant should be made condition precedent to any relief granted.—*Bell v. Solomons*, 142 Cal. 59, 63, 75 Pac. 649.

2. Discretion — Statute fixes cases of.—Question of costs rests in discretion of court only in such cases as are provided for by statute.—*Stoddard v. Treadwell*, 29 Cal. 281, 282.

3. Divorce.—In divorce, costs rest in discretion of court.—*Brenot v. Brenot*, 102 Cal. 294, 296, 36 Pac. 672.

As to costs in matter of divorce, see Kerr's Cyc. Civ. Code, 2d ed., § 137 and note.

4. Eminent domain—Payment of interest and costs.—In eminent domain only requirement of statute is payment of "sum of money assessed" within thirty days after final judgment, which seems to exclude idea that payment of interest on such amount or payment of costs is included.—*San Francisco & S. J. V. R. Co. v. Leviston*, 134 Cal. 412, 416, 66 Pac. 473.

5. Equity — Allowance discretionary.—In equity, costs are always in discretion of court, and whether they are granted or withheld they are but instances to and not part of relief sought. Party getting relief asked may be compelled to pay costs.—*Abram v. Stuart*, 96 Cal. 235, 239, 31 Pac. 44.

6. Same — Foreclosure.—An action of foreclosure being equitable allowance of costs is in discretion of court.—*Irvine v. Perry*, 119 Cal. 352, 357, 51 Pac. 544, 949.

7. Same—Injunction.—In action for injunction where most of findings are in favor of defendant, but injunction is granted plaintiff, it is not abuse of discretion to allow costs to defendant.—*Abrams v. Stuart*, 96 Cal. 235, 239, 31 Pac. 44.

8. Injunction is case in which allowance of costs lies in discretion of court.—*Esmond v. Chew*, 17 Cal. 336, 339.

9. Equitable action—Amount of damages immaterial.—Costs in equitable action are largely in discretion of trial court, and in action to recover damages for trespass on real property, coupled with prayer for injunction to restrain commission of threatened waste, equitable awarding of costs is not controlled by amount of damages recovered.—*Bemmerly v. Smith*, 136 Cal. 5, 6, 68 Pac. 97.

10. Same—Amount governs if equitable relief denied.—Injunction being denied, action in which it was sought should thereafter be considered one for damages only, in which judgment for less than three hundred dollars will not carry costs.—*Himes v. Johnson*, 61 Cal. 259, 262; *Brown v. Delavau*, 63 Cal. 303, 304.

11. Jury can not award costs—Incident of judgment.—Costs are an incident to judgment to be taxed by clerk or court, and can not be given by jury by way of damages.—*Shay v. Tuolumne Water Co.*, 6 Cal. 286.

12. Libel and slander.—In action of libel or slander, act of March 23, 1872, did not give plaintiff recovering judgment any costs beyond those allowed by general law, and therefore plaintiff in such action, recovering less than three hundred dollars, is not entitled to costs.—*Jacobi v. Baur*, 55 Cal. 554, 555.

13. Lost note—Failure to tender indemnity.—In action to recover on lost promissory note, treating action as one of equitable cognizance, failure to tender indemnity before suit is not fatal to recovery, and only affects question of costs.—*Randolph v. Harris*, 28 Cal. 562, 566, 87 Am. Dec. 139.

14. Mechanics' liens — Payment into court.—Owner of building in action to foreclose mechanic's lien should not be charged with costs where he retains and pays into court full amount which under contract could be applied in payment of such lien.—*Hooper v. Fletcher*, 145 Cal. 375, 379, 79 Pac. 418.

15. Same—Percentage allowed on recovery of judgment in San Francisco was properly allowed in cases to foreclose mechanics' liens.—*Golden Gate L. Co. v. Sahrbacher*, 105 Cal. 114, 118, 38 Pac. 635.

As to mechanics' liens, notices thereof, and actions to foreclose same, see, post, §§ 1183 et seq. and notes.

16. New trial—Conditional on granting.—Condition of payment of costs in order granting plaintiff new trial can not be complained of by defendant because not condition imposed upon him, nor does it show in any way that granting of new trial was erroneous.—*Anglo-Nevada Assur. Corp. v. Ross*, 123 Cal. 520, 521, 56 Pac. 335. See *Brooks v. San Francisco & N. P. R. Co.*, 110 Cal. 173, 42 Pac. 570.

17. Same—Tender of costs imposed.—Motion for new trial granted on condition that plaintiff pay defendant's costs, defendant by tendering true amount of costs within time limited by order, although less than amount stated in judgment, and thereafter moving to retax costs, sufficiently complies with order.—*Higuerra v. Bernal*, 46 Cal. 580, 581.

18. Quieting title—Disclaimer—Cross-complaint.—In action to quiet title disclaimer of defendant prevents plaintiff from recovering costs, and defendant can recover only costs of filing disclaimer; but if such defendant is made party to cross-complaint, and is thereby necessitated to continue his appearance in court, his costs are recoverable as defendant to cross-complaint.—*Summerville v. March*, 142 Cal. 554, 559, 100 Am. St. Rep. 145, 76 Pac. 383.

19. Setting aside judgment—Costs on.—Order setting aside judgment for want of jurisdiction by reason of there having been no legal service of summons can not impose costs.—*Waller v. Weston*, 125 Cal. 201, 203, 57 Pac. 392.

20. Statutory costs only can be allowed.—Discretion given court by this section does not justify allowance of costs not properly chargeable as such, as, for instance, making of maps, surveys, etc.—*Bathgate v. Irvine*, 126 Cal. 135, 149, 150, 77 Am. St. Rep. 158, 58 Pac. 442.

21. Leaving determination of question of costs to discretion of trial court in equity cases does not justify court in allowing costs not properly chargeable as such, as, for instance, in action to quiet title for surveying and making papers at instance of one of parties, not acting under direction of court.—*Bathgate v. Irvine*, 126 Cal. 135, 149, 77 Am. St. Rep. 158, 58 Pac. 442.

22. Trust funds may be charged with costs of action to preserve fund.—*Aleman v. Wensinger*, 40 Cal. 288, 294; *Trustees of the Internal Imp. Fund v. Greenough*, 105 U. S. 527, 26 L. ed. 1157.

§ 1026. WHEN THE SEVERAL DEFENDANTS ARE NOT UNITED IN INTEREST, COSTS MAY BE SEVERED. When there are several defendants in the actions mentioned in section ten hundred and twenty-two, not united in interest, and making separate defenses by separate owners, and plaintiff fails to recover judgment against all, the court must award costs to such of the defendants as have judgment in their favor.

History: Enacted March 11, 1872, re-enactment of § 499 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 180, held unconstitutional, see history, § 5 ante.

SEVERAL DEFENDANTS NOT UNITED IN INTEREST—COSTS SEVERED.

1. Concurrent jurisdiction—Amount recovered immaterial.
2. Discretionary where no statutory provision.

3. Nuisance—Damages immaterial.
4. Trespass—Injunction—Appointment of receiver—Costs discretionary.
5. Waters—Quieting title to — Costs discretionary.

As to actions and special proceedings, see, ante, §§ 21-32 and notes.

As to costs in actions of contested elections, see, post, § 1125 and note.

As to costs in action of partition, see, ante, §§ 768, 769, 796, 798, 799 and notes.

As to costs in cases of eminent domain, see, post, § 1255 and note.

As to costs in cases of mechanics' liens, see, post, § 1195 and note.

As to costs on application by guardian of sale of property of ward, see, post, § 1786.

As to costs on contest of probate of will, see, post, § 1332 and note.

As to costs on disclaimer or judgment by default in action to quiet title, see, ante, § 739.

As to costs on foreclosure of mortgages, see, ante, § 726 and note.

As to costs on proceeding for usurpation of office, see, ante, § 809.

As to costs on revocation of submission to arbitration, see, post, § 1290.

As to imposing costs as condition of opening default, see, ante, § 473 and note.

As to imposing costs on allowance of amendments to pleadings, see, ante, § 473 and note.

As to imposing costs on granting continuance, see, post, § 1029 and note.

As to lien of costs in partition, see, ante, § 796.

1. **Concurrent jurisdiction**—Amount recovered immaterial.—In action to foreclose lien, allowance of costs rests within discretion of court, and fact that judgment is

for less than three hundred dollars does not affect such discretionary allowance, as in such cases superior and justice court have concurrent jurisdiction, and plaintiff is entitled to costs, whether he seeks relief in one jurisdiction or in other.—Clark v. Brown, 141 Cal. 93, 95, 74 Pac. 548.

2. **Discretionary where no statutory provision**.—In actions not otherwise provided for by code or statute, allowance of costs rests in sound discretion of trial court.—Gibson v. Hammang, 145 Cal. 454, 455, 456, sub nom. Gibson v. Anderson, 78 Pac. 953.

3. **Nuisance—Damages immaterial**.—Action for abatement of nuisance for which judgment is rendered for plaintiff for damages, but not for abatement of nuisance, because after commencement of action defendant himself abates it, does not cease to be action in equity, and in such action allowance of costs is discretionary with court, no matter what may be amount of damages recovered.—McCarthy v. Gaston Ridge M. & Min. Co., 144 Cal. 542, 547, 78 Pac. 7.

4. **Trespass—Injunction—Appointment of receiver—Costs discretionary**.—Action to recover damages for trespass on land, and to enjoin threatened waste, for appointment of receiver, etc., is action in equity, and not action for damages merely, and in such action allowance of costs is matter largely in discretion of trial court.—Bemmerly v. Smith, 136 Cal. 5, 6, 68 Pac. 97.

5. **Waters—Quieting title to—Costs discretionary**.—In action to quiet title to waters of creek, etc., judgment that each party pay its own costs is within equitable discretion of trial court.—Gutierrez v. Wege, 145 Cal. 730, 736, 79 Pac. 449.

§ 1027. COSTS ON APPEAL DISCRETIONARY WITH COURT IN CERTAIN CASES. The prevailing party on appeal shall be entitled to his costs excepting when judgment is modified, and in that event the matter of costs is within the discretion of the appellate court. The party entitled to costs, or to whom costs are awarded, may recover all amounts actually paid out by him in connection with said appeal, and the preparation of the record for the appeal, including the costs of printing briefs; provided, however, that no amount shall be allowed as costs of printing briefs in excess of one hundred dollars to any one party. The appellate court may reduce costs in case of the insertion of unnecessary matter in the record.

History: Enacted March 11, 1872, re-enactment of § 500 Practice Act; amendment approved June 16, 1913, Stats. and Amdts. 1913, p. 1033; April 15, 1919, Stats. and Amdts. 1919, p. 73. In effect July 22, 1919.

COSTS ON APPEAL—DISCRETIONARY WITH COURT.

1. As to right to recover—Statutory provision.
2. Same—Same—Printing briefs.
3. Same—Same—Record on appeal—Use of party's own transcript obtained during trial.

- 4-10. Construction of section—In general.
11. Certification of transcript.
12. Equitable division—Effect of modification or reversal.
13. Foreclosure of mechanics' lien—Right to costs.
14. Former trial—Costs of.
15. Frivolous appeal—Costs and damages.

16. Judgment of contempt—Annulment on certiorari — Allowance of costs against judgment.
- 17, 18. On modification of judgment.
19. Subsequent judgment.
20. Transcript of reporter's notes.

See, ante, § 1021 and note.

1. As to right to recover—Statutory provision.—The right to recover costs on appeal exists solely by virtue of statute, and the general rule is that their recovery is to be governed by the statute in force at the time the right to have them taxed has accrued; the time to tax costs is at the time of the rendition of the judgment on appeal.—*Turner v. East Side Canal & Irr. Co.*, 177 Cal. 750, 171 Pac. 299.

2. Same—Same—Printing briefs.—Under the provisions of the above section as amended in 1913, the cost of printing briefs on appeal is applicable to the case of an appeal decided after the amendment, notwithstanding the fact that at the time the briefs were printed and filed the amendment had not been made and there was no law authorizing the recovery of any part of the expenses of the printing of the briefs.—*Turner v. East Side Canal & Irr. Co.*, 177 Cal. 750, 171 Pac. 299.

3. Same—Same—Record on appeal—Use of party's own transcript obtained during trial.—The cost of record on appeal provided for in the above section is confined to the recovery of amounts actually put out in connection therewith, and does not include any part of the cost of obtaining a daily transcript of the testimony during the progress of the trial, although the party, by arrangement with the reporter, may use the transcript so obtained in making up the record on appeal.—*Turner v. East Side Canal & Irr. Co.*, 177 Cal. 750, 171 Pac. 299.

4. Construction of section—In general.—Under this section as amended the prevailing party has an absolute right to his costs except where the judgment has been modified, whereas before the amendment the court had discretion to deny costs where a new trial was ordered as well as where judgment was modified.—*Estate of Prager*, 167 Cal. 737, 141 Pac. 369.

5. This section is applicable to all appeals, except where it may be inconsistent with other provisions of law applicable to certain proceedings, and except also as it may be limited in its application to proceedings in eminent domain by constitutional provision.—*Oakland v. Pacific Coast Lumber & Mill Co.*, 172 Cal. 332, 156 Pac. 468.

6. The rule that the modification of a judgment on appeal carries costs to the appellant is inapplicable, where it is conceded by the respondent that the judgment was excessive to the extent that it is modified, and that the appellant could by a proper motion in the trial court have obtained such modification.—*Conlin v. Eman-*

uel Lewis Invest. Co., 26 Cal. App. 388, 147 Pac. 472.

7. The amendment to this section permitting the expense of printing briefs to be charged as a part of the costs is applicable to cases where the brief was filed before the amendment went into effect but where the judgment did not become final upon appeal until after the passage of the amendment. Costs are but an incident of a judgment and the law pertaining to the allowance thereof may be changed or modified by statute during its pendency.—*Cain v. French*, 29 Cal. App. 725, 156 Pac. 518.

8. Where the judgment affirmed on appeal became final prior to the amendment of 1913 to above section allowing expenses for briefs printed, the respondent can not have the cost of printing her brief in answer to the petition of the appellant for a hearing of the appeal in the supreme court, notwithstanding the provision of section 1324 of the code that the time for filing the memorandum of costs on appeal is limited to begin after the filing of the remittitur in the superior court.—*Eaton v. Southern Pac. Co.*, 31 Cal. App. 379, 160 Pac. 687.

9. Where the reporter's transcript was obtained by respondent solely for the purpose of assisting counsel in the preparation of amendments to a bill of exceptions proposed by defendant on his motion for a new trial, the expense thereof can not be allowed as an item of costs, being purely an expense incurred in the conduct of the case in the superior court and not a part of the preparation of the record for the appeal.—*Eaton v. Southern Pac. Co.*, 31 Cal. App. 379, 160 Pac. 687.

10. Since the right of the prevailing party to recover any costs on appeal is obtained by virtue of the judgment as rendered, this necessarily includes the assumption that he is to have those costs and only those costs to which he is entitled by law at the time of the rendition of such judgment.—*Eaton v. Southern Pac. Co.*, 31 Cal. App. 379, 160 Pac. 687.

11. Certification of transcript.—Costs of appeal are in first instance to be borne by appellant, and only effect of rule of supreme court that respondent's counsel shall certify to correctness of transcript within five days is to save to respondent cost of such certification by clerk and to preclude appellant, if he does not present transcript to respondent for such certification, from recovering cost thereof.—*Loftus v. Fischer*, 113 Cal. 286, 289, 45 Pac. 328, 114 Cal. 131, 136, 45 Pac. 1058.

12. Equitable division—Effect of modification or reversal.—Where, in exercise of its discretion in allowing costs in equity cases, court taxes against each party cost of maintaining certain issues, upon reversal of judgment upon one of such issues costs should be retaxed accordingly.—*Bathgate v. Irvine*, 126 Cal. 135, 148, 77 Am. St. Rep. 158, 58 Pac. 442.

13. Foreclosure of mechanic's lien—Right to costs.—In an action to foreclose a materialman's lien in which a defendant who was the owner of the property at the time the materials were furnished and the claim of a lien filed but who had subsequently conveyed his interest in the property, and who thereafter contests the right of the plaintiff to his lien, is not entitled to his costs.—*Bellingham Bay Lumber Co. v. Western Amusement Co.*, 35 Cal. App. 509, 170 Pac. 631.

14. Former trial—Costs of.—Costs on appeal being allowed, means only costs upon appeal, and leaves costs in former trial to abide event of suit.—*Gray v. Gray*, 11 Cal. 341.

15. Frivolous appeal—Costs and damage.—Costs of appeal and damages for frivolous appeal will be allowed where only error is clerical mistake in computation of interest, which would have been corrected by trial court upon its attention being called to it.—*Rountree v. I. X. L. Lime Co.*, 106 Cal. 62, 63, 39 Pac. 16.

As to costs and damages on frivolous appeal, see, ante, § 957 and note.

16. Judgment of contempt—Annulment on certiorari—Allowance of costs against judgment.—In a case in which a judgment for contempt of court is set aside on certi-

orari proceedings, the petitioner is not entitled to have the costs incurred by him in the proceeding taxed against the judge, or allowed against the county, as such a proceeding is not the ordinary action to which the above section and section 1032, post, are applicable.—*Platnauer v. Superior Court*, 33 Cal. App. 394, 165 Pac. 41.

17. On modification of judgment for apparent error which counsel for appellant might have corrected below by specific motion for that purpose, costs will not be taxed to respondent.—*Cassin v. Marshall*, 18 Cal. 689, 693; *Noonan v. Hood*, 49 Cal. 293, 294.

18. Upon modification of judgment, not as result of error, but by reason of changed conditions, appellant should not be entitled to costs.—*Diefenderfer v. State ex rel. First Nat. Bank*, 14 Wyo. 302, 83 Pac. 591.

19. Subsequent judgment.—Upon judgment on the second trial, after reversal of the judgment upon first trial awarding costs to defendant, costs of appeal can not be taxed against defendant.—*Huellmantel v. Huellmantel*, 124 Cal. 583, 588, 57 Pac. 582.

20. Transcript of reporter's notes, obtained for purpose of preparing statement on motion for new trial, can not be taxed as costs on appeal.—*Bank of Woodland v. Hiatt*, 59 Cal. 580, 583.

§ 1028. REFEREE'S FEES. The fees of referees are five dollars to each for every day spent in the business of the reference; but the parties may agree, in writing, upon any other rate of compensation, and thereupon such rate shall be allowed.

History: Enacted March 11, 1872, re-enactment of § 504 Practice Act.

1. Amount of referee's fees—Discretionary.—Court has wide discretion in fixing compensation of referee, and in making sum is not restricted to allowance of five dollars per day.—*Mesnager v. De Leonis*, 140 Cal. 402, 405, 73 Pac. 1052. See *Treadwell v. Treadwell*, 134 Cal. 158, 66 Pac. 197.

See, ante, § 1021 and note.

As to referee's costs, generally, see, ante, §§ 638-645 and notes.

Same—Compensation in partition.—See, ante, §§ 768, 796 and notes.

Same—In probate proceedings.—See, post, § 1508 and note.

§ 1029. CONTINUANCE, COSTS MAY BE IMPOSED AS CONDITION OF. When an application is made to a court or referee to postpone a trial, the payment of costs occasioned by the postponement may be imposed, in the discretion of the court or referee, as a condition of granting the same.

History: Enacted March 11, 1872, re-enactment of § 505 Practice Act as amended 1855, Stats. 1855, p. 251.

CONTINUANCE—COSTS AS CONDITION.

1. Continuance—Amount of costs on.

2. Illness of attorney—Costs on postponement.

As to costs on continuance in cases of contested elections, see, post, § 1121 and note.

1. Continuance—Amount of costs on.—Upon continuance at request of party, court is not limited in imposing costs of such as would be taxable to other party, but may exercise reasonable discretion, imposing such amount as will compensate for ex-

penses incurred in preparing for trial.—*Pomeroy v. Bell*, 118 Cal. 635, 638, 50 Pac. 683.

2. Illness of attorney—Costs on postponement.—When postponement is asked upon any ground, court is authorized in its discretion to impose costs upon granting request, and such imposition of costs upon granting continuance on account of sudden illness of attorney of party making request is not an abuse of discretion.—*Eltzroth v. Ryan*, 91 Cal. 584, 588, 27 Pac. 932.

§ 1030. COSTS WHEN A TENDER IS MADE BEFORE SUIT BROUGHT.

When, in an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in court, for plaintiff, the amount so tendered, and the allegation be found to be true, the plaintiff can not recover costs, but must pay costs to the defendant.

History: Enacted March 11, 1872, re-enactment of § 506 Practice Act.

1. Invalid tender.—The plaintiff is not precluded from recovering costs where the tender was not only insufficient but made after the action had been commenced.—*Fell v. Frierson*, 171 Cal. 351, 153 Pac. 229.

As to offer, in writing, to pay being equivalent to tender, see, post, § 2074 and note.

As to objections to tender must be specified, see, post, § 2076 and note.

As to costs on refusal to accept amount allowed on claim in probate, see, post, § 1503.

§ 1031. COSTS IN ACTION BY OR AGAINST AN ADMINISTRATOR, ETC.

In an action prosecuted or defended by an executor, administrator, trustee of express trust, or a person expressly authorized by statute, costs may be recovered as in action by and against a person prosecuting or defending in his own right; but such costs must, by the judgment, be made chargeable only upon the estate, fund, or party represented, unless the court directs the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in the action or defense.

History: Enacted March 11, 1872, re-enactment of § 507 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 180, held unconstitutional, see history, § 5 ante.

COSTS FOR OR AGAINST ADMINISTRATOR, ETC.

1. Amendment of judgment—Conflict of sections.
2. Executor—Taxation of costs against.
3. Right to change of venue.
4. Trustee of express trust—Costs against estate, when.
5. When a personal judgment.

As to costs an expenses of administration, see, post, § 1485 and note.

As to costs in action against executor or administrator, see, post, § 1509 and note; see, ante, § 1021 and note.

1. Amendment of judgment—Conflict of sections.—When judgment for costs should be against administrator, and when should be "made chargeable only upon estate," are questions about which above section and section 1509, post, are somewhat conflicting, and judgment for costs entered by clerk as judgment against executor individually can not be amended, as clerical misprision of clerk, so as to make costs chargeable only against estate. If judgment be erroneous, remedy like that for any other erroneous judgment is by appeal.—*Leonis v. Leffingwell*, 126 Cal. 369, 371, 58 Pac. 940.

2. Executor—Taxation of costs against.—This section does not forbid taxation of memorandum of costs against executor in action prosecuted or defended by him, but provides that such costs must by judgment be made chargeable only upon estate, unless court for certain specific reason direct same to be paid by such executor.—*Reay v. Butler*, 99 Cal. 477, 480, 33 Pac. 1134.

As to costs against executor, see, post, § 1509 and note.

3. Right to change of venue upon ground of residence can not be defeated where executors are defendants by waiving claim for costs against executors personally.—*Thompson v. Wood*, 115 Cal. 301, 303, 47 Pac. 50.

4. Trustee of express trust, serving as such, being unsuccessful, where there is no showing of bad faith or mismanagement on his part, costs are chargeable only on the estate.—*Sterling v. Gregory*, 149 Cal. 117, 85 Pac. 305.

5. When a personal judgment.—When a judgment is rendered against executor for costs, and not made chargeable to estate, it amounts to personal judgment against executor, which may be enforced by execution.—*Stevens v. San Francisco & N. P. R. Co.*, 103 Cal. 252, 254, 37 Pac. 146.

§ 1032. COSTS IN A REVIEW OTHER THAN BY APPEAL. When the decision of a court of inferior jurisdiction in a special proceeding is brought before a court of higher jurisdiction for a review, in any other way than by appeal, the same costs must be allowed as in cases on appeal, and may be collected by execution, or in such manner as the court may direct, according to the nature of the case.

History: Enacted March 11, 1872, re-enactment of § 508 Practice Act.

As to costs on appeal, see, ante, § 1027 and note; post, § 1034 and note.

As to special proceedings, generally, see, post, §§ 1063-1821 and notes.

§ 1033. FILING OF AND AFFIDAVIT TO BILL OF COSTS. The party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk, and serve upon the adverse party, within five days after the verdict, or notice of the decision of the court or referee, or, if the entry of the judgment on the verdict or decision be stayed, then, before such entry is made, a memorandum of the items of his costs and necessary disbursements in the action or proceeding, which memorandum must be verified by the oath of the party, or his attorney or agent, or by the clerk of his attorney, stating that to the best of his knowledge and belief the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within five days after notice of filing of the bill of costs, file a motion to have the same taxed by the court in which the judgment was rendered, or by the judge thereof at chambers. By the decision of the court, or referee, herein referred to, is meant the signing and filing of the findings of fact and conclusions of law.

History: Enacted March 11, 1872, re-enactment of § 510 Practice Act as amended 1855 (Stats. 1855, p. 251); amendment approved March 24, 1874, Code Amdts. 1873-4, p. 343; February 21, 1899, Stats. and Amdts. 1899, p. 22; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 181, held unconstitutional, see history, § 5, ante.

FILING COST-BILL—AFFIDAVIT.

1. Amendment—Relief from inadvertence, etc.
2. Attachment—Keeper's fees—Order fixing after cost-bill filed.
3. Bill of costs—Service of—"Adverse parties."
4. Same—Time of filing memorandum—Noncompliance with statute.
5. Burden of proof.
6. Same—Presumption.
- 7-9. Construction of section—In general.
10. Court officials' fees must be claimed.
11. Same—Matter of statutory regulation.
12. "Decision" referred to in above section.
13. Discretion on motion to retax.
14. Evidence on motion to retax.
15. Extension of time.
16. Failure to file bill for non-payment of fees.
17. Insertion in judgment—Time of.
18. Memorandum of bill of costs—Service of.
- 19, 20. Same—Ministerial act of clerk.
21. Same—Void act of clerk.
22. Judgment must include costs.
23. Libel and slander—Counsel fees, must be claimed.
- 24, 25. Motion to retax—Manner of making.
- 26, 27. Notice of decision—Waiver of—Object of section.
28. Same—It is the settled rule in this state.
29. Premature filing.
30. Right to tax costs—When accrues.
31. Statute must be complied with.
32. Same—Statute not directory.
33. Stay of entry of judgment—Time of filing memorandum.
34. Stay of execution.
35. Strict compliance with statute necessary.
36. Verification—Construction of section.
- 37, 38. Waiver by failure to file memorandum. See, ante, § 1021 and note.

1. **Amendment—Relief from inadvertence, etc.**—Whether party may be relieved from failure to file memorandum of costs, and whether same may be amended under provisions of section 473, ante, doubted.—*Dow v. Ross*, 90 Cal. 562, 564, 27 Pac. 409; *Gallindo v. Roach*, 130 Cal. 389, 390, 62 Pac. 597.

2. **Attachment—Keeper's fees—Order fixing after cost-bill filed.**—In a case in which an attachment has been issued and a keeper appointed for the property attached an order of the court fixing the keeper's fees which is made after the cost-bill has been filed as required by the above section, but prior to the determination of the court on the motion to tax costs, is in time, and is properly included in the cost-bill as allowed by the court.—*Unwin v. Barstow-San Antonio Oil Co.*, 36 Cal. App. 508, 172 Pac. 622.

3. **Bill of costs—Service of—"Adverse parties."**—In a case in which all the defendants take separate appeal from a judgment and their contentions on appeal are upheld and the remittitur provides "the appellants to recover costs on this appeal" the fact that the result of the appeal is a modification of the original judgment resulting in a reduction of the judgment against some of the appellants and an increased judgment against the other appellants, the last named appellant was not in fact "an adverse party" to the co-appellants against whom the judgment was reduced, as that term is used in the above section; and as the remittitur did not allow one appellant to recover costs from the other appellants, but from the respondent only, and the appellants filed the cost-bill not asking for judgment for costs against the co-appellant it follows that the appellants were not adverse parties to each other, and that it was not necessary the cost-bill should be served by the appellants against whom the original judgment was decreased upon the appellants against whom the original judgment was increased.—*Hubbard v. Jurian*, — Cal. App. —, 190 Pac. 1052.

As to "adverse parties," see, ante, § 936, note pars. 157, 268-283.

As to memorandum of bill of costs, see pars. 18-21, this note.

4. **Same—Time of filing memorandum—Noncompliance with statute.**—The service of a memorandum of costs and necessary disbursements five days after notice of decision and delivery thereof to the clerk on the sixth day, does not constitute a compliance with the requirements of the above section.—*United Casting Co. v. Duncan*, 44 Cal. App. 384, 186 Pac. 403.

5. **Burden of proof as to necessity of items not appearing upon their face to be proper charge,** is upon party seeking to sustain charge.—*Senior v. Anderson*, 130 Cal. 290, 300, 62 Pac. 563.

6. **Same—Presumption.**—Memorandum of costs properly verified, unless something to contrary should control, is sufficient on motion to retax costs, but this rule should be

limited to cases where charges appear on their face to be for proper and necessary disbursements in action, and should not be extended or applied to cases where charges do not appear on their face to be proper and necessary. In such cases burden is on claimant, and not on moving party, and if he fails to introduce evidence to justify his charges, they should be stricken out on motion, e. g., if prevailing party should put in cost-bill charges for services of expert accountant or surveyor, such charges would not appear on face of bill to be necessary disbursements, and he ought not be permitted to say, "because court may have appointed an expert or directed a survey that his verified memorandum unless controverted by proofs on other side, must control decision."—*Miller v. Highland D. Co.*, 91 Cal. 103, 105, 106, 27 Pac. 536.

7. **Construction of section—In general.**—Above section is a statute of limitation as to the subject to which it applies. If a party fails within the time prescribed to file and serve his memorandum of costs he is conclusively deemed to have waived them. If the adverse party fails, within the specified time, to file a notice of motion to have the costs taxed he waives any and all objections thereto.—*Griffith v. Welbanks & Co.*, 26 Cal. App. 477, 147 Pac. 986.

8. The terms of this section are mandatory, and a substantially strict compliance is required not alone by the party claiming costs, but also by the party dissatisfied.—*Griffith v. Welbanks & Co.*, 26 Cal. App. 477, 147 Pac. 986.

9. If a party to an action against whom costs are awarded neglects within the time specified herein to apply to the court to have the same taxed, he is deemed to have assented to the correctness and lawfulness of the items as claimed in the verified memorandum of costs as filed, the total of which upon being entered in the judgment by the clerk is of the same force and effect as any other part of the judgment.—*Mojave & B. R. Co. v. Cuddeback*, 28 Cal. App. 439, 152 Pac. 943.

10. **Court officials' fees must be claimed** in memorandum of costs, and clerk has no authority to insert such in judgment, without their being so claimed.—*Chapin v. Broder*, 16 Cal. 403, 418.

11. **Same—Matter of statutory regulation.**—No distinction is made between fees of court officers and other expenses and disbursements; expenses and disbursements of every character are placed upon same footing. A party entitled to costs is required to claim them in particular manner. When properly claimed clerk is to include them in judgment, but until they are so claimed he is vested with no authority for that purpose.—*Chapin v. Broder*, 16 Cal. 403, 418.

12. **"Decision" referred to in above section** after rendition of which prevailing party must file memorandum of costs, is finding of facts and conclusions of law

signed by court and filed with clerk as basis of judgment entered.—*Porter v. Hopkins*, 63 Cal. 53, 55; *Mullally v. Irish-American B. Soc.*, 69 Cal. 559, 561, 11 Pac. 215.

13. Discretion on motion to retax.—Allowance or disallowance of items for expense and disbursements incurred upon trial of action must be left in nearly every instance to discretion of judge before whom cause was tried.—*Barnhardt v. Kron*, 88 Cal. 447, 26 Pac. 210; *Miller v. Highland Ditch Co.*, 91 Cal. 103, 105, 27 Pac. 536.

14. Evidence on motion to retax.—What motion to retax must contain, or upon what evidence it shall be heard, is not provided by this section; and any evidence, oral or written, in its nature competent to prove or disprove material fact in court of justice is competent on hearing of motion. Reporter's fees for transcribing notes of testimony, unless such transcript be ordered by court, can not be charged as costs against losing party.—*Senior v. Anderson*, 130 Cal. 290, 300, 62 Pac. 563.

15. Extension of time to file cost-bill may be granted by court or judge.—*Beilby v. Superior Court*, 138 Cal. 51, 70 Pac. 1024.

16. Failure to file bill for non-payment of fees.—Omission by clerk to indorse date of filing cost-bill because decision and findings had not been filed by reason of fact that calendar fee due before trial had not been paid can not prejudice rights of party filing cost-bill.—*Beck v. Pasadena L. V. L. & W. Co.*, 130 Cal. 50, 57, 62 Pac. 219.

17. Insertion in judgment—Time of.—Where statute provides, clerk must include costs in judgment, he has no authority to insert amount of costs in judgment at some subsequent time, as his authority terminates with entry of judgment, and if by mistake or otherwise costs are omitted, only remedy is by motion to amend judgment.—*Emeric v. Alvarado*, 64 Cal. 529, 590, 2 Pac. 418. See *Chapin v. Broder*, 16 Cal. 403.

18. Memorandum of bill of costs—Service of.—Service of the memorandum or copy is an indispensable step to be taken before the matter of costs may be considered by the court or judge.—*Griffith v. Welbanks & Co.*, 26 Cal. App. 477, 147 Pac. 986.

As to inclusion of court officials' fees necessary, see par. 10, this note.

As to time of filing memorandum, see par. 4, this note.

19. Same—Ministerial act of clerk.—Insertion of costs in judgment by clerk is purely ministerial act, validity of which depends entirely upon authority for its performance.—*Chapin v. Broder*, 16 Cal. 403, 418.

20. Insertion of costs in judgment is mere ministerial act of clerk which can be performed only in cases in which statute allows it.—*Riddell v. Harrell*, 71 Cal. 254, 260, 12 Pac. 67.

21. Same—Void act of clerk.—Objection to authority of clerk to include costs in judgment goes to legality of judgment, and ground upon which it proceeds is that judgment *pro tanto* is nullity. If costs are illegally inserted act of inserting them is simply void, and there is no reason why this illegality may not be inquired into collaterally. Where language of statute is that clerk shall "include costs in judgment," his authority terminates with entry of judgment, and if by mistake or otherwise costs were omitted, remedy was by motion to amend. Court alone was competent to grant relief, and act of clerk in inserting costs after entry of judgment was illegal and void.—*Chapin v. Broder*, 16 Cal. 403, 419, 420.

22. Judgment must include costs.—Note of amount of costs under certificate of authentication to entry of judgment in judgment-book, but where amount was not included in judgment in case where statute provided that clerk should include costs in judgment, is void act, and proceedings of sale, etc., under such so-called judgment, fall therewith and confer no title on purchaser.—*Emeric v. Alvarado*, 64 Cal. 529, 590, 2 Pac. 418.

23. Libel and slander—Counsel fees allowed in actions of slander, "in addition to other costs," must be included in memorandum filed or they will be waived.—*McKinney v. Roberts*, 2 Cal. Unrep. 532, 8 Pac. 3.

24. Motion to retax—Manner of making.—Written notice that at time therein specified party will move court to retax costs, followed by motion made orally in usual manner, is sufficient compliance with this section. Substance of law being that party dissatisfied with bill of costs as filed must within certain time make his objection known and grounds on which he will move to correct or strike out cost-bill. This object is accomplished by proceedings above stated, and no useful purpose would be subserved by requiring the motion also to be committed to writing.—*Carp v. Dowdell*, 129 Cal. 244, 245, 61 Pac. 1126.

25. Universal practice has been to serve and file written notice of motion to tax cost-bill as equivalent of filing motion within five days, and on day designated in notice, or day to which hearing shall have been postponed, to call up notice and make motion *viva voce*, note of motion being made by clerk on his minutes. This practice is sufficient compliance with statute.—*Kishlar v. Southern Pac. R. Co.*, 134 Cal. 636, 640, 66 Pac. 848.

26. Notice of decision—Waiver of.—Object of section is to give successful party who claims costs five days after he has knowledge of verdict or decision to serve and file his memorandum. If he has knowledge of such decision, it is an idle act to require service of notice of that fact, and where such party gives notice of

decision to his adversary for purpose of starting time within which motion for new trial can be made, he must be held to have notice of decision and to have waived any formal notice thereof.—*O'Neil v. Donahue*, 57 Cal. 226, 231.

27. Notice of decision must be held waived where defeated party has actual knowledge thereof, and participates and takes part in and opposes motion for new trial.—*Mullally v. The Irish-American B. Soc.*, 69 Cal. 559, 562, 11 Pac. 215.

28. Same.—It is settled rule in this state that if party entitled to costs neglects to serve and file his memorandum thereof until more than five days have elapsed after he has knowledge of decision of court, though no notice of it has been served upon him, filing will be too late, and costs will be stricken out on motion.—*Dow v. Ross*, 90 Cal. 562, 563, 27 Pac. 409. See *Mallory v. See*, 129 Cal. 356, 360, 61 Pac. 1123.

29. Premature filing.—Cost-bill filed before filing of findings is premature, and will be stricken out on motion.—*Sellick v. De Carlow*, 95 Cal. 644, 645, 30 Pac. 795.

30. Right to tax costs.—When accrues.—The right to costs accrues at the time when the judgment is rendered notwithstanding that the judgment has not become final or that entry thereof has been stayed.—*Eaton v. Southern Pac. Co.*, 31 Cal. App. 379, 160 Pac. 687.

31. Statute must be complied with.—Insertion of amount of costs in judgment by clerk is mere ministerial act depending entirely on filing of memorandum of costs for its authority, and judgment, so far as costs are concerned, is void, unless based on memorandum filed; party who fails to comply with statute by filing memorandum waives all claims for costs.—*Riddell v. Harrell*, 71 Cal. 254, 260, 12 Pac. 67. See *Chapin v. Broder*, 16 Cal. 403, 418.

32. Same.—Statute not directory.—Provisions of this section are not intended to be directory. No right is created apart from remedy provided for its enforcement, and in respect to this remedy there is no room for construction. Failure to comply with provisions of section not only extinguishes remedy, but forfeits right itself.—*Chapin v. Broder*, 16 Cal. 403, 419.

33. Stay of entry of judgment.—Time of filing memorandum.—Where entry of judgment is stayed memorandum of costs may be filed at any time before such entry.—*Taylor v. McConigle*, 120 Cal. 123, 127, 52 Pac. 159.

34. Stay of execution.—Where judgment for costs has been executed by sheriff, court is authorized to stay execution on money in hands of sheriff, until an application can be made to court to retax and adjust costs.—*Ex parte Burrill*, 24 Cal. 350, 354.

35. Strict compliance with statute necessary for recovery of costs, as matter is regulated exclusively by statute.—*Chapin v. Broder*, 16 Cal. 403, 418.

36. Verification.—Construction of section.—Verification by local attorney who tried case, participated in examination of witnesses, arguments to jury, etc., is sufficient. Statute does not require attorney verifying memorandum must be attorney of record, and there is no reason for such requirement. The object is to allow either party or such representative who may be more familiar with facts to verify items of bill. Formerly statute required memorandum to be verified by oath of party, but court held it could be done by attorney, legislature having intended to permit any one having knowledge of facts to verify bill, and that is certainly what is intended by this section.—*Yorba v. Dobner*, 90 Cal. 337, 338, 27 Pac. 185. See *Burnham v. Hayes*, 3 Cal. 115, 119.

37. Waiver by failure to file memorandum.—Omission from this section of that clause of section 510 of Practice Act which provided that failure by prevailing party to file memorandum of costs within time limited should be deemed waiver of costs is not material defect. Code contemplates that such should be result, so only costs which clerk is authorized to insert in judgment are those claimed, and "taxed or ascertained," in manner provided.—*Riddell v. Harrell*, 71 Cal. 254, 260, 12 Pac. 67. See *Chapin v. Broder*, 16 Cal. 413, 418.

38. It is incumbent upon parties entitled to costs to comply with statute and claim them in manner therein specified, and failure to claim same or any item thereof in such manner, is deemed to be waiver of such costs, and precludes recovery thereof. And omission in this section of express provision that failure by prevailing party to file memorandum of costs within time limit should be deemed a waiver is not material circumstances. Code contemplates such should be result since only costs which clerk is authorized to insert are those claimed and taxed or ascertained in manner provided.—*Galindo v. Roach*, 130 Cal. 389, 391, 62 Pac. 597.

§ 1034. COSTS ON APPEAL, HOW CLAIMED AND RECOVERED. Whenever costs are awarded to a party by an appellate court, if he claims such costs, he must, within thirty days after the remittitur is filed with the clerk below, deliver to such clerk and serve upon the adverse party a memorandum of his costs, verified as prescribed by the preceding section. The party dissatisfied

with the costs claimed may move to have the same taxed in the same manner and within a like time after notice of filing of the bill of costs, as prescribed by the preceding section. After such costs have been taxed, or the time for taxing the same has expired, execution may issue therefor as upon a judgment.

History: Enacted March 11, 1872, founded on § 665 Practice Act as amended 1854 (Stats. 1854, p. 84); amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 181, act held unconstitutional, see history, § 5 ante; amendment approved May 6, 1919, Stats. and Amdts. 1919, p. 291. In effect July 22, 1919.

COSTS ON APPEAL—CLAIM OF AND RECOVERY.

1. Allowance of costs statutory.
2. Nature of judgment.
- 3-5. Practice to claim costs.
6. Practice if dissatisfied.
7. Statute of limitations.
8. Trial court can not vacate judgment for costs on appeal.

See, ante, § 1021 and note.

As to appeals in general, see, ante, §§ 936 et seq. and notes.

As to damages for frivolous appeal, see, ante, § 957 and note.

As to remittitur, see, ante, § 958 and note.

As to undertaking for payment of costs upon affirmance of judgment or dismissal of appeal, see, ante, §§ 941 et seq. and notes.

1. **Allowance of costs statutory.**—Only in pursuance or by provision of statute or rule of court can costs be recovered, and where costs are allowed on appeal party must claim them and come within rules and laws regulating matter of costs to make decision in that respect effectual.—*Candler v. Washoe Lake R. & G. C. D.*, 28 Nev. 422, 82 Pac. 458.

2. **Nature of judgment.**—If judgment of appellate court awards costs, upon going down of remittitur, clerk of court below must attach it to judgment-roll and make minute of judgment on docket against original entry. Judgment thereafter stands as judgment of district court, and on application of parties in whose favor it is clerk must issue execution. In doing so, he acts not by authority of district court, but of supreme court.—*McMann v. Superior Court*, 74 Cal. 106, 108, 15 Pac. 448.

3. **Practice to claim costs.**—Filing of memorandum for costs on appeal incurred in supreme court with clerk of trial court, approved upon ground that practice had become settled under decision of supreme court.—*Ex parte Burrill*, 24 Cal. 350, 352.

4. **Memorandum of costs upon appeal** is not necessary to be filed in supreme court upon judgment awarding costs, but such costs should be claimed in trial court.—*Gray v. Gray*, 11 Cal. 341.

5. **Memorandum indorsed on remittitur** by clerk of supreme court should not be regarded as sufficient memorandum of costs, and if prevailing party intends to collect fees for filing notice of appeal, expenses of preparing transcript, etc., same should be embodied in memorandum of costs and filed with clerk of trial court at time of filing remittitur there, or within time thereafter prescribed by statute in other cases.—*Ex parte Burrill*, 24 Cal. 350, 353.

6. **Practice if dissatisfied.**—Practice where party is dissatisfied with allowance of costs on appeal by supreme court is, within time allowed for filing petition for rehearing, to make application to that court for modification of its judgment.—*Gray v. Gray*, 11 Cal. 341.

7. **Statute of limitations** on judgment for costs awarded by appellate court commences to run from entry thereof in docket.—*McMann v. Superior Court*, 74 Cal. 106, 108, 15 Pac. 448.

8. **Trial court can not vacate judgment for costs on appeal** docketed in conformity with Rule XXIII of supreme court and section 958, ante, but it may vacate or modify such judgment if it be not in conformity with the order of the appellate court.—*Chapman v. Hughes*, 3 Cal. App. 622, 86 Pac. 908.

§ 1035. INTEREST AND COSTS MUST BE INCLUDED BY THE CLERK IN THE JUDGMENT. The clerk must include in the judgment entered up by him, any interest on the verdict or decision of the court, from the time it was rendered or made, and the costs, if the same have been taxed or ascertained; and he must, within two days after the same are taxed or ascertained, if not included in the judgment, insert the same in a blank left in the judgment for that purpose, and must make a similar insertion of the costs in the copies and dockets of the judgment.

History: Enacted March 11, 1872, founded on § 511 Practice Act.

INTEREST AND COSTS—INCLUDED IN JUDGMENT.

1. Alimony—Computation of interest on.
2. Ambiguity—Compound interest.
- 3, 4. Appeal—Modification—Effect of.
5. Computation—Time of.
6. Construction of section.
- 7, 8. Delay in entering judgment.
9. Failure to file memorandum—Void judgment.
10. Matter of right.
11. Mechanics' liens—Computation of interest.
12. Open account—Interest allowed from ascertainment of balance.
13. Premature insertion in judgment—Effect of.
14. Same—Error cured.
15. Promissory note—Finding by court in action upon.
16. Waiver by not claiming.

As to interest on allowed claims in probate, see, post, §§ 1494, 1513 and notes.

As to interest on disbursements in action of partition, see, ante, § 801.

1. Alimony—Computation of interest on.—Upon decree for payment of alimony interest should be allowed from time each successive payment became due but should not be compounded.—*Huellmantel v. Huellmantel*, 124 Cal. 583, 590, 57 Pac. 582.

2. Ambiguity — Compound interest.—Where judgment is headed "January 27th, A. D. 1899," date of rendition of judgment, but clerk had included in judgment actually entered sometime thereafter interest up to the time of entry, and provided that judgment should bear interest from date hereof till paid, date at heading creates ambiguity on face of judgment which debtor is entitled to have removed.—*Cutting v. Fruit P. Co. v. Canty*, 141 Cal. 692, 697, 75 Pac. 564.

3. Appeal—Modification — Effect of.—Interest from time of rendition of judgment is not affected by modification of judgment on appeal.—*Clark v. Dunnam*, 46 Cal. 204, 208.

4. Interest must be allowed from date of rendition of judgment, and where judgment is modified after appeal, it should draw interest from date of its original rendition, and not only from date of modification.—*Barnhart v. Edwards*, 128 Cal. 572, 575, 61 Pac. 176.

5. Computation — Time of.—Judgment should be entered for amount of verdict with interest at legal rate from day on which it was returned by jury, and clerk has no authority to add to amount of verdict interest thereon up to time of entry of judgment and provide that such gross sum shall bear interest.—*Alpers v. Schammel*, 75 Cal. 590, 594, 17 Pac. 708. See *Golden*

Gate M. & Min. Co. v. Joshua Hendy M. Works, 82 Cal. 184, 185, 23 Pac. 45.

6. Construction of section.—Interest up to time judgment was rendered should be added to principal to constitute amount of judgment; theory of law being, not that party recover amount of particular note, or chose in action, but that he recover damages for non-performance of contract, and in case of failure to pay money true measure of damage is amount of money owing and interest agreed upon. This amount being ascertained by judgment, statute steps in, and regulates whether it shall bear interest, and at what rate.—*Guy v. Franklin*, 5 Cal. 416, 417.

7. Delay in entering judgment.—Case where judgment is not rendered on verdict or on facts found by court or referee until some time thereafter is provided for by this section, authorizing interest to be included down to rendition of judgment.—*Gray v. Palmer*, 28 Cal. 416, 420.

8. Where judgment is not entered until one year after rendition of verdict, clerk should include therein interest on amount of verdict from time of its rendition, as this section expressly provides. There is nothing to contrary in *Alpers v. Schammel*, 75 Cal. 590, 17 Pac. 708; but if there were decision would be in direct conflict with statute and would be overruled.—*Golden Gate M. & Min. Co. v. Joshua Hendy M. Works*, 82 Cal. 184, 185, 23 Pac. 45.

9. Failure to file memorandum—Void judgment.—Action of clerk in inserting costs in judgment is mere ministerial act depending entirely for its basis upon memorandum of costs, and where no memorandum has been served on opposite party or has been filed judgment for costs is void.—*Riddell v. Harrell*, 71 Cal. 254, 260, 261, 12 Pac. 67. See *Chapin v. Broder*, 16 Cal. 403, 418.

10. Matter of right.—Right to interest from rendition of judgment is created by this section and party entitled thereto can not be deprived of such right because court formulates judgment to be entered instead of leaving it to action of clerk alone.—*Barnhart v. Edwards*, 128 Cal. 572, 575, 61 Pac. 176.

11. Mechanics' liens—Computation of interest.—Interest in judgment foreclosing mechanics' liens of contractor should be allowed on various amounts from times they became due and not only upon gross amount from time of commencement of action.—*Knowles v. Baldwin*, 125 Cal. 224, 227, 57 Pac. 988.

12. Open account—Interest allowed from ascertainment of balance.—In an action for the reasonable value of goods upon an open account interest is allowable from the date upon which the balance is due was ascertained, only.—*Sea v. Lorden*, 37 Cal. App. 444, 145 Pac. 85, following doctrine in *Erickson v. Stockton & T. C. R. Co.*, 148 Cal. 206,

82 Pac. 961; Merchants' Collection Agency v. Gopcevic, 23 Cal. App. 216, 137 Pac. 609.

13. Premature insertion in judgment.—Effect of.—Inserting in judgment amount of costs before they are taxed or properly ascertained is mere clerical misprision of clerk and, though erroneous, does not affect validity of judgment or order of sale issued thereon. Subsequent granting of motion to retax has effect of amending judgment and curing error.—*Janes v. Bullard*, 107 Cal. 130, 132, 40 Pac. 108.

14. Same.—Error cured.—Order reducing amount of costs claimed cures error of clerk in entering same in judgment with-

out awaiting retaxation of the costs.—*Foley v. California H. Co.*, 115 Cal. 184, 196, 56 Am. St. Rep. 87, 47 Pac. 42.

15. Promissory note.—Finding by court in action upon embraces whole amount due as principal and interest at date of finding, and bears interest thereafter as whole at legal rate and not according to rate stipulated in note.—*Murdock v. Clarke*, 88 Cal. 384, 26 Pac. 601.

16. Waiver by not claiming.—Costs not claimed as provided in section 1033, ante, and interest as provided in this section are waived.—*Hotchkiss v. Smith*, 108 Cal. 285, 286, 41 Pac. 304.

§ 1036. WHEN PLAINTIFF IS A NONRESIDENT OR FOREIGN CORPORATION, DEFENDANT MAY REQUIRE SECURITY FOR COSTS. When the plaintiff in an action or special proceeding resides out of the state, or is a foreign corporation, security for the costs and charges, which may be awarded against such plaintiff, may be required by the defendant. When required, all proceedings in the action or special proceeding must be stayed until an undertaking, executed by two or more persons, is filed with the clerk, to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action or special proceeding, not exceeding the sum of three hundred dollars. A new or an additional undertaking may be ordered by the court or judge, upon proof that the original undertaking is insufficient security, and proceedings in the action or special proceedings stayed until such new or additional undertaking is executed and filed.

History: Enacted March 11, 1872, re-enactment of § 512 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 181, held unconstitutional, see history, § 5 ante; amendment re-enacted March 18, 1903, Stats. and Amdts. 1903, p. 187.

NONRESIDENT OR FOREIGN CORPORATION PLAINTIFF—SECURITY FOR COSTS.

1. As a matter of right.
2. Exception to sureties.
3. Form and sufficiency of security.
4. Section not exclusive.
5. Undertakings by nonresidents—Power to extend time.
6. Will contest—Order requiring security for costs to be filed within ten days, ineffectual.

1. As a matter of right.—Statute vests defendant with right to security for costs, and court can not against his will deprive him of it.—*Clune v. Sullivan*, 56 Cal. 249, 251.

2. Exception to sureties.—The provisions of the above section do not authorize the service of exception to the sureties in an undertaking for security for costs given by a nonresident plaintiff; the only remedy, if the security given is insufficient, being that the court may order a new or an

additional undertaking.—*Estate of Baker*, 176 Cal. 430, 168 Pac. 881.

3. Form and sufficiency of security.—Where the security for costs required to be given on behalf of a nonresident plaintiff, in the undertaking it is recited that the "plaintiff will pay all costs and charges," etc., the undertaking is insufficient; the sureties must, themselves, expressly promise that they will pay costs and charges, etc.—*Carter v. Superior Court*, 176 Cal. 752, 169 Pac. 667.

4. Section not exclusive.—This section does not by application of principle expressio unius exclusio alterius prevent court requiring security for costs as terms upon allowing an amendment, etc., under section 473, ante.—*Clune v. Sullivan*, 56 Cal. 249, 251.

5. Undertakings by nonresidents—Power to extend time.—The undertaking required by the above section to be given to a nonresident plaintiff may be extended under the provisions of section 1054, post.—*Hertz v. Superior Court*, 35 Cal. App. 83, 169 Pac. 258.

See pars. 2, 3, this note.

6. Will contest—Order requiring security for costs to be filed within ten days, ineffectual for any purpose because under above section and section 1037, post, parties

have thirty days in which to file undertaking to secure costs.—Estate of Dean, 149 Cal. 47, 87 Pac. 13.

§ 1037. IF SUCH SECURITY BE NOT GIVEN, THE ACTION MAY BE DISMISSED. After the lapse of thirty days from the service of notice that security is required, or of an order for new or additional security, upon proof thereof, and that no undertaking as required has been filed, the court or judge may order the action or special proceeding to be dismissed.

History: Enacted March 11, 1872, re-enactment of § 514 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 181, held unconstitutional, see history, § 5 ante; amendment re-enacted March 18, 1903, Stats. and Amdts. 1903, p. 188.

NONRESIDENT PLAINTIFF — DISMISSAL FOR WANT OF SECURITY.

1. Construction of section—Matter of right.
2. Contest of probate of will.
3. Same—Costs in—Requiring security for to be filed within ten days.
4. Defective undertaking—Jurisdiction — Dismissal discretionary.
5. Same—Same — Failure to file when properly required—Prohibition.
6. Judgment not a bar.
7. Time of motion—Appeal-bond.

1. **Construction of section—Matter of right.**—Amount as well as condition of bond is prescribed by code, and court has nothing to do with fixing same. Statute vests in defendant's right to have bond, and court can not deprive him of that right or alter amount or terms of bond required. When demand for security is made, law itself stays further proceedings on part of plaintiff until demand is complied with according to provisions of code. After undertaking or bond in form specified is given, new or additional undertaking may be required by court when first is deemed insufficient, but court has no power to dispense with giving of first bond or undertaking.—Meade Co. Bank v. Bailey, 137 Cal. 447, 449, 70 Pac. 297.

2. **Contest of probate of will** is not action provided for in this section, and therefore nonresident contestant need not give this security.—Estate of Joseph, 118 Cal. 660, 662, 50 Pac. 768.

3. **Same—Costs in—Requiring security for to be filed within ten days** ineffectual for any purpose. See, ante, § 1036, note par. 6.

4. **Defective undertaking—Jurisdiction—Dismissal discretionary.**—Where a nonresi-

dent plaintiff, of whom security for costs is required, attempts in good faith to comply with the requirements of the statute, but files an undertaking defective as to form, the court does not lose jurisdiction of the action after the expiration of thirty days, and is not bound to dismiss the action, but has the discretion to grant leave to the plaintiff to file a proper undertaking.—Carter v. Superior Court, 176 Cal. 752, 169 Pac. 667.

5. **Same—Same—Failure to file when properly required—Prohibition.**—In a case in which the court refuses to dismiss an action because of failure of a nonresident plaintiff to give security for costs when properly required to do so, and is proceeding to try the cause without the undertaking required by law to be filed, the defendant has no plain, speedy, and adequate remedy in the ordinary course of law and prohibition will lie to restrain the trial court from proceeding.—Carter v. Superior Court, 176 Cal. 752, 169 Pac. 667.

6. **Judgment not a bar.**—Judgment of dismissal for failure to file undertaking is not judgment on merits, matter directly adjudged being that plaintiff failed to give security for costs and therefore could not be heard, not that he had no cause of action or that defendant had valid defense, and therefore is not bar to subsequent action.—Rosenthal v. McMann, 93 Cal. 505, 509, 29 Pac. 121.

7. **Time of motion — Appeal-bond.**—Where notice requiring security is not accompanied by order staying proceedings, and is given on the day before judgment is rendered, motion for dismissal made after appeal is taken will not be granted, as in such case motion comes too late and appeal-bond furnishes sufficient security for future costs.—Comstock v. Clemens, 19 Cal. 77, 80.

§ 1038. COSTS WHEN STATE IS A PARTY. When the state is a party, and costs are awarded against it, they must be paid out of the state treasury.

History: Enacted March 11, 1872.

COSTS WHEN STATE A PARTY.

1. Costs against—Officer not affected.
2. Counsel fees.
3. Publication—By whom paid.

Security for costs not required to be given by state.—See, post, § 1058.

1. Costs against—Officer not affected.—Dispensing with undertaking on appeal does not necessarily imply that personal liability for costs or damages may not be rendered against county officer.—*Lamberson v. Jefferds*, 116 Cal. 492, 494, 48 Pac. 485.

2. Counsel fees.—This section deals mainly with "costs" as such, and does not

include counsel fees for services rendered in action to which state is party.—*Sullivan v. Gage*, 145 Cal. 759, 767, 769, 79 Pac. 537.

3. Publication—By whom paid.—In action against defaulting purchaser of state lands, cost of publication of summons should be included in costs taxed against defendant, and entire amount of judgment is to be collected of defendant by execution if possible, but if execution be returned unsatisfied, cost of publication is chargeable against state, and payable out of general fund.—*Lawrence v. Booth*, 46 Cal. 187, 189.

§ 1039. COSTS WHEN COUNTY IS A PARTY. When a county is a party, and costs are awarded against it, they must be paid out of the county treasury.

History: Enacted March 11, 1872.

1. Costs against official.—Dispensing with undertaking for costs does not necessarily imply that personal judgment for costs or damages can not be rendered in action against county official in official ca-

capacity.—*Lamberson v. Jefferds*, 116 Cal. 492, 494, 48 Pac. 485.

Security for costs—Not required to be given by county.—See, post, § 1058.

CHAPTER VII.**GENERAL PROVISIONS.**

§ 1045. Lost papers, how supplied.

§ 1046. Papers without the title of the action, or with defective title, may be valid.

§ 1046a. Papers destroyed by fire or other calamity. Filing nunc pro tunc.

§ 1047. Successive actions on the same contract, etc.

§ 1048. Consolidation of several actions into one.

§ 1049. Actions, when deemed pending.

§ 1050. Actions to determine adverse claims and by sureties.

§ 1051. Testimony, when to be taken by the clerk.

§ 1052. The clerk must keep a register of actions.

§ 1053. Two of three referees, etc., may do any act.

§ 1054. Time within which an act is to be done may be extended by the court.

§ 1055. Actions against a sheriff for official acts.

§ 1056. Corporations may become sureties on undertakings and bonds.

§ 1057. Undertakings mentioned in this code, requisites of.

§ 1057a. Justification by corporate surety on bonds.

§ 1058. People of state not required to give bonds when state is a party.

§ 1059. Surety on appeal substituted to rights of judgment creditor.

§ 1045. LOST PAPERS, HOW SUPPLIED. If an original pleading or paper be lost, the court may authorize a copy thereof to be filed and used instead of the original.

History: Enacted March 11, 1872.

LOST PAPERS—HOW SUBSTITUTED.

1. Evidence—Loss of judgment-roll.

2. Intendment or presumption.

3. Lost pleadings—Trial on merits.

4, 5. Notice of motion to substitute.

6. Practice—Manner of correcting loss of pleadings, etc.

7. Substituted papers—Service by publication—Findings of court and contents of judgment-roll—Presumption on appeal.

8. Summons, loss of—Motion to dismiss.

9. Trial court must make substitution.

10. Same—Practice.

11, 12. Weight to be given copies.

13. Same—Summons and proof of service.

As to authentication of records, see, post, §§ 1905, 1906 and note.

As to certificates to copies of writings, see, post, §§ 1923 et seq. and notes.

As to copies of foreign records, see, post, § 1907.

As to presentation of lost claim against estate of decedent, see, post, § 1497 and note.

As to proof of lost or destroyed will, see, post, §§ 1338 et seq. and notes.

1. Evidence—Loss of judgment-roll.—Record of judgment in judgment-book should be admitted as competent evidence of what matters were considered and passed upon by court in case judgment-roll be lost.—*Simmons v. Threshour*, 118 Cal. 100, 101, 50 Pac. 312.

2. Intendment or presumption.—Where copy of paper appears in judgment-roll it will be inferred that original had been lost and copy substituted by order of court upon proper showing.—*Sichler v. Look*, 93 Cal. 600, 608, 29 Pac. 220.

3. Lost of pleadings—Trial on merits.—A judgment rendered on a justices' court appeal can not be questioned on the ground that the superior court was without jurisdiction to try the case, for the reason that the justices' court had no jurisdiction on account of the loss of the original complaint, and the lack of any copy thereof on file therein, where trial was had on the merits in the superior court without objection being made to the jurisdiction of the superior court, or other objection, except to the motion to substitute a copy for the original lost complaint.—*Brians v. Superior Court*, 32 Cal. App. 206, 162 Pac. 420.

4. Notice of motion to substitute.—Substitution of papers is always within discretion of court and no notice of motion to apply for it need be given when notice can be of no use.—*Benedict v. Cozzens*, 4 Cal. 381, 382.

5. See *People v. Cazalis*, 27 Cal. 522, 523, where it is said above case may be distinguished from general rule in that there defendant answered substituted complaint before objection that it was allowed to be filed without notice was taken and also say that if it could not be so distinguished it would be overruled.

6. Practice—Manner of correcting loss of pleadings, etc., is to show by affidavit what record, loss of which is to be supplied, contained. Substitution can only be made after personal notice of intention to move court, and notice must be sufficiently explicit to advise opposite party of what is intended as well as to enable him to controvert affidavits.—*McLendon v. Jones*, 8 Ala. 298, 42 Am. Dec. 640, quoted and approved in *People v. Cazalis*, 27 Cal. 522, 523.

7. Substituted papers—Service by publication—Findings of court and contents of

judgment-roll—Presumption on appeal.—In a case in which a printed form of complaint is found in the judgment-roll, the printed form also containing an attached printed verification, with the signature of affiant and notary public all printed, as in the body of the complaint, and the order of publication of summons contained in such judgment-roll, by reference to a "verified complaint on file" therein, recites that it appears to the court that a good cause of action exists in favor of the plaintiff and against the defendants, and where the judgment therein recites that the defendants had been "duly and regularly summoned to appear and answer plaintiff's complaint," an appellate court must presume, in the absence of evidence to the contrary, that the trial court for good cause permitted a copy of the complaint filed therein to be substituted in lieu and place of the original.—*Shattuck v. Palmer*, 41 Cal. App. 701, 183 Pac. 259, applying the doctrine in *Schiller v. Look*, 93 Cal. 600, 29 Pac. 220.

8. Summons, loss of—Motion to dismiss.—Fact that summons in an action was lost for time makes no difference on motion to dismiss under section 581, ante, as party had remedy under this section to supply copy of lost summons.—*Grant v. McArthur*, 137 Cal. 270, 272, 70 Pac. 88.

9. Trial court must make substitution.—Appellate court has no control over record of trial court, and in case of loss of judgment-roll order substituting copies therefor is within province of trial court.—*Buckman v. Whitney*, 28 Cal. 555, 556.

10. Same—Practice.—In case of appeal where judgment-roll or other papers necessary to be included in transcript are lost application should be made to trial court upon notice to opposite parties to restore its record by supplying defects occasioned by loss and then taking transcript of record thus restored. Proceeding should be for court upon due notice to ascertain what particular papers constitute judgment-roll; to order that such papers be attached together, filed in court, and that the same thenceforth constitute judgment-roll; and not for court to order that copies of certain papers might be used in preparing transcript on appeal with same effect as originals.—*Buckman v. Whitney*, 28 Cal. 555, 557, 559.

11. Weight to be given copies.—Order authorizing copies to be filed is determination that they are correct copies of originals, and copies thus substituted are entitled to same weight as would be originals.—*Hibernia Sav. & L. Soc. v. Matthias*, 116 Cal. 424, 426, 48 Pac. 370. See *Knowlton v. Mackenzie*, 110 Cal. 183, 42 Pac. 580.

12. Copies of papers substituted as provided by this section are entitled to same weight as would be originals.—*Knowlton v. Mackenzie*, 110 Cal. 183, 190, 42 Pac. 580.

13. **Same—Summons and proof of service.**—Summons with proof of service indorsed thereon being lost, court may order copy substituted, and having acquired jurisdic-

tion by service, may proceed upon substituted record same as it might have done upon original.—*Hibernia Sav. & L. Soc. v. Matthia*, 116 Cal. 424, 426, 48 Pac. 370.

§ 1046. PAPERS WITHOUT THE TITLE OF THE ACTION, OR WITH DEFECTIVE TITLE, MAY BE VALID. An affidavit, notice, or other paper, without the title of the action or proceeding in which it is made, or with a defective title, is as valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action or proceeding.

History: Enacted March 11, 1872, re-enactment of § 531 Practice Act.

NO TITLE OR DEFECTIVE TITLE.

- 1, 2. Absence of title—Affidavit as basis for writ of mandamus.
3. Defective title of paper—Does not invalidate judgment.
4. New undertaking in appellate court.
5. Non-prejudicial defect.
6. Notice of appeal.
7. Omission of name of one plaintiff.

1. **Absence of title—Affidavit as basis for writ of mandamus** is not invalid because it does not contain title of cause in which writ is issued. Affidavit is as valid without title as with it.—*McCrary v. Leaudry*, 67 Cal. 120, 122, 7 Pac. 264.

2. Affidavit on motion for change of venue attached to notice and demand but not entitled in action and referring to "above entitled action" may be held to refer to action entitled in notice and demand and is sufficient under this section.—*Watt v. Bradley*, 95 Cal. 415, 417, 30 Pac. 557.

3. **Defective title of paper—Does not invalidate judgment.**—Under the provisions of the above section a mere defect in the title of a paper in a cause does not operate to invalidate a judgment rendered therein, if it intelligently refers to the

action or proceeding.—*In re McGrew*, 183 Cal. 177, 190 Pac. 804.

4. **New undertaking in appellate court** will always be allowed where appeal is taken bona fide and not for delay, upon objection that undertaking filed in lower court is imperfect or objectionable.—*Coulter v. Stark*, 7 Cal. 244, 245.

5. **Non-prejudicial defect.**—Notice of taking deposition is not invalid by error in title of cause where no other suit was pending between parties named and no one was misled by defective title.—*Mills v. Dunlap*, 3 Cal. 94, 97.

6. **Notice of appeal** entitled "Emma Butler v. Thomas Ashworth" instead of "Hannah Butler v. Thomas Ashworth," but duly entitled as to court and department in which action was pending, containing number of cause and intelligibly referring to judgment and order appealed from, is sufficient by virtue of this section and will not invalidate appeal.—*Butler v. Ashworth*, 100 Cal. 334, 335, 34 Pac. 780.

7. **Omission of name of one plaintiff.**—Notice of intention to move for new trial directed to and served on attorneys who were attorneys for all plaintiffs, is not rendered insufficient because name of one of plaintiffs is, by inadvertence, omitted in caption.—*Cook v. Sudden*, 94 Cal. 443, 444, 29 Pac. 949.

§ 1046a. PAPERS DESTROYED BY FIRE OR OTHER CALAMITY. FILING NUNC PRO TUNC. In all cases brought under the provisions of any act providing for the establishment and quieting of title to real property in cases where the public records in the office of the county recorder have been, or shall hereafter be, lost or destroyed, in whole or in any material part by flood, fire or earthquake, all papers filed under order of court nunc pro tunc as of the date when they should have been filed, shall have the same force and effect as if filed on the date when they should have been filed.

History: Enactment approved April 21, 1909, Stats. and Amdts. 1909, p. 1055.

§ 1047. SUCCESSIVE ACTIONS ON THE SAME CONTRACT, ETC. Successive actions may be maintained upon the same contract or transaction, whenever, after the former action, a new cause of action arises therefrom.

History: Enacted March 11, 1872, re-enactment of § 525 Practice Act.

SUCCESSIVE ACTIONS—SAME CONTRACT.

1. Action for breach of contract.
2. Continuous breach—As a new cause of action—Additional damages.
3. Continuous breach of contract for sale of land.

As to proceedings on foreclosure of mortgage where debt falls due at different times, see, ante, § 728 and note.

1. Action for breach of contract.—Upon a breach of a contract for the sale of land by the vendor, the vendee, while he has an election of remedies, acquires but a single cause of action, which must be enforced in a single proceeding.—*Abbott v. The 76*

Land and Water Co., 161 Cal. 47, 118 Pac. 425.

2. Continuous breach—As new cause of action—Additional damages.—The rule here stated has no application to actions for additional damages on account of some particular breach involved in a former action.—*Abbott v. The 76 Land and Water Co.*, 161 Cal. 48, 118 Pac. 425.

3. Continuous breach of contract for sale of land.—Where the vendor absolutely repudiates the contract, such repudiation constitutes a single breach, complete at the time of the repudiation, and a single and entire cause of action; and no continuous breach arises, giving rise to new causes of action, as long as it continues, within the meaning of this section.—*Abbott v. The 76 Land and Water Co.*, 161 Cal. 48, 118 Pac. 425.

§ 1048. CONSOLIDATION OF SEVERAL ACTIONS INTO ONE. Whenever two or more actions are pending at one time between the same parties and in the same court, upon causes of action which might have been joined, the court may order the actions to be consolidated.

History: Enacted March 11, 1872, re-enactment of § 526 Practice Act.

CONSOLIDATION OF ACTIONS.

1. Appellate court will not make.
2. Construction of section.
3. Evidence—Depositions.
4. Justice's court—Has jurisdiction of these separate actions.
5. Nonsuit as to certain parties—Effect of.
6. Where consolidation made.

As to consolidating actions to foreclose mechanics' liens, see, post, § 1195 and note.

As to joinder of causes of action, see, ante, § 427 and note.

1. Appellate court will not make.—On appeal consolidation of causes will not be made.—*Wallace v. Eldredge* (No. 2), 27 Cal. 498, 500.

2. Construction of section.—There is no warrant for construing this section as requiring a consolidation simply because the causes of action might have been joined; in other words, the word "may" need not be construed as "must." The court is hereby authorized to consolidate cases involving causes of action which might have been joined, where, in its judgment, the interests of justice make it proper that a consolidation should be had.—*Realty Const. & Mortg. Co. v. Superior Court*, 165 Cal. 543, 132 Pac. 1048.

3. Evidence—Depositions taken in any one of consolidated actions are admissible on trial after consolidation.—*Wolters v. Rossi*, 126 Cal. 644, 649, 59 Pac. 143.

4. Justices' court—Has jurisdiction of three separate actions to recover same property, value of which is within jurisdictional amount, after same have been consolidated.—*Cariaga v. Dryden*, 29 Cal. 307, 308.

5. Nonsuit as to certain parties—Effect of.—In consolidated actions to foreclose mechanics' liens plaintiffs become actors against each other, as well as against owners, and each is entitled to reduce or avoid lien of either of others by any evidence that would have that effect. Nonsuit of one plaintiff as to certain defendants merely determines that he is entitled to nothing as against those defendants and he still remains party to consolidated action as against other parties.—*Kennedy & S. L. Co. v. Dusenbery*, 116 Cal. 124, 126, 47 Pac. 1008.

6. Where consolidation made.—Where cause of action sued on in several actions might have been united in one, court may order consolidation.—*Smith v. Smith*, 80 Cal. 323, 324, 21 Pac. 4, 22 Pac. 186, 549; *Wolters v. Rossi*, 126 Cal. 644, 649, 59 Pac. 143.

§ 1049. ACTIONS, WHEN DEEMED PENDING. An action is deemed to be pending from the time of its commencement until its final determination

upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied.

History: Enacted March 11, 1872; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 182, act held unconstitutional, see history, § 5 ante.

ACTIONS DEEMED PENDING, WHEN.

1. Abatement, plea of—Practice.
2. Action lies on final judgment only.
3. Alienation of property pendente lite—Effect of.
4. Alimony — Jurisdiction of superior court—Effect of rendition of judgment, and of appeal therefrom.
- 5, 6. Same—Pendente lite.
7. Amending decree.
8. Attachment bond—Suit on.
9. Building and loan association—Liquidation by commissioner—Compensation of custodian.
- 10, 11. Construction of section—In general.
12. Costs—Final adjudication of subject-matter.
13. Default—Action is still pending after entry of.
14. Definition—"Action" and "cause of action."
15. During appeal—Code provision does not affect rule.
16. During interim between sustaining of demurrer, etc.
17. Evidence—Judgment must be final—When final.
- 18, 19. Same—Judgment as—Effect of appeal.
20. Same—Judgment of divorce.
- 21, 22. Same—Rule of evidence is not prescribed.
23. Same—Within time for appeal.
24. Excepting to sufficiency of sureties.
25. Final judgment terminates proceeding—Reason of rule.
26. Former action—"Pendency of."
- 27, 28. Former adjudication—Judgment must be final.
- 29-31. Same—Plea in abatement—Evidence.
32. Jurisdiction exhausted by final judgment.
33. Modification of judgment or supplemental decree.
34. Motion for new trial—Absence of order of the court.
35. New trial—Pendency of motion for.
36. Prohibition—Will lie to restrain further proceedings.
37. Satisfaction of judgment makes it final.
- 38, 39. Satisfaction by execution—Not bar to appeal.
40. Settlement of guardian's account.
41. Statute of limitations—Does not commence to run until, when.

42. When judgment final.

43. Writ of assistance—Judgment as evidence.

As to how action is commenced, see, ante, § 405 and note.

As to offer to allow judgment, see, ante, § 997 and note.

As to when an action is pending, see note Ann. Cas. 1912A, pp. 843-845.

1. Abatement, plea of—Practice.—Where answer contains plea of abatement by reason of another action pending and also defense on merits better practice is to first try issue made by plea in abatement.—*Leonard v. Flynn*, 89 Cal. 535, 541, 23 Am. St. Rep. 500, 26 Pac. 1097.

2. Action lies on final judgment only.—Action will not lie upon judgment until it has become final. Until it has become so no cause of action upon judgment has accrued.—*Hills v. Sherwood*, 33 Cal. 474, 479; *Feeney v. Hinckley*, 134 Cal. 467, 468, 470, 86 Am. St. Rep. 290, 66 Pac. 580.

3. Alienation of property pendente lite—Effect of.—Any alienation of property involved in action while it is pending is subject to rights of other party and will be subject to judgment thereafter rendered in case, and grantee of plaintiff who buys property at execution sale is presumed to know course of proceedings and state of record from which title of his grantor proceeded, and he is presumed to know, too, that right of defendant is to take appeal within statutory time and also consequences of prosecution of this right, and he may be supposed to purchase with reference to these things, and upon reversal of judgment judgment-debtor will be restored to his original estate in land.—*Di Nola v. Allison*, 143 Cal. 106, 114, 101 Am. St. Rep. 84, 76 Pac. 976.

4. Alimony—Jurisdiction of superior court—Effect of rendition of judgment, and of appeal therefrom.—Jurisdiction to grant alimony and suit money not exhausted by rendition of judgment or ousted by appeal therefrom.—*Bruce v. Bruce*, 160 Cal. 30, 116 Pac. 66.

5. Same—Pendente lite.—Power to grant alimony pendente lite in action of divorce is not divested upon rendition of judgment by trial court but may be exercised at any time while action is pending and such allowance may be made after appeal from judgment.—*Bohnert v. Bohnert*, 91 Cal. 428, 431, 27 Pac. 732.

6. Action of divorce is included in this section, and under authority to grant alimony pendente lite court may make allowance after judgment has been entered.—

Grannis v. Superior Court, 143 Cal. 630, 633, 77 Pac. 647.

7. Amending decree, etc.—Action is not pending until after time for appeal has expired in sense that until such time court may amend or set aside its decree.—*O'Brien v. O'Brien*, 124 Cal. 422, 428, 57 Pac. 225.

8. Attachment bond—Suit upon.—An action will lie on an undertaking given on the issuance of a writ of attachment, where the judgment in favor of the defendant for costs has been satisfied, notwithstanding the fact that the time of appeal from the judgment has not expired.—*Morneault v. National Surety Co.*, 37 Cal. App. 285, 174 Pac. 81.

9. Building and loan association—Liquidation by commissioners—Compensation of custodian.—Where the commissioner, under the provisions of section 9 of the Building & Loan Commission Act, determines upon the necessity for the liquidation of the affairs of a building and loan association which is being conducted in an unsafe manner, and to that end appoints a custodian of its property and assets, and on a proceeding by the attorney-general for the approval and confirmation of the act of the commissioner, judgment is entered disapproving of the act in taking possession of the business and affairs of the association, and an appeal taken from that judgment of disapproval, the custodian has no right of action to recover his compensation fixed by the commissioner, while such appeal is pending.—*Brandon v. Anglo-California Trust Co.*, 177 Cal. 699, 171 Pac. 956.

10. Construction of section—In general.—An action once instituted is thenceforth pending at every instant of time until final judgment has been pronounced and entered up.—*Cain v. French*, 29 Cal. App. 725, 156 Pac. 518.

11. It is obvious that a judgment rendered and entered in an action can not become final so long as the action is pending within the meaning of this section.—*Borges v. Hillman*, 29 Cal. App. 144, 154 Pac. 1075.

12. Costs—Final adjudication of subject-matter is not made by judgment for costs only for or against one of the parties.—*Nolan v. Smith*, 137 Cal. 360, 361, 70 Pac. 166.

13. Default—Action is still pending after entry of default until entry of final judgment.—*Abadie v. Lobero*, 36 Cal. 390, 400.

14. Definition—"Action" and "cause of action."—In applying certain rules, e. g., those providing for amendments to complaints changing cause of action sued on, confusion has resulted from neglect to define terms "cause of action" and "action." Latter term is very commonly confounded with suit (*litis*) in which action is enforced. But this is not technical meaning of term according to which action is simply right or power to enforce obligation. An action is nothing else than right or

power of prosecuting in judicial proceeding what is owed to one, which is but to say an obligation. (*Actio nihil aliud est quam jus persequendi in iudicio quod sibi debetur.*) Action therefore springs from obligation and hence "the cause of action" is simply obligation. Obligation thus constituting cause of action may be either *ex contractu* or *ex delicto* and again latter may be either for compensation or damages for restitution, as, e. g., obligation of wrong-doer to restore property of another. For though there is distinction between actions brought for recovery of damages or compensation and those brought for restitution, latter constituting actions in *rem* and former actions in *personam*, yet in either case action is to enforce obligation, nor can there be an action for any other purpose.—*Frost v. Witter*, 132 Cal. 421, 426, 84 Am. St. Rep. 53, 64 Pac. 705.

15. During appeal—Code provision does not affect rule.—The rule that the court in probate loses jurisdiction of distributed property upon the making of the decree, is not affected by the provisions of the above section declaring that the action is deemed to be pending until its final determination on appeal, or until the time for appeal has passed, or until the judgment has been satisfied.—*Estate of Baird*, 181 Cal. 742, 186 Pac. 351.

16. During interim between sustaining of demurrer to complaint and filing of amended complaint, action is pending.—*Ex parte Joutsen*, 154 Cal. 540, 543, 98 Pac. 391.

17. Evidence—Judgment must be final—When final.—Although judgment may be final with reference to court which pronounced it and as such be subject of appeal, yet it is not necessarily final with reference to property or rights affected so long as it is subject to appeal and liable to be reversed; and judgment in order to be admissible in evidence for purpose of proving facts therein recited may be final judgment in case, but if action in which judgment is recorded in judgment-book is still pending necessarily judgment is not final.—*Hills v. Sherwood*, 33 Cal. 474, 478; *Estate of Blythe*, 99 Cal. 472, 475, 34 Pac. 108.

18. Same—Judgment as—Effect of appeal.—Operation of final judgment is suspended by appeal therefrom, and pending such appeal judgment is not admissible in another case as evidence even between same parties.—*Harris v. Barnhart*, 97 Cal. 546, 550, 32 Pac. 589.

19. Effect of judgment as evidence of the matters decided by it is suspended by an appeal even though its execution is not stayed.—*Di Nola v. Allison*, 143 Cal. 106, 112, 101 Am. St. Rep. 84, 76 Pac. 976.

20. Same—Judgment of divorce is not admissible in any civil action involving status of parties as unmarried persons until expiration of time limited for appeal.

—Estate of Wood, 137 Cal. 129, 145, 69 Pac. 900.

21. Same—Rule of evidence is not prescribed by this section. It merely determines condition of action after judgment has been rendered and inferentially effect of judgment; there are many cases in which judgment is admissible in evidence at any time after its entry (per Harrison, J.).—*Naftzger v. Gregg*, 99 Cal. 83, 89, 33 Pac. 757.

22. This section does not purport to prescribe rule of evidence but merely to determine condition of action after judgment has been rendered and inferentially effect of judgment.—*Cook v. Ceas*, 143 Cal. 221, 235, 77 Pac. 65.

23. Same—Within time for appeal.—Judgment in former action between same parties is not admissible in bar of action where time allowed for appeal has not expired.—*Naftzger v. Gregg*, 99 Cal. 83, 88, 33 Pac. 757.

24. Excepting to the sufficiency of sureties upon an undertaking on attachment under the provisions of section 539, ante, is in no sense an appearance in the action.—*Salmonson v. Streiffer*, 13 Cal. App. 395, 398, 110 Pac. 144.

25. Final judgment terminates proceeding—Reason of rule.—Court loses jurisdiction over cause when judgment becomes final as provided in this section and court can not thereafter set aside or modify judgment unless by express authority of some statute. Reason of rule is that there must be some finality in legal proceedings and period beyond which they can not extend. Safety and tranquillity of parties require that their interests should not be constantly suspended and their repose liable to be disturbed at any moment at discretion of court. When judgment becomes final case is out of court and can not be reinstated except perhaps by consent of parties.—*Brackett v. Banegas*, 99 Cal. 623, 627, 34 Pac. 344.

26. Former action—"Pendency of."—Under the provisions of the above section an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, or until the judgment is sooner satisfied, and a finding that a former action had been abandoned and was not pending in abatement, is erroneous where a judgment of nonsuit was entered therein, the plaintiff appealed, and such appeal had not been decided or dismissed, notwithstanding the appellant had practically abandoned it, and the judgment was one of nonsuit only, which could not operate as a bar to a second action.—*Collins v. Ramish*, 182 Cal. 360, 188 Pac. 560.

27. Former adjudication—Judgment must be final.—During period in which appeal may be taken action is to be deemed pending and judgment is so far in abeyance as not to be evidence in bar to recovery in C. C. P.—150

another action for same cause.—*Harris v. Barnhart*, 97 Cal. 546, 550, 32 Pac. 589.

28. While action is pending as provided by this section judgment therein can not be bar to prosecution of subsequent action.—*Story v. Story & I. C. Co.*, 100 Cal. 41, 42, 34 Pac. 675.

29. Same—Plea in abatement—Evidence.—Where time for appeal has not expired judgment is ineffectual as evidence in plea of former adjudication, and pendency of former action may be pleaded in abatement until judgment therein becomes final, when supplemental answer averring proper facts in bar of action would be in order, and proceedings in action are admissible in proof of such plea in abatement.—*Harris v. Barnhart*, 97 Cal. 546, 551, 552, 32 Pac. 589.

30. Only final judgment upon merits prevents further contest upon same issue and becomes evidence in another action between same parties and their privies. Until final judgment is reached proceedings are subject to change and modification, are inchoate, and can avail nothing as bar or as evidence. Not until judgment does its verity as record settle finally and conclusively question at issue. Whenever judgment falls to fix and determine ultimate rights of parties, wherever it leaves room for final decision yet to be made it is not admissible in another action for plain reason that it has finally decided and settled nothing. Until judgment becomes so no man can know what ultimate decision will be.—*Estate of Blythe*, 99 Cal. 472, 476, 34 Pac. 108. See *Webb v. Buckelew*, 82 N. Y. 555, 560.

31. While judgment which has not become final can not be pleaded in bar of subsequent action pendency of action may be pleaded in abatement and may be sufficient basis for order dismissing action or good ground for continuing same until judgment becomes final.—*Brown v. Campbell*, 100 Cal. 635, 647, 38 Am. St. Rep. 314, 35 Pac. 433.

32. Jurisdiction exhausted by final judgment.—Jurisdiction of court over subject-matter of suit and parties is exhausted by entry of final judgment, unless preserved in some mode authorized by statute. Such judgment is conclusive not only to relief granted but as to relief denied or withheld and court is without jurisdiction to render any further judgment therein. After final judgment any further judgment or other proceeding materially involving judgment is mere nullity.—*White v. White*, 130 Cal. 597, 599, 80 Am. St. Rep. 150, 62 Pac. 1062.

33. Modification of judgment or supplemental decree changing property rights of parties in divorce suit can not be made after decree has become final and time for appeal has passed where no reservation of right to make same was made in decree, if such reservation could be made.—*O'Brien v. O'Brien*, 130 Cal. 409, 410, 62 Pac. 598.

See *Howell v. Howell*, 104 Cal. 45, 37 Pac. 770.

34. Motion for new trial—In absence of order of the court to that effect does not stay or sustain the operation of a final judgment, or affect dependency of an action as provided by this section.—*People v. Bank of San Luis Obispo*, 159 Cal. 65, 112 Pac. 866.

35. New trial—Pendency of motion for new trial, in absence of order of court to that effect, does not stay or suspend operation of final judgment in cause.—*Harris v. Barnhart*, 97 Cal. 546, 550, 32 Pac. 589.

36. Prohibition—Will lie to restrain further proceedings in an action to quiet title where the judgment is final, notwithstanding pending settlement of an unfinished account in connection therewith, where the latter is severable from further proceedings under action.—*Granger v. Superior Court*, 159 Cal. 5, 112 Pac. 854.

37. Satisfaction of judgment makes it final, though time for appeal has not expired, and where necessary to sustain judgment against injunction bond it will be presumed in absence of allegation or showing to contrary that judgment was satisfied.—*Alaska Imp. Co. v. Hirsch*, 119 Cal. 249, 258, 47 Pac. 124, 51 Pac. 340.

38. Satisfaction by execution—Not bar to appeal—This section can not be invoked to abridge right of appeal where judgment has been satisfied against will of appellant.—*Kenney v. Parks*, 120 Cal. 22, 24,

52 Pac. 40; *Vermont M. Co. v. Black*, 123 Cal. 21, 23, 55 Pac. 599; *Yndart v. Den*, 125 Cal. 85, 89, 57 Pac. 761.

39. Forced payment by execution-sale against non-consenting judgment-debtor can not be held such satisfaction of judgment as will abridge any right of appeal.—*Warner Bros. Co. v. Freud*, 131 Cal. 639, 646, 82 Am. St. Rep. 400, 63 Pac. 1017.

40. Settlement of guardian's account is a proceeding within meaning of this section and is pending until time allowed for appeal therein has expired.—*Cook v. Ceas*, 143 Cal. 221, 226, 77 Pac. 65.

41. Statute of limitations—Does not commence to run until judgment has become final, that is until time to appeal has elapsed if no appeal be taken, or until its final determination if appeal be taken.—*Feeney v. Hinckley*, 134 Cal. 467, 470, 88 Am. St. Rep. 290, 66 Pac. 580.

42. When judgment final—Until litigation on merits is ended there is no finality to judgment in sense of final determination of rights of parties, although it may have become final for purpose of appeal from it.—*Gillmore v. American C. L. Co.*, 65 Cal. 63, 2 Pac. 882; *Feeney v. Hinckley*, 134 Cal. 467, 468, 86 Am. St. Rep. 290, 66 Pac. 580.

43. Writ of assistance—Judgment as evidence—On application for writ of assistance judgment is admissible in evidence although appeal therefrom be pending.—*California M. & S. Co. v. Graves*, 129 Cal. 649, 650, 62 Pac. 259.

§ 1050. ACTIONS TO DETERMINE ADVERSE CLAIMS AND BY SURETIES.

An action may be brought by one person against another for the purpose of determining an adverse claim, which the latter makes against the former for money or property upon an alleged obligation; and also against two or more persons, for the purpose of compelling one to satisfy a debt due to the other, for which plaintiff is bound as a surety.

History: Enacted March 11, 1872, re-enactment of § 527 Practice Act.

ACTIONS TO DETERMINE ADVERSE CLAIMS—BY SURETIES.

I. DETERMINATION OF ADVERSE CLAIMS, 1-16.

II. ACTIONS BY SURETIES, 17-21.

I. DETERMINATION OF ADVERSE CLAIMS.

1. Adverse claim—Suit to determine.
2. Assignment of mortgage—Action to cancel and for recovery of money collected.
3. Burden of prosecuting action.
- 4, 5. Construction of section—In general.
6. County may maintain action.
7. Defendant not deprived of the right to bring action.
8. Forgeries—To determine liability for.
9. Heir may not sue—To get in or to preserve title.

10. Judgment contrary to complaint.
11. Jury trial should be allowed.
12. Same—Not in equity—Question of fraud.
13. Mortgage—To determine amount due.
14. Supplemental proceedings—Notice.
15. Validity of ordinance can not be tested.
16. Same—Commented upon and approved.

II. ACTIONS BY SURETIES.

17. Compelling creditor to sue—Strict compliance with decree.
18. Entire matter determined.
- 19, 20. Failure of creditor to sue when requested.
21. Subrogation—Surety on bond to release attachment.

I. DETERMINATION OF ADVERSE CLAIMS.

As to action of interpleader, see, ante, § 386 and note.

As to actions to determine conflicting claims to real property, see, ante, §§ 738 et seq. and notes.

As to intervention, see, ante, § 387 and note.

As to substitution as defendant of person making adverse or conflicting claim, see, ante, § 386 and note.

1. Adverse claim—Suit to determine.—In a case in which an action is brought against a bank and the executors of the will of a deceased person, to recover shares of stock in the bank, claimed to have been a gift from the decedent to the ward of the plaintiff, the complaint alleging that the executors claimed some right, title, or interest in the shares of bank stock which claim was entirely without right, does not state a cause of action against the executors under the provisions of the above section, authorizing an action by the above section, but it was, so far as the executors were concerned, more in the nature of, or appropriate to, an action to quiet title.—*Lamus v. Engwicht*, 39 Cal. App. 523, 179 Pac. 435.

2. Assignment of mortgage—Action to cancel and for recovery of money collected.—Where the specific object of a suit is to cancel two purported assignments of a note and mortgage, and for the recovery of the money collected by the assignees under such assignments, it is to be regarded as a suit under the provisions of the above section to determine an adverse claim for money or property upon an alleged obligation.—*Stoner v. Security Trust Co.*, — Cal. App. —, 190 Pac. 500, following the doctrine in *Hoffman v. Kirby*, 136 Cal. 26, 29, 68 Pac. 321.

3. Burden of prosecuting action.—Ordinary rule is that plaintiff is party charged with diligence in prosecuting action as issues are presented, and whenever issue of law or fact is presented duty of plaintiff is to diligently pursue action. But in action brought under this section by one person against another for purpose of determining adverse claim made by latter rule is modified, and burden is cast upon defendant to set forth and maintain his claim, and it might be said he would not come within reason of rule.—*Mowry v. Weisenborn*, 137 Cal. 110, 114, 69 Pac. 971.

4. Construction of section—In general.—This section provides for an action in the nature of a bill quia timet the object of which is to prevent a party from anticipated future probable injury to his rights or interests, as for example, when it is sought to cancel an instrument which creates at least a prima facie liability against the plaintiff or constitutes a cloud on his title to property or where a surety is fear-

ful of injury from neglect of his principal to pay the debt.—*Gagossian v. Arakellian*, 9 Cal. App. 571, 573, 99 Pac. 1113.

5. Under the provisions of this section one may maintain an action against another to determine an adverse claim upon an alleged obligation existing between them, but not upon an obligation or duty of a third party to one of them.—*Gagossian v. Arakellian*, 9 Cal. App. 571, 573, 99 Pac. 1113.

6. County may maintain an action against another county by virtue of provision of County Government Act that counties have power "to sue and be sued."—*County of Colusa v. County of Glenn*, 117 Cal. 434, 436, 49 Pac. 457.

7. Defendant not deprived of the right to bring action.—By bringing action to test claim made against him plaintiff can not deprive defendant of his right of action, for to do so would be to deprive him of remedies of attachment, arrest and bail, etc., either of which in proper case may be resorted to; and fact that plaintiff has given injunction bond does not alter this rule.—*King v. Hall & Huggins*, 5 Cal. 83, 84.

8. Forgery.—To determine liability for.—Bank which has paid checks claimed by depositor to be forgeries may maintain action to determine its liability therefor.—*German Sav. & L. Soc. v. Collins*, 145 Cal. 192, 193, 78 Pac. 637.

9. Heir may not sue—To get in or to preserve title to personal property in the absence of some default or fraud or refusal of the administrator.—See, post, § 1452 and note, and § 1581 and note.

10. Judgment contrary to complaint.—Judgment that plaintiff never became liable, and awarding him costs, can not be sustained where complaint alleges he became surety for payment of rent under lease, and prays amount due be ascertained, and that principal be compelled to pay same.—*McDougald v. Argonaut L. & D. Co.*, 117 Cal. 87, 92, 48 Pac. 1021.

11. Jury trial should be allowed, unless waived, in action to determine claim upon promissory note, where defendant by answer and counter-claim sets up note and prays judgment against plaintiff for amount due thereon.—*Taylor v. Ford*, 92 Cal. 419, 420, 23 Pac. 441.

12. Same—Not in equity—Question of fraud.—In action to determine adverse claim made by defendant, where defendant sets up promissory note and demands payment thereon, to which plaintiff replies that such note was procured by fraud, leaves action one purely statutory and equitable, in which jury trial can not be demanded as matter of right, although legal issues incidental to equitable issue must be determined in arriving at decision.—*Taylor v. Ford*, 3 Cal. Unrep. 297, 24 Pac. 942.

13. Mortgage—To determine amount due.—Where consideration for part of property

conveyed, portion of purchase-price of which was secured by mortgage, fails, mortgageor may, under this section, maintain action to determine amount due on mortgage, and in such case court may determine amount to which plaintiff is entitled and reduce note and mortgage accordingly.—*Hoffman v. Kirby*, 136 Cal. 26, 29, 68 Pac. 321.

14. Supplemental proceedings—Notice.—Conceding but not deciding extremely doubtful proposition that in proceeding supplementary to execution, judge, referee, or court may try and conclusively settle all adverse claims to property sought to be applied to satisfaction of judgment, all known adverse claimants should have opportunity to be heard, otherwise they will not be bound by any order made.—*Deering & Co. v. Richardson-Kimball Co.*, 109 Cal. 73, 83, 41 Pac. 801.

15. Validity of ordinance can not be tested.—Complaint alleging ordinance under which a tax is imposed to be void, and that claim under such ordinance is made upon plaintiff for payment of tax, and praying that such ordinance be declared void, can not be sustained under this section, as state and its political subdivisions can not be sued except as specially authorized by statute, and general language creating new remedy or prescribing procedure has never been held to authorize such actions.—*Whittaker v. County of Tuolumne*, 96 Cal. 100, 101, 30 Pac. 1016.

16. Same—Commented upon and approved in *County of Colusa v. County of Glenn*, 117 Cal. 434, 436, 49 Pac. 457.

As to general principles of suretyship, see *Kerr's Cyc. Civ. Code*, 2d ed., §§ 2831 et seq. and notes.

As to right of contribution between sureties, see, ante, § 709.

As to right of surety paying judgment to take assignment and enforce same, see, ante, § 675 and note.

II. ACTIONS BY SOCIETIES.

17. Compelling creditor to sue—Strict compliance with decree.—Where surety has brought suit and obtained decree compelling creditor to bring suit against principal debtor to enforce his demand upon certain terms, such as that he tender all costs and expenses of action, etc., he must specifically perform conditions imposed by decree in order to render it available as a bar in action by creditor against him, and where such decree imposes condition that surety tender creditor costs and expenses of suit, payment to sheriff and clerk of amount

sufficient to cover their costs and offer to furnish attorney to conduct litigation is not compliance with decree. If surety desire to select attorney he could accomplish his object by bringing suit under this section, and in that mode also accomplish his whole object by single action instead of subjecting himself and creditor to trouble and expense of litigating second suit. Whether such decree is sufficiently specific in its provisions to be valid may be doubted.—*Dane v. Corduan*, 24 Cal. 157, 165, 166, 85 Am. Dec. 53.

18. Entire matter determined.—In action by surety to have amount due creditor ascertained, and to compel principal to pay same, creditor may set up obligation and obtain judgment for amount due him. Plaintiff having brought suit and asked relief in court of equity, such court, where it has once obtained jurisdiction, will decide whole case and not permit litigation to be by piecemeal.—*McDougald v. Hulet*, 132 Cal. 154, 159, 64 Pac. 278.

19. Failure of creditor to sue when requested so to do by surety, does not operate to discharge surety from his liability.—*Dane v. Corduan*, 24 Cal. 157, 165, 85 Am. Dec. 53.

20. Weight both of authority and reason is decidedly in favor of proposition that failure of creditor to sue when requested by surety does not discharge surety from his liability, and there is no necessity for following contrary doctrine in this state for reason that this section furnishes to surety more ample remedy than he formerly had even in courts of equity, for he can himself bring suit against creditor and principal debtor and compel latter to pay debt. Action contemplated by this section was doubtless intended as substitute for proceeding in chancery to compel creditor to sue, and it may be doubted whether any other action by surety against creditor is allowed in our state.—*Dane v. Corduan*, 24 Cal. 157, 165, 85 Am. Dec. 53.

21. Subrogation—Surety on bond to release attachment.—Where, in action against principal and indorser of promissory note, principal gives bond to release attachment conditioned only for payment of judgment against principal, surety on such bond after paying judgment is subrogated to creditor's rights only as against his principal and can not proceed against indorser any more than principal himself could. Had bond been to pay any judgment that might be rendered against both principal and indorser of note rule would be different.—*March v. Barnet*, 121 Cal. 419, 422, 423, 66 Am. St. Rep. 44, 53 Pac. 933.

§ 1051. TESTIMONY, WHEN TO BE TAKEN BY THE CLERK. On the trial of an action in a court of record, if there is no shorthand reporter of the court in attendance, either party may require the clerk to take down the testimony in writing.

History: Enacted March 11, 1872.

**TESTIMONY—TAKEN BY CLERK
WHEN.**

- 1 Bill of exceptions—Testimony taken down by clerk.
2. Reference to testimony in statement.

1. **Bill of exceptions—Testimony taken down by clerk,** and his statement in respect to decision of court, can not take place of bill of exceptions or be used as record on appeal.—*Gunter v. Geary*, 1 Cal. 462, 464; *Pierce v. Minturn*, 1 Cal. 470, 471;

Castro's Executors v. Armesti, 14 Cal. 38, 39.

As to clerk's minutes forming no part of judgment-roll, see, ante, § 670 and note pars. 102, 106, 107.

2. **Reference to the testimony in statement.**—Statement of case need not contain evidence taken down by clerk with consent of party and placed on file and retained among papers in case. Reference thereto by which it is clearly identified is sufficient.—*Darst v. Rush*, 14 Cal. 81, 84.

§ 1052. THE CLERK MUST KEEP A REGISTER OF ACTIONS. The clerk must keep among the records of the court a register of actions. He must enter therein the title of the action, with brief notes under it, from time to time, of all papers filed and proceedings had therein.

History: Enacted March 11, 1872, re-enactment of § 528 Practice Act.

1. **Matters required to be set out in register** are those which form proper connection between pleadings and judgment and such that legislature has deemed proper

be evidenced by permanent memorandum thereof.—*Von Schmidt v. Widber*, 99 Cal. 511, 514, 515, 34 Pac. 109.

§ 1053. TWO OF THREE REFEREES, ETC., MAY DO ANY ACT. When there are three referees, or three arbitrators, all must meet, but two of them may do any act which might be done by all.

History: Enacted March 11, 1872, re-enactment of § 529 Practice Act.

As to majority of arbitrators determining question, see, post, § 1285.

As to references and trials by referees, see, ante, §§ 638 et. seq. and notes.

That majority may act where joint authority is given several persons, see, ante, § 15 and note.

That two of three appraisers may act, see, post, § 1477.

§ 1054. TIME WITHIN WHICH AN ACT IS TO BE DONE MAY BE EXTENDED BY THE COURT. When an act to be done, as provided in this code, relates to the pleadings in the action, or the undertakings to be filed, or the justifications of sureties, or the preparation of bills of exceptions, or of amendments thereto, or to the service of notices other than of appeal, the time allowed by this code, unless otherwise expressly provided, may be extended, upon good cause shown, by the judge of the superior court in and for the county in which the action is pending, or by the judge who presided at the trial of said action;

[Not to exceed thirty days.] but such extension shall not exceed thirty days, without the consent of the adverse party;

[Exception.] except that when it appears to the judge to whom said application is made, that the attorney of record for the party applying for said extension is actually engaged in attendance upon a session of the legislature of this state, as a member thereof; in which case it shall be the duty of said judge

to extend said time until said session of the legislature adjourns, and thirty days thereafter.

History: Enacted March 11, 1872, founded upon § 530 Practice Act as amended 1861, Stats. 1861, p. 591; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 344; March 9, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 7; March 1, 1889, Stats. and Amdts. 1889, p. 45; January 31, 1895, Stats. and Amdts. 1895, p. 11; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 182, held unconstitutional, see history, § 5 ante; amendment approved June 3, 1906, Stats. and Amdts. 1906, p. 9; April 24, 1915, Stats. and Amdts. 1915, p. 203. In effect August 8, 1915.

**EXTENSION OF TIME WITHIN WHICH
ACT TO BE DONE.**

1. Action to recover bail-money—Permission to withdraw answer and file another—Discretion of court.
2. Amended pleadings not affected.
3. Appeal—Dismissal—Extension must be shown.
4. Same—Notice of, excepted—Reason.
5. Same—Presumed time extended.
- 6, 7. Same—Undertaking on appeal.
- 8-10. Bill of exceptions—Time may be extended.
11. Same—Same—Must be secured within original time.
12. Certiorari—Order extending time reviewed.
13. Consent—Not given by failure to object to orders.
14. Same—To order—Limitation on.
15. Construction of order—Commencement of extension.
16. Same—Expiring on holiday.
17. Same—Filing motion for a new trial.
18. Same—Filing statement made before notice of intention given.
- 19-21. Same—Intermediate order expiring on Sunday.
- 22, 23. Same—From date of order.
24. Same—No time stated.
25. Same—Prepare statement is also to serve it.
26. Same—Successive orders.
- 27-29. Construction of section—In general.
30. Same—As to being made with other sections.
31. Same—Extent of.
32. Same—Limitation of section.
33. Same—Thirty days in addition to prescribed time.
34. Default—Consideration of void order on opening.
35. Same—Authority of clerk.
36. Denial of motion without prejudice.
37. Express provision being otherwise made.
38. Filing and serving of order.
39. Form of order—Written or entered in minutes.

40. Notice of intention to move new trial—What sufficient.
41. Fraction of a day—Is not to be considered.
- 42-45. Indefinite extension—Effect of generally.
46. Judge who tries cause should make order.
47. Justices' court—Not applicable to.
48. Lapse of time—Objection and answer.
49. Not waived—Practice—Proposed amendments.
50. Memorandum of costs—Time may be extended for.
51. New trial—Notice of intention to move for.
- 52, 53. Same—Statement on.
54. Notice and presentation of statement for settlement.
55. Notice of intention—Extending time to file, etc.
56. Peremptory provisions.
- 57, 58. Same—Time can not be extended.
59. Place where order made.
- 60, 61. Pleading, time of—Beyond thirty days.
62. Same—To file amended complaint after demurrer sustained.
63. Pro tanto—Order exceeding thirty days, good.
64. Publication of summons.
65. Recital in bill of exceptions—That notice of intention to move for new trial was filed.
66. Showing for order.
- 67, 68. Stipulation extending time—Does not prohibit order.
- 69-74. Time when order must be made.
75. Undertaking by nonresident plaintiff—Extension of time to give.

1. Action to recover bail-money—Permission to withdraw answer and file another—Discretion of court.—Where an action is brought against a justice of the peace to recover bail-money deposited by the plaintiff to secure the appearance of a third person at a preliminary hearing upon an accusation of crime, which money, after the discharge of the third person but prior to its return to the plaintiff, was levied upon by the sheriff under a writ of execution issued under a judgment in an action

against such discharged third person, after answer by the defendant and denial of plaintiff's motion for judgment on the pleadings it is within the discretion of the trial court to grant to defendant leave to withdraw his answer and to file another answer within five days, and to permit the answer on file to protect the defendant from default to a time when the order granting the five days in which to file another answer became operative and in effect.—*Israel v. Superior Court*, 43 Cal. App. 711, 185 Pac. 682.

2. Amended pleadings not affected.—Time to file amended pleading is not affected by this section, but is matter lying entirely in discretion of court, and there being no statutory provision forbidding it, court may therefore allow more than thirty days for filing such amended pleading.—*Vestal v. Young*, 147 Cal. 715, 720, 82 Pac. 381.

3. Appeal—Dismissal—Extension must be shown.—Appeal will be dismissed for failure to file transcript where it appears time allowed by law and thirty days additional which court might have granted have expired, and there is no showing of extension to counsel of time to prepare bill of exceptions.—*Smith v. Solomon*, 84 Cal. 537, 539, 24 Pac. 286.

As to time of taking appeal, see, ante, § 939 and note.

Same—Extension of time.—See, ante, § 473 and note.

4. Same—Notice of, excepted—Reason.—Reason for excepting notices of appeal from power to extend time doubtless was that to allow extension of time to file notice of appeal would be virtually to allow court power to extend time for taking appeal.—*Harper v. Minor*, 27 Cal. 107, 115.

5. Same—Presumed time extended.—On appeal it will be presumed that extension of time on motion for new trial was extended more than thirty days by consent of adverse party, where transcript fails to show any objection was made in court below upon ground that motion came too late.—*Patrick v. Morse*, 64 Cal. 462, 468, 2 Pac. 49.

6. Same—Undertaking on appeal.—Section 940, ante, providing that appeal is ineffectual for any purpose unless undertaking be filed within five days is subject to provision of this section; time for filing undertaking may be extended not exceeding thirty days.—*Wadsworth v. Wadsworth*, 74 Cal. 104, 105, 15 Pac. 447.

7. Time to file undertaking on appeal may be extended.—*Schloesser v. Owen*, 134 Cal. 546, 66 Pac. 726.

8. Bill of exceptions—Time may be extended.—Time to prepare bill of exceptions may be extended thirty days in addition to ten days allowed by section 659, ante.—*Moffat v. Cook*, 65 Cal. 236, 3 Pac. 805.

As to exceptions and bills of exceptions, see, ante, §§ 646 et seq. and notes.

9. The power of the court hereunder to grant such an extension is subject to the express prohibition of section 170, ante, that no disqualified judge shall do any judicial act except those enumerated, and the allowance of such an extension is not one so enumerated.—*Johnson v. German-American Ins. Co.*, 150 Cal. 338, 88 Pac. 985.

10. An order by a judge who is disqualified to act under section 170, ante, as it existed prior to the amendment of 1905, is held to be absolutely void, wherever brought in question.—*Johnson v. German-American Ins. Co.*, 150 Cal. 338, 88 Pac. 985.

11. Same—Same—Must be secured within original time.—An extension of time within which to procure and serve a bill of exceptions, permitted under the provisions of the above section, must be obtained within the period during which the original right is still alive.—*Howell v. Penderston*, 41 Cal. App. 45, 181 Pac. 674, following the doctrine in *Clarke v. Crane*, 57 Cal. 629; *Curtis v. Superior Court*, 70 Cal. 390, 11 Pac. 652; *Union Collection Co. v. Oliver*, 162 Cal. 755, 124 Pac. 435; *Oppenheimer v. Radke & Co.*, 165 Cal. 200, 131 Pac. 365.

12. Certiorari—Order extending time reviewed.—Orders attempting to extend time to plead more than thirty days are in excess of jurisdiction, and there being no plain, speedy, and adequate remedy, may be reviewed on certiorari.—*Gibson v. Superior Court*, 83 Cal. 643, 644, 24 Pac. 152; *Baker v. Superior Court*, 71 Cal. 583, 584, 12 Pac. 685.

As to computation of time, see, ante, § 12 and note.

13. Consent—Not given by failure to object to orders.—Adverse party can not be said to have consented to extension of time for more than thirty days because he failed to object to orders extending time, first of which was valid and second valid for remainder of thirty days court might allow, or by failure to return copy of statement served on him after time had expired and afterwards proposing amendments thereto, especially where he objected promptly by giving notice of motion to strike statement from files and that same should be disregarded because not prepared and filed in time.—*Bryan v. Maume*, 28 Cal. 238, 242.

14. Same—To order—Limitation on.—Consent of adverse party to one extension beyond thirty days does not confer upon court or judge power to make any further extension.—*Bunell v. Stockton*, 83 Cal. 319, 321, 23 Pac. 301.

15. Construction of order—Commencement of extension.—Order that time for defendants to give notice of intention to move for new trial and to serve bill of exceptions "is hereby extended thirty days," should be construed to extend time thirty days from end of ten days allowed by code,

no reference being made to date of order as point of time from which extension was to be computed, and judge who made order having so construed it in his ruling on motion.—*Emeric v. Alvarado*, 64 Cal. 529, 541, 2 Pac. 418.

16. Same—Expiring on holiday.—Stipulation extending time for one week, "ending Saturday, July 4," in which to answer, as both that day and day following were legal holidays, has effect of extending time to July 6, inclusive, and default entered on that day is premature.—*Crane v. Crane*, 121 Cal. 99, 100, 53 Pac. 433.

17. Same—File motion for a new trial.—Whether order granting time "within which to file motion for new trial" would extend time to give notice of intention to move or to prepare statement, or whether it would apply merely to last step in proceedings, actual making of motion, not decided.—*Jenkins v. Frink*, 27 Cal. 337, 340.

18. Same—Filing statement made before notice of intention given.—Order granting time to file statement on motion for new trial made before notice of intention is given must be construed to give time granted from date of giving notice.—*East-erby v. Larco*, 24 Cal. 179, 181.

19. Same—Intermediate order expiring on Sunday.—Where time is extended by several orders, last day of period of extension fixed by one being Sunday, that should be "excluded"; that is to say, it is not to be computed as any portion of the time granted by order, or of thirty days which may be granted, but is supplemental day super-added by law.—*Muir v. Galloway*, 61 Cal. 498, 506.

20. See *Reay v. Butler*, 99 Cal. 477, 480, 33 Pac. 1134, where it is held to be matter of very grave doubt whether *Muir v. Galloway*, supra, was correctly decided in so far as it holds superior court may by entry of two or more orders (first for any order or orders preceding last expiring on Sunday) extend period of time within which any of acts mentioned in this section may be performed for longer period than that authorized by section, if only one order of extension is made. Question not definitely passed upon may be regarded as open.—See *Frassl v. McDonald*, 122 Cal. 400, 55 Pac. 139 (post par. 20), affirming *Muir v. Galloway*, supra, notwithstanding doubts of *Reay v. Butler*, supra.

21. Where order extending time expires on Sunday, order further extending time made on following Monday is valid, as, had act for which time was extended been done on Monday, it would have been in time, and therefore court had power upon that day to further extend time; and although court had previously made two orders of ten days each extending time, third order, being made within life of second, court necessarily had power to make it extending time ten days further. Whatever time law gave by reason of fact that one of those orders ex-

pired upon Sunday does not pro tanto enhance power of court. If thirty days had been given in one order and had expired upon Sunday, act could have been done following day by favor of statute, and fact that time fixed by an intervening order fell upon Sunday does not alter case. Three orders of ten days each, by any process of mathematical calculation, can only be reckoned as extension of thirty days in all. Proposition has been passed upon in *Muir v. Galloway*, 61 Cal. 498, and that case is approved notwithstanding some doubt cast upon it in *Reay v. Butler*, 99 Cal. 477, 33 Pac. 1134.—*Frassl v. McDonald*, 122 Cal. 400, 402, 55 Pac. 139.

22. Same—From date of order.—Order extending time to give notice of intention to move for new trial must be construed to give such time from date of order, and from time of receiving notice of decision.—*East-erby v. Larco*, 24 Cal. 179, 181.

23. Construction of order that "defendants have twenty days within which to file motion for new trial herein" is that defendants have twenty days from date of order, and not twenty days from date of giving notice of intention to move, or twenty days beyond time allowed by statute.—*Jenkins v. Frink*, 27 Cal. 337, 339.

24. Same—No time stated.—Order granting extension of time until after decision of motion, but not specifying what amount of time, must be held to grant such time as judge might fix when motion ruled upon, or reasonable time; which, in case of extension until after ruling on motion to strike out complaint, would by analogy, be statutory time allowed for answering, and default entered immediately after denial of such motion is unauthorized.—*Willson v. Cleaveland*, 30 Cal. 192, 199.

25. Same—Prepare statement is also to serve it.—Order extending time to prepare statement on motion for new trial carries with it same extension to serve statement.—*Bryant v. Sternfeld*, 89 Cal. 611, 612, 26 Pac. 1091.

26. Same—Successive orders.—Verdict rendered September 3, notice of intention to move for a new trial filed September 10, bill of exceptions October 29; September 4 court extended time within which to prepare and serve bill of exceptions thirty days, and October 4 made like extension for thirty days further, each *ex parte* and without consent of opposite party; order of September 4 should be construed as granting thirty days in addition to ten days allowed for preparing bill of exceptions on judgment, and exhausted power of court to extend time for that purpose. Notice of intention to move for new trial stated it would be made upon bill of exceptions to be settled and filed, and party thereto had ten days from service of such notice within which to prepare and serve such bill; this time might have been extended thirty days, but was not, party relying upon order of

October 4; but even conceding this would operate as extension of thirty days beyond time he was entitled to after service of his notice of intention, it expired, and power of court to extend time was exhausted before his bill was served.—*Cameron v. Arcata & M. R. R. Co.*, 129 Cal. 279, 280, 61 Pac. 955.

27. Construction of section—In general.—Construction of section that court is only prohibited from granting extension of more than thirty days at any one time, but may make several extensions of thirty days each, is in direct violation of language of section and of construction thereof by supreme court.—*Cameron v. Arcata & M. R. R. Co.*, 129 Cal. 279, 281, 61 Pac. 955.

28. The court is hereby given power to extend the time for proposing a statement for a period of thirty days. The court can not by its own rule divest itself of this power. In the absence of any showing to the contrary, it will be presumed on appeal, that the court disregarded its rule, for sufficient cause and to subserve the ends of justice, as it has the power to do.—*Connell v. Higgins*, 170 Cal. 541, 150 Pac. 769.

29. An order extending the time for the service of a bill of exceptions which is within the limitations of this section is not invalid, because in conflict with a rule of court providing that the time could not be extended for a period, which including the time covered by stipulation, would exceed thirty days.—*Lantz v. Cole*, 172 Cal. 245, 156 Pac. 45.

30. Same—As to being made with other sections.—Provision of section 650, ante, that draft of bill of exceptions may be prepared and served within ten days after entry of judgment, "or such further time as court in which action is pending or judge thereof may allow," does not authorize court to grant an indefinite extension, but must be read in connection with restriction upon amount of time which may be allowed by court found in this section.—*Cameron v. Arcata & M. R. R. Co.*, 129 Cal. 279, 282, 61 Pac. 955.

31. Same—Extent of.—Limitations upon power to extend time contained in this section applies only to cases therein enumerated, among which filing of affidavits on motion for new trial is not included, and therefore power to extend time in such cases is found in subdivision 1 of section 659, ante, and extension for more than thirty days may be granted.—*Oberlander v. Fixen & Co.*, 129 Cal. 690, 691, 62 Pac. 254.

32. Same—Limitation of section.—This section is limited by its terms to cases where time is allowed by some provision of code for doing of some act, and is designed to enable court or judge to grant time additional to that allowed by code, upon good cause shown.—*Vestal v. Young*, 147 Cal. 715, 720, 82 Pac. 381.

33. Same—Thirty days in addition to prescribed time.—Where the code allows

twenty days for preparation of statement, party preparing such can not have more than fifty days without consent of adverse party; that is, twenty days allowed and thirty days for which court might extend time under this section.—*Bryan v. Maume*, 28 Cal. 238, 241.

34. Default—Consideration of void order on opening.—That defendant relied upon order extending time to plead which was in excess of jurisdiction of court is important fact to be considered on motion to open default.—*Kennedy v. Mulligan*, 136 Cal. 556, 557, 69 Pac. 291.

35. Same—Authority of clerk.—Clerk has no authority to enter default except in cases where defendant has failed to appear within the time specified within summons, or within such further time as may have been granted by court.—*Kennedy v. Mulligan*, 136 Cal. 556, 557, 69 Pac. 291.

36. Denial of motion without prejudice to renewal before court to which action is transferred does not operate to extend time within which motion is required to be made.—*Wallace v. Lewis*, 9 Mont. 399, 403, 24 Pac. 22.

37. Express provision being otherwise made.—This section does not apply where express provision is made in section treating of particular subject, as where section regarding preparing statement on motion for new trial provided that no extension for longer period than twenty days should be made.—*Cottle v. Leitch*, 43 Cal. 320, 322.

38. Filing and service of order.—Correct practice is to file or serve order extending time, but no express provision of law requires it, and where default is entered before expiration of time as extended it should be opened upon payment of costs.—*Swift v. Canovan*, 47 Cal. 86.

39. Form of order—Written or entered in minutes.—Order extending time fixed by the statute should in all cases be in writing and either entered in minutes of court or signed by judge and filed with papers in case within time prescribed. To hold verbal promise of judge to cause order to be entered, or verbal request for order verbally granted by judge sufficient to extend time, would lead to great confusion and needless controversies.—*Campbell v. Jones*, 41 Cal. 515, 518.

40. Notice of intention to move new trial—What sufficient.—"Order extending time" for preparing and filing "motion for new trial" extends time to give notice of intention to move for such new trial.—*Cottle v. Leitch*, 43 Cal. 320, 321.

41. Fraction of a day—Is not to be considered in computing time from one day to another, but only when time of successive acts performed on same day is material.—*Scoville v. Anderson*, 131 Cal. 590, 594, 63 Pac. 1013.

42. Indefinite extension—Effect of generally.—Extension of time to plead for cer-

tain time after receipt of remittitur in another case is void and beyond power of court to any extent beyond thirty days permitted by this section.—*Baker v. Superior Court*, 71 Cal. 583, 584, 12 Pac. 685.

As to extension of time, see, ante, § 473 and note.

43. Extension of time to plead one day after decision of motion to set aside service of summons and dismiss action is void as to any period of time it purports to allow after expiration of thirty days in addition to time allowed by law.—*Kennedy v. Mulligan*, 136 Cal. 556, 557, 69 Pac. 291.

44. Extension of time to plead for certain number of days after decision of pending motion to dismiss is void as to any period of time beyond thirty days (*Thorn-ton, J., dis. op.*).—*Gibson v. Superior Court*, 83 Cal. 643, 644, 24 Pac. 152.

45. Order extending time one day beyond decision upon motion to dismiss may be attempted extension of time beyond statutory thirty days allowed, and, if so, is void.—*Kennedy v. Mulligan*, 136 Cal. 556, 557, 69 Pac. 291.

46. Judge who tries cause should make order extending time for statement or bill of exceptions on motion for new trial.—*Matthews v. Superior Court*, 68 Cal. 638, 641, 10 Pac. 128.

47. Justices' court.—Not applicable to.—Section has no application to acts required to be done in justices' court to perfect appeal to superior court. Hence, order by superior court extending time for justification of sureties on undertaking on appeal filed in justices' court is void.—*McCracken v. Superior Court*, 86 Cal. 74, 76, 24 Pac. 845.

48. Lapse of time.—Objection and answer.—If party objecting to settlement to bill of exceptions relies upon lapse of period limited by statute it becomes duty of other party, in answer to objection, to incorporate in bill any matter to excuse apparent delay.—*Wheeler v. Karnes*, 125 Cal. 51, 53, 57 Pac. 893.

49. Not waived — Practice — Proposed amendments to statement on motion for new trial served too late will not operate as consent to void extension of time if objection be at same time expressly reserved. Proper practice is to reserve such objection rather than to move to strike statement from files.—*Cottle v. Leitch*, 43 Cal. 320, 322.

50. Memorandum of costs.—Time may be extended for.—Service and filing of memorandum of costs is fairly within proper construction of this section, being substantially "a notice other than of appeal."—*Beilby v. Superior Court*, 138 Cal. 51, 52, 70 Pac. 1024.

51. New trial.—Notice of intention to move for new trial is included within notices provided for in this section, and court may, before expiration of ten days allowed by statute, extend time for serving and filing notice for period not to exceed thirty days (overruling *Hook v. Hall*, 2 Cal. Un-

rep. 459, 6 Pac. 422; *Girdner v. Beswick*, 2 Cal. Unrep. 535, 8 Pac. 11; *Brichman v. Ross*, 67 Cal. 601, 8 Pac. 316).—*Burton v. Todd*, 68 Cal. 485, 488, 9 Pac. 663.

As to extension of time to give notice of intention to move for new trial, see par. 55, this note.

52. Same.—Statement on.—Time to prepare and serve statement on motion for new trial may be extended by court or judge, but not longer than thirty days without consent of adverse party, and any extension beyond that time is void, as power of court or judge is exhausted by thirty-day extension.—*Bunnel v. Stockton*, 83 Cal. 319, 320, 23 Pac. 301.

53. Time for preparing statement on motion for new trial may be extended not to exceed thirty days without consent of adverse party, but any extension for greater period gives no right to moving party.—*Freese v. Freese*, 134 Cal. 48, 49, 66 Pac. 43.

54. Notice and presentation of statement for settlement.—The power of the court to grant an extension of time is not affected by the fact that at the time the order granting the extension was made the moving party had allowed so much time to lapse of the original ten days allowed by law without giving the five days' notice prescribed that such notice could not have been given if such extension had not been granted.—*Douglas v. Southern Pac. Co.*, 151 Cal. 245, 90 Pac. 538.

55. Notice of intention.—Extending time to file, etc.—An appeal from an order denying a motion for a new trial will not be dismissed on the ground that the notice of intention was not filed and served within the statutory time, where it appears that within the said statutory time the court extended the time within which the notice might be given, and such notice was given within the time so extended.—*Estate of Richards*, 154 Cal. 478, 98 Pac. 528.

See, also, par. 51, this note.

56. Peremptory provisions.—Statute providing that act must be done within certain time or such extension thereof as court may grant is peremptory, and if act be not done within such time, right to do it is waived.—*Easterby v. Larco*, 24 Cal. 179, 182.

57. Same.—Time can not be extended.—When statute fixes time within which act must be done, courts have not power to enlarge it, although it relates to mere matter of practice; thus, where statute declares judge at chambers may grant new trial if application be made within ten days after judgment, order granting application made on eleventh day is void, for court can no more enlarge time than it can legislate in any other matter.—*Roush v. Van Hagen*, 17 Cal. 121, 122.

58. Where section regarding preparation of statements on motion for new trial expressly provided that party has an absolute right to prepare and serve such statements

within five days after notice of decision, and then adds "or within such further time not exceeding twenty days as court or judge thereof may by order grant," etc., court can not extend time for further period, as limitation in section relating exclusively to certain subject must prevail rather than general provision.—*Harper v. Minor*, 27 Cal. 107, 114.

59. Place where order made.—Order extending time need not be made in court, and may be made by judge in any part of state.—*Matthews v. Superior Court*, 63 Cal. 638, 641, 10 Pac. 128.

60. Pleading, time of—Beyond thirty days.—Extension of time to demur, move, or plead, beyond thirty days with consent, is in excess of the jurisdiction of the court and void under above section, and the decisions of the supreme court.—*Vrooman v. Superior Court*, 149 Cal. 266, 268, 86 Pac. 649, citing *Baker v. Superior Court*, 71 Cal. 583, 12 Pac. 685; *Gibson v. Superior Court*, 83 Cal. 643, 24 Pac. 152, and *Kennedy v. Mulligan*, 136 Cal. 556, 69 Pac. 291.

61. But in the case at bar, where the order of extension was sought to be vacated on February 2, 1906, there was a stipulation granting defendants until February 15, 1906, to answer, and it was a proper exercise of the jurisdiction of the trial court to determine whether the stipulation was a sufficient expression of plaintiff's consent to such extension, or not, and its determination of that question will not be reviewed upon certiorari.—*Vrooman v. Superior Court*, 149 Cal. 268, 86 Pac. 694.

62. Same—To file amended complaint after demurrer sustained.—This section is not applicable, nor is there any statutory provision limiting the time the trial court may give a pleader under the same circumstances.—*Vestal v. Young*, 147 Cal. 719, 82 Pac. 381.

63. Pro tanto—Order exceeding thirty days, good.—Where order is made granting more than thirty days permitted, it is good as to thirty days.—*Bryan v. Maume*, 28 Cal. 238, 242.

64. Publication of summons is not an act which is to be done within meaning of this section.—*Savings & L. Soc. v. Thompson*, 32 Cal. 347, 350.

65. Recital in bill of exceptions—That notice of intention to move for new trial was filed "within time allowed by law" is but legal conclusion, and is overcome by fact that date of such filing is itself given in bill of exceptions.—*Reclamation Dist. v. Thibby*, 131 Cal. 572, 575, 63 Pac. 918.

66. Showing for order.—Application for extension of time to prepare affidavits on motion for new trial should show substantially what it is intended affidavits shall contain; misconduct of jury; nature of newly discovered evidence, etc.—*People v. Winthrop*, 118 Cal. 85, 92, 50 Pac. 390.

67. Stipulation extending time—Does not prohibit order further extending time under

provisions of this section.—*Curtis v. Superior Court*, 70 Cal. 390, 391, 11 Pac. 652.

68. Extension of time by stipulation does not preclude court granting thirty days' extension after expiration of time granted by stipulation.—*Reclamation Dist. v. Hamilton*, 112 Cal. 603, 609, 44 Pac. 1074.

69. Time when order must be made.—Extension of time must be made within period allowed for doing of act, and while right to do it is still alive. After right is gone giving further time could not be called an extension of time but would be in effect reviving right which no longer existed; when such order is given there is no period of time to extend, and court has no further jurisdiction in matter.—*Clark v. Crane*, 57 Cal. 629, 632.

70. Order extending time must be made within period in which act might be done or it is void, as upon expiration of that time right is lost and court has no further jurisdiction in matter.—*Emeric v. Alvarado*, 64 Cal. 529, 541, 2 Pac. 418.

71. Extension of time must be made before party seeking same is in default. If he permits time within which he may act to elapse without acting, any subsequent order giving him time to act will not avail to revive his right.—*Freese v. Freese*, 134 Cal. 48, 49, 66 Pac. 43.

72. Order granting extension of time after expiration of statutory period within which act might have been done is void, and confers no authority for doing act.—In matter of *Clary*, 112 Cal. 292, 295, 44 Pac. 569.

73. After expiration of statutory time within which act must be done order purporting to extend such time is void, and ineffectual.—*Estate of Clary*, 112 Cal. 292, 295, 44 Pac. 569.

74. If statute absolutely fixes time within which act must be done it is peremptory. The act can not be done at any other time unless during prescribed time it has been extended by order made for that purpose under authority of law.—*Connor v. Southern California M. R. Co.*, 101 Cal. 429, 431, 35 Pac. 990. See *Tregambo v. Comanche M. & Min. Co.*, 57 Cal. 501, 503; *Wills v. Rhen Kong*, 70 Cal. 548, 11 Pac. 780.

As to extension of time to file inventory of estate of deceased person, see, post, § 1450 and note.

75. Undertaking by nonresident plaintiff—Extension of time to give.—Under the provisions of the above section the trial court has power to extend the time in which to file the bond for costs required of nonresidents and foreign corporations by the provisions of section 1036, ante, and where the bond is thereafter filed within the extended time, the action will not be dismissed.—*Hertz v. Superior Court*, 35 Cal. App. 83, 169 Pac. 258, approving the doctrine in *Kissler v. Budge*, 24 Idaho 246, 133 Pac. 125, and *Sciutti v. Pacific Coal Co.*, 30 Utah 462, 8 Ann. Cas. 942, 85 Pac. 1011.

§ 1055. ACTIONS AGAINST SHERIFF FOR OFFICIAL ACTS. If an action is brought against any officer or person for an act for the doing of which he had theretofore received any valid bond or covenant of indemnity, and he [1] gives seasonable notice thereof in writing to the persons who executed such bond or covenant, and [2] permits them to conduct the defense of such action, the

Judgment recovered therein is conclusive evidence against the persons so notified; and the court may, on motion of the defendant, upon notice of five days, and upon proof of such bond or covenant, and of such notice and permission, enter judgment against them for the amount so recovered and costs.

History: Enacted March 11, 1872, re-enactment of § 645 Practice Act; amendment approved April 15, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 73; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 182, held unconstitutional, see history, § 5 ante; amendment approved March 15, 1907, Stats. and Amdts. 1907, p. 309, Kerr's Stats. and Amdts. 1906-7, p. 475.

ACTIONS AGAINST SHERIFF ON OFFICIAL ACTS.

1. Character of notice required.
2. Construction of section—Several judgments against sureties.
3. Equitable action by surety to set aside judgment.
4. Nature of proceeding — Jurisdictional amount.
5. Pleading—Evidence—Burden of proof.
6. Principle of rule.
7. Strict compliance.

1. Character of notice required.—Full notice to indemnifier of pendency of suit, what he is required to do, and consequence which may follow if he neglect to defend action, should be given. Some knowledge or information of existence of such action is entirely insufficient to bind party by judgment. Unless party to action notifies indemnifier that he expects him to defend action or to furnish testimony, or do some other act, he may well suppose that party is well prepared to defend it, has all evidence necessary, and needs no assistance from him to defend his title or assert his rights. He may well rely upon that supposition, for if party desires his aid or assistance it is his duty to give him full notice, a reasonable time before trial to enable him to prepare for it.—*Sampson v. Ohleyer*, 22 Cal. 200, 209.

2. Construction of section—Several judgments against sureties.—Where undertaking is by several sureties justifying in different amounts several judgments against them may be entered under this section in accordance with terms of bond. Section does not necessarily require judgment provided for shall be joint when obligation of sureties is several, and they become liable for different amounts, or that judgment to be entered shall not be for less amount than one recovered against sheriff obligee, if sureties have not bound themselves for so great sum. Section should be construed as

authorizing entry of judgment against sureties for amount named in bond and for which each has become liable, but not to exceed amount of judgment recovered against sheriff, including costs of action.—*Moore v. McSleeper*, 102 Cal. 277, 280, 281, 36 Pac. 593.

3. Equitable action by surety to set aside judgment.—Surety is concluded by judgment against sheriff where upon notice he takes charge of defense and by his own attorney defends action from commencement. In such action any alleged fraud in sale of property over which controversy originated may be litigated, and therefore action in equity by surety to set aside judgment for such fraud will not lie.—*Dutil v. Pacheco*, 21 Cal. 438, 442, 82 Am. Dec. 749.

4. Nature of proceeding—Jurisdictional amount.—Proceeding is not independent action but simply supplemental motion for judgment against sureties in action in which superior court has jurisdiction, and in which it has already proceeded to judgment against nominal defendant. Remedy is allowed upon theory that indemnifiers are real parties defendant when sheriff is sued for official act for which they have indemnified him, and that when they have notice of pendency of such action judgment against sheriff is conclusive of his right to recover against them, and this being so, statute permits sheriff to have judgment entered against them at once upon motion in that action, without expense and delay of prosecuting action upon bond of indemnity, and therefore judgment may be entered against several indemnifiers for amounts less than three hundred dollars where such amounts are limit of their liability.—*Moore v. McSleeper*, 102 Cal. 277, 282, 36 Pac. 593, approved in *Sullivan v. California R. Co.*, 142 Cal. 201, 207, 75 Pac. 767.

5. Pleading — Evidence — Burden of proof.—Payment or satisfaction of judgment need not be alleged by sheriff. Re-

covery of judgment against him is sufficient showing for prima facie case against sureties and burden is upon them to show judgment has been satisfied by themselves or by return of property sued for or that property with which to satisfy it was, or ought to have been, still in possession of sheriff. —Moore v. McSleeper, 102 Cal. 277, 282, 36 Pac. 593.

6. Principle of rule.—Provision making judgment conclusive evidence against indemnifier when notified of action is founded upon principle that under such circum-

stances action is in substance against indemnifier—real party in interest—and that he has in that action opportunity to make any defense that may exist.—Dutil v. Pacheco, 21 Cal. 438, 442, 82 Am. Dec. 749.

7. Strict compliance with terms of section is necessary before sheriff can avail himself of summary remedy provided, and it must appear that he gave sureties written notice of action or he can not avail himself of such remedy but is left to his action on indemnity bond.—Dennis v. Packard, 28 Cal. 101, 102.

§ 1056. CORPORATIONS MAY BECOME SURETIES ON UNDERTAKINGS AND BONDS. In all cases where an undertaking or bond, with any number of sureties, is authorized or required by any provision of this code, or of any law of this state, any corporation with a paid-up capital of not less than one hundred thousand dollars, incorporated under the laws of this or any other state of the United States for the purpose of making, guaranteeing, or becoming a surety upon bonds or undertakings required or authorized by law, or which, by the laws of the state where it was originally incorporated has such power, and which shall have complied with all the requirements of the law of this state regulating the formation or admission of these corporations to transact such business in this state, may become and shall be accepted as security or as sole and sufficient surety upon such undertaking or bond, and such corporate surety shall be subject to all the liabilities and entitled to all the rights of natural persons' sureties;

[**Examination by insurance commissioner—Making up deficiency.**] Provided, that the insurance commissioner shall have the same jurisdiction and powers to examine the affairs of such corporations as he has in other cases; shall require them to file similar statements and issue to them a similar certificate. And whenever the liabilities of any such corporation shall exceed its assets, the insurance commissioner shall require the deficiency to be paid up in sixty days, and if it is not so paid up, then he shall issue a certificate showing the extent of such deficiency, and he shall publish the same once a week for three weeks, in a daily San Francisco paper. And, until such deficiency is paid up, such company shall not do business in this state. In estimating the condition of any such company, the commissioner shall allow as assets only such as are allowed under existing laws at the time, and shall charge as liabilities, in addition of eighty per cent of the capital stock, all outstanding indebtedness of the company, and a premium reserve equal to fifty per centum of the premiums charged by said company on all risks then in force.

History: Original section enacted March 11, 1872, re-enactment of § 646 Practice Act as amended 1857 (Stats. 1857, p. 29); repeal approved April 16, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 111; enactment of present section approved March 16, 1889, Stats. and Amdts. 1889, p. 215. A codification of Stats. 1885, p. 114.

CORPORATION AS SURETY ON UNDERTAKING.

1. Amount paid as premium for replevin bond.

2. Construction of the section.
3. Execution of bond—Presumption of authority.
4. Exception to sufficiency of corporation surety.

5. Filing designation of agent.
 6, 7. Nonresident plaintiff—Security for costs
 —Undertaking by qualified corporation.

As to corporations becoming surety on bonds and undertakings in probate matters, see, post, § 1348.

1. Amount paid as premium for replevin bond procured pendente lite by a plaintiff ultimately successful is not recoverable as costs.—*Williams v. Atchison, T. & S. F. R. Co.*, 156 Cal. 140, 103 Pac. 885.

2. Construction of section.—Proper construction of section is not that corporation of character therein defined must be accepted as sole and sufficient surety upon any undertaking, no matter what disparity between amount of undertaking and amount of corporation's assets. Provision that any such corporation with capital stock of one hundred thousand dollars "may become and shall be accepted as," etc., must be allowed some operation, but should not be given sweeping force to allow such corporation to be sole sureties on bond, amount of which far exceeds all its assets. The object of law was not only to enable corporations of class designated to be co-sureties upon undertakings required in legal proceedings, but to make sole undertaking of such corporation equivalent to joint undertaking of two or more natural persons. To accomplish that object use of language quoted or something equivalent was necessary, and words chosen are as apt for purpose as any that could be suggested. Their only fault being that, taken literally, they seem to mean something more, viz., that such corporation is not only sufficient as surety, but also sufficient as surety for any amount, no matter how much greater such amount may be than value of its assets. Such construction would defeat general policy of act, which is to provide ample security for money judgments in order to stay proceedings for their enforcement pending appeals, and it is not to be supposed that legislature intended to discharge security of judgment with lien, etc., incident thereto, without providing an equivalent where corporation becomes surety upon stay-bond any more than in case where sureties are natural persons. True construction of section is that such corporations must show their financial ability and have assets in excess of their liabilities of sufficient amount to enable them to justify on an

undertaking same as would natural persons.—*Fox v. Hale & Norcross S. M. Co.*, 97 Cal. 353, 355, 358, 32 Pac. 446.

3. Execution of bond.—Presumption of authority.—Undertaking signed in behalf of corporation surety by its second vice-president and assistant secretary, and having affixed seal of corporation, can not be held void because not properly signed, in absence of anything to show such officers were not authorized.—*Gutzeit v. Pennie*, 95 Cal. 598, 599, 30 Pac. 836.

4. Exception to sufficiency of corporation surety executing undertaking in pursuance of section 942, ante, may be taken in pursuance of section 948, ante, with exactly same effect as if undertaking had been executed by natural persons. In response to such exception corporation must justify upon notice, and in addition to facts which qualify it for business, must, like natural persons, show surplus assets equal to amount of undertaking.—*Fox v. Hale & Norcross S. M. Co.*, 97 Cal. 353, 359, 32 Pac. 446.

5. Filing designation of agent upon whom process may be served with insurance commissioner, as provided in section 616, ante, is all that is necessary to enable corporation to become surety on bond under this section so far as naming agent upon whom process may be served, and certificate of commissioner is at least prima facie evidence that such corporation has complied with section 616, ante, under presumption that commissioner has properly performed his official duty in issuing certificate.—*Gutzeit v. Pennie*, 95 Cal. 598, 599, 600, 30 Pac. 836.

6. Nonresident plaintiff—Security for costs—Undertaking by qualified corporation.—Under the provisions of the above section requiring security for costs by a nonresident plaintiff or foreign corporation, on demand therefor, and a stay of proceedings for failure to give such security, an undertaking by a qualified surety corporation is sufficient.—*Carter v. Superior Court*, 176 Cal. 752, 169 Pac. 667.

7. In a case in which the security for costs required is given by a surety corporation, the qualifications of such corporation need not appear on the face of the undertaking; it is sufficient if the corporation be in fact qualified as required by law.—*Carter v. Superior Court*, 176 Cal. 752, 169 Pac. 667.

§ 1057. UNDERTAKINGS MENTIONED IN THIS CODE, REQUISITES OF. In any case where an undertaking or bond is authorized or required by any law of this state, the officer taking the same must, except in the case of such a corporation as is mentioned in the next preceding section, require the sureties to accompany it with an affidavit that they are each residents and householders, or freeholders, within the state, and are each worth the sum specified in the undertaking or bond, over and above all their just debts and liabilities, exclusive of property exempt from execution; but when

the amount specified in the undertaking or bond exceeds three thousand dollars, and there are more than two sureties thereon, they may state in their affidavits that they are severally worth amounts less than the amount specified in the undertaking or bond, if the whole amount is equivalent to that of two sufficient sureties.

Any corporation such as is mentioned in the next preceding section, may become sole surety on such bond. No such corporation must be accepted in any case as a surety when its liabilities exceed its assets as ascertained in the manner provided in section ten hundred and fifty-six.

[**New undertaking ordered when—Failure to give, etc.**] Whenever an undertaking has been given and approved in any action or proceeding, and it is thereafter made to appear to the satisfaction of the court that any surety upon such undertaking has for any reason become insufficient, the court may, upon notice, order the giving of a new undertaking, with sufficient sureties, in lieu of such insufficient undertaking. In case such new undertaking so required shall not be given within the time required by such order, or in case the sureties thereon fail to justify thereon when required, all rights obtained by the filing of such original undertaking shall immediately cease.

History: Enacted March 11, 1872, substantial re-enactment of § 650 Practice Act as amended 1854 (Stats. 1854, p. 84); amendment approved March 16, 1889, Stats and Amdts. 1889, p. 216; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 183, held unconstitutional, see history, § 5 ante; amendment approved March 15, 1907, Stats. and Amdts. 1907, p. 308, Kerr's Stats. and Amdts. 1906-7, p. 475.

UNDERTAKINGS—REQUISITES OF.

1. Affidavit essential.
2. Same—Affidavit of sureties—No part of.
3. Corporations—Construction of section.
4. Defect in affidavit—How cured.
5. Form of undertaking.
6. Freeholders or householders — Defective affidavit.
7. Prima facie justification.
8. Sureties can not object to absence of affidavit.

As to justification of sureties in general, see, ante, §§ 493, 494, 513, 555, 559 and notes.

As to property exempt from execution, see, ante, § 690 and notes.

As to undertaking, etc., in condemnation proceedings, see, post, §§ 1254 et seq. and notes.

1. **Affidavit essential.**—Omission from affidavit of statement that sureties are householders or freeholders is omission of very material part, and by such omission entire affidavit goes for naught, and as undertaking without any affidavit of sureties would not support writ of attachment, writ issued upon undertaking unaccompanied by affidavit, as required by this section, is irregularly and improperly issued and should be discharged upon application.—*Tibbett v. Tom Sue*, 122 Cal. 206, 208, 54 Pac. 741.

As to affidavit where corporation security, see par. 2, this note.

As to defective affidavit, see pars. 4, 6, this note.

2. **Same—Affidavit of sureties—No part of.**—The affidavit of sureties constitutes no part of the contract of the sureties.—*Rauer's Law & Coll. Co. v. Superior Court*, 169 Cal. 296, 146 Pac. 866.

As to sureties not permitted to object to absence of affidavit, see par. 8, this note.

3. **Corporations—Construction of section.**—By this section corporations are merely exempted from annexing to their undertakings usual affidavit required of natural persons as regards being householders, freeholders, as to their ability to pay, etc.; a full equivalent for affidavit ordinarily required being supplied by insurance commissioner's certificate. But second clause of section seems to imply that undertaking will be accompanied by affidavit showing liabilities do not exceed assets computed according to rule of statute, in which case it is incapable of becoming surety or co-surety for any amount whatever. But it does not necessarily imply that so long as assets of corporation are equal to its liabilities it may become surety for any amount in excess of such assets. All that is necessarily implied is that corporation may go on doing business, i. e., executing bonds in such amount as other provisions of statute authorize.—*Fox v. Hale & Norcross S. M. Co.*, 97 Cal. 353, 358, 32 Pac. 446.

4. **Defect in affidavit—How cured.**—Objection or exception to sufficiency of under-

taking, e. g., that affidavit fails to state sureties are freeholders, or householders, should be met by filing new undertaking in supreme court as provided by section 954, ante, and such objection does not require justification of sureties.—*Schacht v. Odell*, 52 Cal. 447, 449.

See par. 6, this note.

5. Form of undertaking.—Undertakings need not be in precise conformity with the statutory rules.—*Hammond v. United States Fidelity & Guaranty Co.*, 29 Cal. App. 464, 145 Pac. 1023.

6. Freeholders or householders—Defective affidavit.—An affidavit of a stay-bond which fails to state that the sureties were freeholders or householders is defective, and the bond thereby rendered invalid.—*Maze v. Langford*, 16 Cal. App. 745, 117 Pac. 929.

As to affidavit, see pars. 1, 2, 8, this note.

As to defective affidavit, see par. 4, this note.

7. Prima facie justification of sureties is established by affidavit required by this section, and where no counter showing is made against sufficiency of sureties justification will be deemed complete.—*Bank of Escondido v. Superior Court*, 106 Cal. 43, 46, 39 Pac. 211.

8. Sureties can not object to absence of affidavit.—Requirement that sureties shall justify by affidavit is intended solely for protection of obligee, and it does not lie in mouth of sureties to object to sufficiency of bond because of their failure to comply with this provision of law.—*Carpenter v. Furrey*, 128 Cal. 665, 669, 61 Pac. 369.

§ 1057a. JUSTIFICATION BY CORPORATION SURETY ON BONDS.

Whenever the surety on a bond or undertaking authorized or required by any law of this state is a corporation of the state or a foreign corporation, authorized to become surety on bonds or undertakings in the state, and exception is taken to the sufficiency of such surety as required by law, such corporate surety may justify on such bond or undertaking as follows:

[Procedure.] Any agent, attorney in fact, or officer of such corporation shall submit to the court, judge, officer, board or other person before whom the justification is to be made:

First—The original, or a certified copy of, the power of attorney, by-laws or other instrument showing the authority of the person or persons who executed the bond or undertaking to execute the same;

Second—A certified copy of the certificate of authority issued by the insurance commissioner as required by section 596 of the Political Code, showing that the corporation is authorized to transact business;

Third—A certificate from the county clerk of the county or city and county in which the bond or undertaking is filed, showing that the said certificate of authority has not been surrendered, revoked, canceled, annulled or suspended, or in the event that it has been, that renewed authority to act under such certificate has been granted, as provided for in section 625a of the Political Code;

Fourth—A financial statement showing the assets and liabilities of such corporation at the end of the quarter calendar year prior to thirty days next preceding the date of the execution of the bond or undertaking; such financial statement must be verified under oath by the president, or a vice-president and attested by the secretary or an assistant secretary of such corporation.

Upon complying with the foregoing provisions and it appearing that the bond or undertaking was duly executed, that the corporation is authorized to transact business in the state, and that its assets exceed its liabilities in an amount equal to or in excess of the amount of the bond or undertaking, the justification of the surety shall be complete and it shall be accepted as the sole and sufficient surety on the bond or undertaking.

[County clerk to issue certificate.] The county clerk of any county or city and county shall, upon request, issue the certificate hereinbefore provided for, which certificate shall state whether or not the certificate of authority of such corporation has been surrendered, revoked, canceled, annulled or suspended, and in the event that it has, whether or not renewed authority to act under such certificate of authority has been granted as provided in section 625a of the Political Code.

[Fee.] For each certificate issued the county clerk shall receive a fee of fifty cents to be paid by the person obtaining the certificate.

Sec. 2. [Repealing clause.] All laws and parts of laws in conflict herewith are hereby expressly repealed.

History: Enactment approved March 20, 1911, Stats. and Amdts. 1911, p. 412; amendment approved May 12, 1921, Stats. and Amdts. 1921, p. 82. In effect July 29, 1921.

1. Corporate surety—Qualification of—Provable by evidence.—In the case of an appeal from a judgment of the justice of the peace to the superior court the sufficiency of a foreign corporation as surety upon the undertaking may be established by evidence which satisfies the justice of the

peace of the financial standing of the foreign corporation and the sufficiency of the bond; and the provisions of the above section are not required to be strictly complied with.—*San Francisco-Oakland Terminal Railways v. Superior Court*, — Cal. App. —, 192 Pac. 116.

§ 1058. PEOPLE OF STATE NOT REQUIRED TO GIVE BONDS WHEN STATE IS A PARTY. In any civil action or proceeding wherein the state, or the people of the state, is a party plaintiff, or any state officer, in his official capacity, or in behalf of the state, or any county, city and county, city, or town, is a party plaintiff or defendant, no bond, written undertaking, or security can be required of the state, or the people thereof, or any officer thereof, or of any county, city and county, city, or town; but on complying with the other provisions of this code the state, or the people thereof, or any state officer acting in his official capacity, have the same rights, remedies, and benefits as if the bond, undertaking, or security were given and approved as required by this code.

History: Enacted March 11, 1872; amendment approved April 15, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 76.

PEOPLE OF STATE—NOT REQUIRED TO GIVE BOND.

1. Attachment-bond by city void.
2. Board of education of city.
3. Construction of section.
4. County ordinance.
5. Defendant or plaintiff—Immaterial which.
6. Individual joining with state.
7. Officer suing in behalf of county.

1. Attachment-bond by city void.—Undertaking on attachment given by city and county is against policy of law and void, even as common-law bond. There was no authority in clerk of court to take bond, but, on contrary, it was his duty to issue writ without it; there was no consideration for undertaking.—*Morgan v. Menzies*, 60 Cal. 341, 348. C. C. P.—151

2. Board of education of city is not included within terms of this section. Rule is well settled that statutory exemptions will not be extended by implication beyond specified cases, as they are exceptions to general policy of law.—*Mitchell v. Board of Education*, 137 Cal. 372, 374, 70 Pac. 180.

3. Construction of section.—The state superintendent of banks when performing his duties in taking possession of and liquidating the assets of a banking corporation is acting as a state officer in his official capacity within the meaning of this section, and is therefore exempted from giving an undertaking on appeal for a stay of execution.—*Mercantile Trust Co. v. Miller*, 166 Cal. 563, 137 Pac. 913.

4. County ordinance providing that in action by county to recover license-tax attachment may issue without giving of bonds is not void as "a special law regulating

practice in courts of justice," but is in harmony with section 3360 Political Code and above section.—County of San Luis Obispo v. Greenberg, 120 Cal. 300, 304, 52 Pac. 797.

5. Defendant or plaintiff—Immaterial which.—State when defendant comes within exemption of this section as well as when plaintiff.—San Francisco L. & C. Co. v. California, 141 Cal. 354, 357, 74 Pac. 1047.

As to costs against county or state, see, ante, §§ 1038, 1039 and notes.

6. Individual joining with state in appeal is not by this section excused from giving

appeal bond, and in absence of such undertaking appeal of such party will be dismissed.—Meyer v. San Diego, 130 Cal. 60, 61, 62 Pac. 211.

7. Officer suing in behalf of the county.—Although county officers are not expressly mentioned in this section, where county officer prosecutes action not in his individual right but on behalf of county, he comes within reason of rule and is included within provisions of this section; county itself being real party in interest.—Lamberson v. Jeffers, 116 Cal. 492, 494, 48 Pac. 485.

§ 1059. SURETY ON APPEAL SUBSTITUTED TO RIGHTS OF JUDGMENT CREDITOR. Whenever any surety on an undertaking on appeal, executed to stay proceedings upon a money judgment, pays the judgment, either with or without action, after its affirmation by the appellate court, he is substituted to the rights of the judgment creditor, and is entitled to control, enforce, and satisfy such judgment, in all respects as if he had recovered the same.

History: Enacted March 24, 1874, Code Amdts. 1873-4, p. 344.

1. Payment must be made by surety before he can proceed under this section, and under it he can be reimbursed only for what he has expended.—Estate of Hill, 67 Cal. 238, 243, 7 Pac. 664.

As to notice, and notice of motion, of judgment-debtor seeking to enforce con-

tribution from his cojudgment-debtors, see, ante, § 709 and note.

As to right of contribution of party paying more than just share of judgment, see, ante, § 709 and note.

["A new chapter to be numbered VIII is hereby added to title fourteen of part two of the Code of Civil Procedure, relating to declaratory relief [judgment], and to read as follows:"]

CHAPTER VIII.

DECLARATORY RELIEF [JUDGMENT].

§ 1060. Declaratory relief [judgment].
§ 1061. Power not to be exercised, when.

§ 1062. Other remedies not affected.

§ 1060. DECLARATORY RELIEF [JUDGMENT]. Any person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the natural channel of a water course, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in

form and effect, and such declaration shall have the force of a final judgment. Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought.

History: Enactment approved May 27, 1921, Stats. and Amdts. 1921, p. 689. In effect July 29, 1921.

Editorial Note: The phrase "declaratory relief" is thought not to have been aptly chosen, for the reason that there may be no "relief" follow from the proceedings authorized and from any judgment that may be rendered therein. The term "judgment" is a more comprehensive term, and more accurately describes the action of the court under the provisions of the sections added, being applicable alike to all the results of the proceedings authorized, whether mere constructions by the court as to rights and duties, or affirmative relief awarded under section 1060.

DECLARATORY JUDGMENT.

1. Constitutionality of statute — Kansas doctrine.
2. Same—Michigan doctrine.
3. Same—Same—Decision purely dictum.
- 4, 5. Same—Same—Declarations in bill put plaintiff out of court.

1. **Constitutionality of statute — Kansas doctrine.**—A statute similar to the above and following sections has been adopted in Kansas, where the power of the legislature to pass an act imposing such a duty upon the courts was called in question and the supreme court of that state held that a statute authorizing the rendition of merely declaratory judgments in a case in which no consequential relief is sought, is not unconstitutional on the ground of attempting to confer nonjudicial powers upon courts; saying that such judgments may be judicial acts although rendered in actions admittedly brought before a right has been invalid, or a wrong inflicted and although no consequential relief is given or sought.—*State ex rel. Hopkins v. Grove*, — Kan. —, 201 Pac. 82.

2. **Same — Michigan doctrine.**—A similar statute was passed in Michigan in 1919 and its constitutionality challenged in the supreme court of that state and the court held the act to be unconstitutional. The proceedings in which the decision was rendered was not based upon an actual controversy and was not brought within the provisions of the act; yet the members of the court appear to have agreed that because there was no actual controversy the action could not be maintained, and felt called upon to go to the length of holding the statute invalid because the power to make a declaration of rights where no consequential relief can be had is not judicial, and can not be conferred upon courts.—*Anway v. Grand Rapids R. Co.*, 211 Mich. 592, 12 A. L. R. 26, 179 Pac. 350.

3. **Same—Same—Decision purely dictum.**—Inasmuch as there was no case properly before the Michigan court under the act, all that is said is purely dictum, indicating how a majority of the court may decide when the question of the constitutionality of the statute is duly and properly

presented to them. The provisions of the Michigan statute, in the relevant part thereof is: "The court may make binding declarations of rights whether any consequential relief is or could be claimed, or not, including the determination, at the instance of any one claiming to be interested under a deed, will or other written instrument, of any question of construction arising under the instrument and a declaration of the rights of the parties interested."—Michigan Public Acts of 1919, Act 150.

4. **Same—Same—Declarations in bill put plaintiff out of court,** or rather show that the plaintiff was not within the act above set out; had no contract in writing to be interpreted, but was merely desirous of entering into a contract in the future, and for that reason his cause never had any standing in court; and the only power the court had was to dismiss the cause for want of jurisdiction. Anything done or said beyond that was done and said by the court without jurisdiction, was simply a voluntary expression of an opinion when there was no cause before the court, and for that reason is not a "precedent" for that court or for any other court.

5. Briefly stated, the bill recited or alleged that the plaintiff is employed by the defendant street-railway company as a conductor; that he desires to work more than six days in consecutive seven days. He does not claim to have any contract with the defendant to that effect; he claims no breach of any contract; he does not allege that the defendant has committed, or threatened to commit, any wrong upon him, or that he has any claim, present or prospective, for any damages from defendant; he simply seeks to get the advice of the court regarding a contract he says he desires to make in futuro as to whether such a contract, if made, will be violative of another act of the legislature regulating the number of consecutive days an employee may work in seven days. Plainly, there was nothing before the court to consider, and one can but express surprise that the court for an instant retained jurisdiction after reading the opening paragraphs of the bill. The trial court and the appellate court alike were remiss; and the appellate court set up a bogey-man of straw to knock down,

At another time and in another place the editor may discuss the argument of the majority of the court.—*Anway v. Grand Rapids R. Co.*, 211 Mich. 592, 12 A. L. R. 26, 179 N. W. 350.

As to constitutionality of statutes providing for declaratory judgments where no consequential relief is sought, see matter fully treated in 12 A. L. R. 1-92.

§ 1061. POWER NOT EXERCISED WHEN. The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances.

History: Enactment approved May 27, 1921, Stats. and Amdts. 1921, p. 690. In effect July 29, 1921.

§ 1062. OTHER REMEDIES NOT AFFECTED. The remedies provided by this chapter are cumulative, and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party to such action, and no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts.

History: Enactment approved May 27, 1921, Stats. and Amdts. 1921, p. 690. In effect July 29, 1921.

PART III.

OF SPECIAL PROCEEDINGS OF A CIVIL NATURE.

PRELIMINARY PROVISIONS, §§ 1063, 1064.

- TITLE I. OF WRITS OF REVIEW, MANDATE, AND PROHIBITION, §§ 1067-1110a.
 II. OF CONTESTING CERTAIN ELECTIONS, §§ 1111-1127.
 III. OF SUMMARY PROCEEDINGS, §§ 1132-1179.
 IV. OF THE ENFORCEMENT OF LIENS, §§ 1180-1208.
 V. OF CONTEMPTS, §§ 1209-1222.
 VI. OF THE VOLUNTARY DISSOLUTION OF CORPORATIONS, §§ 1227-1235.
 VII. OF EMINENT DOMAIN, §§ 1237-1264.
 VIII. OF ESCHEATED ESTATES, §§ 1269-1274a.
 IX. OF CHANGE OF NAME, §§ 1275-1279.
 X. OF ARBITRATIONS, §§ 1281-1290.
 XI. OF PROCEEDINGS IN PROBATE COURTS, §§ 1294-1810c.
 XII. OF SOLE TRADERS, §§ 1811-1821.
 XIII. OF PROCEEDINGS IN INSOLVENCY, §§ 1822-1822b.
 XIV. PROCEEDINGS FOR THE ADJUSTMENT, SETTLEMENT, AND PAYMENT OF ANY INDEBTEDNESS EXISTING AGAINST ANY CITY OR MUNICIPAL CORPORATION AT THE TIME OF EXCLUSION OF TERRITORY THEREFROM, AND THE DIVISION OF THE PROPERTY THEREOF, §§ 1822c-1822f.

PRELIMINARY PROVISIONS.

§ 1063. Parties, how designated.

§ 1064. Judgment and order same meaning as in civil actions.

§ 1063. **PARTIES, HOW DESIGNATED.** The party prosecuting a special proceeding may be known as the plaintiff, and the adverse party as the defendant.

History: Enacted March 11, 1872.

§ 1064. **JUDGMENT AND ORDER SAME MEANING AS IN CIVIL ACTIONS.** A judgment in a special proceeding is the final determination of the rights of the parties therein. The definitions of a motion and an order in a civil action are applicable to similar acts in a special proceeding.

History: Enacted March 11, 1872.

JUDGMENT AND ORDER.

1. Appeal lies from judgment.
2. Jurisdiction on appeal.

64 Cal. 473, 474, 2 Pac. 245; *People ex rel. Levenson v. Thompson*, 66 Cal. 398, 5 Pac. 686; *Heinlen v. Phillips*, 88 Cal. 557, 558, 559, 26 Pac. 366.

1. **Appeal lies from judgment of superior court granting or denying writ in special proceeding.**—*Knowles v. Thompson*, 133 Cal. 245, 248, 65 Pac. 463. See *Palache v. Hunt*,

2. **Jurisdiction on appeal from judgments in special proceedings does not depend on amount in controversy.**—*Heinlen v. Phillips*, 88 Cal. 557, 558, 559, 26 Pac. 366. See *Winter v. Fitzpatrick*, 35 Cal. 269, 273.

TITLE I.

OF WRITS OF REVIEW, MANDATE, AND PROHIBITION.

Chapter I. WRIT OF REVIEW, §§ 1067-1077.

II. WRIT OF MANDATE, §§ 1084-1097.

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CHAPTER I.

WRIT OF REVIEW.

§ 1067. Writ of review defined.

§ 1068. When and by what courts granted.

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§ 1067. WRIT OF REVIEW DEFINED. The writ of certiorari may be denominated the writ of review.

History: Enacted March 11, 1872, re-enactment of § 455 Practice Act; amended March 24, 1874, Code Amdts. 1873-4, p. 345.

WRIT OF REVIEW—CERTIORARI.

1, 2. As to generally.

3. Bar of remedy by lapse of time.

4. Review in supreme court—Of judgment of justices' court.

5-11. Scope and purpose of writ.

See, also, post, § 1068 and note.

As to writ of certiorari generally, see note 12 Am. Dec. 529-537.

1. **As to generally.**—In certiorari to review an order vacating a decree of partial distribution made in the matter of the estate of a deceased person, the only question that can be determined is whether the court, in making the order, exceeded its jurisdiction, and where it appears from the stipulation submitting the matter for decision that the only question submitted is whether the original decree was erroneous in certain respects, the submission will be set aside.—*Dam v. Superior Court*, 169 Cal. 216, 146 Pac. 684.

2. **Certiorari will not lie to set aside and annul a default judgment obtained in an action for the foreclosure of a mortgage, upon the mere statement of the petitioners that they were not served with summons and had no knowledge of the pendency of the action, where eighteen years have elapsed since the judgment was entered; some facts or circumstances explaining why they had no knowledge or the means of knowledge of so important a matter affect-**

ing their title to the property should appear.—*Cooper v. Superior Court*, 26 Cal. App. 629, 147 Pac. 606.

3. **Bar of remedy by lapse of time.**—The remedy by certiorari is barred by the lapse of time within which an appeal from the judgment may be taken, unless circumstances of an extraordinary character are shown to have intervened.—*Cooper v. Superior Court*, 26 Cal. App. 629, 147 Pac. 606.

4. **Review in supreme court—Of judgment of justices' court.**—The supreme court will not entertain an original proceeding in certiorari to annul a judgment and orders subsequent thereto made by a justice of the peace, on the ground that the same were in excess of his jurisdiction, where a similar proceeding, based upon the same facts, duly instituted in the superior court, is pending and undetermined. From an adverse judgment or order of dismissal in the superior court proceeding, the petitioner would have a right of appeal to the district court of appeal; and in the event that the superior court refuses to take any action whatever in the matter pending therein, it may be compelled to do so by appropriate proceedings.—*Cohen v. Melrose*, 167 Cal. 792, 141 Pac. 374.

5. **Scope and purpose of writ.**—The three following concurrent conditions must exist as a prerequisite to the issuance of the extraordinary writ of certiorari: 1. An excess of jurisdiction of an inferior tribunal; 2. No appeal; and 3. No other plain, speedy and

adequate remedy.—Postal Telegraph-Cable Co. v. Superior Court, 22 Cal. App. 770, 136 Pac. 538.

6. While it may be somewhat difficult to define with accuracy the scope and significance of the expression "and there is no appeal," used in section 1068, post, the ready inference from the terminology is that if the aggrieved party has the legal right to obtain in the regular way a review by an appellate court of the declared wrong, no authority exists for the issuance of the writ of certiorari.—Postal Telegraph-Cable Co. v. Superior Court, 22 Cal. App. 770, 136 Pac. 538.

7. The term is not confined in its application to the particular order that may be made the subject of special attack, and whether that order be appealable or not is of no consequence if its effect can be nullified by an appeal from the judgment.—Postal Telegraph-Cable Co. v. Superior Court, 22 Cal. App. 770, 136 Pac. 538.

8. Where in an action against a corporation it develops at the beginning of the trial that a mistake has been made as to the identity of the corporation against which the cause of action exists, and an amendment of the complaint is permitted substituting the proper corporation defendant without service of process, the order of substitution, if erroneous, is correctible upon

appeal from the final judgment, and is not reviewable upon certiorari.—Postal Telegraph-Cable Co. v. Superior Court, 22 Cal. App. 770, 136 Pac. 538.

9. It is not the consideration whether the petitioner takes advantage of the right of appeal, but whether the right of appeal exists in his favor that is decisive of the question, and he can not allow the time for appeal to lapse and then successfully urge this circumstance as a legal justification for the writ of certiorari.—Postal Telegraph-Cable Co. v. Superior Court, 22 Cal. App. 770, 136 Pac. 538.

10. The writ of certiorari should not issue to review the order of substitution in this case, for the additional reason that the petitioner has the right to move to set aside the judgment under section 473, ante, on the ground of surprise and excusable neglect, and should the motion be denied, an appeal would lie as from a "special order made after final judgment."—Postal Telegraph-Cable Co. v. Superior Court, 22 Cal. App. 770, 136 Pac. 538.

11. Where a person has been convicted in the recorder's court of violating an ordinance requiring a permit to remove or construct a shake house, certiorari will not lie to review the judgment; his remedy is by appeal to the superior court.—Hood v. Melrose, 24 Cal. App. 355, 141 Pac. 396.

§ 1068. WHEN AND BY WHAT COURTS GRANTED. A writ of review may be granted by any court, except a police or justices' court, when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy.

History: Enacted March 11, 1872, founded on § 546 Practice Act.

WRIT OF REVIEW—WHEN AND BY WHAT COURTS GRANTED.

1. Act being wholly void.
2. Act complained of being simply ministerial.
3. Action of supervisors—Is not made judicial by reason of preamble.
4. Additional finding—Made by trial court after appeal.
5. Allegation upon information and belief.
6. Application for appointment of receiver—Sufficiency of—Review of.
7. Application for writ—Is premature, when.
8. Can not be made to perform the office of writ of error.
9. Canceling order admitting to citizenship—Order not reviewable by certiorari.
10. Conclusiveness of record.
11. Construction of section.
- 12, 13. Contempt of court cases.
14. Court will not exercise power for no material or useful purpose.
15. Defense of former adjudication—Does not go to jurisdiction of court.
16. Discretion of court—Public convenience.
17. Same—Public policy.
18. Dismissal of action—An order denying.
19. Same—By motion in open court.
- 20, 21. Dismissal of appeal—Does not involve question of excess of jurisdiction.
22. Same—From justices' court.
23. Distinguished from writ of error.
24. Division of powers of government—Not applicable.
- 25, 26. Does not lie to review action of justice of the peace.
27. Effect of inexcusable neglect of petitioner.

28. Error in judgment—Not respecting question which court is authorized to investigate.
29. Errors in exercise of its jurisdiction.
30. Evidence conflicting.
31. Exercise of judgment—Does not make act judicial.
32. Same—Dismissal of appeal for failure of prosecution.
33. Exercise of purely legislative functions—Which are not judicial in their character.
- 34, 35. Extent of review.
36. Fact of excess of jurisdiction—And also of no appeal.
- 37, 38. Failure to object to jurisdiction of court.
39. Fixing fee of attorney of guardian ad litem.
40. Function of writ—Is not to restrain proceedings.
41. Same—Until proceedings are terminated there is nothing to annul.
42. Functions exercised by municipal corporation.
43. Functus officio order.
- 44-48. Granted when—As to purposes for which power exercised.
49. Same—After final determination by lower court, only.
50. Same—Certain requisites essential to issuance of writ.
51. Same—Same—Absence of remedy by appeal.
52. Same—Same—Loss of right of appeal by laches.
- 53-60. Same—Remedy by appeal—Writ will not issue.
61. Judgment sought to be enforced—Having been reversed.
62. Judgment-roll.
63. Judicial functions of the civil service commission.
64. Jurisdiction—Does not depend upon amount in controversy.
65. Same—Is power to hear and determine.
66. Same—To determine an issue involves, what.
67. Justices' court—Judgment in excess of jurisdiction—Remedy by appeal—Writ of review can not be resorted to.
68. Lapse of three years after making order.
69. Legislative acts—Examples of—Action of mayor in affixing his approval.
70. Same—Same—Action of supervisors in directing supplemental assessment.
71. Same—Same—Action of supervisors in passing resolution.
72. Same—Same—Adoption by city council of order for improvement of street.
73. Same—Same—Adoption of school reader.
74. Same—Same—Declaring vacancy and appointing party to fill same.
75. Same—Same—Eminent domain—Determination as to right to exercise.
76. Same—Same—Exercise of power to fill vacancy in board of supervisors.
77. Same—Same—Granting of franchise by supervisors to maintain wharf.
78. Same—Same—Ordinance of supervisors empowering mayor to make connections with pipes of water company.
79. Same—Same—Proceedings of city council for improvement of street.
80. Same—Same—Removal of appointive officer by mayor.
81. Same—Same—Resolution of supervisors.
82. Legislative and judicial acts—Distinguished.
83. Same—Distinction is well defined.
- 84-87. Matters reviewable on.
88. Mere irregularity intervening—In exercise of admitted jurisdiction.
- 89, 90. Not a writ of right.
- 91, 92. Office of the writ of certiorari.
93. Officer or tribunal to whom writ of certiorari is issued.
94. Order appointing a receiver—Made before judgment.
95. Same—Will not be reviewed after receiver has been discharged.
96. Order canceling an order admitting to citizenship—Can not be reviewed by certiorari.
97. Order directing payment to receiver of insolvent bank.
98. Order in excess of jurisdiction—Right of appeal—Certiorari not granted.
99. Order of arrest in civil action based upon affidavit upon information and belief.
100. Ordinary remedies—Afforded by courts of law and equity.
101. Petition for writ—Must be by party beneficially interested.
102. Power of taxation is confided to legislative department.
- 103, 104. Powers of board of supervisors—Derived exclusively from statute.
105. Proceedings in the nature of quo warranto.
106. Proceedings of supervisors in establishing road—Involves exercise of judicial function.

107. Proceedings upon certiorari — Are not in nature of post-mortem examination.
108. Question is—Does body whose acts are to be reviewed exercise judicial functions.
109. Record for review — Can not be amended or attacked, when.
110. Same — Evidence outside of record and contradictory to it.
111. Same—Facts involving question of jurisdiction—When examined.
112. Same — Inferior magistrates must show affirmatively that they had authority.
113. Same—No issue of law or fact not involved in question of jurisdiction.
114. Same—Questions of law and fact examined.
115. Remedy barred by lapse of time.
116. Resolution of board—Being ministerial or legislative in character.
- 117, 118. Review under writ.
- 119, 120. Same—Objections as to jurisdiction.
121. Same—Supreme court upon, can not consider or correct errors of law.
122. Right of appeal prevents certiorari — Differs from mandamus and prohibition.
123. Same—Lies from judgment of superior court granting or denying writ.
124. Same—Lost through laches.
125. Same — Need not be plain, speedy, or adequate.
126. Same—Order for injunction can not be annulled by.
127. Proceedings in insolvency cases.
128. Same — Writ of certiorari will not lie when.
129. Rules of supreme court — Contain provisions regarding procedure.
130. Same—Order or judgment being set out at length in petition.
131. Sale of real property—Confirmation — Remedy by appeal—Prohibition does not lie.
- 132, 133. Supreme court and superior court— Both have original jurisdiction.
134. Term "judicial"—Is not to be received in sense usually applied.
135. Three concurring requisites — Are essential to issuance of writ of.
136. Until final determination has been reached in court below—Supreme court will assume what.
137. Writ can not be issued on mere errors of law.

As to relief in equity other than by appellate proceedings against judgments, etc., see note 54 Am. St. Rep. 218.

1. Act being wholly void, law will afford remedy.—*Robinson v. Board of Supervisors*, 16 Cal. 208, 210.

2. Act complained of being simply ministerial, it can not ordinarily be reviewed on certiorari. Exercise of legislative power of common council is ministerial when they act upon question authorized by charter, and which resolves itself into question merely of expediency. But where council is vested by legislature with power to decide on property or rights of citizen, in making their decision they act judicially whatever may be their public character.—*Robinson v. Board of Supervisors*, 16 Cal. 208, 209, 210.

3. Action of supervisors—Is not made judicial by reason of preamble to resolution stating reasons for their actions. If board had power to pass resolution and other sections of order, resolution and other sections of order would have derived no support from preamble, and would have been equally effective without it.—*Spring Valley W. W. v. Bryant*, 52 Cal. 132, 138.

4. Additional finding—Made by trial court after appeal taken in action tried before him, conceding it to have been made without jurisdiction, gives no ground for certiorari, as supreme court will entirely disregard, as part of record on appeal, any finding which trial court had no authority to make.—*Auzerais v. Superior Court*, 101 Cal. 542, 36 Pac. 6.

5. Allegation upon information and belief that court has made certain order can not be considered. It is an easy matter for petitioner to determine whether such order was made. Court will not assume that order was made which has never been filed.—*Sayers v. Superior Court*, 84 Cal. 642, 644, 24 Pac. 296.

6. Application for appointment of receiver — Sufficiency of.—Review of.—In those cases in which an order appointing a receiver in a given cause is within the jurisdiction of the court, the question whether the facts disclosed to the court on the application for the appointment are such as legally to warrant the court in putting in operation its power or applying its jurisdiction in that regard, can be engaged into on a writ of review issued under the provisions of the above and succeeding sections.—*Takeba v. Superior Court*, 43 Cal. App. 469, 185 Pac. 406.

7. Application for writ—Is premature in suit to annul action of supervisors in granting franchise when made while matter is still pending before supervisors, and before franchise is granted.—*Gauld v. Board of Supervisors*, 122 Cal. 18, 19, 54 Pac. 272.

8. Can not be made to perform the office of writ of error for the correction of errors of law or of fact. The full scope of the remedy is to determine whether an inferior tribunal board or officer exercising judicial functions has exceeded the jurisdiction of such tribunal board or officer where there is no appeal nor in the judgment of the court

any plain, speedy, or adequate remedy.—*Thomas v. Hawkins*, 12 Cal. App. 327, 329, 107 Pac. 578.

9. Canceling order admitting to citizenship—Order not reviewable by certiorari.—In *re Tinn*, 148 Cal. 773, 113 Am. St. Rep. 354, 84 Pac. 152.

10. Conclusiveness of record.—Complaint is made that on certiorari to review a proceeding for contempt counsel was not permitted to read petitioner's affidavit on the day of the hearing of the order to show cause. The certified record fails to indicate any such state of facts; consequently we can not consider the point.—*Mitchell v. Superior Court*, 163 Cal. 423, 125 Pac. 1061, 1062.

11. Construction of section.—The provision that the writ may issue where there is no appeal is not limited to the case where no appeal lay to the court petitioner for certiorari, but where no appeal lay to a court of common law jurisdiction, such a court as could itself in a proper case issue certiorari.—*Olcese v. Justice Court*, 156 Cal. 82, 85, 103 Pac. 317.

12. Contempt of court cases.—If an order adjudging defendant guilty of contempt for failure to comply with an order for the payment of counsel fees on a motion to vacate an interlocutory decree of divorce, final in form, was erroneous, it could not be reviewed on certiorari.—*Grannis v. Superior Court*, 143 Cal. 632, 77 Pac. 647.

13. An order of the superior court refusing to adjudge a witness before a board of equalization guilty of contempt is not in excess of its jurisdiction, and can not therefore be the subject of annulment by certiorari.—*People v. Latimer*, 160 Cal. 720, 117 Pac. 1051.

14. Court will not exercise power for no material or useful purpose.—Though action of supervisors was unauthorized, and in excess of its jurisdiction, and money was wrongfully and unlawfully obtained from county treasurer by reason of such acts, relief sought by certiorari, if granted, being of no material or beneficial consequence, either to petitioner or county, writ will be denied.—*Burr v. Board of Supervisors*, 96 Cal. 210, 212, 31 Pac. 38; *Auzerais v. Superior Court*, 101 Cal. 532, 36 Pac. 6.

15. Defense of former adjudication—Does not go to jurisdiction of court.—Question whether contempt charged had been previously adjudicated having been raised, court had same power to pass upon it as any other question in case, and if it erred in holding that there was no such former adjudication as claimed, error could not be reviewed upon certiorari.—*Muir v. Superior Court*, 58 Cal. 361.

16. Discretion of court—Public convenience.—Granting or refusing writ of certiorari for purpose of reviewing proceedings of supervisors in establishing public highway is determined by exercise of sound judicial discretion. Considerations of public convenience are not to be overlooked in its

determination.—*Keys v. Board of Supervisors*, 42 Cal. 252, 255; *People ex rel. Church v. Supervisors*, 15 Wend. (N. Y.) 198, 206; *People ex rel. Agnew v. Mayor of New York*, 2 Hill (N. Y.) 9, 12.

17. Same—Public policy.—Boards of supervisors exercise powers in which people at large are concerned, and great public detriment or inconvenience might result from interfering with their proceedings. Assuming, therefore, that power exists to review resolution and order of board empowering mayor to make connections with pipes of water company for municipal purposes, on ground that water company has arbitrarily stopped supply, courts would best exercise their sound discretion by refusing to employ power.—*Spring Valley W. W. v. Bryant*, 52 Cal. 132, 139, 140.

18. Dismissal of action—An order denying a motion to dismiss an action, made by plaintiff in open court, and not in the manner prescribed by section 581, ante, is an order affecting the judgment, and is reviewable on appeal from the judgment, and not on certiorari.—*Huntington Park Co. v. Superior Court*, 17 Cal. App. 695, 121 Pac. 701.

19. Same—By motion in open court.—Where the plaintiff, instead of pursuing the statutory method herein prescribed, makes a motion to dismiss in open court, the denial of the motion is within the inherent jurisdiction of the court, and is subject to review; but if reviewable otherwise, it can not be reviewed on certiorari.—*Huntington Park Co. v. Superior Court*, 17 Cal. App. 694, 121 Pac. 701.

20. Dismissal of appeal—Does not involve question of excess of jurisdiction, although it be conceded that action of court in dismissing appeal was entirely without support in law and furnished ample material to justify reversal of order if proper matter for review under statute. To deprive appellant of right to be heard upon merits of his cause is great hardship and often productive of serious pecuniary loss, but appellant suffers no greater hardship or loss than though he proceeds to trial and court decides against him upon final judgment when he has cause full of merit.—*Buckley v. Superior Court*, 96 Cal. 119, 120, 31 Pac. 8; *Sherer v. Superior Court*, 96 Cal. 653, 654, 31 Pac. 565; *History Co. v. Light*, 97 Cal. 56, 58, 31 Pac. 627; *Holbrook M. & S. v. Superior Court*, 106 Cal. 589, 593, 39 Pac. 936.

21. Overruling: *Carlson v. Superior Court*, 70 Cal. 628, 631, 11 Pac. 788.

22. Same—From justices' court.—Dismissal of an appeal from a justices' court to the superior court on questions of law and fact, for want of prosecution, and the rendition of judgment in plaintiff-respondent's favor without trial was in excess of the jurisdiction of the superior court, and its action was annulled on certiorari.—*Kraker v. Superior Court*, 15 Cal. App. 653, 115 Pac. 663.

23. Distinguished from writ of error.—Writ of review can not be made to perform the office of a writ of error, for the corrections of errors of law or fact. It involves the question of jurisdiction only.—*Stimpson Computing Scale Co. v. Superior Court*, 12 Cal. App. 536, 538, 107 Pac. 1013.

24. Division of powers of government.—Not applicable.—Boards of supervisors, city councils, and like boards and commissioners are not within inhibition of article III, section 1 of our state constitution, dividing powers of government into three departments, and providing that no person charged with exercise of powers properly belonging to one of these departments should exercise any function appertaining to either of others. Boards and commissioners may be vested with powers belonging to either or all of three departments of our government.—*Wulzen v. Board of Supervisors*, 101 Cal. 15, 26, 40 Am. St. Rep. 17, 35 Pac. 353. See *People ex rel. Attorney-General v. Provines*, 34 Cal. 520, 532; *Kimball v. Board of Supervisors*, 46 Cal. 19, 23.

25. Does not lie to review action of justice of the peace, although he may exceed his jurisdiction where there is a complete remedy by appeal from the judgment to the superior court.—*Hall v. Justices' Court*, 5 Cal. App. 133, 138, 87 Pac. 870.

26. Writ does not lie to review order of justice of the peace refusing to change venue under section 1431 of the Penal Code, as the defendant has a plain, speedy, and adequate remedy at law by appeal, and the court does not exceed its jurisdiction in proceeding with the trial.—*Miles v. Justices' Court*, 13 Cal. App. 454, 455, 110 Pac. 349.

27. Effect of inexcusable neglect of petitioner.—While the writ will issue ordinarily in a case where an appellate court would be powerless to afford relief in any event, yet where the order complained of might have been reviewed, and relief afforded, and the right to a review is lost by petitioner's inexcusable neglect, the writ will not issue.—*Kokole v. Superior Court*, 17 Cal. App. 457, 120 Pac. 67.

28. Error in judgment.—Not respecting question which court is authorized to investigate and determine, does not constitute excess of jurisdiction. If it did, every error committed by court in course of official investigation would be an excess of jurisdiction.—*People ex rel. Lamby v. Dwinelle*, 29 Cal. 632, 635.

29. Errors in exercise of its jurisdiction, however gross and glaring they may be, must be submitted to as part of sacrifice which every individual is compelled to yield to infirmities of human government.—*Sherer v. Superior Court*, 94 Cal. 354, 355, 29 Pac. 716.

30. Evidence conflicting upon the question as to whether a deposit for costs on appeal made with a justice was made for that purpose, the supreme court will not interfere with the decision of the superior court by

writ of review.—*Thomas v. Hawkins*, 12 Cal. App. 327, 333, 107 Pac. 578.

31. Exercise of judgment.—Does not make act judicial.—Improvements on street is question addressed to governing body of municipality in its legislative capacity, and its determination upon that question, as well as upon character of improvements to be made, is legislative act. Act does not cease to be legislative because members of city council are required to exercise their judgment in determining whether improvements shall be made. Judgment which they exercise in ordering improvements is not determination of rights of individuals under existing laws, but is conclusion or opinion which they form in exercise of discretionary power which has been intrusted to them, and upon consideration of public welfare and demands for which they are to provide. This discretion is part of legislative power conferred, and is independent of supervision by judiciary as much as its discretion exercised by legislature in providing for general welfare of state.—*Quinchard v. Board of Trustees*, 113 Cal. 664, 669, 45 Pac. 856. See *Bolton v. Gilleram*, 105 Cal. 244, 248, 45 Am. St. Rep. 33, 38 Pac. 881; *People ex rel. Dean v. Board of Supervisors*, 122 Cal. 421, 423, 55 Pac. 131; *Frasher v. Rader*, 124 Cal. 132, 134, 56 Pac. 797; *Brown v. Board of Supervisors*, 124 Cal. 274, 277, 57 Pac. 82; *People ex rel. Corwin v. Walter*, 68 N. Y. 403; *People ex rel. Second Ave. R. Co. v. Board of Commissioners*, 97 N. Y. 37; *In re Wilson*, 32 Minn. 145, 19 N. W. 723.

As to discretion not being reviewed upon certiorari, see note 40 Am. St. Rep. 34, 35.

32. Same.—Dismissal of appeal for failure of prosecution by superior court requires exercise of judgment within jurisdiction of such court, and its decision, though erroneous, affords no ground for review on certiorari.—*Alexander v. Municipal Court*, 66 Cal. 387, 388, 5 Pac. 675.

33. Exercise of purely legislative functions.—Which are not judicial in their character by inferior tribunal or board can not be reviewed upon certiorari.—*Wulzen v. Board of Supervisors*, 101 Cal. 15, 18, 40 Am. St. Rep. 17, 35 Pac. 353. See *People ex rel. McDonald v. Bush*, 40 Cal. 344; *Spring Valley W. W. v. Bryant*, 52 Cal. 132; *People ex rel. Cochran v. Board of Education*, 54 Cal. 375, 377; *Myers v. Hamilton*, 60 Cal. 289, 290; *Williams v. Board of Supervisors*, 65 Cal. 160, 161, 3 Pac. 667; *Quinchard v. Board of Trustees*, 113 Cal. 664, 668, 45 Pac. 856; *Frasher v. Rader*, 124 Cal. 132, 133, 56 Pac. 797; *Brown v. Board of Supervisors*, 124 Cal. 274, 277, 57 Pac. 82; *People ex rel. Agnew v. Mayor*, 2 Hill (N. Y.) 9; *Matter of Mt. Morris Square*, 2 Hill (N. Y.) 14; *People ex rel. Dickinson v. Board of Supervisors*, 43 Barb. (N. Y.) 232; *In re Salinas Co.*, 45 Mo. 52.

34. Extent of review.—This section plainly limits the court to the determination of the single question—whether the inferior tribunal has regularly pursued its author-

ity. The judgment should be to annul the proceedings where the inferior court has not regularly pursued its authority.—*Green v. Rogers*, 18 Cal. App. 572, 576, 123 Pac. 974.

35. What constitutes departure by court from the regular pursuit of its authority is often difficult to determine.—*Bergevin v. Wood*, 11 Cal. App. 643, 644, 105 Pac. 935.

36. Fact of excess of jurisdiction.—And also of no appeal must both exist, otherwise writ of certiorari does not lie. Statute was intended to supply remedy where none existed in first instance, and not to supplement one lost through laches of party himself. Allowing time within which appeal might be taken to lapse does not give party right to writ.—*Bennett v. Wallace*, 43 Cal. 25, 27.

37. Failure to object to jurisdiction of court in proceeding to compel party to deliver up custody of will does not thereafter deprive such party of his right to have order annulled if it was in fact made in excess of jurisdiction.—*Mastick v. Superior Court*, 94 Cal. 347, 350, 29 Pac. 869.

38. Compare: *Shay v. Superior Court*, 57 Cal. 541, 542.

39. Fixing fee of attorney of guardian ad litem.—The writ will not issue to review the order of one department of the superior court fixing such fee for the prosecution of an action pending in another department thereof, the latter department never having exercised its jurisdiction to fix such fee.—*Lund v. Superior Court*, 159 Cal. 440, 114 Pac. 569.

40. Function of writ.—Is not to restrain proceedings of an inferior tribunal, but to annul proceedings which have been taken without jurisdiction. It can not be employed to prevent threatened excess of jurisdiction. It is issued only when inferior tribunal board, or officer, exercising judicial functions, has exceeded jurisdiction of such tribunal, board, or officer, and there is no appeal nor, in judgment of court, any plain, speedy, or adequate remedy.—*Sayers v. Superior Court*, 84 Cal. 642, 644, 24 Pac. 296. See *Lamb v. Schottler*, 54 Cal. 319, 322.

41. Same.—Until proceedings are terminated there is nothing to annul.—Office of writ is in no sense that of restraining order. It is not purpose of writ to restrain or prohibit, but to annul. And until proceedings of inferior tribunal or board have culminated in final order there is nothing to annul.—*Gauld v. Board of Supervisors*, 122 Cal. 18, 19, 54 Pac. 272.

42. Functions exercised by a municipal corporation, may be legislative, administrative, or judicial, but only acts done by it "when exercising judicial functions" can be reviewed upon writ of certiorari.—*People ex rel. Cochran v. Board of Education*, 54 Cal. 375, 377; *Quinchard v. Board of Trustees*, 113 Cal. 664, 669, 45 Pac. 856.

43. Functus officio order.—Writ of review will not lie where application therefor is

not made until after the order sought to be reviewed has become functus officio.—*Reagan v. Bahrs*, 11 Cal. App. 234, 236, 104 Pac. 589.

44. Granted when.—As to purposes for which power exercised.—Writ of review examines only the jurisdiction of the tribunal to make the order complained of, and not mere error in its exercise.—*Vrooman v. Superior Court*, 149 Cal. 268, 86 Pac. 694.

45. One who is enjoined in an action in which he is not a party may make himself a party by a motion to set aside the injunction, and if his motion is denied, may appeal from the order of denial, and he is not entitled to a writ of review to annul the injunction proceedings.—*Tattenham v. Superior Court*, 155 Cal. 206, 100 Pac. 248.

46. Only orders in excess of the jurisdiction of the tribunal making them may be annulled by this writ. Mere errors in the exercise of a proper jurisdiction can not be so remedied.—*People v. Latimer*, 160 Cal. 720, 117 Pac. 1051.

47. Application to the district court of appeals for a writ of review having been denied, supreme court will not grant certiorari.—*Snyder v. Plummer*, 174 Cal. 118, 162 Pac. 1040.

48. Writ of review can be called in use only for the purpose of reviewing judgments or orders made without, or in excess of, jurisdiction, and can not be made to serve the office of an appeal.—*Times-Mirror Co. v. Superior Court*, 15 Cal. App. 517, 115 Pac. 248.

49. Same.—After final determination by lower court, only.—The writ of review lies only when the final determination of an inferior court, tribunal or board is in excess of its jurisdiction; it does not lie to determine the correctness, in point of law, of rulings or decisions made by such court, tribunal or board, upon objections made or questions arising in the course of the proceeding or cause preliminary and prior to the final determination regarding the action which it is asked to take in the matter.—*Holabird v. Railroad Commission*, 171 Cal. 691, 154 Pac. 831.

50. Same.—Certain requisites essential to issuance of writ.—Three concurring requisites essential to the issuance of the writ of review (1) an excess of jurisdiction by the inferior tribunal, etc., exercising judicial functions (2) that there is no appeal and (3) that there is no other plain, speedy, and adequate remedy.—*Magee v. Superior Court*, 10 Cal. App. 154, 160, 101 Pac. 532.

51. Same.—Same.—Absence of remedy by appeal.—Want of jurisdiction alone is not a ground for a writ of review, if there be an adequate remedy by appeal to the superior court, as appears in the present case as respects the aggregate verdict. It must further appear that there is no plain, speedy, and adequate remedy.—*La Due v. Forbes*, 19 Cal. App. 124, 124 Pac. 867.

52. Same—Same—Loss of right of appeal by laches.—Where the right of appeal has been lost by laches, above section applies.—*Green v. Rogers*, 18 Cal. App. 572, 576, 123 Pac. 974; *Faut v. Mason*, 47 Cal. 7; *Bennett v. Wallace*, 43 Cal. 25.

53. Same—Remedy by appeal—Writ will not issue.—A party who has the right of appeal from an order made in excess of the jurisdiction of the court, can not have such order reviewed by certiorari.—*Anglo-California Bank v. Superior Court*, 153 Cal. 755, 96 Pac. 803.

54. It has been uniformly held, in accord with the provisions of above section, that if a party has the right of appeal from an order in excess of jurisdiction, he can not have such order reviewed in certiorari proceedings.—*Hildebrand v. Superior Court*, 173 Cal. 86, 159 Pac. 147.

55. The denial is made solely for the reason that the order of the superior court sought to be reviewed is a special order made after final judgment, and is therefore one from which an appeal lies, and this being so, certiorari will not lie.—*Snyder v. Plummer*, 174 Cal. 118, 162 Pac. 1040.

56. Certiorari will lie when the matter complained of can be corrected on appeal.—*Baird v. Justices' Court*, 11 Cal. App. 439, 442, 105 Pac. 269.

57. The writ will not issue to review an order dismissing proceedings on motion for new trial, since such order is a special order after final judgment, and is appealable, and an appeal is a plain, speedy, and adequate remedy in course of law.—*Kokole v. Superior Court*, 17 Cal. App. 457, 120 Pac. 67.

58. Under the provisions of the above section regulating the granting of a writ of review the action of an inferior tribunal board or officer exercising any judicial functions, will not be granted in those cases in which the petitioner has a plain and adequate remedy by appeal.—*Candelas v. Superior Court*, — Cal. App. —, 196 Pac. 86, following the doctrine in *Noble v. Superior Court*, 109 Cal. 523, 42 Pac. 155.

59. In a case in which the petitioner has a right of appeal through which he can obtain a speedy, plain, and adequate remedy and relief from the order sought to be reviewed, a writ of review will not issue.—*Cline v. Superior Court*, 35 Cal. App. 150, 169 Pac. 453, following the doctrine in *Stoddard v. Superior Court*, 108 Cal. 303, 141 Pac. 278.

60. Under the provisions of the above section where the petitioner for a writ of review has a remedy by appeal which is plain, speedy, and adequate, a writ of review will not issue.—*Stinnett v. Superior Court*, 36 Cal. App. 275, 171 Pac. 1076.

61. Judgment sought to be enforced.—Having been reversed by supreme court, and court having issued peremptory mandamus to enforce such judgment, writ of review is proper remedy for such excess of jurisdic-

tion in issuing mandamus.—*Clary v. Hoagland*, 5 Cal. 476, 478.

62. Judgment-roll.—Where a return is made, the petition and affidavit for a writ of review can serve no purpose on appeal unless it is embodied in a bill of exceptions, but where there is interposed a demurrer, the effect of which, for the time, is to adopt the allegations of the petition as the return, the petition, upon the sustaining of the demurrer and rendition of judgment of dismissal is substituted as and for the record in lieu of which it is accepted, and may be brought up and considered, not as a petition, but as the return, and therefore a part of the judgment-roll.—*Stoner v. City Council of Los Angeles*, 8 Cal. App. 607, 611, 97 Pac. 692.

63. Judicial functions of the civil service commission.—This section applies only to judicial functions, and it is held that the civil service commission did not perform such functions in declaring a list of eligibles for promotion to the rank of battalion chief after an examination held without previous adoption, printing, and distribution of rules.—*Cook v. Civil Service Commission*, 160 Cal. 591, 117 Pac. 662.

64. Jurisdiction.—Does not depend upon amount in controversy in an appeal to supreme court from judgment in certiorari reviewing action of justices' court.—*Winter v. Fitzpatrick*, 35 Cal. 269, 273; *Heinlen v. Phillips*, 88 Cal. 557, 558, 559, 26 Pac. 366.

65. Same.—Is power to hear and determine.—Jurisdiction as applied to particular claim or controversy is power to hear and determine that controversy. Mere grounds upon which determination is reached may or may not be correct in themselves, or may be supported by inadmissible evidence, or reasons given for conclusion arrived at may not be such as address themselves to judgment of others; but erroneous views entertained, or incorrect reasons assigned or evidence erroneously admitted in deciding controversy, do not make out case of want of jurisdiction.—*Central Pac. R. Co. v. Board of Equalization*, 43 Cal. 365, 368; *Quinchard v. Board of Trustees*, 113 Cal. 664, 669, 670, 45 Pac. 856; *People ex rel. Dean v. Board of Supervisors*, 122 Cal. 421, 423, 55 Pac. 131.

66. Same.—To determine an issue involves power to determine it erroneously. Jurisdiction to determine effect of evidence involves power to draw erroneous conclusions from it.—*Farmers' & M. Bank v. Board of Equalization*, 97 Cal. 318, 328, 32 Pac. 312.

67. Justices' court.—Judgment in excess of jurisdiction.—Remedy by appeal.—Writ of review can not be resorted to.—A writ of review can not be resorted to for the purpose of annulling a judgment rendered by a justices' court, on the alleged ground that the court exceeds its jurisdiction where the petitioner has a plain, speedy, and adequate remedy by appeal to correct the alleged error, under the provisions of the above section.—*Maldenberg v. Justices'*

Court, 32 Cal. App. 686, 163 Pac. 872, following the doctrine in *Hall v. Justices' Court*, 5 Cal. App. 133, 139, 89 Pac. 870; *McCue v. Superior Court*, 71 Cal. 545, 12 Pac. 615; *Tucker v. Justices' Court*, 120 Cal. 512, 52 Pac. 808; *Weldon v. Superior Court*, 138 Cal. 427, 429, 71 Pac. 502.

68. **Lapse of three years after making order sought to be annulled before application made for certiorari**, and no circumstances being shown which in any manner tend to excuse long delay in making application, writ will be denied.—*Smith v. Superior Court*, 97 Cal. 348, 352, 32 Pac. 322. See *Keys v. Board of Supervisors*, 42 Cal. 252, 256; *Reynolds v. Superior Court*, 64 Cal. 372, 373, 28 Pac. 121; *Kimple v. Superior Court*, 66 Cal. 136, 137, 4 Pac. 1149.

69. **Legislative acts—Examples of—Action of mayor in affixing his approval upon order of board of supervisors which empowered him to make connections with water mains**, was not exercise of judicial function, and not reviewable by certiorari.—*Spring Valley W. W. v. Bryant*, 52 Cal. 132, 139.

As to acts, legislative in their nature, not being controlled by writ of certiorari, see note 18 Am. Dec. 236-238.

70. **Same—Same—Action of supervisors in directing supplemental assessment made in reclamation district and in appointment of commissioners to assess lands lying within such district**, and subsequent rescission of such order, is not judicial in its nature, and can not be reviewed on certiorari.—*Bixler v. Board of Supervisors*, 59 Cal. 698, 702.

71. **Same—Same—Action of supervisors in passing resolution empowering mayor to make connections with pipes and mains of water works wherever water is required for municipal purposes on ground that water company had arbitrarily stopped supply of water for improvement of public squares**, was not judicial in its character, and could not be reviewed on certiorari.—*Spring Valley W. W. v. Bryant*, 52 Cal. 132, 139.

72. **Same—Same—Adoption by city council of order for improvement of street** is not in nature of judgment which is binding upon city, but is merely declaration of purpose, and is only step taken in contemplation of such improvement from which it may recede at any time before contract for improvement has been awarded. Fact that public agent exercises judgment and discretion in performance of duties does not make its action or powers judicial in character.—*Quinchard v. Board of Trustees*, 113 Cal. 664, 670, 45 Pac. 856.

73. **Same—Same—Adoption of school reader**.—Action is one of policy or expediency in case where board adopts one of two series of readers for use in public schools. Action of board, in adopting that which in its judgment would be best for constituency which it represented, would be political or legislative, and not, in proper sense, judi-

cial. Board exercised its judgment in exercise of legislative functions. It is apparent that exercise of judgment is not criterion by which proceeding must be viewed to determine its character. To render it exercise of judicial function, its judgment must act in matter which is judicial.—*People ex rel. Cochran v. Board of Education*, 54 Cal. 375, 377.

74. **Same—Same—Declaring vacancy and appointing party to fill same**, by city trustees, is not exercise of judicial function, and can not be reviewed by certiorari. Party being lawfully in office, trustees could not, by declaring office vacant, deprive him of his office. Party having failed to qualify, office ipso facto became vacant, in which case trustees could fill vacancy without declaring it.—*Lorbeer v. Hutchinson*, 111 Cal. 272, 273, 43 Pac. 896.

75. **Same—Same—Eminent domain—Determination as to whether or not right of eminent domain should be exercised**, and as to what means are necessary to be taken in exercise of that right, is political and legislative question, and not judicial one. Determination rests exclusively with legislature or with subordinate bodies as it may be properly devolved upon, and question of whether exercise of power is wise or not is one with which judicial department has no concern.—*Wulzen v. Board of Supervisors*, 101 Cal. 15, 21, 40 Am. St. Rep. 17, 35 Pac. 353.

76. **Same—Same—Exercise of power to fill vacancy in board of supervisors** is not judicial function.—*Myers v. Hamilton*, 60 Cal. 289, 290.

77. **Same—Same—Granting of franchise by supervisors to maintain wharf** is not exercise of judicial function, and certiorari will not lie to annul such action.—*People ex rel. Dean v. Board of Supervisors*, 122 Cal. 421, 423, 55 Pac. 131.

78. **Same—Same—Ordinance of supervisors empowering mayor to make connections with pipes of water company for municipal purposes for reasons stated** was an attempt to make law, not to render judgment under existing law. It may be obnoxious to criticism that it was attempt to deprive corporation of its rights without due process of law and violative of constitutional principles; but neither this nor circumstance that board was not authorized by city charter to pass it, can justify review of action of board by certiorari.—*Spring Valley W. W. v. Bryant*, 52 Cal. 132, 138.

79. **Same—Same—Proceedings of city council for improvement of street—Resolution of intention, order directing improvement, invitation for proposal, award of contract**—are all legislative in character.—*Quinchard v. Board of Trustees*, 113 Cal. 664, 671, 45 Pac. 856.

80. **Same—Same—Removal of appointive officer by mayor for cause by giving written notice thereof, stating cause to person removed, and notifying common council of ac-**

tion and reasons therefor, is not exercise of judicial function.—In *matter Carter*, 141 Cal. 316, 318, 321, 322, 74 Pac. 997.

81. Same—Same—Resolution of supervisors to effect that it is necessary to acquire certain water-rights and that three persons be appointed to appraise value thereof, is nothing more than expression of opinion, and is not judicial in any sense, nor can act appointing such appraisers be reviewed by writ, as it was purely ministerial or executive.—*Lamb v. Schottler*, 54 Cal. 319, 321.

82. Legislative and judicial acts—Distinguished.—Legislative act is one which predetermines what law shall be for regulation of future cases falling under its provisions, while judicial act is determination of what law is in relation to existing thing done or happened.—*Wulzen v. Board of Supervisors*, 101 Cal. 15, 24, 40 Am. St. Rep. 17, 35 Pac. 353.

83. Same—Distinction is well defined.—One defines what law is, and what rights of parties are, with reference to transactions already had. The other prescribes what law shall be in future cases arising under it. Whenever an act undertakes to determine question of right, or obligation, or of property, as foundation upon which it proceeds, such act is to that extent judicial one and not proper exercise of legislative function.—*People ex rel. Cochran v. Board of Education*, 54 Cal. 375, 376; *Sinking Fund Cases*, 99 U. S. 700, 761, 25 L. ed. 496.

84. Matters reviewable on.—Certiorari will not go to restrain mere errors by the court below. It is only an excess of jurisdiction which may be reached in this manner.—*Reclamation Dist. No. 1500 v. Superior Court*, 171 Cal. 672, 154 Pac. 845.

As to when issues are, and what issues are, reviewable upon the writ of certiorari, see note 12 Am. Dec. 581.

85. The functions of the railroad commission being judicial, the supreme court would have jurisdiction in certiorari to review its final decision without any express grant of jurisdiction in the act creating the commission. The statutory jurisdiction of this section and article VI, section 4, constitution, can extend only to the inquiry as to whether the commission had exceeded its authority.—*Marin Water & Power Co. v. Railroad Commission*, 171 Cal. 706, 154 Pac. 864.

86. The issuance of a liquor license by a city council contrary to a "zone" ordinance is in excess of jurisdiction, and therefore subject to review by certiorari.—*Rigdon v. San Diego*, 30 Cal. App. 107, 157 Pac. 513.

87. The action of a city council in considering applications for liquor licenses is so far judicial as to be subject to review on certiorari.—*Rigdon v. San Diego*, 30 Cal. App. 107, 157 Pac. 513.

88. Mere irregularity intervening—In exercise of admitted jurisdiction.—Mere mistakes of law committed in conducting proceedings in an inquiry which board or tribu-

nal had authority to entertain—as, for instance, admission of evidence not best in degree or not applicable to issue in hand—are not to be considered upon certiorari, otherwise that writ would be turned into writ of error.—*Central Pac. R. Co. v. Board of Equalization*, 43 Cal. 365, 367; *Farmers' & M. Bank v. Board of Equalization*, 97 Cal. 318, 326, 32 Pac. 312.

89. Not a writ of right.—At the time the constitution vested the supreme court with power to issue writs of certiorari it was well settled that certiorari was not a writ of right; that the granting or refusing to issue it rested in the discretion of the court, and that by modern common-law usage and rules laid down by decisions in this state under its earlier constitution the writ would not be issued where the matter sought to be reviewed could be heard and determined upon appeal.—*Olcese v. Justices' Court*, 156 Cal. 82, 84, 103 Pac. 317.

90. Where judgment is rendered in a justices' court and an appeal taken therefrom to the superior court and judgment therein rendered against the defendant, a writ of certiorari will not be issued to review the judgment of the justices' court, ignoring that of the superior court upon the appeal. If the writ would issue in any event, it must be to review the judgment, not of the justices' court, but of the superior court upon the appeal, for the law has provided for an appeal from the judgment of the justices' court to the superior court, but no appeal from the judgment of the superior court.—*Olcese v. Justices' Court*, 156 Cal. 85, 87, 103 Pac. 317.

91. Office of the writ of certiorari is not so much to determine the valid existence of a tribunal, board, or officer, while acting in a judicial capacity, as it is to determine whether the jurisdiction of such tribunal, board, or officer, has been exceeded. It is the character of the act or determination sought to be reviewed, rather than the tribunal or officer by which the act or determination is made, that is the test for determining whether the writ should be issued.—*Beaumont v. Samson*, 5 Cal. App. 491, 492, 90 Pac. 839.

92. The sole office of a writ of review, or a certiorari, under the provisions of the above section, is to test and determine an action of jurisdiction.—*Camm v. Justices' Court*, 35 Cal. App. 293, 170 Pac. 49.

93. Officer or tribunal to whom writ of certiorari is issued, must be an inferior officer or tribunal, exercising judicial functions, and proceeding to be brought up for review must be judicial proceeding. Writ does not extend to mere ministerial act or proceeding, though performed by judicial officer.—*Bixler v. Board of Supervisors*, 59 Cal. 698, 702. See *People ex rel. McDonald v. Bush*, 40 Cal. 344.

94. Order appointing a receiver—Made before judgment, may be reviewed upon writ of certiorari, no direct appeal from

such order being given by statute.—*La Societe Francaise v. District Court (French Bank Case)*, 53 Cal. 495, 550.

As to writ of certiorari in case of order appointing receiver, in excess of jurisdiction, see, ante, § 564 and note.

95. **Same—Will not be reviewed after receiver has been discharged** and his accounts settled by order of court under which he was appointed. Correctness of order has become moot question, there being no existing order which can be affected by judgment upon review.—*Visalia City W. Co. v. Superior Court*, 120 Cal. 219, 52 Pac. 485. See *People ex rel. Attorney-General v. Wallace*, 91 Cal. 535, 537, 27 Pac. 767.

96. **Order canceling an order admitting to citizenship—Can not be reviewed by certiorari.**—*In re Tinn*, 148 Cal. 773, 113 Am. St. Rep. 354, 84 Pac. 152.

97. **Order directing payment to receiver of insolvent bank.**—The writ will not lie to review such an order, however erroneous, where such order was in effect a final adjudication of the rights of all the parties, including the petitioner, who had intervened, so that an appeal therefrom will afford petitioner an adequate remedy.—*Anglo-California Bank v. Superior Court*, 153 Cal. 756, 96 Pac. 803.

98. **Order in excess of jurisdiction—Right of appeal—Certiorari not granted.**—In a case in which an action was brought in the superior court and judgment recovered and thereafter execution was issued and notice of garnishment served upon A, and thereafter in supplementary proceedings, initiated under the provisions of sections 717, etc., ante, A was brought before the court and an order of the court made at the hearing directing A to deliver to the sheriff a certain sum of money, and that the same be used in satisfaction of the judgment; and thereafter the defendant duly presented a motion to the court for an order vacating and annulling said order respecting A made in supplementary proceedings on the ground, among others, that said court was without jurisdiction to make said order, which motion was denied; the defendant in such case having a right to appeal from an order made in excess of the jurisdiction of the court, can not have such order reviewed in certiorari proceedings, under the provisions of the above section.—*Stensland v. Superior Court*, 39 Cal. App. 172, 178 Pac. 549, following the doctrine in *Anglo-California Bank v. Superior Court*, 153 Cal. 753, 755, 96 Pac. 803.

99. **Order of arrest in civil action—Based upon affidavit upon information and belief, but failing to state facts upon which such information and belief are founded, is beyond the jurisdiction of the court and will be annulled on certiorari.**—*Lay v. Superior Court*, 11 Cal. App. 558, 560, 105 Pac. 775.

100. **Ordinary remedies—Afforded by courts of law and equity would seem sufficient to afford protection against attempted**

legislation by supervisors with respect to subjects beyond their control.—*Spring Valley W. W. v. Bryant*, 52 Cal. 132, 140.

101. **Petition for writ—Must be by party beneficially interested.**—Petition of application for the writ must be by a party beneficially interested.—*Baird v. Justices' Court*, 11 Cal. App. 439, 442, 105 Pac. 259.

102. **Power of taxation is confided to legislative department of government, and act of levying taxes and providing means for collection of same comes within power of legislature.**—*Wulzen v. Board of Supervisors*, 101 Cal. 15, 20, 40 Am. St. Rep. 17, 35 Pac. 353.

103. **Powers of board of supervisors—Derived exclusively from statute, and construction of statute is necessarily involved in proceedings by which supervisors created office of assistant clerk and raised salaries of other clerks. To that extent such proceedings were judicial in their nature, and therefore subject to review upon certiorari as only remedy provided by law.**—*Robinson v. Board of Supervisors*, 16 Cal. 208, 213.

104. **Compare:** Dis. op. by Field, C. J., p. 213.

105. **Proceedings in the nature of quo warranto, and not writ of review, is the proper method of review where it is claimed certain parties are illegally acting as trustees of a certain town.**—*Beaumont v. Samson*, 5 Cal. App. 491, 492, 90 Pac. 839.

106. **Proceedings of supervisors in establishing road—Involves exercise of judicial function in sense of rendering such proceedings subject of review through instrumentality of writ of certiorari.**—*Keys v. Board of Supervisors*, 42 Cal. 252, 254.

107. **Proceedings upon certiorari—Are not in nature of post-mortem examination.**—If there is nothing to annul, there is nothing for supreme court to act upon in such proceeding. Motion to quash writ limits consideration to those acts set forth in petition, and court is, and must be, oblivious to any and all other facts.—*Lamb v. Schottler*, 54 Cal. 319, 323.

108. **Question is—Does body whose acts are to be reviewed exercise judicial functions under constitution and laws of state? If so, and there is no appeal, nor, in opinion of court, any other plain, speedy, and adequate remedy, such acts may be reviewed on certiorari, and all inquiry into creation and organization of such body is irrelevant and immaterial. It is of no consequence how it was created, or by what means it exists; if it is clothed with judicial powers, it must be regarded as tribunal exercising judicial functions within meaning of statute.**—*People ex rel. Whitney v. Board of Delegates*, 14 Cal. 479, 498, 499.

109. **Record for review—Can not be amended or attacked, when.**—Recitals in order of facts essential to jurisdiction are conclusive in proceeding for writ of review. Record can not be amended or attacked, but

must be taken as it is found, at least as to all matters of fact adjudicated therein. It is not proper function of writ of review to add or to modify record with respect to jurisdictional facts determined therein, but to test questions of jurisdiction on facts appearing on face thereof.—*De Pedronena v. Superior Court*, 80 Cal. 144, 146, 22 Pac. 71; *Farmers' & M. Bank v. Board of Equalization*, 97 Cal. 318, 326, 32 Pac. 312; *Borchard v. Board of Supervisors*, 144 Cal. 10, 14, 77 Pac. 708. See *Roe v. Superior Court*, 60 Cal. 93.

As to no questions to be presented upon certiorari except those arising on record, see note 40 Am. St. Rep. 35, 36.

110. Same—Evidence outside of record and contradicting it will never be permitted, universal rule being that provisions of writ of certiorari is to review record of inferior court, board, or tribunal, and determine from record whether such court, board, or tribunal had exceeded its jurisdiction.—*Los Angeles v. Young*, 118 Cal. 295, 298, 62 Am. St. Rep. 234, 50 Pac. 534.

111. Same—Facts involving question of jurisdiction—When examined.—It is held in many cases that record alone can be regarded, and that it is not office of writ to bring up evidence, even upon disputed jurisdictional fact. On other hand, cases are numerous to effect that review may extend to every issue of law and fact involved in question of jurisdiction, and that not only record, but evidence itself, when necessary for determination of this question, must be returned. Latter is more reasonable and the true rule.—*People ex rel. Whitney v. Board of Delegates*, 14 Cal. 479, 500; *Lent v. Tillson*, 72 Cal. 404, 434, 14 Pac. 71; *In re Madera Irr. Dist.*, 92 Cal. 296, 335, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 675; *Schwarz v. Superior Court*, 111 Cal. 106, 112, 43 Pac. 580; *Los Angeles v. Young*, 118 Cal. 295, 298, 62 Am. St. Rep. 234, 50 Pac. 534; *Borchard v. Board of Supervisors*, 144 Cal. 10, 14, 77 Pac. 708. *Nev. State v. Board of Commissioners*, 5 Nev. 317; *State ex rel. Fall v. County Commissioners*, 6 Nev. 100. *N. D. In re Dance*, 2 N. D. 184, 33 Am. St. Rep. 768, sub nom. *In re Evingson*, 49 N. W. 733. *Colo. Board of Aldermen v. Darrow*, 13 Colo. 460, 16 Am. St. Rep. 215, 22 Pac. 784. *R. I. Lonsdale v. Board of License Comrs.*, 18 R. I. 5, 10, 25 Atl. 655. *Wash. State ex rel. Hellbron v. Van Brocklin*, 8 Wash. 557, 562, 36 Pac. 495.

112. Same—Inferior magistrates must show affirmatively that they had authority to act, when required by writ of certiorari to return their proceedings; and where their authority and jurisdiction depends upon fact to be proved before themselves, and such fact is disputed, magistrates must certify proofs given in relation to it for purpose of enabling higher court to determine whether fact was established. Decision of magistrate on all other facts is final and conclusive, and will not be reviewed.—*People ex rel. C. C. P.*—152

Whitney v. Board of Delegates, 14 Cal. 479, 500; *Blair v. Hamilton*, 32 Cal. 49, 53; *In matter Madera Irr. Dist.*, 92 Cal. 296, 335, 27 Am. St. Rep. 106, 14 L. R. A. 755; 28 Pac. 272, 675; *Stumpf v. Board of Supervisors*, 131 Cal. 364, 367, 82 Am. St. Rep. 350, 63 Pac. 663; *Borchard v. Board of Supervisors*, 144 Cal. 10, 14, 77 Pac. 708.

113. Same—No issue of law or fact not involved in question of jurisdiction can be brought up by writ, and incidentally regularity of proceedings upon which jurisdiction depends. Under no circumstances can review be extended to merits. Upon every question, except mere question of power, action of inferior tribunal is final and conclusive.—*People ex rel. Whitney v. Board of Delegates*, 14 Cal. 479, 500.

114. Same—Questions of law and fact examined.—Main object of writ being to confine action of inferior officers within limits of their delegated powers, reviewing court will re-examine, if required, decision of magistrate on all questions on which his jurisdiction depends, whether of law or fact.—*People ex rel. Whitney v. Board of Delegates*, 14 Cal. 479, 501.

115. Remedy barred by lapse of time, unless circumstances of an extraordinary character be shown to have intervened, and time fixed by law for appeal from final judgment, should be held to be period within which application for writ should be made.—*Keys v. Board of Supervisors*, 42 Cal. 252, 256.

116. Resolution of board—Being ministerial or legislative in character, certiorari will not lie. Legislation of any body having authority to legislate can not be reviewed, even where, in course of such legislation, it might have exceeded power vested in it.—*Spring Valley W. W. v. Bryant*, 52 Cal. 132, 139.

117. Review under writ.—Superior court has authority to hear motion for dismissal of appeal upon ground that undertaking is insufficient but its jurisdiction to try the case depends upon the question whether there was an undertaking on appeal. If there was no such undertaking as the statute it had no jurisdiction of the case and therefore in the lawful exercise of its authority the only course to pursue was to dismiss the appeal. If there was such an undertaking it not only had complete jurisdiction of the case but it could not divest itself of such jurisdiction by dismissing the appeal. If the court has the power to determine its jurisdiction it would follow that whether there is or is not an undertaking the court may have jurisdiction either to try or not to try the cause.—*Bergevin v. Wood*, 11 Cal. App. 643, 646, 105 Pac. 935.

118. Where superior court properly exercised jurisdiction in dismissing an appeal the writ of review has no function to perform and should be dismissed.—*Bergevin v. Wood*, 11 Cal. App. 643, 644, 105 Pac. 935.

119. Same—Objections as to jurisdiction.—On a writ of certiorari directing the superior court to certify a transcript of the proceedings of a case appealed from a justices' court, the attack must be confined to the jurisdiction of the superior court over the person of the petitioner, and objections to the jurisdiction of the justices' court can not be reviewed.—*American Law Book Co. v. Superior Court*, 164 Cal. 327, 128 Pac. 921.

120. Where the petitioner has submitted its person to the jurisdiction of the superior court to set aside a default judgment rendered in a justices' court, it can not, on certiorari to the supreme court, question the power of the superior court to determine the appeal from the justices' court.—*American Law Book Co. v. Superior Court*, 164 Cal. 327, 128 Pac. 921, 923.

121. Same—Supreme court upon, can not consider or correct errors of law committed by the inferior court in the exercise of its authority on the merits of the cause it has jurisdiction to entertain and decide. No matter how erroneous the decision may be even on the face of the record, the supreme court has no power to change, annul, or reverse it in such proceeding if the court had jurisdiction to act in the matter before it.—*In re Hughes*, 159 Cal. 360, 113 Pac. 684.

122. Right of appeal prevents certiorari—Differs from mandamus and prohibition.—Admitting that court had no jurisdiction to make order, but as order is appealable, certiorari will not lie because it lies only where there is no appeal. In this respect it differs from mandamus and prohibition, which lie "in all cases where there is not a plain, speedy, and adequate remedy in ordinary course of law."—*Stoddard v. Superior Court*, 108 Cal. 303, 305, 41 Pac. 278.

123. Same—Lies from judgment of superior court granting or denying writ of certiorari. Appellate jurisdiction in certiorari, and other special writs was not conferred by either constitution of 1849 or 1879, yet supreme court has repeatedly exercised such jurisdiction.—*Palache v. Hunt*, 64 Cal. 473, 474, 2 Pac. 245; *People ex rel. Levenson v. Thompson*, 66 Cal. 398, 5 Pac. 686; *Heinlen v. Phillips*, 88 Cal. 557, 558, 559, 26 Pac. 366; *Knowles v. Thompson*, 133 Cal. 245, 248, 65 Pac. 468.

124. Same—Lost through laches.—Rule that writ will not issue in case where there is remedy by appeal applies with equal force where right of appeal has been lost through laches.—*Valentine v. Police Court*, 141 Cal. 615, 617, 75 Pac. 336.

125. Same—Need not be plain, speedy, or adequate.—Appeal not affording plain, speedy, and adequate remedy makes no difference; provision of statute governs that writ will not lie in any case in which there may be an appeal.—*Stoddard v. Superior Court*, 108 Cal. 303, 305, 306, 41 Pac. 278.

126. Same—Order for injunction can not be annulled by certiorari, because appeal

lies from such order.—*Golden Gate C. H. Co. v. Superior Court*, 65 Cal. 187, 189, 3 Pac. 628.

127. Same—Proceedings in insolvency cases must be brought before supreme court by appeal, and not by certiorari.—*Noble v. Superior Court*, 109 Cal. 523, 527, 42 Pac. 155.

128. Same—Writ of certiorari will not lie when there is an appeal from action complained of.—*Clary v. Hoagland*, 13 Cal. 173, 175; *People ex rel. Sturgis v. Shepard*, 28 Cal. 115, 117; *Faut v. Mason*, 47 Cal. 7, 9; *Golden Gate C. H. M. Cö. v. Superior Court*, 65 Cal. 187, 189, 3 Pac. 328; *Slavonic I. M. B. Assoc. v. Superior Court*, 65 Cal. 500, 501, 4 Pac. 500; *Stuttmeister v. Superior Court*, 71 Cal. 322, 323, 12 Pac. 270; *McCue v. Superior Court*, 71 Cal. 545, 12 Pac. 615; *Estate of McConnell*, 74 Cal. 217, 219, 15 Pac. 746; *Weill v. Light*, 98 Cal. 193, 194, 32 Pac. 943; *Stoddard v. Superior Court*, 108 Cal. 303, 305, 306, 41 Pac. 278; *Noble v. Superior Court*, 109 Cal. 523, 526, 42 Pac. 155; *White v. Superior Court*, 110 Cal. 54, 57, 42 Pac. 471; *Tucker v. Justices' Court*, 120 Cal. 512, 514, 52 Pac. 808; *Southern Cal. R. Co. v. Superior Court*, 127 Cal. 417, 421, 59 Pac. 789; *Elledge v. Superior Court*, 131 Cal. 279, 280, 63 Pac. 360; *Weldon v. Superior Court*, 138 Cal. 427, 429, 71 Pac. 502; *Mahoney v. Superior Court*, 140 Cal. 513, 514, 74 Pac. 13; *Valentine v. Police Court*, 141 Cal. 615, 617, 75 Pac. 336; *Elliot v. Superior Court*, 144 Cal. 501, 506, 77 Pac. 1109; *Wittman v. Police Court*, 145 Cal. 474, 475, 78 Pac. 1052; *Grant v. Justices' Court*, 1 Cal. App. 383, 82 Pac. 263.

As to appeals from justices' court, see, ante, § 974 and note.

As to appeals in general, see, ante, §§ 936-959 and notes.

As to time within which an appeal may be taken, see, ante, § 939 and note.

As to what orders and judgments may be appealed from, see, ante, §§ 963, 964 and notes.

129. Rules of supreme court—Contain provisions regarding procedure to be observed when original jurisdiction of that court is involved upon application for certiorari, and such rules fix return day of an alternative writ for hearing application. Although technically speaking there is no alternative writ of certiorari, manifest object of rule is applicable to petitions for that writ as fully as those for other original writs referred to. A hearing after notice for application serves same purpose as hearing upon return of alternative writ of mandate or prohibition. One object of rule is to enable parties to obtain decision upon sufficiency of order or judgment sought to be annulled without incurring expense or delay attendant upon waiting until there had been issuance of writ.—*Stewart v. Superior Court*, 101 Cal. 594, 595, 36 Pac. 100.

130. Same—Order or judgment being set out at length in petition, and respondent conceding it to be correctly set forth, no useful purpose is served by issuance of writ and formal return thereto in which same order or judgment would be merely repeated. It is only when correctness of order as set out is challenged, or where other portions of record will qualify its terms, that it will be necessary for issuance of writ before hearing upon merits, in which case better practice would be to allow writ to issue and have hearing upon merits await its return.—Stewart v. Superior Court, 101 Cal. 594, 596, 36 Pac. 100.

131. Sale of real property—Confirmation—Remedy by appeal—Prohibition does not lie.—In the case of a sale of real property where all the grounds of objection presented in a petition for a writ of prohibition, and urged against the confirmation of such sale because thereof, can be presented on appeal from an order of confirmation thereafter made, a writ prohibiting the court from confirming the sale will not issue, under the provisions of the above section.—Estate of Turner, 181 Cal. 467, 185 Pac. 171.

132. Supreme court and superior court—Both have original jurisdiction to issue writs of mandamus, certiorari, and prohibition.—Santa Cruz G. T. J. S. Co. v. Board of Supervisors, 62 Cal. 40, 41. See Miller v. Board of Supervisors, 25 Cal. 93, 95, 96.

133. Compare: Miliken v. Huber, 21 Cal. 166, 169.

134. Term "judicial"—Is not to be received in sense usually applied to court

of justice when applied to actions of board of supervisors.—Robinson v. Board of Supervisors, 16 Cal. 208, 209.

135. Three concurring requisites—Are essential to issuance of writ of review, viz: 1. Excess of jurisdiction by inferior tribunal, board, etc., exercising judicial functions; 2. That there is no appeal; 3. That there is no other plain, speedy, and adequate remedy.—Noble v. Superior Court, 109 Cal. 523, 526, 42 Pac. 155.

136. Until final determination has been reached in court below—Supreme court will assume that such court will limit its action to its proper jurisdiction. So long as proceedings are still pending, party grieved has plain, speedy, and adequate remedy by motion in court below, and it can not be assumed that such court will decide erroneously against any objection made.—Sayers v. Superior Court, 84 Cal. 642, 644, 645, 24 Pac. 296.

137. Writ can not be issued on mere errors of law.—Foundation of writ is essentially and necessarily an excess of jurisdiction, for no act of tribunal, board, or officer, exercising judicial functions done or made within its jurisdiction, can ever be made subject of attack by writ of review.—Central Pac. R. Co. v. Placer Co., 46 Cal. 667, 671; Sayers v. Superior Court, 84 Cal. 642, 645, 24 Pac. 296; Sherer v. Superior Court, 94 Cal. 354, 29 Pac. 716; Farmers' & M. Bank v. Board of Equalization, 97 Cal. 318, 327, 328, 32 Pac. 312; Buckley v. Superior Court, 96 Cal. 119, 120, 31 Pac. 8, overruling Carlson v. Superior Court, 70 Cal. 628, 11 Pac. 788.

§ 1069. APPLICATIONS FOR, HOW MADE. The application must be made on the verified petition of the party beneficially interested, and the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice.

History: Enacted March 11, 1872, re-enactment of § 457 Practice Act; amendment by Code Commission, Act March 8, 1900, Stats. and Amdts. 1900-1, p. 183, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 603, Kerr's Stats. and Amdts. 1906-7, p. 475.

APPLICATION FOR WRIT OF REVIEW—HOW MADE.

1. A person beneficially interested may apply for.
2. Same — Surety on administrator's bond.
3. Notice of application for certiorari—Should be given to adverse party.
4. Party beneficially interested — Action to annul order of supervisors.
5. Same—Defendant in action for partition.
6. Same—Only party to record can appeal.

7. Same — Plain, speedy, and adequate remedy is allowed by our practice.
8. Same—Stranger to proceedings.
9. Same — Stranger to record who has been injuriously affected.
- 10, 11. Same — Tax-payer—Interest common with others, only.
12. Same—Same—Right when taxation increased.
13. Same — Same — When substantially bound by proceedings.
14. Petition to supreme court for writ—Must set forth sufficient reason.
15. Premature application for.

16. Proof of interest.
17. Right to writ—"Party beneficially interested."
18. Same—Goods stored in warehouse—Seized under search-warrant—President of warehouse lacks "beneficial interest."
19. Service of writ on judge of superior court—As sole respondent, is sufficient when.

See, ante, §§ 1067, 1068 and notes.

1. A person beneficially interested may apply for.—Only one "beneficially interested" may maintain certiorari proceedings; and in such action to quiet title parties other than the bank who make adverse claims to ownership of the property are not so interested as to entitle them to maintain certiorari proceedings to annul the order for assignment of the note and mortgage and subrogation to the rights of the mortgagee.—*Hildebrand v. Superior Court*, 173 Cal. 86, 159 Pac. 147.

As to person beneficially interested, see pars. 4-13, this note.

2. Same—Surety on administrator's bond.—The surety on the bond of a removed administrator, who has been joined with such administrator in an action for fraud in the administration of the estate, is a party beneficially interested in a proceeding to annul a void order appointing a special administrator for a person interested in the estate, who was by an order of the court made a party plaintiff in such action.—*Estate of Paulsen*, 35 Cal. App. 654, 170 Pac. 855.

3. Notice of application for certiorari.—Should be given to adverse party where proceeding is to annul judgment of inferior tribunal given in action in which such adverse party was interested.—*Pollock v. Cummings*, 38 Cal. 683, 685; *Fraser v. Freelon*, 53 Cal. 644, 646.

4. Party beneficially interested—Action to annul order of supervisors.—Requirement that application must be made by "the party beneficially interested" has been construed to mean that in application made by private party his interest must be of nature which is distinguished from that of mass of community.—*Ashe v. Board of Supervisors*, 71 Cal. 236, 237, 16 Pac. 783.

See pars. 1, 2, this note.

5. Same—Defendant in action for partition is party beneficially interested to make application for writ of certiorari to review proceedings of judge in striking complaint in such action from files.—*Younger v. Superior Court*, 136 Cal. 682, 687, 69 Pac. 485.

6. Same—Only party to record can appeal.—Word "party" as used in above section is to be construed in same way.—*Elliott v. Superior Court*, 144 Cal. 501, 508, 77 Pac. 1109.

7. Same—Plain, speedy, and adequate remedy is allowed by our practice to one whose rights or interests are injuriously

affected by judgment or by any appealable order of court given or made in an action or proceeding to which he is not party. He may make himself party by moving to set aside such judgment or order, and if his motion is denied, may, on appeal from order, have proceeding of which he complains reviewed not only for excessive jurisdiction, but for error. It is true that in one respect this remedy is less efficacious than that by certiorari, for neither motion nor appeal stays enforcement of void order unless supreme court, in exercise of its inherent power, should approve stay-bond.—*Elliott v. Superior Court*, 144 Cal. 501, 509, 77 Pac. 1109.

8. Same—Stranger to proceedings and not affected thereby could not properly apply for writ.—*Clary v. Hoagland*, 5 Cal. 476, 478.

9. Same—Stranger to record who has been injuriously affected by an order or judgment in excess of jurisdiction, but which is not appealable, and therefore reviewable only upon certiorari, may resort to method of moving to set aside such order or judgment and thereby make himself party. This is practice to be commended and encouraged for its convenience; for it is to be presumed that attention of court being called to its excess of jurisdiction, order or judgment would be vacated on motion without trouble and expense of certifying record to court of review.—*Elliott v. Superior Court*, 144 Cal. 501, 509, 510, 77 Pac. 1109.

10. Same—Tax-payer—Interest common with others, only.—Party applying for mandate having no interest, beneficial or otherwise, other than such interest as each one of one thousand four hundred and fifty-one persons besides himself who signed petition to board of supervisors may be said to have, has not such an interest as would support application by private citizen who may see fit to volunteer to bring action in behalf of public interests.—*Linden v. Board of Supervisors*, 45 Cal. 6, 7.

As to officers to whom writ must be directed and who must be before court, see, post, § 1070 and note.

As to party beneficially interested, see, post, § 1086, note Part II.

As to tax-payer being party beneficially interested so as to bring mandamus to compel public officer or board to perform public duty, see, post, § 1086 and note.

11. Compare: *Eby v. Board of School Trustees*, 87 Cal. 166, 174, 175, 25 Pac. 240.

12. Same—Same—Right when taxation increased.—Neglect of public officer to discharge public duty may affect interest of every tax-payer, but such result must, in ordinary cases, be uncertain and dependent upon contingencies. When, however, public board or officer has exceeded limited powers conferred by law, and direct consequence of such excessive use of authority must be to add to burden of local taxa-

tion, it clearly appears that, unless act ultra vires be annulled, each tax-payer must suffer injury common in character but special in amount or degree. One thus directly affected should be entitled to remedy and authorized to commence proceedings for certiorari.—*Maxwell v. Board of Supervisors*, 53 Cal. 389, 393.

13. Same—Same—When substantially bound by proceedings.—Writ awarded to tax-payer to review orders of body like board of supervisors when acting judicially in matter affecting whole body of tax-payers seems to be exceptional, there being no formal parties, and there being no appeal or other remedy for excess of jurisdiction, review upon certiorari is allowed to those who are substantially parties who were bound by proceedings. Another exceptional class of cases is that which has arisen under special statutes extending remedy. These grounds of exception have no application where action of court is to be reviewed, and no decisions can be found in this state of single case in which certiorari to review judgment or order of court has been issued at suit of stranger to record.—*Elliott v. Superior Court*, 144 Cal. 501, 509, 77 Pac. 1109.

14. Petition to supreme court for writ—Must set forth sufficient reason why application was not made to superior or district court. Petitions of this kind can not be made vehicle of insulting lower court.—*Gallardo v. Hannah*, 49 Cal. 136. See *Edwards v. Ryan*, 45 Cal. 243; *Menzies v. Board of Equalization*, 62 Pac. 179.

15. Premature application for.—An application for a writ of review to annul an alleged decision and order made by the railroad commission upon the overruling of a demurrer to a complaint praying for an order requiring the receiver of a water company to deliver water to the complainant for irrigation purposes upon payment of the usual rates, that such company was a public utility, and therefore subject to the jurisdiction of the commission, is premature and must be dismissed, as such decision is not a final adjudication of the case, but preliminary only to such final adjudication.

—*Holabird v. Railroad Commission*, 171 Cal. 691, 154 Pac. 831.

16. Proof of interest.—The question whether the petitioners are "beneficially interested" should be raised and determined by objection appropriately expressed by demurrer or motion to dismiss the proceedings, and where no such objection is raised and the return of the writ has been made, the petitioners are not required to make proof of their capacity.—*Rigdon v. City of San Diego*, 30 Cal. App. 107, 157 Pac. 513.

17. Right to writ—"Party beneficially interested."—Under the provisions of the above section where an application for a writ of review is made by a private party, his interest must be of a nature which is distinguishable from that of the mass of the community.—*James v. Police Court*, 39 Cal. App. 362, 178 Pac. 867, following the doctrine in *Ashe v. Board of Supervisors*, 71 Cal. 238, 16 Pac. 783.

As to certiorari not a writ of right, see, ante, § 1068, note pars. 89, 90.

As to party beneficially interested, see, post, § 1086, note Part II.

18. Same—Goods stored in warehouse—Seized under search-warrant—President of warehouse lacks "beneficial interest."—Under the provisions of the above section, requiring that an applicant for a writ of review must be a party beneficially interested where goods stored in a warehouse are seized under a search-warrant, the president of the warehouse company is not a party who is beneficially interested, so as to entitle him to become an applicant for a writ to review the proceedings of a police court by order of which goods of a third party so stored with his company were seized under search-warrant issued out of the police court.—*James v. Police Court*, 39 Cal. App. 362, 178 Pac. 867.

19. Service of writ on judge of superior court—As sole respondent, is sufficient when proper parties are before supreme court in proceeding for writ of review to annul order of superior court granting defendant in action time in which to plead.—*Baker v. Superior Court*, 71 Cal. 533, 12 Pac. 685.

§ 1070. THE WRIT TO BE DIRECTED TO THE INFERIOR TRIBUNAL, ETC. The writ may be directed to the inferior tribunal, board, or officer, or to any other person having the custody of the record or proceedings to be certified. When directed to a tribunal, the clerk, if there be one, must return the writ with the transcript required.

History: Enacted March 11, 1872, re-enactment of § 458 Practice Act.

WRIT—TO WHOM DIRECTED.

1. Costs for certifying record.
2. Custodian of record—Writ should be directed to.
3. Officer must be made party—To protect his jurisdiction.

4. Officers acting independently—No joinder.
5. Same—Superintendent of streets.
6. Same—Tribunals or officers who exercise jurisdiction separate.
7. Party whose acts are subject of review—Should be before court.

3. Public corporation—Organization by local board—Void proceedings—Certiorari.
 9. Writ should be directed to court instead of judge.

See, ante, §§ 167-169 and notes.

1. **Cost for certifying record.**—Writ issued to superior court and judge thereof directing him to certify transcript of record and proceedings in complaint to supreme court for review, matter sought to be reviewed being civil proceeding, does not require clerk of lower court to certify transcript without payment of fees. Party seeking writ must pay clerk of court in which he instituted his proceedings fees fixed by law for service of writ when issued; he must also pay fees of clerk of lower court for furnishing certified transcript of record in his office.—*I. X. L. Lime Co. v. Superior Court*, 143 Cal. 170, 172, 175, 76 Pac. 973.

2. **Custodian of record.**—Writ should be directed to.—Judge having returned to proper superior court all papers and proceedings filed with or had before him in matter in which search-warrant was issued by him, before date of filing of petition for writ of review, and no proceeding in said matter being pending before such judge, and he not having possession of any paper or record in such matter, his acts in issuing such search warrant can not be reached by writ of review. The writ must be directed to tribunal, officer or person having custody of record or proceeding to be certified.—*Quan Chick v. Coffey*, 75 Cal. 371, 372, 17 Pac. 427.

3. **Officer must be made party.**—To protect his jurisdiction.—Judgment attacked can not be annulled or modified unless tribunal or officer by whom it was rendered has been made party, whatever might be mode of service. Officer may have no personal interest in sustaining his judgment or order, but duty is imposed upon him of protecting his jurisdiction. If he be denied hearing, he may be shorn of power, if not by collusion, yet by failure to present question as forcibly as it might have been presented (*McKinstry, J., conc. op.*).—*Lamb v. Schottler*, 54 Cal. 319, 328.

4. **Officers acting independently** — No joinder.—Jurisdiction is in its nature an entirety and exclusive in body or person upon

whom it has been conferred. Writ of certiorari directed to different officers having no joint or common duties, but acting independently of each other, is unauthorized.—*Quinchard v. Board of Trustees*, 113 Cal. 654, 671, 45 Pac. 856.

5. **Same** — **Superintendent of streets**, board of trustees, and contractor are improperly joined in proceeding for writ of certiorari to annul order passed by board of trustees for improvement of certain street in city.—*Quinchard v. Board of Trustees*, 113 Cal. 664, 671, 45 Pac. 856.

6. **Same**—**Tribunals or officers who exercise jurisdiction separate** and distinct from each other should not be joined in same proceedings, as review is limited to examining jurisdiction of board or officers to whom writ is issued.—*Quinchard v. Board of Trustees*, 113 Cal. 664, 671, 45 Pac. 856.

7. **Party whose acts are subject of review**—Should be before court notwithstanding provision that writ may be directed to person having custody of record or proceedings to be certified.—*Lamb v. Schottler*, 54 Cal. 319, 322.

8. **Public corporation** — **Organization by local board**—**Void proceedings**—**Certiorari**.—In proceedings by certiorari to review the organization of a public corporation by a local board, under appropriate circumstances, the correct means of relief against void proceedings for the organization of a corporation for public purposes, where the method of creation of such corporation is prescribed by statute, a local board, empowered to create the corporation upon certain conditions and upon ascertainment of certain facts by such board, after a hearing held upon notice to parties interested; in ascertaining the required facts and determining that they exist, the action of the board is of a judicial character, and it sufficiently comes within the purview of a writ of review if such proceedings are of a judicial nature and are exercised by a quasi-judicial body.—*Bryant v. Board of Supervisors*, 32 Cal. App. 495, 163 Pac. 341.

9. **Writ should be directed to court instead of judge** when application is made to review judgment of court. Return in such case should be made by clerk of court. Proceeding contemplated by code is proceeding against tribunal instead of judge.—*Onesti v. Freelon*, 61 Cal. 625, 627.

§ 1071. CONTENTS OF THE WRIT. The writ of review must command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, a transcript of the record and proceedings (describing or referring to them with convenient certainty), that the same may be reviewed by the court; and requiring the party, in the mean time, to desist from further proceedings in the matter to be reviewed.

History: Enacted March 11, 1872, re-enactment of § 459 Practice Act.

WRIT—CONTENTS OF.

1. Duty of officers to whom writ is directed.
2. Party seeking to have action of inferior tribunal reviewed must furnish record.
3. Service upon all whose proceedings are to be reviewed required.
4. Writ requires only return of certified transcript of record.

1. **Duty of officers to whom writ is directed** is to prepare their return, and although they may be compelled summarily to make a return, yet it is incumbent upon prosecutor of writ, rather than party adverse to him, to see that return is made, to invoke aid of court to compel compliance with mandate of writ, and to use due diligence in having complete record made out, and his proceeding will be dismissed if he fails to use due diligence in prosecution thereof.—*I. X. L. Lime Co. v. Superior Court*, 143 Cal. 170, 175, 76 Pac. 973.

2. **Party seeking to have action of inferior tribunal reviewed by certiorari** is only person interested in having it so reviewed, and it should be his duty to furnish record to be reviewed as it is duty of

appellant on ordinary appeal. Certiorari is simply an additional method for reviewing action of inferior tribunal at instance of aggrieved party, and state or county, except when party to proceedings sought to be reviewed has no interest therein. No reason is apparent why charges imposed by state for services of state and county officers, rendered for benefit of private parties, should be waived in such proceeding, and there is nothing in statute to indicate any such intention.—*I. X. L. Lime Co. v. Superior Court*, 143 Cal. 170, 174, 76 Pac. 973.

3. **Service upon all whose proceedings are to be reviewed** seems to be contemplated by above section by providing that they may be required to desist from further proceedings in mean time.—*Lamb v. Schottler*, 54 Cal. 319, 322.

4. **Writ requires only return of certified transcript of record** and proceedings to be reviewed. General rules adopted by board of supervisors regulating mode and manner of giving notice with reference to equalization of assessment should not be included in return of writ.—*Garretson v. Board of Supervisors*, 61 Cal. 54, 55.

§ 1072. PROCEEDINGS IN INFERIOR COURT MAY BE STAYED, OR NOT. If a stay of proceedings be not intended, the words requiring the stay must be omitted from the writ; these words may be inserted or omitted, in the sound discretion of the court, but if omitted, the power of the inferior court or officer is not suspended or the proceedings stayed.

History: Enacted March 11, 1872, re-enactment of § 460 Practice Act.

§ 1073. SERVICE OF THE WRIT. The writ must be served in the same manner as a summons in civil action, except when otherwise expressly directed by the court.

History: Enacted March 11, 1872, re-enactment of § 461 Practice Act.

See, ante, §§ 1067-1071.

As to service of summons, see, ante, §§ 410 et seq. and notes.

As to service of writ on judge of superior court, see, ante, § 1069 and note par. 19.

As to service upon all whose proceedings are to be reviewed, being required, see, ante, § 1071 and note par. 3.

§ 1074. THE REVIEW UNDER THE WRIT, EXTENT OF. The review upon this writ can not be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer.

History: Enacted March 11, 1872, re-enactment of § 462 Practice Act.

REVIEW UNDER WRIT—EXTENT OF.

- 1, 2. Construction of section—In general.
3. Construction of "whether inferior tribunal regularly pursued its authority."
4. Correction of mere errors—Not province of writ of review.

5. Inferior tribunal is required to certify only matters of record.
6. Judgment of inferior court in excess of its jurisdiction—Is nullity.
7. Jurisdiction of subject-matter and person having been acquired—Effect of.

8. Merits of case are not for adjudication, when.
9. Objection not made that question can not be presented.
10. Proceedings complained of having been annulled—Effect of.
11. Sufficiency of evidence to establish jurisdictional facts—May be reviewed, when.
12. Writ of review is not writ of error.

1. **Construction of section—In general.**—The provision of this section (enacted prior to the constitution of 1879) that the review can not be extended further than to determine whether the inferior tribunal "has regularly pursued the authority of such tribunal, board or officer" does not assume to enlarge the range of inquiry or purpose as defined in section 1068, ante. The clause "whether the tribunal has regularly pursued its authority" is the equivalent of "whether it has exceeded its jurisdiction."—*Pacific Tel. & Tel. Co. v. Eshleman*, 166 Cal. 640, Ann. Cas. 1915C, 822, 50 L. R. A. (N. S.) 652, 137 Pac. 1119.

2. **Certiorari** is not a collateral, but a direct attack, and under this writ the existence of the jurisdictional facts may be a subject of inquiry. To this end the evidence itself may, in proper cases, be brought up for examination. While the writ of review is not a writ of error, and is not a means by which, as upon appeal, the mere manner of conducting the proceedings, the rulings of the court upon questions of evidence, and other matters within the jurisdiction, involving the merits, however erroneous they may be, can be reviewed, it is, nevertheless, a means by which the power of the court in the premises can be inquired into; and for this purpose the review extends, not only to the whole of the record of the court below, but even to the evidence itself, where necessary to determine the jurisdictional fact.—*Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 9 N. C. C. A. 466, 149 Pac. 35.

3. **Construction of "whether inferior tribunal regularly pursued its authority"** is that it is equivalent to clause "has exceeded jurisdiction of such tribunal." Character of act or determination sought to be reviewed, rather than character of tribunal or officer by which act or determination is made, is test for determination whether writ should be issued, for it is only determination which is made when exercising judicial functions that can be reviewed.—*Quinchard v. Board of Trustees*, 113 Cal. 664, 668, 45 Pac. 856.

4. **Correction of mere errors**—Not province of writ of review.—Only inquiry is whether tribunal or body regularly pursued its authority and did not exceed its jurisdiction, and beyond that proceeding does not authorize an inquiry.—*People ex rel. Lamby v. Dwinelle*, 29 Cal. 632, 635.

5. **Inferior tribunal is required to certify only matters of record**, yet if jurisdictional facts do not appear of record, it must certify not only what is technically denominated of record, but such facts or evidence of them as may be necessary to determine question of jurisdiction of tribunal which may be involved.—In *matter Madera Irr. Dist.*, 92 Cal. 296, 335, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 675. See *People ex rel. Whitney v. Board of Delegates*, 14 Cal. 479; *Lowe v. Alexander*, 15 Cal. 296, 300; *Blair v. Hamilton*, 32 Cal. 49, 53; *Stumpf v. Board of Supervisors*, 131 Cal. 364, 367, 82 Am. St. Rep. 350, 63 Pac. 663.

As to what constitutes record for review, and as to amendment of and attack on same, see, ante, § 1068, note pars. 109-113.

6. **Judgment of inferior court in excess of its jurisdiction**—Is nullity and will be set aside upon certiorari. Superior court could not give jurisdiction to inferior court or legalize void judgment. Its jurisdiction in premises extends no further than either to adjudge judgment of inferior court void or else dismiss writ of certiorari.—*Will v. Sinkwitz*, 39 Cal. 570, 571.

7. **Jurisdiction of subject-matter and person having been acquired** by inferior tribunal or board, procedure within its jurisdiction is no more open to question than it would be if it were court of general jurisdiction. All its acts after having acquired jurisdiction constituted exercise of such jurisdiction—none less if such acts were erroneous.—*Farmers' & M. Bank v. Board of Equalization*, 97 Cal. 318, 327, 32 Pac. 312.

8. **Merits of case are not for adjudication** where motion is granted dismissing writ of review on ground that writ was improperly issued for want of prosecution. Order dismissing writ in such case should not affirm judgment of lower court.—*Onesti v. Freelon*, 61 Cal. 625, 628.

9. **Objection not being made that question presented** can not be reached on certiorari, court will examine it on its merits.—*People ex rel. Johnson v. Board of Supervisors*, 77 Cal. 136, 137, 19 Pac. 257.

10. **Proceedings complained of having been annulled** by competent authority, it would not be necessary or proper for court to proceed further. If there is nothing to annul, there is nothing for court to act upon in this proceeding.—*Lamb v. Schotter*, 54 Cal. 319, 322.

11. **Sufficiency of evidence to establish jurisdictional facts**—May be reviewed upon application for writ of certiorari; otherwise, if inferior board or tribunal assumed jurisdiction from certain facts, writ of certiorari would be of no avail unless such facts could be reviewed.—*Stumpf v. Board of Supervisors*, 131 Cal. 364, 367, 82 Am. St. Rep. 350, 63 Pac. 663.

12. Writ of review is not writ of error.—While mere matter of conducting proceedings, rules of court upon questions of evidence, and other matters within jurisdiction involving merits, however erroneous they may be, can not be reviewed upon certiorari, it is nevertheless means by

which power of court in premises can be inquired into, and for this purpose the review extends not only to whole record of court below, but even to evidence itself where necessary to determine jurisdictional facts.—*Schwarz v. Superior Court*, 111 Cal. 106, 112, 43 Pac. 580.

See, ante, §§ 1067-1071 and notes.

§ 1075. A DEFECTIVE RETURN OF THE WRIT MAY BE PERFECTED. HEARING AND JUDGMENT. If the return of the writ be defective, the court may order a further return to be made. When a full return has been made, the court must hear the parties, or such of them as may attend for that purpose, and may thereupon give judgment, either affirming or annulling, or modifying the proceedings below.

History: Enacted March 11, 1872, re-enactment of § 463 Practice Act.

DEFECTIVE RETURN—HEARING AND JUDGMENT.

1. Affidavits—Can not be received in supreme court.
2. Error complained of—Must be shown by record.
3. Facts upon which court below acted—When part of record.
- 4, 5. Hearing on return of certiorari.
6. Proper return not having been made before submission—Effect of.
7. Writ of certiorari—Can not be made to subserve purpose of writ of mandate.
8. Same—Defective return—"Transcript of record and proceedings"—Answer substituted for—Striking from files.

1. Affidavits—Can not be received in supreme court to contradict, add to, or amend record, for latter imports absolute verity. If minutes do not correctly show proceedings had in court below, application should have been made in that court to correct same.—*Hoffmann v. Superior Court*, 79 Cal. 475, 476, 21 Pac. 862.

2. Error complained of—Must be shown by record.—Record is taken as true, and if contrary is fact it must be corrected by motion or suggestion to court below. Supreme court can not alter record of trial court.—*Roe v. Superior Court*, 60 Cal. 93, 94.

3. Facts upon which court below acted becoming necessary for court of review to be put into possession of, and such facts not being technically of record, it is competent for court of review to require lower court to certify such facts in its return to writ and this statement of facts would then be part of record.—*City of Los Angeles v. Young*, 118 Cal. 295, 297, 62 Am. St. Rep. 234, 50 Pac. 534.

4. Hearing on return of certiorari.—A minute order dismissing a petition for a writ of review is not a judgment rendered upon the return of an inferior tribunal from which an appeal lies. Where this, however, is contradicted by the fact that the writ was issued and a return there-

after made, but there is nothing to show that a hearing was ever had, the matter is still pending and should be heard.—*Frede v. Justices' Court*, 30 Cal. App. 85, 157 Pac. 528.

5. On certiorari proceedings to review and annul a resolution of a city council, after the return to the writ has been made and no other steps taken by the respondents to question the sufficiency of the petition as to the capacity of the parties petitioning to sue, it is not necessary that the petitioners be put upon proof as to the allegation of competency; the court is entitled to consider the case upon the issue of law presented by a motion for judgment upon the facts shown by the return; and the matter of the competency of the parties to sue or the sufficiency of the petition in its statement of facts showing such competency should be raised by demurrer or motion to dismiss the proceeding.—*Rigdon v. City of San Diego*, 30 Cal. App. 107, 157 Pac. 513.

6. Proper return not having been made before submission—Effect of.—Proper return of writ not having been made before submission of case, submission should be set aside as premature and direction should issue to clerk of superior court to return writ with transcript of record of matter to be reviewed.—*Tapl v. Superior Court* (Cal. May '4, 1894), 36 Pac. 781, not elsewhere reported, and not in California Digest.

7. Writ of certiorari—Can not be made to subserve purpose of writ of mandate.—Upon review of action of supervisors in awarding contract for printing and declaring that certain bid was not bid, decree of court canceling such order and decreeing that such board at their first meeting award contract for printing to person whose bid was canceled, is erroneous and can not be sustained. Only judgment that court can give upon hearing of writ is either to affirm, annul, or modify proceedings below.—*Townsend v. Copeland*, 56 Cal. 612, 614.

8. Same—Defective return—"Transcript of record and proceedings"—Answer substituted for—Striking from files.—In a case in which goods stored in a warehouse were seized under a search-warrant issuing out of a police court, and in answer to a writ of review issued out of a superior court and directed to a judge of a police court, requiring him to certify a transcript of the record in a certain search-warrant proceedings, no such writ was made, but the judge of the police court appealed by veri-

fied answer in the action for the writ, setting out in narrative form the history of the cause, and alleging that "No further proceedings have been had in said police court other than as set forth in the petition for a writ of review," such purported answer does not constitute a return to the writ, and the superior court properly struck the answer from the files.—*James v. Police Court*, 39 Cal. App. 362, 187 Pac. 867, following the doctrine in *I. X. L. Lime Co. v. Superior Court*, 143 Cal. 175, 76 Pac. 973.

§ 1076. COPY OF JUDGMENT MUST BE SENT TO THE INFERIOR TRIBUNAL. A copy of the judgment, signed by the clerk, must be transmitted to the inferior tribunal, board, or officer having the custody of the record or proceeding certified up.

History: Enacted March 11, 1872, re-enactment of § 464 Practice Act.

§ 1077. JUDGMENT-ROLL. A copy of the judgment, signed by the clerk, entered upon or attached to the writ and return, constitute the judgment-roll.

History: Enacted March 11, 1872, re-enactment of first portion of § 465 Practice Act.

JUDGMENT-ROLL.

1. Appeal may be taken to supreme court.
- 2, 3. Construction of section.
4. Petition for writ—No part of record.

1. **Appeal may be taken to supreme court** from judgment of superior court in proceedings upon certiorari.—*Morley v. Elkins*, 37 Cal. 454, 456. See *Palache v. Hunt*, 64 Cal. 473, 474, 2 Pac. 245; *People ex rel. Levenson v. Thompson*, 66 Cal. 398, 5 Pac. 886; *Heinlen v. Phillips*, 88 Cal. 557, 558, 559, 26 Pac. 366; *Knowles v. Thompson*, 133 Cal. 245, 248, 65 Pac. 468.

2. **Construction of section.**—The court in this case declines to consider a supplemental transcript for the reason that the appellants have chosen to present their appeal upon the papers and record as being that designated in above section.—*Rigdon*

v. City of San Diego, 30 Cal. App. 107, 157 Pac. 513.

3. The requirement that the judgment-roll certified must show the issuance and existence of a writ and a return doubtless rests upon the theory that, inasmuch as the return to the writ is the basis of the judgment reviewed by the court, it should appear as a part of the record on appeal.—*Donovan v. Board of Police Commrs.*, 32 Cal. App. 392.

4. **Petition for writ—No part of record.**—The petition upon which court directs writ to issue is no part of record upon appeal taken from judgment in proceedings by certiorari where appeal is taken from judgment and no bill of exceptions is filed and matter is heard upon such appeal on judgment-roll alone.—*Reynolds v. County Court*, 47 Cal. 604, 605; *Garretson v. Board of Supervisors*, 61 Cal. 54, 55; *Rauer v. Justices' Court*, 115 Cal. 84, 85, 46 Pac. 870.

CHAPTER II.

WRIT OF MANDATE.

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| § 1084. Mandate defined. | § 1092. Motion for new trial, where made. |
| § 1085. When and by what court issued. | § 1093. The clerk must transmit the verdict to the court where the motion is pending, after which the hearing shall be had on motion. |
| § 1086. Writ, when and upon what to issue. | § 1094. If no answer be made, or if the answer raise no material issue of fact, the hearing must be before the court. |
| § 1087. Writ must be either alternative or peremptory. | § 1095. If the applicant succeed, he may have damages, costs, and a peremptory mandate. |
| § 1088. If the application be without notice, the alternative writ may issue; otherwise, the peremptory. | § 1096. Service of the writ. |
| § 1089. The adverse party may answer under oath. | § 1097. Penalty for disobedience to the writ. |
| § 1090. If an essential question of fact is raised, the court may order a jury trial. | |
| § 1091. The applicant may demur to the answer, or countervail it by proof. | |

§ 1084. MANDATE DEFINED. The writ of mandamus may be denominated a writ of mandate.

History: Enacted March 11, 1872, re-enactment of § 466 Practice Act; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 345.

As to all writs to issue in name of people, see Kerr's Cyc. Pol. Code, 2d ed., § 30 and note.

As to seal of court being necessary to writ, see, ante, § 153.

As to writ of prohibition being counterpart of writ of mandate, see, post, § 1102 and note.

Same—Effect of writ and against whom runs.—See, post, § 1102 and note pars. 71-73.

§ 1085. WHEN AND BY WHAT COURT ISSUED. It may be issued by any court, except a justice's or police court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person.

History: Enacted March 11, 1872, substantial re-enactment of § 467 Practice Act.

MANDAMUS—WHEN AND BY WHAT COURT ISSUED.

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| 1-3. As to when lies—In general. | 16. Act not being discretionary—But purely ministerial duty. |
| 4. Same—To coerce official action. | 17. Act to be performed in foreign state—The writ of mandamus can not be invoked. |
| 5. Same—To compel audit of claim. | 18. Same—Order to be issued in this state. |
| 6. Same—To compel calling election. | 19. Action against husband and wife—For wife's tort—Dismissal as to husband—Writ lies to compel dismissal as to wife. |
| 7. Same—To compel city council to pass upon protest to assessment. | 20, 21. Against auditor—In case of judgment against creditor of municipality. |
| 8, 9. Same—To compel entry of decree of divorce. | 22, 23. Appeal—Remedy by. |
| 10. Same—To compel exercise of discretion. | 24. Auditing of claim against county—Order of superior court—Mandamus. |
| 11, 12. Same—To compel to proceed with action—Settle bill of exceptions. | 25. Auditor—Has no authority to refuse to draw his warrant. |
| 13. Same—To deliver property in replevin to plaintiff. | |
| 14. Same—To punish for contempt. | |
| 15. A prerogative writ. | |

26. Ballots void for uncertainty—Mandamus will not lie to compel their canvas.
27. Bill of exceptions—Compelling settlement of—Appeal from action of referee refusing.
28. Same—Duty of judge to settle bill.
29. Same—Exercise of discretion can not be controlled.
30. Same—Mandamus may issue to compel judge to sign bill.
31. Same—Mandamus will not lie to strike matter from bill.
32. Same—Term of judge having expired.
33. Certification of transcript in criminal case—The writ will not issue to compel.
34. Charter giving supervisors right to reject any and all bids.
35. Common council—May be compelled to advertise as required by law.
36. Common-law proceeding by mandamus—Was employed as supplemental and extraordinary writ.
37. Construction of section—As to application.
38. Construction of Long Beach charter—Issue of bonds for new pier.
39. Coupons on bonds of irrigation district—Mandate lies, what purpose.
40. Court—Having acted upon and determined matter within its jurisdiction.
41. Same—May act as effectively by refusing as by granting.
42. Same—Will not be compelled to try and determine action.
43. Creation of reclamation district—By order of board of supervisors—May be compelled by mandamus.
44. Defendant voluntarily complying with mandate of court—Pending appeal.
45. Demand and refusal—Distinction is recognized between duties.
- 46, 47. Same—Imperative rule.
- 48, 49. Depositions—A proper remedy for the refusal of a commission.
50. Discretion—Abuse of will be corrected by mandamus.
51. Same—Can not be controlled by mandamus.
- 52-55. Discretion of court as to granting writ—In general.
56. Dismissal of indictments—Trial postponed without due cause.
57. Doubt existing as to duty of officer to act.
58. Duty of clerk—Aid of nonappealable order.
59. Same—Authentication of reporter's notes—Papers not included in judgment-roll.
60. Duty of judge—To proceed with trial.
61. Same—Duty of preliminary examination.
62. Effect of delay in applying for writ.
63. Election—Canvassing officers—Mandamus is proper remedy.
64. Erroneous dismissal of appeal by superior court.
65. Expiration of time prescribed for performance of official act.
66. Facts that must be shown—Course of conduct required—Refusal to follow.
67. Filing certificates.
- 68, 69. Filing certified copy of amended articles of incorporation—Duty of secretary of state.
70. Same—Necessity for refusal.
71. Same—When request unnecessary.
72. Function of writ.
- 73, 74. Granting writ—Appeal from order—Effect of.
75. Intention of legislature—Was to give statutory authority.
76. Irrigation district—Coupons on bonds of—Mandate lies, for what.
77. Issuance of commission to take depositions, under sections 2020 and 2021, post.
78. Issuance of permit by police commissioners.
- 79, 80. Issuance of writ—Discretion of court in.
81. Same—Exercise of not compelled by writ.
82. Jurisdiction—Determination of court as matter of law purely.
83. Same—Determination of court upon facts shown.
84. Same—Duty of hearing and determining all matters within its jurisdiction.
85. Same—Necessary legal deduction from facts stated.
86. Same—To try cause or hear appeal depending upon existence of certain facts.
87. Laches—Allowing seven years to elapse.
88. Law affixing right to specific relief from certain facts.
89. Mandamus—Can not serve purpose of action for money had and received.
90. Same—Will lie to compel—Example of acts compelled—Act of judicial body or officer.
91. Same—Same—Advertisement of street-railroad franchise.
92. Same—Same—Apportionment of election officers.
93. Same—Same—Assessment of taxes.

94. Same—Same—Auditor to audit valid and legal claim.
95. Same—Same—Auditor to draw warrant for claim allowed.
96. Same—Same—Auditor to recognize, compute, and enter tax-levy.
97. Same—Same—Board of education to issue certificate as teacher.
98. Same—Same—Board of library trustees to draw and deliver warrant.
99. Same—Same—Board of trustees of city to call election.
100. Same—Same—Canvassing election returns.
101. Same—Same—City clerk to countersign certified improvement bonds of city.
102. Same—Same—City clerk to draw warrant for purchase-money for land.
103. Same—Same—City treasurer to pay warrant drawn by board of education.
104. Same—Same—Claim against municipality.
105. Same—Same—Clerk of justices' court to file affidavit.
106. Same—Same—Clerk of court to issue execution.
107. Same—Same—Controller to draw his warrant.
108. Same—Same—Corporation to open its books and allow registry.
109. Same—Same—Court to allow suspended attorney to appear.
110. Same—Same—Court to make decree showing due notice to creditors.
111. Same—Same—Exclusion of land from irrigation district.
112. Same—Same—Inspection of corporate books and records.
113. Same—Same—Judge to fix amount of stay-bond.
114. Same—Same—Judge to fix undertaking to stay proceedings upon appeal.
115. Same—Same—Judge to hear and determine motion for change of venue.
116. Same—Same—Juvenile court officer, payment of salary of.
117. Same—Same—Payment of full amount appropriated by act.
- 118, 119. Same—Same—Payment of salary as public officer—Trial of title to office.
120. Same—Same—Reinstatement of student as pupil in state normal school.
121. Same—Same—Salary of public officer—Auditing of and issuance of warrant.
122. Same—Same—Secretary of corporation.
123. Same—Same—Settlement of bill of exceptions.
124. Same—Same—Same—Appeal from order amending judgment.
125. Same—Same—Street superintendent to pay over to party entitled.
126. Same—Same—Superior court to allow amendment directed by appellate court.
127. Same—Same—Treasurer to repay excess taxes.
128. Same—Will not lie to compel—Examples of acts not compelled—Assessor to assess street-railway.
129. Same—Same—Auditor to allow claim incurred during prior year.
130. Same—Same—Auditor to draw his warrant for illegal claim.
131. Same—Same—Auditor to draw warrant for salary for commissioners.
132. Same—Same—Auditor to draw warrant in favor of shorthand reporter.
133. Same—Same—Board of education to declare teacher elected.
134. Same—Same—Board of education to issue county certificate.
135. Same—Same—Clerk to enter default.
136. Same—Same—Clerk of court to issue execution.
137. Same—Same—Court to act upon motion to vacate injunction.
138. Same—Same—Court to render decision and judgment.
139. Same—Same—Discretionary power of supervisors in advertising for bids.
140. Same—Same—Illegal, etc., act—Will not lie to compel performance of.
141. Same—Same—Issuance of liquor license by municipal authorities.
142. Same—Same—Justice of peace to render judgment by default.
143. Same—Same—Not lie to compel a referendum under city charter.
144. Same—Same—Not lie to compel board of police commissioners.
145. Same—Same—Not lie to compel school trustees to reinstate teacher.
146. Same—Same—Performance of a vain act.
147. Same—Same—Restoration to membership.
148. Same—Same—Tax-collector to execute tax-deed.
149. Same—Same—Trustees of reclamation district to levy assessment.
150. Manner of action—Can not be controlled by.

151. Same—Court can be compelled to act.
 152. Same—Person who acts in judicial capacity may be ordered to proceed.
 153. Same—Subordinate judicial tribunal may be compelled to proceed.
 154. Matters of discretion.
 155. Same—Amount of attachment bond.
 156. Same—Decision of board of county supervisors.
 - 157-159. Not a writ of right.
 160. Not anticipatory.
 161. Notice of application—Evidence of service upon all parties interested.
 162. Object being to restore person to right given by law—Mandamus is proper remedy.
 163. Objection that costs were improperly included in judgment—Can not be set up as defense.
 164. Obligation of contract—Can not be enforced by mandamus.
 165. Officer—Can not be compelled to pay sum of money by mandate, when.
 166. Order changing place of trial—Is matter within cognizance of court.
 167. Orders of court—Are not usually set aside by mandamus.
 168. Parties defendant—General practice in mandamus.
 169. Same—Must be an official when duty is required.
 170. Same—Road-overseer should be made party, when.
 171. Performance of act—Beyond that enjoined by law.
 172. Petition for writ—Averments in—Taken as true.
 173. Same—Compliance with statute.
 - 174, 175. Same—Sufficiency of.
 176. Petition to compel—Judge to fix amount of stay-bond.
 177. Same—State controller to draw warrant.
 178. Power to comply with order of court in premises, lost.
 179. Presumption—Is that official duty is regularly performed.
 180. Prerogative writ.
 181. Prevention of failure of justice—Where there is no specific remedy in ordinary course of law.
 182. Process of superior courts—Extends throughout state.
 183. Purpose to be accomplished by writ necessary.
 184. Same—Enforcement of statutory right.
 185. Same—Failing to show that writ will serve or protect some right or interest.
 186. Same—Fundamental principle of law of mandamus.
 - 187, 188. Refusal to issue writ—No advantage to be derived.
 189. Reporter's fees at preliminary examination—In San Francisco.
 190. Representation on election board.
 191. Right to inspect record of corporation—By stockholder.
 192. Salary, compelling payment of—Office being filled by de facto officer.
 193. Same—Res judicata.
 194. Scope of inquiry—Truth of facts assumed.
 195. Statute of limitations—Is applicable to petition for writ.
 196. Stenographic report—Mandate to compel preparation.
 197. Supreme court and superior court—Both have original jurisdiction.
 198. Tax-payer or resident-elect—Not party beneficially interested, when.
 - 199, 200. Title to office—Can not be tried in proceeding to obtain mandamus.
 201. Same—Contending boards of supervisors.
 202. Same—Demand that defendant hand over books and papers.
 203. Same—Incidentally determined.
 204. Same—Office being filled—Mandamus will not lie.
 205. Same—Party in office under color of lawful right.
 206. Same—Person showing prima facie right to office.
 207. Same—Right to office can not be secured by mandamus.
 208. Same—When only incidentally involved.
 209. Writ of—Issues only to compel performance of act.
 210. Same—May issue in what cases.
 211. Same—Under our statute—Like writ of procedendo ad judicium at common law.
 212. Writ of possession—Issued under order of court can not be set aside by mandamus.
 213. Wrongful order of dismissal of appeal.
- As to issuance of writ to compel sheriff to execute writ of execution, see, ante, § 691 and note.
- As to relief by mandate and injunction in same suit, see, ante, § 526 and note.
- As to unconstitutionality of statute as defense against mandamus to compel its enforcement, see note 24 L. R. A. (N. S.) 1260.
1. As to when lies—In general.—Where there is no conflicting evidence nor disputes as to the facts and the decision depends

wholly upon questions of law, and the law enjoins upon a board as a duty an act the performance of which is refused, mandamus will lie where there is no plain, speedy, and adequate remedy in the ordinary course of law.—*San Diego & Ariz. R. Co. v. State Board of Equalization*, 165 Cal. 560, 132 Pac. 1044.

As to not being a writ of right, see pars. 157-159, this note.

As to subjects of writ, see pars. 90-127, this note.

As to when writ will not issue, see pars. 128-149, this note.

2. Mandamus can not be invoked to compel the police commissioners of San Francisco to grant a pension before a proper demand has been made upon them.—*French v. Cook*, 173 Cal. 126, 160 Pac. 411.

3. Lies only to compel performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station.—*Fox v. Workman*, 6 Cal. App. 633, 635, 92 Pac. 742.

4. **Same—To coerce official action.**—If a contractual right is so inseparably bound with an imperative duty laid upon public officials by law as to require the performance of the duty of the officers to further secure such right, mandamus may be invoked to coerce such official action.—*Moreing v. Shields*, 28 Cal. App. 513, 152 Pac. 964.

5. **Same—To compel audit of claim.**—The principle that the state can not be sued without its consent has no application to a proceeding in mandamus to compel the state board of control to audit a claim for services rendered to the state conservation commission.—*U'Ren v. State Board of Control*, 31 Cal. App. 6, 159 Pac. 615.

6. **Same—To compel calling election.**—Inasmuch as the law does not specially or at all enjoin the holding of an election, even though the requisite number of qualified voters has petitioned therefor, a writ of mandate will not lie to compel the directors of an irrigation district to call such election.—*Imperial Land Co. v. Imperial Irr. Dist.*, 26 Cal. App. 529, 147 Pac. 593.

7. **Same—To compel city council to pass upon protest to assessments.**—A writ of mandate may be issued to compel a city council to pass upon and determine the questions involved in the protests as to assessments, and orders with reference to their confirmation or modification, or the ordering of new assessments in lieu of the original, as they are required to do under section 19 of the act of 1903 relating thereto.—*Title Ins. & Trust Co. v. Lusk*, 15 Cal. App. 362, 115 Pac. 53.

8. **Same—To compel entry of decree of divorce.**—Where an appeal is pending and undetermined from the portion of an interlocutory decree of divorce making provision for the maintenance and support of the wife, mandamus will not lie to compel the superior court to enter the final decree,

notwithstanding the interlocutory decree has become final with respect to the plaintiff's right to a divorce.—*Newell v. Superior Court*, 27 Cal. App. 343, 149 Pac. 998.

9. After the expiration of a year from the entry of the interlocutory decree in a divorce action, if no appeal has been taken, a writ of mandate may issue at the instance of the plaintiff to require that the court grant the final decree.—*Newell v. Superior Court*, 29 Cal. App. 694, 159 Pac. 735.

10. **Same—To compel exercise of discretion.**—Even where discretion is vested, if that discretion under the facts can be legally exercised in but one way, mandate will lie to compel the inferior tribunal so to exercise it.—*Newlands v. Superior Court*, 171 Cal. 741, 154 Pac. 829.

11. **Same—To compel to proceed with action—Settle bill of exceptions.**—Notwithstanding the imprisonment of the plaintiff in a civil action in the state prison, upon the conviction of a felony, after the filing by him of a complaint in the civil action, the defendant in the action has the right to have the action proceed, and upon the court's refusal to proceed with the case, mandamus will issue to compel it.—*Castera v. Superior Court*, 29 Cal. App. 694, 159 Pac. 735.

12. Mandamus will lie to compel the settlement of bill of exceptions, notwithstanding no appeal was taken from the order dismissing the motion for a new trial, since the moving parties are entitled to use such bill on their appeal from the judgment.—*Slye v. Hunt*, 29 Cal. App. 117, 154 Pac. 607.

13. **Same—To deliver property in replevin to plaintiff.**—Where the defendant in replevin seeks a redelivery of the property, but his sureties fail to justify, the sheriff must deliver the property to the plaintiff; and if he declines to do so, he may be compelled by mandamus.—*Bailey v. Baker*, 28 Cal. App. 537, 153 Pac. 242.

14. **Same—To punish for contempt.**—In proper cases the superior court should issue citations in contempt and punish for disobedience to its orders, including injunctions, and mandate is the proper remedy where the court refuses to hear and decide such a contempt proceeding.—*United Railroads of San Francisco v. Superior Court*, 172 Cal. 80, 155 Pac. 463.

15. **A prerogative writ.**—The writ is a prerogative one, and in order to entitle the petitioner to such writ it must plainly appear that he is entitled to the relief demanded.—*Gray v. Mullins*, 15 Cal. App. 119, 113 Pac. 694.

16. **Act not being discretionary.**—But purely ministerial duty resulting from antecedent act of party, it may be enforced by mandamus. Applicant for certificate as teacher having been awarded percentage of proficiency on all subjects included in examination required by law and rules of board so as to entitle him to such certificate, and

board having found and decided that he was of good moral character and in every way competent to receive such certificate, mandamus will lie to compel board to issue certificate after formal demand for such issuance, and its refusal by board.—*Keller v. Hewitt*, 109 Cal. 146, 148, 41 Pac. 871.

As to correction of abuse of discretion by mandamus, see par. 50.

17. Act to be performed in foreign state.—The writ of mandamus can not be invoked to compel performance of an act which can not be performed within this state, but must be done, if at all, some place in another state.—*Hobbs v. Tom Reed Gold Min. Co.*, 164 Cal. 497, 129 Pac. 781, 782.

18. Same.—Order to be issued in this state.—Where a corporation holds its directors' meetings in this state, its directors reside here, and the corporate business, in part at least, is done in this state, its directors, acting in this state, may make and deliver to the plaintiff an order of the person in charge of the mine, situated in another state, instructing them to permit the plaintiff to enter and examine the same. In the ordinary course of business, it is to be presumed that such an order would be made in this state, rather than in the foreign state, since the directors and officers reside here and hold meetings here. There is, therefore, no physical or jurisdictional obstacle to prevent the issuance and execution of a writ of mandate to compel the defendants to perform such act. Ample power to compel obedience is conferred by section 1097, post, although, doubtless, the power would exist in the absence of such express grant.—*Hobbs v. Tom Reed Gold Min. Co.*, 164 Cal. 497, 129 Pac. 781, 782.

19. Action against husband and wife.—For wife's tort.—Dismissal as to husband.—Writ lies to compel dismissal as to wife.—When an action, which has been brought against husband and wife for her tort, is dismissed as to him, mandamus lies to compel the dismissal of the action as to her.—*Horsburgh v. Murasky*, 49 Cal. Dec. 308, 147 Pac. 147.

20. Against auditor.—In case of judgment against creditor of municipality.—Mandamus will lie to compel a city auditor to draw his warrant upon the treasurer in favor of a person who has filed with him, pursuant to section 710, ante, an authenticated transcript of a judgment obtained against a creditor of the municipality, notwithstanding that by the provisions of the charter of the municipality the mayor is required to sign all warrants on such treasurer.—*Ott Hardware Co. v. Davis*, 165 Cal. 795, 134 Pac. 973.

21. Mandamus will lie to compel a city auditor to draw his warrant upon the treasurer in favor of a person who has filed with him a duly authenticated copy of a judgment obtained against a creditor of the municipality, notwithstanding the fund out of which such payment should be made has

been subsequently wrongfully disbursed by such officer.—*Ott Hardware Co. v. Davis*, 165 Cal. 795, 134 Pac. 973.

22. Appeal.—Remedy by, if plain, speedy and adequate, mandamus will not lie.—*People ex rel. Gesford v. Superior Court*, 114 Cal. 466, 472, 46 Pac. 383.

As to effect of right of appeal, see, post, § 1086, note pars. 28-31.

23. Mandamus will not lie where the petitioner has a plain, speedy and adequate remedy in the ordinary course of law. And an allegation that he has not such a remedy is but a conclusion of law, and does not avail him where the case is of a character that such a remedy does exist under the law.—*Turner v. Morrissey*, 22 Cal. App. 271, 134 Pac. 335.

24. Auditing of claim against county.—Order of superior court.—Mandamus.—The superior court has no inherent power to make an order requiring a county auditor to audit a claim against the county for service of detectives employed by the grand jury to assist that body in the investigation of crime, the auditor not being an officer of the court or a party to the proceedings in which the order was made; the remedy of the claimant for such services is by writ of mandate directed to the auditor, under the provisions of the above and following sections.—*Woody v. Peairs*, 35 Cal. App. 553, 170 Pac. 660.

25. Auditor.—Has no authority to refuse to draw his warrant for claim allowed by supervisors. His duties are ministerial and he must not anticipate violation of law by any one else. It is sufficient for him to do his duty under law and not to assume other responsibilities. Mandamus will lie to compel auditor to draw warrant.—*Worthington v. Breed*, 142 Cal. 102, 104, 75 Pac. 675.

26. Ballots void for uncertainty.—Mandamus will not lie to compel their canvass.—Where the ballots cast at a city election are void for uncertainty, mandamus does not lie to compel the city counsel to canvass the votes, for a court will exercise its power to issue the writ only when some useful purpose may be accomplished thereby.—*Wilson v. Blake*, 49 Cal. Dec. 273, 147 Pac. 129.

27. Bill of exceptions.—Compelling settlement of.—Appeal from action of referee refusing to settle bill of exceptions could not afford defendant adequate remedy, for if on such appeal order should be reversed, it would not secure aggrieved party right erroneously denied him, viz., settlement of statement. Referee might still refuse to settle it and defendant at last be compelled to resort to mandamus.—*Careaga v. Fernald*, 66 Cal. 351, 353, 5 Pac. 615.

28. Same.—Duty of judge to settle bill of exceptions when properly presented is imposed on him by law. And if it contains redundant or useless matter it is his duty to strike it out. Party presenting bill of ex-

ceptions which contains literal transcript of reporter's notes, should be allowed opportunity to correct same, and judge can be compelled by mandamus to take such steps as, in his judgment, may be requisite for purpose of striking out all useless matter in such statement and upon its amendment to settle and allow same.—City of Santa Ana v. Ballard, 126 Cal. 677, 679, 59 Pac. 133. See Careaga v. Fernald, 66 Cal. 351, 353, 5 Pac. 615; Estate of Herteman, 73 Cal. 545, 547, 15 Pac. 121; Sansome v. Myers, 80 Cal. 483, 486, sub nom. Sansome v. Superior Court, 22 Pac. 212; Leach v. Pierce, 93 Cal. 614, 618, 29 Pac. 235; Tibbets v. Riverside B. Co., 97 Cal. 258, 259, 32 Pac. 174; Cohen v. Wallace, 107 Cal. 133, 138, 40 Pac. 101; Winters v. Buck, 121 Cal. 279, 280, 53 Pac. 799.

29. Same—Exercise of discretion can not be controlled or reviewed by mandamus. Judge can not be compelled to settle any one particular bill instead of another, or to insert or exclude any particular facts; but if petitioner is entitled to move for new trial and has taken proper steps within time, or has tendered bill of exceptions to be used on appeal from order within time allowed by law, judge can not refuse to settle and sign bill containing record of proceedings. This is act which law requires him to perform—and duty resulting from his office.—Leach v. Pierce, 93 Cal. 614, 618, 29 Pac. 235. See Careaga v. Fernald, 66 Cal. 351, 353, 5 Pac. 615; Estate of Herteman, 73 Cal. 545, 547, 15 Pac. 121; Sansome v. Myers, 80 Cal. 483, 486, sub nom. Sansome v. Superior Court, 22 Pac. 212; Landers v. Landers, 82 Cal. 480, 482, 23 Pac. 126; Tibbets v. Riverside B. Co., 97 Cal. 258, 259, 32 Pac. 174; Winters v. Buck, 121 Cal. 279, 281, 53 Pac. 799; City of Santa Ana v. Ballard, 126 Cal. 677, 679, 59 Pac. 133.

As to matters of discretion, see par. 51, this note.

30. Same—Mandamus may issue to compel judge to sign bill of exceptions.—Wood v. Strother, 76 Cal. 545, 550, 9 Am. St. Rep. 249, 18 Pac. 766. See People v. Lee, 14 Cal. 510, 511; People ex rel. Grow v. Rosborough, 29 Cal. 415, 417; People ex rel. Smith v. Keyser, 53 Cal. 183, 184; Lin Tai v. Hewill, 56 Cal. 117, 118; People v. Crane, 60 Cal. 279, 280.

31. Same—Mandamus will not lie to strike matter from bill.—Mandamus will not lie to compel the correction or striking out of matter from a settled bill of exceptions.—Holland v. Superior Court, 49 Cal. Dec. 211, 146 Pac. 878.

32. Same—Term of judge having expired.—Settlement of by judge before whom action was tried can not be compelled after expiration of his term of office, although he is authorized by law to settle such bill.—Leach v. Aitken, 91 Cal. 484, 485, 28 Pac. 777.

33. Certification of transcript in criminal case.—The writ will not issue to compel such certification of transcript to permit the defendant to regain his right of appeal C. C. P.—153

which was lost for non-compliance with the provisions of section 1247 Penal Code, as amended in 1911.—Rhodes v. Sargent, 17 Cal. App. 58, 118 Pac. 727.

34. Charter giving supervisors' right to reject any and all bids for public printing when they believe that public interests will be subserved thereby, gives supervisors jurisdiction to decide such matter, and having such jurisdiction its judgment can not be controlled by court. If court were to interfere it would substitute its belief and judgment for belief and judgment of board, result that our system does not contemplate.—Stanley-Taylor Co. v. Board of Supervisors, 135 Cal. 486, 488, 67 Pac. 783.

35. Common council—May be compelled to advertise as required by law for bids for lighting streets and public buildings and other public places in city and to let contract under such advertisement. The law can not be evaded by simply employing some person or corporation from day to day to perform service.—Construction of law that would allow this to be done, would nullify object of its enactment.—Santa Rosa L. Co. v. Woodward, 119 Cal. 30, 31, 34, 50 Pac. 1025.

36. Common-law proceeding by mandamus—Was employed as supplemental and extraordinary writ of remedial character, and was resorted to early in English jurisprudence from necessity of establishing residuary method to be used in action where law had provided no other remedy, and where in justice there ought to be one; upon principle that no right should be without remedy.—People ex rel. Smith v. Olds, 3 Cal. 167, 170, 171, 58 Am. Dec. 398.

37. Construction of section—As to application.—This section applies to original proceeding in mandamus whether begun in the superior court, in the supreme court or in a district court of appeal.—Gould v. Moss, 158 Cal. 548, 111 Pac. 925.

As to intention of legislature, see par. 75, this note.

38. Construction of Long Beach charter—Issue of bonds for new pier and for maintenance and repair of old pier held unauthorized, and a writ of mandate to compel the city clerk to attest such bonds was refused.—City of Long Beach v. Boynton, 17 Cal. App. 291, 119 Pac. 677.

39. Coupons on bonds of irrigation district—Mandate lies under this section to compel treasurer of the district to pay.—Hewel v. Hugin, 3 Cal. App. 248, 84 Pac. 1002.

40. Court—Having acted upon and determined matter within its jurisdiction, such action and determination can not be void; and however erroneous such action and determination may have been, it can not be reviewed in proceeding for mandamus, nor could mandate be issued to compel court to revise, rescind or review its own action in premises, or proceed in any

manner antagonistic to such action.—*Francisco v. Manhattan Ins. Co.*, 36 Cal. 283, 286.

41. *Same*—May act as effectively by refusing as by granting motion or request.—*Kerr v. Superior Court*, 130 Cal. 183, 185, 62 Pac. 479.

42. *Same*—Will not be compelled to try and determine action to annul marriage, and petition for mandamus will be dismissed without costs in case where court has imposed upon plaintiff and petitioner conditions which are too exacting, but where petitioner has not offered to comply with such conditions which court might properly have imposed.—*Allen v. Superior Court*, 138 Cal. 504, 505, 65 Pac. 977.

43. *Creation of reclamation district*—By order of board of supervisors—May be compelled by mandamus where, upon the petition of landowners therefor, all of the facts required by law are shown by clear and uncontrovertible evidence so that the refusal of the board to grant the same is arbitrary.—*Inglin v. Hoppin*, 156 Cal. 483, 488, 105 Pac. 582.

44. *Defendant voluntarily complying with mandate of court*—Pending appeal from judgment, motion to dismiss such appeal would be granted. After mandate had been satisfied there is nothing in judgment rendered by court of which defendant could complain or by which it could say it was aggrieved.—*San Diego School Dist. v. Board of Supervisors*, 97 Cal. 438, 439, 32 Pac. 517; *Board of Education v. Common Council*, 128 Cal. 369, 371, 60 Pac. 976; *Moore v. Morrison*, 130 Cal. 80, 82, 62 Pac. 268.

45. *Demand and refusal*—Distinction is recognised between duties of public nature or those which affect public at large, and duties of merely private nature affecting only rights of individuals. Where right claimed is merely private, demand and refusal are necessary, but where duty sought to be enforced is of public nature, and no one is specially empowered to demand its performance, law takes place of demand.—*Wilson v. Board of Directors*, 138 Cal. 67, 68, 69, 70 Pac. 1059.

46. *Same*—Imperative rule is that before making application for writ of mandamus express demand or request must be made on defendants to perform act sought to be enforced by writ.—*Wilson v. Board of Directors*, 138 Cal. 67, 68, 70 Pac. 1059.

See pars. 70 and 71, this note.

47. *Demand for performance of act*, before application for writ of mandate essential to the granting of the writ.—*Ferguson v. Board of Education*, 7 Cal. App. 568, 570, 95 Pac. 165.

48. *Depositions*—A proper remedy for the refusal of a commission to take depositions, in a proper case, before judgment, for the granting of such commission, does not rest in the discretion of the trial court or judge

in the cases defined in the code, and although the refusal might be appealable, the appeal would in most cases be entirely inadequate.—*San Francisco Gas & El. Co. v. Superior Court*, 155 Cal. 30, 39, 99 Pac. 359.

As to issuance of commission to take depositions, see par. 77, this note.

49. Proper remedy to compel superior judge to pass upon return to notary showing that witness has refused to answer questions in the taking of deposition before notary.—*Roussin v. Kirkpatrick*, 8 Cal. App. 7, 12, 16, 95 Pac. 1123.

50. *Discretion—Abuse of will be corrected by mandamus* if case is otherwise proper.—*Wood v. Strother*, 76 Cal. 545, 549, 9 Am. St. Rep. 249, 18 Pac. 766. See *Raisch v. Board of Education*, 81 Cal. 542, 546, 22 Pac. 890; *Hunt v. Broderick*, 104 Cal. 313, 315, 37 Pac. 1040; *Keller v. Hewitt*, 109 Cal. 146, 149, 41 Pac. 871; *Hensley v. Superior Court*, 111 Cal. 541, 543, 544, 44 Pac. 232; *County of San Luis Obispo v. Gage*, 139 Cal. 398, 402, 73 Pac. 174.

As to matters of discretion, see pars. 154-156, this note.

51. *Same*—Can not be controlled by mandamus.—Writ can not perform functions of writ of error nor revise judicial action, but can only compel performance of ministerial functions, and will only issue to compel tribunal to act in same way, but not in any particular way. These formulas express a truth, but express it in misleading and inaccurate manner, and have forced courts to call acts "ministerial" which are not so.—*Wood v. Strother*, 76 Cal. 545, 548, 549, 9 Am. St. Rep. 249, 18 Pac. 766.

See additional authorities, par. 29, this note.

As to mandamus not lying to control official judgment and discretion, see note 3 L. R. A. 316.

52. *Discretion of court as to granting writ*—In general.—The granting of a writ of mandate is a matter within the discretion of the court. It should be granted where necessary to protect a substantial writ, but not where no useful purpose will be subserved.—*Holland v. Superior Court*, 169 Cal. 361, 146 Pac. 878.

53. Relief through an action of mandamus lies to a great extent in the discretion of the court. It should be allowed only to secure or protect a clear legal right, and should never be granted when its enforcement would work an injustice or accomplish a wrong.—*People ex rel. Sill v. Murphy*, 20 Cal. App. 398, 129 Pac. 603, 605.

54. Relief by mandamus lies to a great extent in the discretion of the court. It should be allowed only to secure or protect a clear legal right, and should never be granted where its enforcement would work an injustice or accomplish a wrong.—*Devlin v. Donnelly*, 20 Cal. App. 495, 129 Pac. 607, 609.

55. Where there is a clear legal right, the courts will not ordinarily refuse to enforce it in disregard to possible consequences, but, where the right is not clear and the duty of the court is imperative, the consequences to flow from granting the remedy may be considered, and this is especially true in determining whether the extraordinary writ of mandamus should issue.—*Devlin v. Donnelly*, 20 Cal. App. 495, 129 Pac. 607, 609.

56. **Dismissal of indictments—Trial postponed without due cause.**—The remedy by writ of mandate may be invoked to compel the dismissal of an indictment, pending for a series of years, where trial is postponed from time to time, for more than sixty days after filing of indictment, without good cause and over petitioner's protest.—*Ford v. Superior Court*, 17 Cal. App. 3, 118 Pac. 96; *Abbott v. Superior Court*, 17 Cal. App. 13, 118 Pac. 100.

57. **Doubt existing as to duty of officer to act in given case,** courts will not by mandamus compel him to act (dis. op. by Sharpstein, J.).—*Bank of California v. Shaber*, 55 Cal. 322, 329.

58. **Duty of clerk—Aid of nonappealable order.**—The writ will not issue to compel the clerk of the superior court to perform any duty not enjoined upon him by law, nor in aid of a nonappealable order.—*Rose v. Leland*, 17 Cal. App. 309, 119 Pac. 532.

59. **Same—Authentication of reporter's notes—Papers not included in judgment-roll.**—The writ will not issue to compel the clerk of the superior court to certify or attest the transcript containing the reporter's notes, or papers not included in the judgment-roll.—*Rose v. Leland*, 17 Cal. App. 309, 119 Pac. 532.

60. **Duty of judge—To proceed with trial of cause pending in his court** is duty resulting from office which he holds; and whenever it appears that he refuses to do so, it is not to be doubted that supreme court holds power to require him by mandamus to proceed with performance of such duty.—*People ex rel. Meminger v. Sexton*, 24 Cal. 78, 82; *People ex rel. Hamilton v. Barnes*, 66 Cal. 594, 595, 6 Pac. 698; *Hogue v. Fanning*, 73 Cal. 54, 58, 14 Pac. 560.

As to mandamus to compel judge to try cause, see note 34 Am. St. Rep. 48.

61. **Same—Duty of preliminary examination in case of person charged regularly with having committed public offense,** arrested and brought before him, is duty distinctly imposed upon justice of peace, and he may be compelled to proceed with such examination by mandamus.—*People ex rel. Hamilton v. Barnes*, 66 Cal. 594, 595, 6 Pac. 698.

62. **Effect of delay in applying for writ.**—The courts require those who would avail themselves of the assistance of the writ of mandamus to be prompt in the enforcement of their rights. By the lapse of time the necessary evidence is lost, and third

parties may acquire rights growing out of the existing state of affairs. Where the parties have been guilty of unreasonable delay in applying for the writ, the courts have not hesitated to refuse such relief, unless the delay was accounted for to their satisfaction. In determining what will constitute unreasonable delay regard should be had to the circumstances that justified the delay, to the nature of the case and the relief demanded, and to the question whether the rights of the defendant or of other persons have been prejudiced by such delay.—*MacMullan v. Kelly*, 19 Cal. App. 700, 127 Pac. 819, 822.

As to laches, see par. 87, this note.

As to the application of the doctrine of laches to mandamus, see notes 9 Ann. Cas. 845; 20 Ann. Cas. 1114.

63. **Election—Canvassing officers—Mandamus is a proper remedy** to compel the canvassing officers of election to discharge their duties.—*Cerini v. DeLong*, 7 Cal. App. 398, 404, 94 Pac. 582.

As to representation on election board, see par. 190, this note.

64. **Erroneous dismissal of appeal by superior court.**—Where the superior court erroneously dismisses an appeal from the justices' court over which it has jurisdiction, upon the theory that it has no jurisdiction, mandamus will lie to compel the court to hear and decide the cause.—*Widrin v. Superior Court*, 17 Cal. App. 94, 118 Pac. 550; *Blake v. Superior Court*, 17 Cal. App. 53, 118 Pac. 448.

See, also, par. 213, this note.

65. **Expiration of time prescribed for performance of official act.**—While the writ will not ordinarily issue after the lapse of the time prescribed for the doing of the official act sought to be compelled, yet where the requirements of the law have been disregarded and defeated, of their own volition, by the officers entrusted with the duty which was clearly obligatory, the rule does not apply.—*Conn v. City Council*, 17 Cal. App. 716, 121 Pac. 714, 719.

66. **Facts that must be shown—Course of conduct required—Refusal to follow.**—In a proceedings under the provisions of the above section to secure a writ of mandamus to an inferior tribunal, before the writ will issue petitioner must clearly show a situation, through facts presented or admitted in which the law demands a certain course of action on the part of such inferior tribunal, which it has declined or failed to pursue.—*Ryan v. Superior Court*, — Cal. App. —, 192 Pac. 1036.

67. **Filing certificates.**—Mandate will issue to compel secretary of state to file certificate of creator of bonded indebtedness where he refuses to do so upon the ground that the bonded indebtedness created is greater than the subscribed capital stock of the corporation.—*Merced River El. Co. v. Curry*, 157 Cal. 727, 730, 109 Pac. 264.

68. **Filing certified copy of amended articles of incorporation—Duty of secretary of state.**—A refusal by the secretary of state to file a certified copy of amended articles of incorporation filed in the clerk's office of the county in which the original articles were filed, as provided by law, on the ground that the certificate did not include the acknowledgment of the original articles, a certified copy of which had been originally filed with the secretary of state, is not justifiable, and mandamus will lie to compel him to file the same.—*California Tel. & Light Co. v. Jordan*, 19 Cal. App. 536, 126 Pac. 598.

69. Where the secretary of state refused to file a certified copy of the amended articles of corporation, for the additional reason that the change in the designation of certain stock as preferred amounts to an increase of such stock and a diminution of the common stock in violation of law, such ground of refusal is unjustifiable, and mandamus will lie to compel the secretary of state to file the amended articles, notwithstanding such objection.—*California Tel. & Light Co. v. Jordan*, 19 Cal. App. 536, 126 Pac. 598.

70. **Same—Necessity for refusal.**—Undoubtedly the rule is that an officer will not be compelled by writ of mandate to do anything which he has not first been asked to do and has neglected or refused. But, where the attitude of the officer toward the matter has been officially declared to be such that an application to him would be idle and fruitless, the reason for the rule ceases.—*Moore v. Superior Court*, 20 Cal. App. 299, 128 Pac. 946, 948.

See pars. 46, 47, this note.

71. **Same—When request unnecessary.**—Where the court has refused to proceed with a case on the ground that jurisdiction has been lost by lapse of time, mandamus will lie to compel the court to reset the case for trial, even though no request has been made, since the court, by its attitude, has shown that such request would be useless.—*Moore v. Superior Court*, 20 Cal. App. 299, 128 Pac. 946, 948.

72. **Function of writ.**—It is not the function of a writ of mandate to review error.—*Lapique v. Superior Court*, 24 Cal. App. 313, 141 Pac. 223.

73. **Granting writ—Appeal from order—Effect of.**—A judgment granting a peremptory writ of mandate to compel a city clerk to place the name of a candidate on the official ballot is stayed upon the taking of an appeal from the judgment and the giving of an appeal bond in the sum of three hundred dollars, and an order thereafter made, adjudging the appellant guilty of contempt for disobedience of the judgment, is in excess of the jurisdiction of the court.—*Ballagh v. Superior Court*, 25 Cal. App. 149, 142 Pac. 1123.

As to when writ granted generally, see pars. 1-14, 90-127, this note.

As to when writ will not be granted, see pars. 128-149, this note.

74. An application for such writ is a special proceeding, from the judgment in which an appeal lies, as provided in section 939, ante; and section 949, ante, provides in such case, it not being a case specified in sections 942 to 945, ante, both inclusive, that the giving of the undertaking specified in section 941, ante, stays proceedings in the court below upon the judgment.—*Ballagh v. Superior Court*, 25 Cal. App. 149, 142 Pac. 1123.

75. **Intention of legislature—Was to give statutory authority and validity to process which is regarded as remedy of extraordinary and supplemental character, and to define its functions and limit its power in accordance with recognized and established principles of common law.**—*People ex rel. Smith v. Olds*, 3 Cal. 167, 174, 58 Am. Dec. 398.

As to construction of section, see par. 37, this note.

76. **Irrigation district—Coupons on bonds of—Mandate lies under above section to compel treasurer of district to pay.**—*Hewell v. Hugin*, 3 Cal. App. 248, 84 Pac. 1002.

77. **Issuance of commission to take depositions under sections 2020 and 2021, post.**—In a case within the definition of the statute the court is without discretion to refuse to issue the commission, and in the event of his refusal a writ of mandate will issue to compel such issue. Conceding that the order is one made after judgment, and appealable, the remedy by appeal is not exclusive, and it is inadequate.—*San Francisco Gas & El. Co. v. Superior Court*, 155 Cal. 39, 99 Pac. 359.

As to mandamus being proper remedy for refusal to issue commission to take testimony, see pars. 48, 49, this note.

78. **Issuance of permit by police commissioners.**—Where municipal ordinances impose upon the board of police commissioners the plain duty of issuing a permit, upon ascertaining the conditions precedent attached to such issuance, and refuse to do so in a case where such conditions exist, the writ will issue to compel the performance of the duty imposed.—*Laurelle v. Bush*, 17 Cal. App. 417, 119 Pac. 953.

79. **Issuance of writ—Discretion of court in.**—The issuance of a writ of mandate lies to a considerable extent in the discretion of the court. Will not issue where its issuance will work injustice, or produce confusion and disorder, or operate harshly, or where it will not promote substantial justice (dictum).—*Bashore v. Superior Court*, 152 Cal. 3, 91 Pac. 801.

As to discretion of court in issuing writ, see pars. 50, 51, this note.

As to the writ not being a writ of right, see pars. 157-159, this note.

80. Where a continuance was granted upon request, upon condition that the party

pay certain designated items of cost, actual payment of which is not exacted at the time, it is within the discretion of the supreme court to refuse a writ to compel the court to proceed to trial of the case so long as the items of cost remain unpaid.—*Bashore v. Superior Court*, 152 Cal. 4, 91 Pac. 801.

81. Same—Exercise of not compelled by writ.—The supreme court will not, by proceeding in mandamus, compel the superior court or a judge thereof to make orders in matters confided to their discretion, where they are called upon to act upon evidence satisfactory to them, and the evidence of essential facts, though, it may be, formally sufficient, is not satisfactory to them, except in cases of manifest abuse of discretion.—*Bender v. Hutton*, 160 Cal. 373, 117 Pac. 322.

82. Jurisdiction—Determination of court as matter of law purely, that it had no power to vacate order made setting apart homestead does not depend on any facts, but wholly upon consideration of powers of court. Law especially enjoins upon superior court duty of hearing and determining all matter within its jurisdiction which come properly before it, and motion to vacate such order coming on properly to be heard, if court refuse to entertain such motion as matter of law, mandamus will lie to compel court to hear and act upon such motion.—*Cahill v. Superior Court*, 145 Cal. 42, 46, 78 Pac. 467. See *Merced Min. Co. v. Fremont*, 7 Cal. 130, 133; *Ortman v. Dixon*, 9 Cal. 23, 24; *Heinlen v. Cross*, 63 Cal. 44, 45; *People ex rel. Hamilton v. Barnes*, 66 Cal. 594, 596, 6 Pac. 698; *Crocker v. Conrey*, 140 Cal. 213, 218, 73 Pac. 1006.

83. Same—Determination of court upon facts shown as to its jurisdiction of particular cause is deemed final and conclusive upon supreme court when review of that determination is sought by proceedings in mandamus.—*Cahill v. Superior Court*, 145 Cal. 42, 45, 78 Pac. 467.

84. Same—Duty of hearing and determining all matters within its jurisdiction and which properly come before it, is duty which law especially enjoins upon superior court and upon judge thereof. Motion to vacate order setting apart homestead being properly before court, if judge decides as matter of law that court had no power to make order of kind applied for, he may be compelled to proceed by mandamus, otherwise writ of mandate would be practically useless. Court can not, by holding without reason that it has no jurisdiction, divest itself of jurisdiction and evade duty of hearing and determining matter.—*Cahill v. Superior Court*, 145 Cal. 42, 46, 78 Pac. 467. See *Merced Min. Co. v. Fremont*, 7 Cal. 130, 132; *Ortman v. Dixon*, 9 Cal. 23, 24; *Heinlen v. Cross*, 63 Cal. 44, 45; *People ex rel. Hamilton v. Barnes*, 66 Cal. 594, 596, 6 Pac. 698; *Temple v. Superior Court*, 70 Cal. 211, 212, 11 Pac.

699; *Crocker v. Conrey*, 140 Cal. 213, 218, 73 Pac. 1006.

85. Same—Necessary legal deduction from facts stated showing that aggrieved party has been denied writ, which it was plain legal duty of officer to have granted and without his proper discretion to refuse, mandamus is appropriate remedy to obtain relief.—*Rundberg v. Belcher*, 118 Cal. 589, 590, 50 Pac. 670.

86. Same—To try cause or hear appeal depending upon existence of certain facts, and court having, upon evidence consisting either of affidavits or of record, made its determination as to such facts, although erroneously, yet supreme court can not in mandamus proceedings go behind its determination and itself consider from evidence whether or not jurisdiction existed.—*Cahill v. Superior Court*, 145 Cal. 42, 45, 78 Pac. 467. See *People ex rel. Wheaton v. Weston*, 28 Cal. 639, 640; *Lewis v. Barclay*, 35 Cal. 213, 214; *Francisco v. Manhattan Ins. Co.*, 36 Cal. 283, 286; *People v. Sexton*, 37 Cal. 532, 534; *Strong v. Grant*, 99 Cal. 100, 102, 33 Pac. 733; *Kerr v. Superior Court*, 130 Cal. 183, 185, 62 Pac. 479.

87. Laches—Allowing seven years to elapse after dismissal of policeman from force before bringing action for mandamus to compel his reinstatement, causes such action to be barred by laches; courts will not allow parties to sleep on their rights for so many years and then invoke aid of this prerogative writ.—*Jones v. Board of Police Commissioners*, 141 Cal. 96, 97, 74 Pac. 696.

As to effect of delay in applying for writ, see also par. 62, this note.

88. Law affixing right to specific relief from certain facts, and there being no question made as to existence of such facts, court has no discretion to refuse relief. In such case limit of discretionary power has been reached and nothing but clear duty remains, and if relief is refused and there is no appeal or other plain, speedy, and adequate remedy, mandamus will lie to compel it.—*Hensley v. Superior Court*, 111 Cal. 541, 543, 544, 44 Pac. 232.

89. Mandamus—Can not serve purpose of action for money had and received.—It can only compel performance of duty enjoined by law.—*Kings Co. v. Johnson*, 104 Cal. 198, 201, 37 Pac. 870.

90. Same—Will lie to compel—Example of acts compelled—Act of judicial body or officer.—It is undoubtedly true that the writ of mandamus is not a writ of error, and that, generally speaking, it is not available for the purpose of altering or varying in any particular the finding of a judicial or quasi-judicial body or officer acting without its or his appellate jurisdiction; but where the facts are undisputed and the only matter to be determined is the duty of the body or officer under the law, the court will defend such duty and enforce not only its performance, but the carrying out of the

obligation to the respondent body or officer in a particular manner, and where the board of directors of an irrigation district found that petitioner's land was being irrigated by means of a pumping plant, which fact, established, entitled him to have the land excluded from such district, this fact could not be nullified by an erroneous meaning given to the statute.—*Harellson v. South San Joaquin Irr. Dist.*, 20 Cal. App. 324, 128 Pac. 1010, 1014.

As to discretion in issuing mandamus, see pars. 52-54, this note.

As to effect of appeal from order granting writ, see pars. 73, 74, this note.

As to subjects of writ, see pars. 2-14, this note.

91. Same — Same — Advertisement of street-railroad franchise.—The writ will not issue to control the discretion of the governing body of a municipality as to whether they will advertise an application for such franchise.—*McGinnis v. Mayor etc.*, 153 Cal. 714, 96 Pac. 367.

92. Same—Same—Apportionment of election officers.—A writ of mandate will not lie to compel the city council of such city to apportion the officers of the election boards at a recall election among persons belonging to different political parties, as required by that section, in the absence of an averment that the council threatens to disobey the section in that particular.—*Vincent v. Mott*, 163 Cal. 342, 125 Pac. 346. See par. 190, this note.

93. Same—Same—Assessment of taxes.—The failure of the state board of equalization to make any order disposing of a protest filed by a city assessor after the statutory time is not a breach of duty, and mandamus will not lie to compel the entry of such order. The act of placing the alleged nonoperative property of a public service corporation on the operative list is as valid as if the belated protest had not been filed.—*Pacific Electric Ry. Co. v. Rolkin*, 164 Cal. 154, 128 Pac. 20.

94. Same—Same—Auditor to audit valid and legal claim against county where board of supervisors have not exceeded their powers in allowing such demand.—*Hunt v. Broderick*, 104 Cal. 313, 315, 37 Pac. 1040.

As to subjects of relief by mandamus, see pars. 1-14, 90-127, this note.

As to when writ of mandamus will not lie generally, see pars. 128-149, this note.

95. Same—Same—Auditor to draw warrant for claim allowed by supervisors for road work which they had authority to order done.—*Davis v. Whidden*, 117 Cal. 618, 623, 49 Pac. 766.

96. Same—Same—Auditor to recognize, compute, and enter tax-levy in accordance with rate fixed by board of supervisors.—*Morton v. Broderick*, 118 Cal. 474, 480, 481, 50 Pac. 644.

97. Same—Same—Board of education to issue certificate as teacher to person pass-

ing examination in accordance with rules of board and found proficient therein, and also found to be of good moral character.—*Keller v. Hewitt*, 109 Cal. 146, 148, 41 Pac. 871.

98. Same—Same—Board of library trustees to draw and deliver warrant from library fund of city in payment for supplies, although board had theretofore allowed claims and issued warrants therefor which were left with librarian, and librarian had unlawfully obtained payment thereof and had absconded.—*Robertson v. Library Trustees*, 136 Cal. 403, 406, 69 Pac. 88.

99. Same—Same—Board of trustees of city to call election.—*Frederick v. San Luis Obispo*, 118 Cal. 391, 393, 50 Pac. 661.

100. Same—Same—Canvassing election returns.—The mode and manner of canvassing election returns is provided by the statute, and when a showing is made that the duty so devolving upon the board of supervisors, sitting as a board of canvassers, is not being performed, or is being performed in a manner otherwise than that provided by law, mandamus is the proper remedy.—*People ex rel. Del Valle v. Butler*, 20 Cal. App. 379, 129 Pac. 600, 601.

As to mandate to compel city council to pass upon a demand, see pars. 5, 104, this note.

101. Same—Same—City clerk to countersign certified improvement bonds of city, law requiring him to do so.—*City of Los Angeles v. Hance*, 122 Cal. 77, 78, 54 Pac. 387.

102. Same—Same—City clerk to draw warrant for purchase-money for land as site for fire-engine house, as provided by ordinance.—*City of Santa Barbara v. Davis*, 142 Cal. 669, 672, 76 Pac. 495.

103. Same—Same—City treasurer to pay warrant drawn by board of education as salary to teacher of kindergarten class, drawn against fund known as grammar and primary school fund.—*Sinnott v. Colombet*, 107 Cal. 187, 193, 28 L. R. A. 594, 40 Pac. 329.

104. Same—Same—Claim against municipality.—It is not the duty of the treasurer to pay a claim against the city, which has not been reduced to judgment and which has been rejected by the city trustees. He is a mere ministerial officer, and exercises no judicial functions. It must be plain that his election to pay or refuse payment of such claim is no legal determination of its validity, nor would it be binding upon the city or the claimant. Under such circumstances no court would issue the writ of mandate, but would hold that the claimant must proceed against the city in the proper form to establish his right to the payment.—*Madary v. City of Fresno*, 20 Cal. App. 91, 128 Pac. 340, 344.

105. Same—Same—Clerk of justices' court to file affidavit in undertaking for attachment.—*Kozminsky v. Williams*, 126 Cal. 26, 29, 58 Pac. 310.

106. **Same—Same—Clerk of court to issue execution** when condition imposed in order granting new trial has not been complied with.—*Garoutte v. Haley*, 104 Cal. 497, 502, 38 Pac. 194.

107. **Same—Same—Controller to draw his warrant only** for what is expressly authorized by statute.—*Sawyer v. Colgan*, 102 Cal. 283, 293, 36 Pac. 580.

108. **Same—Same—Corporation to open its books and allow registry** in case where corporation refuses to recognize owner of stock as shareholder and refuses to deliver to him new certificate for shares.—*Herbert Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 67, 65 Pac. 143.

109. **Same—Same—Court to allow suspended attorney to appear and prosecute** in his own behalf cause of action which in good faith has been assigned to him.—*Philbrook v. Superior Court*, 111 Cal. 31, 35, 43 Pac. 402.

110. **Same—Same—Court to make decree showing due notice to creditors**, legal notice having been given and due proof thereof having been made.—*Hensley v. Superior Court*, 111 Cal. 541, 543, 44 Pac. 232.

111. **Same—Same—Exclusion of land from irrigation district.**—Since the Irrigation District Act makes no provision for an appeal from the decision of the board of directors, and there is therefore no speedy or adequate remedy by appeal, it follows that mandamus will lie to the board of directors of such a district to have excluded from such district certain lands which have other sources of water supply, and do not need such system of irrigation.—*Hareison v. South San Joaquin Irr. Dist.*, 20 Cal. App. 324, 128 Pac. 1010, 1013.

112. **Same—Same—Inspection of corporate books and records.**—Where the right to inspect the books of a corporation is given by statute, the rule is that, unless the statute imposes restrictions or limitations, the right is absolute, and it may be enforced by mandamus, regardless of the purposes or motives of the stockholders, or the existence of good causes. Where the right to be enforced is a common-law right, the issuance of the right is discretionary, and the motives of the applicant may be questioned, and he is required to show good causes for granting the relief.—*Hobbs v. Tom Reed Gold Min. Co.*, 164 Cal. 497, 129 Pac. 781, 783.

113. **Same—Same—Judge to fix amount of stay-bond** upon appeal by defendant from judgment entered against him.—*Spencer v. Troutt*, 133 Cal. 605, 609, 65 Pac. 1083.

114. **Same—Same—Judge to fix undertaking to stay proceedings** upon appeal from judgment directing delivery of possession of real property.—*Gutierrez v. Hebbard*, 104 Cal. 103, 105, 37 Pac. 749.

115. **Same—Same—Judge to hear and determine motion for change of venue** to place of residence of defendant.—*Hennessy v. Nicol*, 105 Cal. 138, 142, 38 Pac. 649.

116. **Same—Same—Juvenile court officer, payment of salary of.**—There being no constitutional objection to the act of 1911, designated as the "juvenile court law," mandamus will lie to compel the payment by the county auditor of the salary of a probation officer legally appointed under the provisions of that act.—*Moore v. Williams*, 19 Cal. App. 600, 127 Pac. 509.

117. **Same—Same—Payment of full amount appropriated by act** appropriating money for support of minor orphans in favor of institution supporting such minors.—*Grand Lodge v. Markham*, 102 Cal. 169, 171, 36 Pac. 423.

118. **Same—Same—Payment of salary as public officer—Trial of title to office.**—One who is the de jure and de facto incumbent and in possession of a public office is entitled to the writ to compel payment of his salary, if it is refused; but where the petitioner is not in possession of the office and has performed none of its duties during the time for which the salary is claimed, but another is in possession under color and claim of right, and has collected the salary, mandamus will not lie to try the petitioner's right to the office, or compel payment of the salary of the office, until his title has been finally adjudicated in an appropriate proceeding.—*Black v. Police Commissioners*, 17 Cal. App. 312, 119 Pac. 674.

See, also, pars. 121 and 199 et seq., this note.

119. **Title to office** may be tried in a mandamus proceeding by one asserting that he is a de jure officer to compel another public officer, not the claimant, to audit and approve his demand for salary as such officer.—*Bannerman v. Boyle*, 160 Cal. 203, 116 Pac. 732.

120. **Same—Same—Reinstatement of student as pupil in state normal school** who possesses all requisite qualifications for admission as student and had been regularly admitted as such, but who was unlawfully expelled.—*Miller v. Dailey*, 136 Cal. 212, 221, 68 Pac. 1029.

121. **Same—Same—Salary of public officer, auditing of and issuance of warrant.**—Mandamus is an appropriate remedy to compel an auditing officer to issue a warrant for the compensation of the employees or officers of a city, county, or state, where the amount thereof is so fixed by law, ordinance, or otherwise that the act of auditing the same and drawing a warrant accurately is merely ministerial in character.—*Scott v. Boyle*, 164 Cal. 321, 128 Pac. 941, 942.

See pars. 104, 121, and 199 et seq., this note.

122. **Same—Same—Secretary of corporation** who has custody of records to allow stockholders right to inspect same.—*Johnson v. Langdon*, 125 Cal. 624, 627, 87 Am. St. Rep. 156, 67 Pac. 1050.

123. Same—Same—Settlement of bill of exceptions according to facts by superior court.—*Crooks v. Superior Court*, 136 Cal. 23, 25, 68 Pac. 96.

124. Same—Same—Same—Appeal from order amending judgment.—While the right of the trial court to amend or correct its own judgments in immaterial matters occasioned by inadvertence, when such amendment is objected to, and an appeal sought from the order, a writ of mandate will issue to compel the settlement of a bill of exceptions upon such appeal, when such settlement is refused.—*Calkins v. Monroe*, 17 Cal. App. 326, 119 Pac. 680.

125. Same—Same—Street superintendent to pay over to party entitled thereto money advanced to him by contractor to cover compensation of city engineer as part of incidental expenses required by law to be so advanced.—*Fitzhugh v. Ashworth*, 119 Cal. 393, 400, 51 Pac. 635.

126. Same—Same—Superior court to allow amendment directed by appellate court on appeal and to proceed with trial of cause.—*Dixon v. Risley*, 114 Cal. 204, 206, 46 Pac. 5.

127. Same—Same—Treasurer to repay excess taxes paid to assessor.—*Corbett v. Widber*, 123 Cal. 154, 155, 55 Pac. 764.

128. Same—Will not lie to compel—Examples of acts not compelled—Assessor to assess street-railway in excess of its value.—*Clunie v. Siebe*, 112 Cal. 593, 597, 44 Pac. 1064.

129. Same—Same—Auditor to allow claim incurred during prior year against fund raised for subsequent year, notwithstanding such claim had been reduced to judgment, and provision for its payment had been attempted to be made by supervisors by special tax levied and collected in such subsequent year and placed in general fund.—*Smith v. Broderick*, 107 Cal. 644, 48 Am. St. Rep. 167, 40 Pac. 1033.

130. Same—Same—Auditor to draw his warrant for illegal claim against county, although it has been allowed by board of supervisors.—*Walton v. McPhetridge*, 120 Cal. 440, 444, 52 Pac. 731.

131. Same—Same—Auditor to draw warrant for salary for commissioners appointed under unconstitutional law.—*Denman v. Broderick*, 111 Cal. 96, 99, 43 Pac. 516.

132. Same—Same—Auditor to draw warrant in favor of shorthand reporter of court for transcribing notes taken at preliminary examination where defendant was discharged.—*Mattingly v. Nichols*, 133 Cal. 332, 334, 65 Pac. 748.

133. Same—Same—Board of education to declare teacher elected after vote only being taken in her favor.—*Malloy v. Board of Education*, 102 Cal. 642, 646, 36 Pac. 948.

134. Same—Same—Board of Education to issue county certificate without examination to any one coming within terms of section 1775 of Political Code, providing for cases

where board may grant county certificates without examination.—*Kemble v. McPhall*, 128 Cal. 444, 447, 60 Pac. 1092.

135. Same—Same—Clerk to enter default where service summons has been set aside and vacated.—*Elder v. Grunsky*, 127 Cal. 67, 68, 59 Pac. 300.

136. Same—Same—Clerk of court to issue execution against plaintiff in action of interpleader involving disputed right to fund which plaintiff had deposited in court and action had been dismissed as against him.—*Long v. Superior Court*, 127 Cal. 686, 688, 40 Pac. 464.

137. Same—Same—Court to act upon motion to vacate injunction pending appeal from judgment granting such injunction.—*Rogers v. Superior Court*, 126 Cal. 183, 188, 58 Pac. 452.

138. Same—Same—Court to render decision and judgment in action of ejectment where defendant has pleaded former judgment in same court quieting title as against plaintiff to same property and that appeal was still pending in such action. Judge may exercise proper discretion to continue matter until determination of such appeal.—*Smith v. Jones*, 128 Cal. 14, 15, 60 Pac. 466.

139. Same—Same—Discretionary power of supervisors in advertising for bids for sprinkling of roads.—*Spilvalo v. Bryan*, 102 Cal. 403, 405, 36 Pac. 780.

As to matters of discretion, see pars. 154-156, this note.

140. Same—Same—Illegal, etc., act—Will not lie to compel performance of.—It is well settled that mandamus will not lie to compel the performance of acts which are illegal, contrary to public policy, or which tend to aid an unlawful purpose.—*Cook v. Noble*, 181 Cal. 720, 186 Pac. 150, approving doctrine *Godwin v. Caroline Telephone Co.*, 136 N. C. 258, 103 Am. St. Rep. 941, 1 Ann. Cas. 203, 67 A. L. R. 251, 48 S. E. 636.

See, also, notes 89 Am. Dec. 731; 1 Ann. Cas. 204.

141. Same—Same—Issuance of liquor license by municipal authorities where petitioner does not bring forth sufficient evidence of his compliance with requirements of ordinance providing for issuance of such license.—*Hippen v. Ford*, 129 Cal. 315, 317, 61 Pac. 929.

142. Same—Same—Justice of peace to render judgment by default against defendant after overruling of demurrer.—*Hall v. Kerrigan*, 135 Cal. 4, 6, 66 Pac. 868.

143. Same—Same—Not lie to compel a referendum under city charter of Los Angeles, where the petitions required therefor were not filed within the thirty-day limit, upon the expiration of which the ordinance became effective and beyond the reach of a referendum.—*Rushton v. Lelander*, 15 Cal. App. 449, 115 Pac. 56.

144. Same—Same—Not lie to compel board of police commissioners of San Francisco to issue written permits to carry wea-

pons to agents of a society organized for the prevention of cruelty to children and animals.—United States Protective Assn. v. Board of Police Commissioners, 14 Cal. App. 350, 111 Pac. 755.

145. Same—Same—Not lie to compel school trustees to reinstate teacher who has been dismissed without a hearing, a plain, speedy and adequate remedy at law existing in an action on contract for his salary.—Taylor v. Mahoney, 12 Cal. App. 549, 553, 107 Pac. 1012.

146. Same—Same—Performance of a vain act, such as the filing of an ineffective certificate showing an increase of capital stock, which is absolutely void, for failure to give the notice of meeting at which the increase was voted as prescribed by the constitution and section 359 Civil Code.—Navajo Min. Co. v. Curry, 147 Cal. 532, 82 Pac. 247.

147. Same—Same—Restoration to membership of party who, having signed written constitution and by-laws of Odd-Fellows lodge, has thereafter been expelled under provisions of by-laws for violation thereof.—Levy v. Magnolia Lodge, 110 Cal. 297, 310, 42 Pac. 887.

As to mandamus to obtain reinstatement in club or other social organization, see notes 8 L. R. A. 195, 196; 59 Am. St. Rep. 200-203.

148. Same—Same—Tax-collector to execute tax-deed for land sold for delinquent taxes where purchaser failed to apply for deed within time limited by law.—Tuttle v. Block, 104 Cal. 443, 449, 38 Pac. 109.

149. Same—Same—Trustees of reclamation district to levy assessment to pay judgment against it.—Hensley v. Reclamation District, 121 Cal. 96, 98, 53 Pac. 401.

150. Manner of action—Can not be controlled by.—Writ can not direct what decision or judgment shall be rendered by subordinate judicial tribunal, nor can it be granted after inferior tribunal has acted for purpose of reviewing its decision. To review errors is not office of writ of mandate.—People ex rel. Gesford v. Superior Court, 114 Cal. 466, 472, 46 Pac. 383.

151. Same—Court can be compelled to act, but having acted, its act can not be reviewed by mandamus. Mandamus will lie to set court in motion but not to control result.—Kerr v. Superior Court, 130 Cal. 183, 185, 62 Pac. 479.

152. Same—Person who acts in judicial capacity may be ordered to proceed to do his duty by acting and deciding according to best of his judgment, but he can not be directed in what manner he shall act or decide in premises.—Francisco v. Manhattan Ins. Co., 36 Cal. 283, 286.

153. Same—Subordinate judicial tribunal may be compelled to proceed and exercise its functions where it has neglected or refused so to do, but when act to be done is judicial or discretionary, writ can not direct

what decision or judgment shall be rendered.—People ex rel. Gesford v. Superior Court, 114 Cal. 466, 471, 46 Pac. 383.

154. Matters of discretion.—Wherever the action of the court involves the exercise of judicial discretion, mandamus will not lie to control such action.—Am. Well & Prospecting Co. v. Superior Court, 19 Cal. App. 497, 126 Pac. 497.

As to abuse of discretion being corrected by mandamus, see par. 50, this note.

As to exercise of discretion not controlled by mandamus, see par. 51, this note.

155. Same—Amount of attachment bond.—Fixing amount of bond in attachment proceedings is within the discretion of the trial court, and mandamus will not lie to control such action.—Am. Well & Prospecting Co. v. Superior Court, 19 Cal. App. 497, 126 Pac. 497.

156. Same—Decision of board of county supervisors.—Mandamus will not lie to compel the board of county supervisors to create a separate reclamation district out of the petitioners' lands, since such board exercises a discretionary function in reviewing the conflicting evidence as to whether such lands are capable of independent reclamation.—Inglin v. Snider, 163 Cal. 747, 127 Pac. 60.

157. Not a writ of right.—Not a civil action, which every citizen having a cause of action against another may avail himself of; neither will it lie at the suit of every one having a cause of action against a person occupying a public office.—Fox v. Workman, 6 Cal. App. 633, 635, 92 Pac. 742.

As to civil action or proceeding, see 5 Words & Phrases (1st Series), 4329.

As to when writ lies generally, see pars. 1-14, 90-127, this note.

As to when mandamus will not lie generally, see pars. 128-149, this note.

158. Application of section 1091, post, leads to the conclusion that if affirmative allegations of a certain answer present matters material to the issue before the court, and are not controverted either by pleading or proof, they are sufficient to support the judgment of the court, although no evidence be taken to support them.—Fox v. Workman, 6 Cal. App. 633, 635, 92 Pac. 742.

159. The writ of mandamus is not wholly a writ of right, but lies, to a considerable extent, within the sound judicial discretion of the court where the application is made; and no court should allow a writ of mandamus to compel a technical compliance with the letter of the law, where such compliance will violate the spirit of the law.—McRae v. Pine, 25 Cal. App. 594, 144 Pac. 983.

160. Not anticipatory.—The writ can not be issued to be effectual only in the event the inferior tribunal or board shall subsequently determine a matter then pending before it in a certain way.—McGinnis v. Mayor etc., 153 Cal. 715, 96 Pac. 367.

161. Notice of application—Evidence of service upon all parties interested.—One who applies for an alternative writ of mandate to require a judge of the superior court to stay execution on a judgment must, under paragraph 4 of Rule XXVI of the supreme court, furnish evidence that notice has been given to all parties interested that such application will be made, in order that they may have an opportunity to oppose the issuance of the writ.—*Kaiser v. Hancock*, 25 Cal. App. 323, 143 Pac. 614.

162. Object being to restore person to right given by law—Mandamus is proper remedy.—School-teacher wrongfully removed from position may proceed by mandamus to compel her reinstatement.—*Kennedy v. Board of Education*, 82 Cal. 483, 491, 22 Pac. 1042; *Fairchild v. Board of Education*, 107 Cal. 92, 93, 40 Pac. 26.

163. Objection that costs were improperly included in judgment—Can not be set up as defense in application for writ of mandate to compel trustees of school district to issue proper requisition for entire amount of said judgment.—*Howe v. Southrey*, 144 Cal. 767, 769, 78 Pac. 259.

164. Obligation of contract—Can not be enforced by mandamus.—It only lies to enforce performance of act which law specially enjoins. It can not go further than to compel board of trustees of school district to issue its requisition for exact amount of judgment against them. It can not determine whether obligation rests upon district to pay interest upon judgment.—*Howe v. Southrey*, 144 Cal. 767, 769, 78 Pac. 259.

165. Officer—Can not be compelled to pay sum of money by mandate unless money is in his official custody, legally subject to payment of demand made when steps are initiated to enforce payment of such demand by writ of mandate.—*People ex rel. Attorney-General v. Reis*, 76 Cal. 269, 275, 18 Pac. 309.

166. Order changing place of trial—In matter within cognizance of court, upon which it acts judicially. If error intervenes to injury of party it can not be corrected by means of writ of mandamus.—*People ex rel. Meminger v. Sexton*, 24 Cal. 78, 83.

167. Orders of court—Are not usually set aside by mandamus.—If order is one made in excess of court's jurisdiction, mandate is not remedy. If order is erroneous, mandate will not lie.—*O'Neill v. Reynolds*, 116 Cal. 264, 266, 48 Pac. 57.

168. Parties defendant—General practice in mandamus has been to proceed against officials only who as representatives of body politic have refused performance of some duty owed to plaintiff or relator; yet there seems no good reason why their principal, legal entity which is commonly real party to be affected by writ, may not be joined as defendant in proceeding. Though seldom necessary party, school district may be joined as defendant in proceeding by mandamus against its officials to compel perform-

ance of duty enjoined by law.—*Barber v. Mulford*, 117 Cal. 356, 358, 49 Pac. 206.

169. Same—Must be an official when duty is required.—No person can be compelled to perform judicial or official duties unless he is judge or other officer at time when duty is required to be performed. Writ of mandate can not compel any one other than officer to perform official act.—*Leach v. Aitken*, 91 Cal. 484, 486, 28 Pac. 777.

170. Same—Road-overseer should be made party to proceeding to compel board of supervisors to repair, open and put certain road into proper condition for public travel, as duty devolves upon him to take charge of such highways.—*Peck v. Board of Supervisors*, 90 Cal. 384, 386, 27 Pac. 301.

171. Performance of act—Beyond that enjoined by law upon party as duty pertaining to his office or position can not be commanded by any court in this state. Command in writ of mandate which imposes upon treasurer of city performance of act beyond what is required of him by law in discharge of duties of his office should not be inserted.—*Davis v. Porter*, 66 Cal. 658, 659, 6 Pac. 746.

172. Petition for writ—Averments in—Taken as true.—The averments in a petition for mandamus will be taken as true upon demurrer.—*Davidson v. Graham*, 25 Cal. App. 484, 144 Pac. 147.

173. Same—Compliance with statute.—A petition for a writ of mandate is not subject to a general demurrer for insufficiency for failure to set out the contents of the affidavit, undertaking, and order which constitute the process under which property was seized, where it is alleged that such documents were made in accordance with the provisions or requirements of the Code of Civil Procedure, and that upon receiving those documents the sheriff took the property into his possession.—*Bailey v. Security Trust Co.*, 34 Cal. App. 348, 167 Pac. 409.

174. Same—Sufficiency of.—Where the petitioner is an elector and a tax-payer of the city, and the injury complained of is in effect a wrongful denial of his right to vote upon a question which affects the welfare of the community individually and collectively, and the relief sought is the securing of an enforcement of the right, he is a party beneficially interested within the meaning of section 1069, ante.—*Conn v. City Council*, 17 Cal. App. 710, 121 Pac. 714, 719. See to same effect *Locher v. Walsh*, 17 Cal. App. 727, 121 Pac. 712.

175. An allegation that there was money in the county treasury or in the custody of defendant as such county treasurer, with which to pay the demand sued for, is necessary in a petition for a writ of mandate to compel a county treasurer to pay money from the public funds.—*State Commission in Lunacy v. Welch*, 20 Cal. App. 624, 129 Pac. 974, 975.

176. Petition to compel—Judge to fix amount of stay-bond on appeal from order

appointing receiver must allege that appeal has been taken. Averment that petitioner is desirous of appealing from such order is not sufficient.—*De Leonis v. York*, 140 Cal. 333, 334, 73 Pac. 1053.

177. Same—State controller to draw warrant to state printer is fatally defective because of failure to allege that there is any money not otherwise appropriated by law, out of which compensation in question is directed to be paid.—*Redding v. Bell*, 4 Cal. 333, 334; *People ex rel. Attorney-General v. Reis*, 76 Cal. 269, 275, 18 Pac. 309.

178. Power to comply with order of court in premises having been lost or taken away, at time of application for writ, mandamus will not lie.—*McClatchy v. Matthews*, 135 Cal. 274, 276, 67 Pac. 134.

179. Presumption—Is that official duty is regularly performed, and where parties presented their warrants for labor done for county to county treasurer for payment, there being money and proper fund for that purpose, they were apparently entitled to have it paid without question; and when they go into court to compel payment by mandamus they make out prima facie case by setting out regular issuance of writ, their ownership of it, refusal of treasurer to pay it, and fact that there was money in treasury out of which it could be paid, burden of proof in case is upon treasurer to show that he was justified in refusing payment.—*McGowan v. Ford*, 107 Cal. 177, 186, 40 Pac. 231.

180. Prerogative writ.—The petitioner must show that he is entitled to the relief demanded and that it is the duty of the inferior board, tribunal or person to perform the act which it is claimed he refuses to perform.—*Gray v. Mullins*, 15 Cal. App. 119, 113 Pac. 694.

181. Prevention of failure of justice.—Where there is no specific remedy in ordinary course of law, is only reason for writ. To authorize its use there should be not only want of specific legal remedies, but also there should be specific legal right, and the right must be perfect, not inchoate.—*People ex rel. Smith v. Olds*, 3 Cal. 167, 170, 171, 58 Am. Dec. 398.

182. Process of superior courts—Extends throughout state, and this includes mandamus, certiorari, and prohibition.—*Kings Co. v. Johnson*, 104 Cal. 198, 203, 204, 37 Pac. 870.

183. Purpose to be accomplished by writ necessary.—Court will not undertake to exercise power through writ of mandamus except when it can exercise it to some purpose.—*Kerr v. Superior Court*, 130 Cal. 183, 186, 62 Pac. 479.

184. Same — Enforcement of statutory right makes it necessary for petition to aver or show purpose or object, and motive of the petitioner, whether proper or improper, can not be set up to defeat right.—*Johnson v. Langdon*, 135 Cal. 624, 626, 87 Am. St. Rep. 156, 67 Pac. 1050.

185. Same—Failing to show that writ will serve or protect some right or interest makes complaint for writ defective, for it will not issue where plaintiff has no interest in action or where no benefit can be derived therefrom.—*Ellis v. Workman*, 144 Cal. 113, 115, 77 Pac. 822.

186. Same—Fundamental principle of law of mandamus is that writ will never be granted in case where, if issued, it would prove unavailing.—*Board of Education v. Common Council*, 128 Cal. 369, 372, 60 Pac. 976. See *San Diego School Dist. v. Board of Supervisors*, 97 Cal. 438, 439, 32 Pac. 517; *Moore v. Morrison*, 130 Cal. 80, 82, 62 Pac. 268.

187. Refusal to issue writ—No advantage to be derived.—Where, upon petition for a writ of mandate, an examination of the facts shows that the issuance of such writ will confer no appreciable advantage upon the petitioners, such writ will not be issued.—*Moore v. Conley*, 163 Cal. 609, 126 Pac. 492.

As to the dismissal of an application for mandamus when the question involved has become immaterial, see note 5 Ann. Cas. 620.

188. Since, after the record of assessments has been delivered to the controller for collection, the state board of equalization has no power to change such record, mandamus will not lie to compel such board to list a railroad company for taxation, under the rule that a writ of mandate will not issue to compel the performance of an act that will be wholly void and of no possible benefit to the petitioner.—*San Diego & A. R. Co. v. Cal. St. Board of Equalization*, 164 Cal. 41, 127 Pac. 153.

189. Reporter's fees at preliminary examinations—In San Francisco.—Writ to compel treasurer of the city and county to draw a warrant for the fees of a police court reporter under section 870 Penal Code held improperly granted, and that demurrer should have been overruled without leave to amend.—*Trefts v. McDougald*, 15 Cal. App. 588, 115 Pac. 655.

190. Representation on election board.—Where the charter of a municipality makes it the imperative duty of the mayor to allow equal representation on the election board to the two political parties casting the highest vote at the last general election, a political party entitled to representation may have the writ to enforce its right.—*Independence League v. Taylor*, 154 Cal. 184, 97 Pac. 303.

As to elections, see pars. 63, 92, this note.

191. Right to inspect records of corporation—By stockholder.—Right being statutory, it is not necessary for petition to aver or show purpose or object of inspection, neither is it any defense to allege that objects and purposes are improper and that petitioner desires to injure business of corporation. Clear legal right given by constitution and statute can not be defeated by

stopping to inquire into motives.—Johnson v. Langdon, 135 Cal. 624, 626, 87 Am. St. Rep. 156, 67 Pac. 1050.

As to mandamus to enforce provisions of by-laws of corporation, see note 32 L. R. A. 575.

As to mandamus to private corporation to compel performance of duty, see notes 37 Am. St. Rep. 317-323; 40 Am. St. Rep. 140.

192. Salary, compelling payment of—Office being filled by de facto officer, court can not determine right to fees and emoluments of such office until right to office is determined, and writ of mandate by party claiming title to office, but not in possession thereof, must be denied.—Meredith v. Board of Supervisors, 50 Cal. 433-435.

193. Same—Res judicata.—Judgment in mandamus against board of supervisors as to salary of district attorney is not res judicata as against one having title to such office and not made party to such action.—People ex rel. Dorsey v. Smith, 28 Cal. 21, 25.

194. Scope of inquiry—Truth of facts assumed.—In disposing of a petition for a writ of mandate, the supreme court will assume that the facts stated by the petitioners therein are true, in the absence of any opportunity afforded the respondent to contest them.—Moore v. Conley, 163 Cal. 609, 126 Pac. 492.

195. Statute of limitations—Is applicable to petition for writ of mandate. Provisions of part two of this code constitute rules of practice in proceedings for mandamus and contain provisions upon subject of limitation of actions. Word "action" used therein includes special proceeding of civil nature, and application for writ of mandate is such proceeding.—Jones v. Board of Police Commissioners, 141 Cal. 96, 97, 98, 74 Pac. 696.

196. Stenographic report—Mandate to compel preparation.—Under the provisions of the above section a mandate will issue, upon proper showing, to compel performance of the duty enjoined upon the stenographic reporter of a court, to prepare a transcript on appeal taken under the new and alternative method in accordance with the provisions of sections 954a and 954b, ante.—Harris v. Burt, — Cal. App. —, 190 Pac. 1058.

197. Supreme court and superior court—Both have original jurisdiction to issue writs of mandamus, certiorari, and prohibition.—Santa Cruz G. T. J. S. Co. v. Board of Supervisors, 62 Cal. 40, 41. See Miller v. Board of Supervisors, 25 Cal. 93, 95, 96.

198. Tax-payer or resident elector—Not party beneficially interested, when.—Tax-payer, resident or elector of a state as such is not a party beneficially interested in having a special election called for the purpose of submitting to a vote the confirmation of the granting of a franchise to build a wharf, etc., so as to entitle him to bring mandamus to compel the calling of such

election. The only party so beneficially interested is the one to whom the franchise is granted.—Webster v. Common Council, 8 Cal. App. 480, 482, 97 Pac. 92.

199. Title to office—Can not be tried in proceeding to obtain mandamus against state controller to draw his warrant for salary attached to such office, nor can third person set up want of title as defense to proceeding by incumbent of office to obtain his salary.—Turner v. Melony, 13 Cal. 621, 622.

See, also, pars 5, 121, 199 et. seq., this note.

200. The rule that the title to an office can not be incidentally determined in an application for mandamus is not jurisdictional, but is merely one of procedure.—McKannay v. Horton, 151 Cal. 716, 21 Pac. 598.

201. Same—Contending boards of supervisors.—The question of legal title to office as between contending boards of supervisors is not involved in proceeding by mandate to compel auditor to compute and enter tax upon assessment-roll in conformity with rates fixed by order of body claiming to be board of supervisors, for such inquiry goes to right of either board to act, as contradistinguished from title of either as to office.—Morton v. Broderick, 118 Cal. 474, 482, 50 Pac. 644.

202. Same—Demand that defendant hand over books and papers and allow relator to enter upon discharge of duties of office, upon ground that he is entitled to it and that he is unlawfully precluded from enjoyment of it by defendant, is in reality an attempt to try title to office.—People ex rel. Smith v. Olds, 3 Cal. 167, 174, 175, 58 Am. Dec. 398.

203. Same—Incidentally determined.—Where two persons claim to be mayor of the city and county of San Francisco, and each appoints a different person as his secretary, the situation is one of sufficient urgency to warrant the maintenance of a proceeding in mandamus by one of the appointees against the auditor for the approval of his claim for salary, in which it may be incidentally determined who is de facto mayor.—McKannay v. Horton, 151 Cal. 716, 91 Pac. 598.

204. Same—Office being filled, mandamus will not lie, although office be filled only by de facto officer.—People ex rel. Smith v. Olds, 3 Cal. 167, 175, 176, 58 Am. Dec. 398.

205. Same—Party in office under color of lawful right and claiming to be lawful incumbent, his title to office can not be tried by mandamus.—People ex rel. Smith v. Olds, 3 Cal. 167, 175, 58 Am. Dec. 398.

206. Same—Person showing prima facie right to office may apply by mandamus to have proper oath of office administered to him, to the end that it may place him in condition to assert his legal rights, but he would still have to resort to quo warranto to oust incumbent and get possession of office.—People ex rel. Smith v. Olds, 3 Cal. 167, 175, 58 Am. Dec. 398.

207. *Same*—Right to office can not be secured by mandamus, nor even right of possession, although it may enforce such right.—*People ex rel. Smith v. Olds*, 3 Cal. 167, 175, 58 Am. Dec. 398.

208. *Same*—When only incidentally involved, is no ground for refusal to issue writ of mandate where it is invoked to enforce specific duty and remedies at law are not adequate. It will act under such circumstances as does equity and inquire into and determine rights so far as, but no further than, may be necessary to grant relief sought.—*Morton v. Broderick*, 118 Cal. 474, 481, 50 Pac. 644.

As to mandamus to compel surrender of office, see note 31 L. R. A. 342-368.

209. *Writ of*—Issues only to compel performance of act which law specially enjoins as duty resulting from office, trust, or station.—*Peck v. Board of Supervisors*, 90 Cal. 384, 386, 27 Pac. 301.

210. *Same*—May issue in what cases.—The writ may issue in cases mentioned in above section, only, when it is evident that law has provided no other sufficient remedy.—*Kimball v. Union Water Co.*, 44 Cal. 173, 175.

211. *Same*—Under our statute—Like writ of *procedendo ad iudicium* at common law, which issued out of court of chancery, commanding, in name of sovereign, judges who failed to give judgment in any suits before them, when it was their duty so to do, to proceed to judgment; but command was not to give any particular judgment, for that, if erroneous, could be set aside in course of appeal.—*People ex rel. Meminger v. Sexton*, 24 Cal. 78, 84.

212. *Writ of possession*—Issued under order of court can not be set aside by mandamus.—If the court committed error therein, or in refusing to set aside execution of writ, party could appeal therefrom and have error corrected, but error can not be corrected by mandamus.—*Gutierrez v. Superior Court*, 106 Cal. 171, 172, 39 Pac. 530.

213. *Wrongful order of dismissal of appeal*—A writ of mandate will lie to vacate a wrongful order of dismissal given by the superior court of an appeal from a justices' court and to restore the appeal to the calendar of the superior court for trial.—*Peacock v. Superior Court*, 163 Cal. 701, 126 Pac. 976, citing *Golden Gate Tile Co. v. Superior Court*, 159 Cal. 474, 114 Pac. 978; *Edwards v. Superior Court*, 159 Cal. 712, 115 Pac. 649.

See, also, par. 64, this note.

§ 1086. WRIT, WHEN AND UPON WHAT TO ISSUE. The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested.

History: Enacted March 11, 1872, re-enactment of § 468 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 183, held unconstitutional, see history, § 5 ante; amendment approved March 15, 1907, Stats. and Amdts. 1907, p. 307, *Kerr's Stats. and Amdts. 1906-7*, p. 475.

WRIT OF MANDAMUS—WHEN AND UPON WHAT ISSUED.

I. IN GENERAL, 1-6.

II. PARTY BENEFICIALLY INTERESTED, 7-26.

III. PLAIN, SPEEDY, AND ADEQUATE REMEDY—EFFECT OF, 27-39.

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1. As to showing necessary.
2. Affidavit—May be treated as a complaint.
3. By city against official of city.
4. Construction of section—As limitation upon power of court.
5. Prayer of complaint—Amendment, changing to equitable relief.
6. Writ—Issued upon an unverified complaint.

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8. Calling election—Tax-payer and property-owner, is party beneficially interested.
9. Consolidation-election returns—Canvass of—Mandamus to compel—Tax-payer interested party.
10. Enforcement of the mere naked right.
11. Executor or trustee of express trust—Is party beneficially interested.
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13. Moving school-house—Tax-payer may have mandate.
14. Not necessarily party of record.
15. Nuisance—Removal of, can not be compelled by mandate.
16. Performance of duty by public officer—Citizen who has no beneficial interest different, etc.
17. Prosecution for misdemeanor—Citizen is not party beneficially interested.
18. Removal of nuisance—Can not be compelled by mandate.

19. Right of inspection of document—Custody of public officer.
20. Right of stockholder—To examine records and books of corporation.
21. Seeking to compel affirmative action—On part of board or public officer.
22. Street improvement — Execution of contract—Mandamus by property-owner—Demand.
23. Same — Same — Property-owners — Beneficially interested parties.
24. Street lighting—Tax-payer is party beneficially interested.
25. Taxation—Beneficial interest of one tax-payer.
26. Tax-payer has interest which is distinguished from that of mass.

III. PLAIN, SPEEDY, AND ADEQUATE REMEDY—EFFECT OF.

- 27, 28. As to when writ issues.
29. Appeal—Certiorari differs from mandamus and prohibition.
30. Same — Appeal from matter complained of affording plain, speedy, etc.
- 31, 32. Same—Appeal, remedy by being inadequate.
33. Direct remedy can not be rejected.
34. Legal remedy which will prevent mandamus—Must not only be specific, etc.
35. Mandamus will not lie, when.
36. Petition showing on its face that applicant has plain, etc.
37. Right to inspect records of a corporation—By stockholder.
38. Subordinate officer or tribunal—Refusing to perform positive duty.
39. Usurpation of office—Law provides speedy and adequate remedy.

See, ante, § 1085 and note.

I. IN GENERAL.

1. **As to showing necessary.**—A resident property owner and tax-payer of the county of Los Angeles has no right to maintain a proceeding in mandamus to compel the sheriff to pay into the county treasurer certain fees collected and alleged to have been wrongfully appropriated by him, in the absence of any showing that the proper county officers have refused to commence or prosecute such a proceeding.—*Keith v. Hammel*, 29 Cal. App. 131, 154 Pac. 871.

2. **Affidavit**—May be treated as a complaint and demurred to.—*McCrary v. Beaudry*, 67 Cal. 120, 7 Pac. 264.

3. **By city against official of city.**—Where officers of a city charged with the performance of ministerial duties, neglect or refuse to follow the direction of the law under which they have assumed office, it would seem most proper that the city, by its common council, should be permitted in a pro-

ceeding of this kind to compel such officers to fulfil the obligation which their oath has imposed upon them.—*City of San Diego v. Capps*, 32 Cal. App. 461, 163 Pac. 235.

4. **Construction of section**—As limitation upon power of court.—The above section is limitation upon powers of court as conferred by preceding section, and not an enlargement of such powers.—*Kimball v. Union Water Co.*, 44 Cal. 173, 175.

5. **Prayer of complaint — Amendment, changing to equitable relief.**—It is irregular under our system of procedure to change a proceeding in mandamus to an action for equitable relief or for the recovery of damages by an amendment of the complaint.—*Franscioni v. Soledad Land & Water Co.*, 170 Cal. 221, 149 Pac. 161.

6. **Writ—Issued upon an unverified complaint** unaccompanied by an affidavit can not be taken advantage of in supreme court, where parties went to trial on complaint without objecting to lack of affidavit. Objection comes too late when made for first time on appeal. There is no reason why defendant may not waive affidavit, and in such case it will be considered to have been waived.—*People ex rel. Attorney-General v. Reis*, 76 Cal. 269, 276, 18 Pac. 309.

II. PARTY BENEFICIALLY INTERESTED.

7. **Appointment of chief of police—Mandamus—Persons entitled to relief—Common council.**—The common council of a city for such a beneficial interest in the appointment of a superintendent or chief of police for such city by the mayor thereof, as provided by a freeholders' charter of such city, as to make them proper parties under the provisions of the above section to petition for a writ of mandamus to compel such executive to make such appointment, upon his refusal to do so.—*City of San Diego v. Capps*, 32 Cal. App. 461, 163 Pac. 235.

8. **Calling election—Tax-payer and property-owner, is party beneficially interested** to bring mandamus requiring board of trustees of San Luis Obispo to call election on question of disincorporating municipality under statute. Case differs from one where only allegation is that plaintiff is qualified elector.—*Frederick v. San Luis Obispo*, 118 Cal. 391, 392, 393, 50 Pac. 461. See *Maxwell v. Board of Supervisors*, 53 Cal. 389, 392, 393; *Hyatt v. Allen*, 54 Cal. 353, 360; *Eby v. Board of School Trustees*, 87 Cal. 166, 176, 25 Pac. 240.

As to action to be in name of party in interest, see, ante, § 367 and note.

As to party beneficially interested who may bring action for certiorari, see, ante, § 1069 and note pars. 10-13, 17, 18.

As to tax-payer being party beneficially interested so as to bring certiorari to annul action of public officer or board, see, ante, § 1069 and note pars. 11-13.

9. **Consolidation—election returns—Canvass of—Mandamus to compel—Tax-payer interested party.**—In a proceedings to secure

mandamus to compel the board of trustees of a city to canvass the returns of a certain election held in that city for consolidation of said city with another city, tax-payers of the city are beneficially interested in such proceedings, since the matter bears a direct relation to the question of the amount of taxes to be paid, and may maintain the proceedings for a writ of mandamus.—*Taft v. Haas*, 34 Cal. App. 309, 167 Pac. 306.

10. Enforcement of the mere naked right or gratification of idle curiosity can not be secured as matter of course by writ of mandate. It is necessary for petitioner to show some specific interest or beneficial purpose to be derived from issuance of writ.—*Johnson v. Langdon*, 135 Cal. 624, 626, 87 Am. St. Rep. 156, 67 Pac. 1050.

11. Executor or trustee of express trust—Is party beneficially interested and may invoke any remedy afforded by law of land in his own name without joining with him person or persons for whose benefit he is acting. In all cases where such remedy is lawful and proper, and he labors under no disability which would attach to parties for whom he acts.—*Tyler v. Houghton*, 25 Cal. 26, 29.

12. Inspection of public records—Party beneficially interested.—Under the provisions of the above section a writ of mandamus must issue in favor of a party beneficially interested upon his filing a proper petition; but in an action in mandamus by a resident, citizen, and tax-payer of a city to compel its officers to allow the petitioner to inspect and examine certain books, of account, records, papers, and documents kept by such officers, under the claim that the same were public records, where the answer alleges that the plaintiff is not the party beneficially interested, but sought the information for a gas and electric corporation engaged in competition with the city, a judgment in favor of the plaintiff on the pleadings was erroneous.—*Mushet v. Department of Public Service*, 35 Cal. App. 630, 170 Pac. 653.

13. Moving school-house—Tax-payer may have mandate to compel board of school trustees not to unlawfully move school-house, although injury to him is same in kind as that suffered by all others from whose residences new site is more distant than the old.—*Eby v. Board of School Trustees*, 87 Cal. 166, 174, 25 Pac. 240.

14. Not necessarily party of record.—Party beneficially interested does not mean party of record in action or proceeding to which writ of mandate is auxiliary or corrective, for ordinarily there is no such action or proceeding. It differs from party referred to by statute who may apply for writ of certiorari.—*Elliott v. Superior Court*, 144 Cal. 501, 508, 77 Pac. 1109.

15. Nuisance—Removal of, can not be compelled by mandate.—As to generally, see par. 18, this note.

16. Performance of duty by public officer—Citizen who has no beneficial interest different or distinct from that of citizens at large has no power to bring action of mandamus to compel public officer to perform duty.—*People ex rel. Wirt v. Budd*, 5 Cal. Unrep. 572, 47 Pac. 594.

17. Prosecution for misdemeanor—Citizen is not party beneficially interested so as to compel arrest and prosecution of party who has committed misdemeanor. If officers of law fail to do their duty where rights of public are involved, law provides remedy in such cases. Private individual can apply for this remedy only in those cases where he has some private or particular interest to be subserved, or some particular right to be preserved or protected, by aid of this process, independent of that which he holds with public at large.—*Fritts v. Charles*, 145 Cal. 512, 513, 78 Pac. 1057.

18. Removal of nuisance—Can not be compelled by mandate at instance of a private citizen where showing made is that the nuisance complained of is not more injurious to him than it is to inhabitants at large. Injury or annoyance suffered may be greater in degree, but it is not different in kind from that sustained by public; therefore he receives from it no special injury for which he is entitled in law to private action.—*Marini v. Graham*, 67 Cal. 130, 133, 7 Pac. 442. See *Hopkins v. Western Pac. R. Co.*, 50 Cal. 190, 194; *Colnon v. Orr*, 71 Cal. 43, 45, 11 Pac. 814; *People ex rel. Wirt v. Budd*, 5 Cal. Unrep. 572, 47 Pac. 594; *Fritts v. Charles*, 145 Cal. 512, 513, 78 Pac. 1057.

19. Right of inspection of document—In custody of public officer can not be enforced by writ of mandate. Writ must be issued upon affidavit upon application of party beneficially interested, and conceding that such document was part of public records, citizen of state as such can have no beneficial interest in inspection of such document, and where petitioner does not allege any such special interest writ must be denied.—*Colnon v. Orr*, 71 Cal. 43, 45, 11 Pac. 814.

20. Right of stockholder—To examine records and books of corporation is given by constitution and statute and can not be defeated by stopping to inquire into motives. Remedy of stockholder when refused right is by mandamus.—*Johnson v. Langdon*, 135 Cal. 624, 626, 87 Am. St. Rep. 156, 67 Pac. 1050. See *Ala. Foster v. White*, 86 Ala. 467, 469, 6 So. 88. **Ill.** *Stone v. Kellogg*, 165 Ill. 192, 204, 56 Am. St. Rep. 240, 46 N. E. 222. **Md.** *Weißenmayer v. Bitner*, 88 Md. 325, 42 Atl. 245, 45 L. R. A. 446. **Mo.** *State v. St. Louis R. Co.*, 29 Mo. App. 307. **N. J.** *Mitchell v. Rubber Reclaiming Co.* (N. J. Ch. June 4, 1892), 24 Atl. 407. **N. Y.** *People ex rel. Gunst v. Goldstein*, 37 N. Y. App. Div. 550, 56 N. Y. Supp. 306. **Ohio.** *Cincinnati v.*

Co. v. Hoffmeister, 62 Ohio St. 189, 199, 78 Am. St. Rep. 707, 56 N. E. 1033, 48 L. R. A. 732.

21. Seeking to compel affirmative action—On part of board or public officer. It has always been held that applicant must have right which is specific, complete, and legal, and for which he has no other specific and equally adequate remedy. Neglect of public officer to discharge public duty may affect interest of every tax-payer, but such result must in ordinary cases be uncertain and dependent upon contingencies.—Maxwell v. Board of Supervisors, 53 Cal. 389, 392, 393.

22. Street improvement—Execution of contract—Mandamus by property-owner—Demand.—In the case of a street improvement which has been regularly adopted, and a contract entered into for the work, it is the duty of a city superintendent of streets to execute the contract for street-work, and this is a public duty for the performance of which no demand is required to be made by the property-owner as a condition precedent to and right to compel such execution by a writ of mandate.—Tholts v. Byxbee, 34 Cal. App. 226, 167 Pac. 166.

23. Same — Same — Property-owners — Beneficially interested parties.—In the case of a determined improvement of a city street, and a contract entered into for such improvement, the owners of lots that are to be improved under such street contract are sufficiently beneficially interested in the contract to petition for a writ of mandate to compel the execution of such contract by the superintendent of streets, under the provisions of the above section.—Tholts v. Byxbee, 34 Cal. App. 226, 167 Pac. 166, following the doctrine in Eby v. School Trustees, 87 Cal. 166, 25 Pac. 240.

24. Street lighting—Tax-payer is party beneficially interested in contract for street lighting in municipality, and it is not essential upon application in proper case designed to compel compliance with statute law that party must show actual pecuniary damages. It should be presumed that, where law enjoins duty upon municipal body and specifically points out mode of its performance, violation of such duty and disregard of mode of its performance will work injury.—Santa Rosa L. Co. v. Woodward, 119 Cal. 30, 34, 50 Pac. 1025.

25. Taxation—Beneficial interest of one tax-payer in question of taxation is not different in kind or nature from that of mass of tax-payers or from that of any other tax-payer in same district or community.—Eby v. Board of School Trustees, 87 Cal. 166, 176, 25 Pac. 240.

26. Tax-payer has interest which is distinguished from that of mass of community. Every citizen has interest in proper discharge of public duties, but every citizen is not owner of property taxed for state or municipal purposes (conc. op. by Thornton and Paterson, J. J.).—Eby v.

Board of School Trustees, 87 Cal. 166, 177, 25 Pac. 240.

III. PLAIN, SPEEDY, AND ADEQUATE REMEDY—EFFECT OF.

27. As to when writ issues.—Where one has a substantial right to protect or enforce, and this may be accomplished by mandamus, and there is no other plain, speedy and adequate remedy in the ordinary course of law, he is entitled, as a matter of right, to the writ, and a court can not lawfully refuse it.—Larkin v. Superior Court, 171 Cal. 719, 154 Pac. 841.

28. The writ of mandate should not issue if there is a plain, speedy and adequate remedy at law.—White v. Mathews, 29 Cal. App. 634, 156 Pac. 372.

29. Appeal—Certiorari differs from mandamus and prohibition in respect to right of appeal. In former, writ will not lie where there is any appeal. With mandamus and prohibition, writ lies in all cases where there is not plain, speedy, and adequate remedy in ordinary course of law.—Stoddard v. Superior Court, 108 Cal. 303, 305, 41 Pac. 278.

30. Same—Appeal from matter complained of affording plain, speedy, and adequate remedy, mandamus will not lie.—Francisco v. Manhattan Ins. Co., 36 Cal. 283, 287; Clark v. Minnis, 50 Cal. 509, 510; Aldrich v. Superior Court, 135 Cal. 12, 14, 66 Pac. 846.

31. Same—Appeal, remedy by being inadequate, existence of such remedy is not answer to an application for writ of mandate.—Careaga v. Fernald, 66 Cal. 351, 353, 5 Pac. 615; Estate of Herteman, 73 Cal. 545, 547, 15 Pac. 121. See Merced M. Co. v. Fremont, 7 Cal. 130, 133.

32. Appeal, right of existing, but in ordinary course would not be decided for a long time, and pending appeal there would be no security for payment of judgment, and where result of appeal would only be reversal of order, which would simply confirm right of petitioner and not compel enforcement of his right, does not give party plaintiff speedy and adequate remedy such as would bar him from bringing mandamus proceedings.—Holtum v. Greif, 144 Cal. 521, 527, 78 Pac. 11.

33. Direct remedy can not be rejected.—To accomplish indirectly by mandamus what can be accomplished directly by simple motion is to reject plain remedy and resort to doubtful one. This the statute does not sanction (dis. op. by Sharpstein, J.).—Bank of California v. Shaber, 55 Cal. 322, 330.

34. Legal remedy which will prevent mandamus—Must not only be specific, adequate, and legal, but one competent to afford relief upon subject-matter of application and one which is equally convenient, beneficial, and effective as proceeding in mandamus.—Raisch v. Board of Education.

81 Cal. 542, 546, 22 Pac. 890; Hunt v. Broderick, 104 Cal. 313, 316, 37 Pac. 1040. See Babcock v. Goodrich, 47 Cal. 488, 508.

35. Mandamus will not lie when plain, speedy, and adequate remedy exists.—Kimball v. Union W. Co., 44 Cal. 173, 174; People ex rel. Lowry v. McLane, 62 Cal. 616, 617; Colnon v. Orr, 71 Cal. 43, 45, 11 Pac. 814; Aldrich v. Superior Court, 135 Cal. 12, 14, 66 Pac. 846.

36. Petition showing on its face that applicant has plain, speedy, and adequate remedy in ordinary course of law is fatal objection to its sufficiency.—Kimball v. Union Water Co., 44 Cal. 173, 174.

37. Right to inspect records of a corporation.—By stockholder may be compelled by mandamus. Action at law for damages is not plain, speedy, or adequate remedy. Such action might be delayed until judgment that might be obtained could not be enforced; the very information sought by

stockholder and withheld from him by corporation might be basis of an action for damages.—Johnson v. Langdon, 135 Cal. 624, 625, 87 Am. St. Rep. 156, 67 Pac. 1050.

38. Subordinate officer or tribunal—Refusing to perform positive duty resulting from his office, or by some act equivalent to refusal and manifesting such intention, it becomes duty of higher court, upon proper application, to issue its mandate to compel performance of such duty, provided there is not open to party aggrieved plain, speedy, and adequate remedy in due course of law.—People ex rel. Meminger v. Sexton, 24 Cal. 78, 82; Laugenour v. Shanklin, 57 Cal. 70, 76.

39. Usurpation of office.—Law provides speedy and adequate remedy against person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise, within the state.—People ex rel. Smith v. Olds, 3 Cal. 167, 175, 58 Am. Dec. 398.

§ 1087. WRIT MUST BE EITHER ALTERNATIVE OR PEREMPTORY.

The writ may be either alternative or peremptory.

The alternative writ must command the party to whom it is directed immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court at a specified time and place why he has not done so.

The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he has not done as commanded must be omitted and a return day inserted.

History: Enacted March 11, 1872, re-enactment of § 400 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 183, held unconstitutional, see history, § 5 ante; amendment approved March 15, 1907, Stats. and Amdts. 1907, p. 307, Kerr's Stats. and Amdts. 1906-7, p. 476.

WRIT—ALTERNATIVE OR PERMANENT.

1. Alternative or permanent writ.
- 2, 3. Peremptory writ must follow alternative writ.
4. Relator proceeding by petition and notice for peremptory writ.

As to alternative or peremptory writ of prohibition, see, post, § 1104; also court rule No. XXVI.

As to peremptory writ without the alternative, see, post, § 1088 and note.

As to compelling clerk to enter name on great register, see Kerr's Cyc. Pol. Code, 2d ed., §§ 1108, 1110 and notes.

As to rules of supreme court in relation to alternative and peremptory writs, see, ante, § 1068 and note pars. 129, 130.

1. **Alternative or peremptory writ.**—The rule that a petitioner for a writ of mandate is concluded by the terms of the alternative writ, and that where the alternative writ is awarded for a purpose partly proper C. C. P.—154

and partly improper, the court will not enforce it by a peremptory mandamus as to that which is proper, but will give judgment for the respondent, is not an iron-bound one, to be enforced by a court regardless of circumstances, but is one to be applied in consonance with principles of fairness and justice.—Larkin v. Superior Court, 171 Cal. 719, 154 Pac. 841.

2. **Peremptory writ must follow alternative writ,** and if alternative writ demands too much, something more than relator is entitled to, judgment must be for the defendant, for there can not be judgment for relator for part of relief demanded in writ and for defendant for other part.—People v. Board etc. of Dutchess Co., 1 Hill (N. Y.) 50; People v. Board, 10 Abb. Pr. (N. Y.) 233.

3. See above rule commented on but not decided.—People ex rel. Central Pac. R. Co. v. Board of supervisors, 27 Cal. 655, 683, 684.

4. **Relator proceeding by petition and notice for peremptory writ in supreme**

court without procuring alternative writ, court under enlarged discretion may grant any relief consistent with case made by petition and embraced in issues, although

it may be only part of relief demanded in prayer of petition.—People ex rel. Central Pac. R. Co. v. Board of Supervisors, 27 Cal. 655, 684.

§ 1088. IF THE APPLICATION BE MADE WITHOUT NOTICE, THE ALTERNATIVE WRIT MAY ISSUE; OTHERWISE, THE PEREMPTORY.

When the application to the court is made without notice to the adverse party, and the writ is allowed, the alternative must be first issued; but if the application is upon due notice and the writ is allowed, the peremptory may be issued in the first instance.

With the alternative writ and also with any notice of an intention to apply for the writ, there must be served on each person against whom the writ is sought a copy of the petition. The notice of the application, when given, must be at least ten days. The writ can not be granted by default. The case must be heard by the court, whether the adverse party appears or not.

History: Enacted March 11, 1872, re-enactment of § 470 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 184, held unconstitutional, see history, § 5 ante; amendment approved March 15, 1907, Stats. and Amdts. 1907, p. 308, Kerr's Stats. and Amdts. 1906-7, p. 476.

ISSUING MANDATE.

- 1, 2. Allegations of petition—Are not taken as true because of default.
- 3, 4. Answer not filed—Mandate may issue on complaint.
5. Default judgment improper.
6. Demurrer to answer.
7. Voluntary compliance with mandate of court satisfies judgment.

1. **Allegations of petition—Are not taken as true because of default;** no answer being filed, judgment of the lower court denying petition will not be disturbed.—Jackson School Dist. v. Culbert, 134 Cal. 508, 510, 66 Pac. 741.

2. **Compare:** Pereria v. Wallace, 129 Cal. 397, 400, 62 Pac. 61.

3. **Answer not filed—Mandate may issue on complaint.**—An answer not having been filed and matter having been heard on complaint and court having made and filed finding, writ of mandate was properly ordered to issue. Facts set forth in complaint justifying its issuance, and complaint being verified, failure of defendants to answer conceded truth of all the facts

alleged.—Pereria v. Wallace, 129 Cal. 397, 400, 62 Pac. 61.

4. **Compare:** Jackson School Dist. v. Culbert, 134 Cal. 508, 510, 66 Pac. 741.

5. **Default judgment improper.**—The judgment will be reversed where writ of mandate has been granted by default.—People ex rel. Commissioners v. Central Pac. R. Co., 62 Cal. 506, 507; Town of Hayward v. Pimental, 107 Cal. 386, 390, 40 Pac. 545.

6. **Demurrer to answer,** which stated nothing inconsistent with allegations of complaint or affidavit on which respondent prayed issuance of writ, being sustained after submission of cause on pleadings, is sufficient hearing under requirements of above section for issuance of writ without further action or hearing in case.—Town of Hayward v. Pimental, 107 Cal. 386, 390, 40 Pac. 545.

7. **Voluntary compliance with mandate of court satisfies judgment** thereon and exhausts its force, and where supervisors took appeal from order directing them to levy certain tax, but had voluntarily levied such tax prior to such appeal, respondent may have the appeal dismissed on motion.—San Diego School Dist. v. Board of Supervisors, 97 Cal. 438, 439, 32 Pac. 517.

§ 1089. THE ADVERSE PARTY MAY ANSWER UNDER OATH. On the return of the alternative, or the day on which the application for the writ is noticed, the party on whom the writ or notice has been served may answer

the petition under oath, in the same manner as an answer to a complaint in a civil action.

History: Enacted March 11, 1872, re-enactment of § 471 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 184, held unconstitutional, see history, § 5 ante; amendment approved March 15, 1907, Stats. and Amdts. 1907, p. 308, Kerr's Stats. and Amdts. 1906-7, p. 476.

ANSWER.

1. Defense by averring upon information and belief.
2. Recall petition—Duty of registrar of voters—Mandamus to compel performance of—Answer.
3. Statute of limitations—Setting up on return to mandamus to compel payment of interest coupons.

1. Defense by averring upon information and belief a want of funds in treasury is insufficient in action of mandamus to compel president and clerk of city of sixth class to draw, sign, and countersign warrant for claim against city; it being duty of clerk to keep account of moneys received and disbursed, and being fact peculiarly within his knowledge, averment should be positive in form.—*McConoughey v. Jackson*, 101 Cal. 265, 269, 40 Am. St. Rep. 53, 35 Pac. 863.

2. Recall petition—Duty of registrar of voters—Mandamus to compel performance of—Answer.—In the case in which a recall petition has been filed, and in the meantime injunctive proceedings have been

taken and a writ of prohibition issued against the registrar of voters, on proceedings to secure a writ of mandamus to compel the registrar of voters to perform his official ministerial duties, neither the pending of an application in the superior court for a writ of prohibition and the issuing of an alternative writ thereon, nor the pendency of an action for an injunction in the same court and the issuing of a restraining order restraining the registrar from further action on such recall petition until the hearing of said application, will furnish a sufficient answer in the application for mandamus.—*Baines v. Zemansky*, 176 Cal. 369, 168 Pac. 565.

3. Statute of limitations—Setting up on return to mandamus to compel payment of interest coupons of irrigation district bonds, same being payable out of a particular fund, or in a particular way, the answer must show that the particular fund was on hand, or the particular method pursued; an affirmative allegation that no fund was at any time provided for the payment of the interest coupons is insufficient to support the plea (on rehearing).—*Hewell v. Hugin*, 3 Cal. App. 248, 84 Pac. 1002.

§ 1090. IF AN ESSENTIAL QUESTION OF FACT IS RAISED, THE COURT MAY ORDER A JURY TRIAL. If an answer be made, which raises a question as to a matter of fact essential to the determination of the motion, and affecting the substantial rights of the parties, and upon the supposed truth of the allegation of which the application for the writ is based, the court may, in its discretion, order the question to be tried before a jury, and postpone the argument until such trial can be had, and the verdict certified to the court. The question to be tried must be distinctly stated in the order for trial, and the county must be designated in which the same shall be had. The order may also direct the jury to assess any damages which the applicant may have sustained, in case they find for him.

History: Enacted March 11, 1872, re-enactment of § 472 Practice Act.

ESSENTIAL QUESTION OF FACT—JURY TRIAL.

1. Answer not raising issues—Effect of.
2. Motion that writ issue—Notwithstanding matters alleged in answer.
3. Motion to file supplemental answer—Should be granted.
4. Motion to strike out answer is immaterial—Effect of.
5. Power to determine every issue between parties—Must be placed somewhere.

6. Several facts as to defenses being stated in answer—Effect of.
7. Supreme court will direct trial of facts in original proceedings.
8. Trial by jury—Writ of mandate to compel payment of interest coupons.

1. Answer not raising issues—Effect of.—Answer of part of board of supervisors which does not deny nor confess and avoid any fact alleged in petition, but which attempts to raise issues between themselves and remaining members of board respect-

ing certain facts alleged in answer of board, amounts to no more than would their default, and such issues as alleged in such answer can not be tried in proceeding for mandamus, nor would any finding upon such issues be of any value.—*People ex rel. Central Pac. R. Co. v. Board of Supervisors*, 27 Cal. 655, 670.

2. Motion that writ issue.—Notwithstanding matters alleged in answer of defendant amounts to general demurrer to answer. It necessarily assumes that matters set up in answer, though true in point of fact, do not in law amount to defense against application for writ.—*Ward v. Flood*, 48 Cal. 36, 46, 17 Am. Rep. 405; *People ex rel. Atkinson v. Johnson*, 95 Cal. 471, 474, 31 Pac. 611; *McGowan v. Ford*, 107 Cal. 177, 185, 40 Pac. 231.

3. Motion to file supplemental answer.—Should be granted.—A motion to file supplemental answer setting up new and material facts occurring subsequent to commencement of proceeding, where there was no unreasonable delay in making such motion, should be granted, and it is abuse of discretion to refuse it.—*Grady v. Bramlet*, 59 Cal. 105, 107.

4. Motion to strike out answer as immaterial.—Effect of.—A motion to strike out answer as immaterial is equivalent to general demurrer. Effect is admission of matters stated in answer.—*Middleton v. Low*, 30 Cal. 596, 600.

5. Power to determine every issue between parties.—Must be placed somewhere.—Juries are used as instruments to deter-

mine facts unknown to court, but court does not require verdict of jury to inform itself of fact occurring in presence of court itself. It must, from nature of case, be trusted as to fidelity of its own records. Mandamus will be denied where petitioner alleges that judge refused to sign bill of exceptions, and judge in his answer alleges that he did sign such bill.—*People ex rel. Galvin v. Judge of Tenth Judicial District*, 9 Cal. 19, 20, 21.

6. Several facts as to defenses being stated in answer.—Effect of.—Where several facts as being stated in answer to alternative writ of mandate, judgment should not be given until issues have been disposed of.—*Gregg v. Pemberton*, 53 Cal. 251.

7. Supreme court will direct trial of facts in original proceedings.—The supreme court will direct that case be referred to lower court to try issues of fact before jury or without jury, as parties may agree, and return to supreme court a special verdict of jury or special finding of court upon issues joined by pleadings which require trial of issue of fact in proceeding for mandamus originally commenced in supreme court.—*County of Calaveras v. Brockway*, 30 Cal. 325, 339; *People ex rel. Lova v. Board of Supervisors*, 45 Cal. 395, 398.

8. Trial by jury.—Writ of mandate to compel payment of interest coupons of irrigation district bonds, on hearing of, it is not abuse of discretion to refuse to submit the questions of fact in dispute to jury.—*Hewel v. Hugin*, 3 Cal. App. 248, 84 Pac. 1002.

§ 1091. THE APPLICANT MAY DEMUR TO THE ANSWER, OR COUNTERVAIL IT BY PROOF. On the trial the applicant is not precluded by the answer from any valid objection to its sufficiency, and may countervail it by proof either in direct denial or by way of avoidance.

History: Enacted March 11, 1872, re-enactment of § 473 Practice Act.

PROCEEDINGS FOR MANDAMUS—ANSWER.

1. Allegations in return—Failure to answer or deny—Effect of.
2. Answer containing material averments of affirmative material.

1. Allegations in return—Failure to answer or deny.—Effect of.—In the case of an application for a mandamus to compel a city clerk or other officer charged with the duty, to certify to the sufficiency of a recall petition where the return alleges that the verification deputy circulating the petition in each case signed by a different name, or in a different manner, or with a different signature than that of any regularly appointed and qualified verification deputy, and these allegations of the return

are not controverted by proof or otherwise by the petitioner as he might do under the provisions of the above section, where the certificates are not before the court it is impossible for the court to determine what numbers were rejected for the reason alleged and the burden being upon the petitioner to show the sufficiency of the recall petition, the determination of the officer that some of the certificates were invalid because of the defective verification, can not be disturbed.—*Foster v. Cummings*, — Cal. App. —, 192 Pac. 100.

2. Answer containing material averments of affirmative matter, to which no valid objection was presented, and which was not countervailed by proof, judgment upon pleadings will be reversed.—*McClatchy v. Matthews*, 135 Cal. 274, 276, 67 Pac. 134.

§ 1032. MOTION FOR NEW TRIAL, WHERE MADE. The motion for a new trial must be made in the court in which the issue of fact is tried

History: Enacted March 11, 1872, founded on § 474 Practice Act.

MOTION FOR NEW TRIAL—WHERE MADE.

1. As to power of supreme court to grant a rehearing.
2. Constitution provides that the judgment of supreme court shall be final.
- 3, 4. Supreme court having referred issues to lower court for trial.

As to judgment of department of supreme court becoming final in thirty days unless rehearing ordered, see Const. 1879 art. VI, § 2, I Henning's General Laws, 3d ed., p. xiviii.

1. As to power of supreme court to grant a rehearing, see opinion by Chief Justice Beatty, In re Jessup, 81 Cal. 408, 459-474, 6 L. R. A. 594, 21 Pac. 976, 22 Pac. 742, 1028.

2. Constitution provides that the judgment of supreme court shall be final in thirty days unless before that time hearing in bank is ordered, and rule of supreme court is to same effect unless rehearing is ordered. Neither constitution nor rules make any distinction between cases of ap-

pellate and original jurisdiction. Provisions of code as to new trials can not be applied to supreme court, as it would overturn constitutional provision. Motion for new trial would suspend judgment for more than thirty days fixed by constitution.—Granger's Bank v. Superior Court, 101 Cal. 198, 199, 35 Pac. 642. See in matter Tyler, 71 Cal. 353, 374, 60 Am. Rep. 539, 12 Pac. 289, 13 Pac. 169; In matter Philbrook, 108 Cal. 14, 15, 40 Pac. 1061.

3. **Supreme court having referred issues to lower court for trial,** and jury having rendered verdict, proceeding having been originally commenced in supreme court, motion for new trial should have been made in such court, and motion having been made in lower court, petitioner is entitled to judgment on verdict in his favor.—People ex rel. Thompson v. Holloway, 41 Cal. 409, 410.

4. **Overruled:** In matter Tyler, 71 Cal. 353, 374, 60 Am. Rep. 539, 12 Pac. 289, 13 Pac. 169; Granger's Bank v. Superior Court, 101 Cal. 198, 199, 35 Pac. 642; In matter Philbrook, 108 Cal. 14, 15, 40 Pac. 1061.

§ 1093. THE CLERK MUST TRANSMIT THE VERDICT TO THE COURT WHERE THE MOTION IS PENDING, AFTER WHICH THE HEARING SHALL BE HAD ON MOTION. If no notice of a motion for a new trial be given, or if given, the motion be denied, the clerk, within five days after rendition of the verdict or denial of the motion, must transmit to the court in which the application for the writ is pending, a certified copy of the verdict attached to the order of trial; after which either party may bring on the argument of the application, upon reasonable notice to the adverse party.

History: Enacted March 11, 1872, re-enactment of § 475 Practice Act.

§ 1094. IF NO ANSWER BE MADE, OR IF THE ANSWER RAISE NO MATERIAL ISSUE OF FACT, THE HEARING MUST BE BEFORE THE COURT. If no answer be made, the case must be heard on the papers of the applicant. If the answer raises only questions of law, or puts in issue immaterial statements, not affecting the substantial rights of the parties, the court must proceed to hear or fix a day for hearing the argument of the case.

History: Enacted March 11, 1872, re-enactment of § 476 Practice Act; amended March 24, 1874, Code Amdts. 1873-4, p. 345.

HEARING BEFORE COURT WHEN.

- 1, 2. Facts alleged in verified complaint—When considered true.
3. Hearing and submission of cause on pleadings of parties.
4. Statute of limitations—Defense of—Not considered, when.

1. **Facts alleged in verified complaint** to which no answer has been filed are considered to be true, and do not need to be otherwise proved.—Pereria v. Wallace, 129 Cal. 397, 400, 62 Pac. 61.

2. **Compare:** Jackson School Dist. v. Culbert, 134 Cal. 508, 510, 66 Pac. 741.

3. **Hearing and submission of cause on pleadings of parties** may be had as well

in proceeding on mandamus as in any other. Court can not be divested of power to complete hearing for action for mandamus by reason of defendant's absenting himself on date to which such hearing had been regularly continued.—*Town of Hayward v. Pimental*, 107 Cal. 386, 391, 40 Pac. 545.

4. **Statute of Limitations—Defense of—** Not considered when not set up in answer on hearing of return to writ of mandate to compel payment of interest coupons of bonds of irrigation district.—*Hewel v. Hogin*, 3 Cal. App. 248, 84 Pac. 1002.

§ 1095. IF THE APPLICANT SUCCEED, HE MAY HAVE DAMAGES, COSTS, AND A PEREMPTORY MANDATE. If judgment be given for the applicant, he may recover the damages which he has sustained, as found by the jury, or as may be determined by the court or referee, upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue; and a peremptory mandate must also be awarded without delay;

[When state, etc., is respondent.] Provided, however, that in all cases where the respondent is a state, county or municipal officer, all damages and costs, or either, which may be recovered or awarded, shall be recovered and awarded against the state, county or municipal corporation represented by such officer and not against such officer so appearing in said proceeding, and the same shall be a proper claim against the state, or county, or municipal corporation for which such officer shall have appeared, and shall be paid as other claims against the state, county or municipality are paid; but in all such cases, the court shall first determine that the officer appeared and made defense in such proceeding in good faith.

History: Enacted March 11, 1872, a re-enactment of § 477 Practice Act; amendment approved May 31, 1913, Stats. and Amdts. 1913, p. 359. In effect August 10, 1913.

JUDGMENT—COSTS.

1. Court reporter—Refusal to transcribe notes—Mandamus—Costs on.
2. Judgment directing supervisors to pay amount personally—Incorrect.
3. Personal judgment against county auditor—Incorrect.
4. Public officer against whom mandamus is issued—Personally chargeable with costs.

As to costs, see, ante, §§ 1021 et seq. and notes.

1. **Court reporter—Refusal to transcribe notes—Mandamus—Costs on.**—In an original proceeding in mandamus in an appellate court to compel a court reporter to make a transcript of his notes in a criminal cause for the use of the defendant on appeal, the petitioner, if successful, is entitled to his costs, although the judge of the trial court refused to order the transcripts on the ground that the defendant was not en-

titled thereto.—*Smith v. McCallum*, 36 Cal. App. 143, 149, 172 Pac. 408, 410.

2. **Judgment directing supervisors to pay amount personally—Incorrect.**—Treasurer is to pay, and judgment in mandamus proceedings to compel payment of judgment which petitioner had recovered against county should be that supervisors allow order for such payment.—*Johnson v. Board of Supervisors*, 65 Cal. 481, 482, 4 Pac. 463.

3. **Personal judgment against county auditor for amount of claim due plaintiff** can not be entered in action where party brings action for mandamus to compel auditor to issue warrant for claim allowed by the supervisors.—*Sweeny v. Maynard*, 52 Cal. 468, 470.

4. **Public officer against whom mandamus is issued—Personally chargeable with costs of plaintiff.** That he may appeal without giving undertaking does not imply that personal judgment for costs or damages may not be rendered.—*Power v. May*, 123 Cal. 147, 152, 55 Pac. 796.

§ 1096. SERVICE OF THE WRIT. The writ must be served in the same manner as a summons in a civil action, except when otherwise expressly directed by order of the court. Service upon a majority of the members of

any board or body, is service upon the board or body, whether at the time of the service the board or body was in session or not.

History: Enacted March 11, 1872, re-enactment of § 478 Practice Act, last sentence added.

SERVICE OF WRIT.

1. Failure to serve person interested in proceedings—Effect of.
- 2, 3. Failure to serve respondent with copy of petition or writ—Effect of.
4. State having interest in controversy—Effect of.

As to service of petition and writ in proceeding originally commenced in supreme court, see Rule XXVI, par. 1, of supreme court, 177 Cal. p. lv, 176 Pac. vii.

As to service of summons, see, ante, §§ 410 et seq. and notes.

1. **Failure to serve person interested in proceeding** but one who is not required to be formal party to proceeding by being named as defendant in petition for writ; does not abate whole proceeding, but at most requires postponement of hearing or trial until such person could be served and have reasonable time in which to appear.—*Havemeyer v. Superior Court*, 84 Cal. 327, 372, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

2. **Failure to serve respondent with copy of petition or writ**, as required by rules of supreme court in original proceedings before it, is ground for dismissal of action.—*Coffey v. Grand Council*, 87 Cal. 367, 369, 25 Pac. 547.

3. **Compare:** *Havemeyer v. Superior Court*, 84 Cal. 327, 372, 373, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

4. **State having interest in controversy—Effect of.**—The state having interest in controversy over appointment of receiver, in proceeding for writ of prohibition to restrain superior court from further action in matter, it would be duty of supreme court in advance to order service of petition and writ upon representative of state, and then proof of such service would be required before hearing; or, if on hearing, fact had developed that party not named or served had an interest to be affected, it would be duty of court to suspend proceeding until such party was served and brought in.—*Havemeyer v. Superior Court*, 84 Cal. 327, 372, 373, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

§ 1097. PENALTY FOR DISOBEDIENCE TO THE WRIT. When a peremptory mandate has been issued and directed to any inferior tribunal, corporation, board, or person, if it appear to the court that any member of such tribunal, corporation, or board, or such person upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ.

History: Enacted March 11, 1872, re-enactment of § 479 Practice Act, omitting last sentence; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 345.

As to contempt of court generally, see, post, §§ 1209-1222 and notes.

As to imprisonment until order of court has been complied with, it being in power

of party to so comply with such order, see, post, § 1219 and note.

As to judgment and penalty for contempt, see, post, § 1218 and note.

CHAPTER III.

WRIT OF PROHIBITION.

§ 1102. Prohibition defined.

§ 1103. Where and when issued.

§ 1104. Writ may be alternative or peremptory. Form of.

§ 1105. Certain provisions of the preceding chapter applicable.

§ 1102. PROHIBITION DEFINED. The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board, or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.

History: Enacted March 11, 1872; amendment approved March 3, 1881, Stats. and Amdts. 1881, p. 20; May 6, 1919, Stats. and Amdts. 1919, p. 291. In effect July 22, 1919.

WRIT OF PROHIBITION.

- 1, 2. As to when will issue.
- 3-13. As to when will not issue—In general.
14. Same—Adequate, plain, and speedy remedy.
15. Same—An improper issue of summons.
16. Same—Judgment of police court in a civil action.
17. Same—Validity of grand jury can not be tested upon application for writ.
18. Admissions against interest.
- 19, 20. Appeal—Plain, speedy, and adequate remedy by.
21. Same—Stay of proceedings.
22. Appellate court will not determine questions of law.
23. Application for appointment of receiver—Sufficiency of—Review on prohibition.
24. Can not be used as writ of error.
25. Civil action in police court.
26. Common-law writ of prohibition—Was issued on suggestion.
27. Construction of section—Unconstitutional.
- 28, 29. Counterpart of writ of mandate.
30. Same—"Counterpart," as employed in above section.
- 31, 32. Criminal case.
- 33, 34. Denial of writ.
35. Disqualification of judge—Bias or prejudice in favor of moving party.
36. Distinction—Between error in exercising jurisdiction and jurisdiction itself.
37. Election contest.
38. Error can not be corrected by means of writ.
39. Exercise of proper discretion.
40. Finality of judgment.
41. Formation of reclamation district.
42. Irregularities and errors in law occurring.
43. Judge—May be disqualified from acting, and yet court have jurisdiction.
44. Same—Who is interested in action.
- 45, 46. Jurisdiction—Sole question which is presented.
47. Same—Of court, is not lost because of appeal.
48. Same—Of appellate court.
49. Same—Of superior court.
50. Same—When used in connection with prohibition.
51. Mandamus not exact converse of prohibition.
52. Ministerial act—Issuance of a writ of execution from a recorder's court.
53. Same—Can not be arrested—Legislature had no power to enact statute.
54. Orders appointing receiver.
55. Order requiring sureties upon stay-bond to justify.
56. Preventing adjudication in insolvency.
57. Proceedings in lower court—Having been ended.
58. Proceedings of board of supervisors—Can not be interfered with or arrested by writ of prohibition.
59. Prohibition is essentially jurisdictional.
60. Remedy by appeal inadequate.
61. Removal of city officers.
62. Removal of public officers.
63. Same—Proceeding to remove public officer—Erroneous title—Prohibition will not lie.
64. Right of appeal of a police court.
- 65, 66. Supreme and district courts of appeal—Concurrent jurisdiction.
67. To restrain appointment of receiver.
68. Trial upon defective appeal.
69. Trial upon merits.

70. Two administrations—Prohibition to restrain second.
71. Writ does not run against ministerial officers.
72. Writ of prohibition—Mentioned in constitution, is what.
73. Same—Will not issue when.

As to grounds for issuance of writ, see note 111 Am. St. Rep. 944.

1. As to when will issue.—Before writ of prohibition is issued, it must appear that the lower court exceeded its jurisdiction and, second, that petitioners have no plain, speedy and adequate remedy in the ordinary course of law of which they might avail themselves.—*Lange v. Superior Court of Solano County*, 11 Cal. App. 1, 3, 103 Pac. 908.

As to prohibition, in case of two administrations, to restrain second, see par. 70, this note.

2. Will lie to prevent the execution of a void order punishing the secretary of a corporation for contempt for refusing to present immaterial books showing the profits of the corporation in a divorce suit, under claim of plaintiff that defendant was a stockholder, whereas it was shown by undisputed evidence that defendant had ceased to be a stockholder two months prior to commencement of suit.—*Kullman, Salz & Co. v. Superior Court*, 15 Cal. App. 278, 114 Pac. 589.

3. As to when will not issue.—In general.—Prohibition will not lie where the petitioner has a plain, speedy and adequate remedy by suit for injunction.—*Murphy v. Bantel*, 6 Cal. App. 215, 216, 91 Pac. 805.

4. Can not issue to restrain exercise of jurisdiction, however erroneous, and if the superior court has jurisdiction to try a case, and deny a motion to continue, pending decision of a land question by the local land office, prohibition will not issue to restrain its action, whether right or wrong.—*Lightner Mining Co. v. Superior Court*, 14 Cal. App. 646, 112 Pac. 909.

5. The writ of prohibition will not issue for want of jurisdiction alone. It must be made to appear that the petitioner applying therefor is without any "plain, speedy and adequate remedy in the ordinary course of law" (Code Civ. Proc., § 1103).—*Gardner v. Superior Court*, 19 Cal. App. 548, 126 Pac. 501, 503.

6. The writ will not lie to restrain the superior court from proceeding with the trial of petitioner upon an indictment found by the grand jury, on the ground that no evidence was produced before the grand jury tending to show him guilty of a public offense.—*Brobeck v. Superior Court*, 152 Cal. 289, 92 Pac. 646.

7. It is well settled that the regularity of the proceedings of the court, if within its jurisdiction, can not be reviewed on prohi-

bition.—*Reed Orchard Co. v. Superior Court*, 19 Cal. App. 648, 128 Pac. 9, 15.

8. Prohibition will not lie to prevent judgment being rendered in a criminal action after the time fixed by law therefor, as the court has jurisdiction of the subject-matter and the person of the defendant.—*Rankin v. Superior Court*, 157 Cal. 189, 192, 106 Pac. 718.

9. Prohibition will not issue to an inferior tribunal or officer acting without or in cases of the jurisdiction of such tribunal or officer unless the aggrieved party be without a plain, speedy and adequate remedy in the ordinary course of law.—*Hamberger v. Police Court*, 12 Cal. App. 153, 154, 106 Pac. 894.

10. Prohibition will not lie against justice of the peace in action where although he may exceed his jurisdiction, an appeal upon questions of both law and fact lies to the superior court.—*Hubbard v. Justices' Court*, 5 Cal. App. 90, 91, 89 Pac. 865.

11. Where a trial, if had upon a verified complaint filed in the superior court, would be in excess of the court's jurisdiction, it does not follow that the petitioners would be entitled to the writ of prohibition. They would have an adequate remedy by appeal from any adverse judgment rendered against them. This being true, the want of jurisdiction, in the absence of facts or circumstances showing the inadequacy of the remedy by appeal, does not entitle them to the writ.—*Gardner v. Superior Court*, 19 Cal. App. 548, 126 Pac. 501, 503, citing *Lindley v. Superior Court*, 141 Cal. 220, 74 Pac. 765.

12. Where the court is without jurisdiction to proceed with a case, prohibition will lie to prevent further proceedings. The petitioner will not be allowed to undergo the chance of conviction and imprisonment until his case can be reached on appeal.—*Arfsten v. Superior Court*, 20 Cal. App. 269, 128 Pac. 949, 951.

13. Where the petition and affidavit shows the conviction of petitioner in the police court for vagrancy, a fine therefor, an appeal to the superior court upon a statement of the case under section 1468 Penal Code, the affirmance of the judgment, without notice, and the entry and certification thereof to the lower court, without waiting ten days, and prohibition is asked to prevent the application of the bail money to the payment of the fine, but does not state that petitioner had no actual notice of the hearing on appeal, the writ will be denied.—*La Porte v. Williams*, 17 Cal. App. 429, 120 Pac. 55.

14. Same—Adequate, plain, and speedy remedy.—Where there is a plain, speedy and adequate remedy, the writ will not be granted, and therefore will not be granted to prevent the appointment of a receiver upon the ground that the petitioner not a party to the action will be damaged thereby and that no appeal will lie from

order refusing to discharge the receiver if appointed, as the petitioner might intervene in the action and have a remedy by appeal from the order making the appointment.—*First Nat. Bank v. Superior Court*, 12 Cal. App. 335, 347, 107 Pac. 322.

See, also, pars. 19-21, 60, this note.

15. Same—An improper issue of summons, or an improper service thereof, appearing, the remedy of the aggrieved party is by motion to quash the service, addressed to the court in which the action was commenced, and if that motion be denied an appeal is available, and therefore prohibition will not lie.—*Burge v. Justices' Court*, 11 Cal. App. 213, 215, 104 Pac. 581.

16. Same—Judgment of police court in a civil action is appealable to the superior court and therefore prohibition will not lie to prevent a trial in the police court of action upon a demand for money only.—*Hamberger v. Police Court*, 12 Cal. App. 153, 155, 106 Pac. 894.

See, also, pars. 25 and 64, this note.

17. Same—Validity of grand jury can not be tested upon application for writ or prohibition if it was drawn and empaneled under the form of law and the direction of the court having jurisdiction to empanel it.—*In re Hatch*, 9 Cal. App. 333, 334, 99 Pac. 398.

18. Admissions against interest.—Letters of defendant are admissible not to prove the truth of their contents, but as evidence of the admissions against interest made therein.—*People v. Rollins*, 14 Cal. App. 138, 111 Pac. 123.

19. Appeal—Plain, speedy, and adequate remedy by.—Appeal is none the less speedy and adequate, within the meaning of this section, merely because more time is consumed than by writ of prohibition.—*Lightner Mining Co. v. Superior Court*, 14 Cal. App. 651, 112 Pac. 909.

See, also, pars. 3-17, 60, this note.

20. Will not issue where there is a plain, speedy and adequate remedy in ordinary course of law. Such remedy exists where there is an opportunity for a review and correction of the wrong complained of in a higher court on appeal; hence where the right of appeal exists, prohibition will not lie. Only in exceptional cases is appeal deemed an inadequate remedy.—*Lightner Mining Co. v. Superior Court*, 14 Cal. App. 646, 112 Pac. 909.

21. Same—Stay of proceedings.—Where enforcement of an alimony order is stayed by the appeal, under section 946, ante, and such enforcement is sought by the appointment of a receiver after appeal perfected, prohibition will not lie, since an adequate remedy in ordinary course of law exists in the authority of the appellate court to grant a special order restraining such action.—*McAneny v. Superior Court*, 150 Cal. 9, 87 Pac. 1020.

22. Appellate court will not determine questions of law upon application for prohibition which do not properly come before it on the record notwithstanding a stipulation of counsel that such question be submitted.—*Hubbard v. Justices' Court*, 5 Cal. App. 90, 93, 89 Pac. 865.

23. Application for appointment of receiver—Sufficiency of—Review on prohibition.—In those cases in which an order appointing a receiver in a given cause is within the jurisdiction of the court, whether the facts disclosed to the court on the application for the appointment are such as legally warrant it in putting in operation, or applying its jurisdiction in that regard, can not be engaged into or reviewed in an application for a writ of prohibition, under the provisions of the above section and following sections.—*Takeba v. Superior Court*, 43 Cal. App. 469, 185 Pac. 406.

24. Can not be used as writ of error to determine a question of fact which it was the province of the trial court to determine. Its sole province is to determine as to whether or not the inferior court is proceeding in excess of its jurisdiction.—*Conlan v. Superior Court of the City and County of San Francisco*, 12 Cal. App. 420, 421, 107 Pac. 577.

25. Civil action in police court.—An appeal may be prosecuted on questions of both law and fact from a judgment in a civil action in a police court, and prohibition will not lie to control the action of such court in excess of its jurisdiction.—*Simpson v. Police Court of Riverside*, 160 Cal. 531, 117 Pac. 553.

See, also, pars. 16 and 60, this note.

26. Common-law writ of prohibition.—Was issued on suggestion that cause originally, or some collateral matter arising therein, did not belong to inferior judge, but to cognizance of some other court. It was an original remedial writ provided as remedy for encroachments of jurisdiction. Its office was to restrain subordinate courts and inferior judicial tribunals from exceeding their authority.—*Maurer v. Mitchell*, 53 Cal. 289, 291. See *Spring Valley W. W. v. San Francisco*, 52 Cal. 111; *Camron v. Kenfield*, 57 Cal. 550, 553.

27. Construction of section—Unconstitutional.—The provisions of the above section in so far as it seeks to provide for prohibition against the exercise of mere ministerial functions is unconstitutional, the writ of prohibition being limited to judicial proceedings and functions.—*Baines v. Zemansky*, 176 Cal. 369, 168 Pac. 565.

28. Counterpart of writ of mandate and upon the same reasoning as requires a demand upon the defendants to perform an act sought to be enforced by the writ it would seem reasonable to require that before a judge should be prohibited from doing an act it should appear that he is about to proceed or threaten to do the act and where in his return he denies that he will

do the act complained of unless prohibited, the writ should be denied.—*Lewis v. Superior Court*, 11 Cal. App. 483, 485, 105 Pac. 763.

29. At common law the writ of prohibition was issued to restrain subordinate courts and inferior judicial tribunals from exceeding their jurisdiction. The writ mentioned in the constitution is the writ of prohibition as known to the common law and the office of the writ has not been extended by this section and it should not now issue in cases in which it could not have been resorted to prior to the statute nor does the clause "whether exercising functions judicial or ministerial" enlarge the scope of the writ.—*Beaulieu Vineyard v. Superior Court*, 6 Cal. App. 242, 247, 91 Pac. 1015.

30. Same—"Counterpart," as employed in above section is designed to illustrate operation of writ of prohibition when issued in proper case, but is not intended to enlarge or add to class of cases in which it may be resorted to. It must be used in more general sense that prohibition is opposite to mandamus in that it arrests, while mandamus commands, action.—*Maurer v. Mitchell*, 53 Cal. 289, 293.

31. Criminal case.—In criminal case prohibition will not lie although the offense charged may be barred by the statute of limitations or the court without jurisdiction if there is a remedy by appeal or habeas corpus is applicable.—*Keith v. Recorder's Court*, 9 Cal. App. 380, 381, 99 Pac. 416.

32. Prohibition will not lie to prevent the superior court proceeding in a criminal trial upon the ground that the defendant has never been legally committed by a magistrate as the law provides a remedy therefor by motion to set aside the indictment and if the ruling thereon be erroneous by appeal from the judgment.—*Western Meat Co. v. Superior Court of the County of Sacramento*, 9 Cal. App. 538, 543, 99 Pac. 976.

33. Denial of writ.—It is held, in denying the application for an alternative writ of prohibition herein, that while the petition presents a question as to the jurisdiction of the superior court, the petitioner, however, has his remedy by appeal, and in view of the power of the supreme court to prevent by supersedeas a retrial pending appeal, if a sufficient showing is made to warrant such action, the remedy by appeal is sufficiently plain, speedy and adequate.—*Glougle v. Superior Court*, 49 Cal. Dec. 448, 147 Pac. 972.

34. The action of the superior court in refusing to dismiss an appeal because of delay in bringing it to a hearing can not be considered on an application for a writ of prohibition to prevent the superior court from hearing the appeal on the ground that the undertaking is defective.—*Cohen v. Connick*, 26 Cal. App. 491, 147 Pac. 479.

35. Disqualification of judge—Bias or prejudice in favor of moving party is not ground for calling in another judge, and when the facts relied upon tend to create bias or prejudice in favor of party applying for the writ, prohibition will not issue to prevent the judge from trying the case.—*Lassen Irr. Co. v. Superior Court*, 151 Cal. 362, 90 Pac. 709.

36. Distinction—Between error in exercising jurisdiction and jurisdiction itself is difficult to express in abstract terms so as to be readily applied to all cases that may arise. Main test of jurisdiction is whether or not discretion is given court as to such matter. Sheriff, being disqualified to act, determination of issue of such disqualification is necessarily left to discretion of court, and it has jurisdiction to hear and determine that issue. But where there is no disqualification, there is no discretion given to determine whether an ellisor should or should not be appointed.—*Bruner v. Superior Court*, 92 Cal. 239, 251, 252, 28 Pac. 341.

37. Election contest.—The writ will not issue to restrain the trial of an election contest, where the court has not lost jurisdiction, and mere irregularities are complained of which are proper subjects of consideration and review upon appeal.—*Busick v. Superior Court*, 16 Cal. App. 500, 118 Pac. 581.

38. Error can not be corrected by means of writ of prohibition. Court having jurisdiction to set aside its order or decree discharging party from office of administrator upon ground that decree had been inadvertently made and entered, prohibition does not lie to correct any error committed.—*Wiggin v. Superior Court*, 68 Cal. 398, 402, 9 Pac. 646.

39. Exercise of proper discretion.—Where jurisdiction and authority are given a public board to exercise its discretion, and no facts are shown that such discretion has been abused, it is not within the province of the court to review such exercise of discretion.—*People v. Nellis*, 14 Cal. App. 253, 111 Pac. 631.

40. Finality of judgment.—Jurisdiction ceases with judgment, when final, and prohibition will lie to prevent further action, even though an unfinished account remains, where the judgment, and the unfinished account, and the proceedings thereunder, are severable, as in the case at bar.—*Granger v. Superior Court*, 159 Cal. 5, 112 Pac. 854.

41. Formation of reclamation district is a legislative act involving the exercise of legislative discretion, and after it has acquired jurisdiction of an application therefor, the board of supervisors can not be enjoined from acting thereon, and prohibition will lie to restrain the superior court from proceeding with the trial of a suit for that purpose, appeal not being an adequate remedy, following the delay, trouble, and expense of the trial of a question of fact over which the court has no jurisdiction.—

Glide v. Superior Court, 147 Cal. 28, 81 Pac. 225.

42. Irregularities and errors in law occurring before and after finding and return of indictment are not grounds for prohibition to restrain court from proceeding with trial, but are only matters which may be reviewed and remedied on appeal.—*Levy v. Wilson*, 69 Cal. 105, 108, 10 Pac. 272.

43. Judge—May be disqualified from acting, and yet court have jurisdiction of cause. Such judge is person within letter and spirit of statute against whom writ of prohibition may issue in proper case when he is disqualified from sitting and acting by reason of interest.—*North Bloomfield Gold Min. Co. v. Keyser*, 58 Cal. 315, 324.

44. Same—Who is interested in action not only has no authority to hear and determine it, but is expressly prohibited from doing so (conc. op. by Sharpstein, J.).—*North Bloomfield Gold Min. Co. v. Keyser*, 58 Cal. 315, 326.

45. Jurisdiction—Sole question which is presented or may be considered in this proceeding.—*Hogan v. Superior Court*, 16 Cal. App. 787, 117 Pac. 947.

46. Jurisdiction is the power to hear, determine, and pronounce judgment upon the issue before the court.—*In re Hatch*, 9 Cal. App. 333, 99 Pac. 398.

47. Same—Of court, is not lost because of appeal taken from order denying motion to change place of trial, although appellant is entitled to continuance of general cause while such appeal is pending. Trial of cause pending appeal would not be proceeding without or in excess of jurisdiction so as to authorize writ of prohibition.—*People ex rel. Scannell v. Whitney*, 47 Cal. 584, 585.

48. Same—Of appellate court.—While the appellate court has original jurisdiction in prohibition, it has also appellate jurisdiction; and where the petitioner elects to make his application in the lower court, the appellate court will not issue such a writ in the absence of some showing rendering such action proper, since the right of appeal from the judgment of the lower court exists.—*In re Burt*, 17 Cal. App. 310, 119 Pac. 674.

49. Same—Of superior court.—The state may maintain an action to prevent the issuance of a purchase of state lands and the superior court would have jurisdiction thereof, and prohibition will not lie to prevent the prosecution of such an action, even though the complaint fails to state a cause of action.—*Woodworth v. Superior Court*, 153 Cal. 38, 94 Pac. 232.

50. Same—When used in connection with prohibition, is employed in sense of legal power or authority to hear and determine causes.—*Maurer v. Mitchell*, 53 Cal. 289, 292.

51. Mandamus not exact converse of prohibition.—Prohibition as remedy is not, in every respect, exact converse with manda-

mus. This is shown by second clause of section, which declares that prohibition arrests proceedings which are without or in excess of jurisdiction. In prohibition, it is shown to court that inferior court or person has exceeded powers conferred by law, and court intervenes to prevent further proceedings without or in excess of such power. Mandamus may be resorted to whenever officer or person refuses to perform duty enjoined by law, although act may have been an isolated one, disconnected with any other proceedings.—*Maurer v. Mitchell*, 53 Cal. 289, 292.

As to writs of prohibition and mandamus distinguished, see note 3 L. R. A. 56, 57.

52. Ministerial act—Issuance of a writ of execution from a recorder's court imposing a fine which has been affirmed on appeal is a mere ministerial act which can not be arrested by prohibition; nor can the judgment of the superior court be annulled in a proceeding against the inferior court.—*Harris v. Recorder's Court*, 15 Cal. App. 104, 113 Pac. 687.

53. Same—Can not be arrested—Legislature had no power to enact statute purporting to amend above section by providing that writ should arrest proceedings (in excess of jurisdiction) whether exercising functions judicial or ministerial.—*Camron v. Kenfield*, 57 Cal. 550, 554.

54. Orders appointing receivers.—Since the amendments of 1907 to section 939, ante, allowing appeals from such orders, and section 943, ante, providing for stay of execution, an interested party has a plain, speedy, and adequate remedy in ordinary course of law, that is, by appeal, and prohibition will not lie to arrest proceedings under such an order.—*Lightner Mining Co. v. Superior Court*, 14 Cal. App. 649, 112 Pac. 909.

55. Order requiring sureties upon stay-bond to justify within two days even if void is an order made after final judgment and appealable, and therefore the writ of prohibition can not be invoked.—*Holt v. James*, 10 Cal. App. 360, 361, 101 Pac. 1065.

56. Preventing adjudication in insolvency.—Where the petition is by party to proceedings, such party has plain, speedy, and adequate remedy by appeal, and prohibition will not lie. If, on the other hand, he is not a party, he is not interested and his rights can not be prejudiced thereby; hence he is a stranger thereto, and can not have the writ.—*Southern Pac. Milling Co. v. Superior Court*, 14 Cal. App. 240, 243, 111 Pac. 625.

57. Proceedings in lower court—Having been ended, and court having nothing further to do in pursuance or completion of its order, or where it has dismissed proceeding, prohibition is no remedy; but where anything remains to be done by court, prohibition not only prevents what remains to be done, but gives complete relief by undoing what has been done.—

Havemeyer v. Superior Court, 84 Cal. 327, 394, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

58. Proceedings of board of supervisors—Can not be interfered with or arrested by writ of prohibition because purchase of road by them was injudicious from business point of view, but only when such proceedings are without or in excess of jurisdiction of board.—People ex rel. Brundage v. Board of Supervisors, 47 Cal. 81, 82.

59. Prohibition is essentially jurisdictional, and therefore judicial; while mandamus is purely ministerial. When code declares prohibition is counterpart of mandate, declaration can not be true in its broadest sense, and to that extent is misleading. These two writs are counterpart of each other to extent that one is prohibitory and other mandatory; one acts upon person, other acts upon tribunal; but beyond that they have nothing in common.—City of Coronado v. San Diego, 97 Cal. 440, 441, 32 Pac. 518.

60. Remedy by appeal inadequate.—An action for damages for trespass upon a quartz ledge in another state by mining upon the dip thereof upon ground in defendant's possession, and for an injunction to prevent further mining thereon is local in its nature and beyond the jurisdiction of a superior court of this state, and inasmuch as the remedy by appeal is inadequate by reason of the heavy expense of transporting witnesses to attend a trial, which could not be recovered as legal costs, prohibition will lie to prevent such trial.—Ophir Silver Mining Co. v. Superior Court, 147 Cal. 479, 82 Pac. 70.

See, also, pars. 13, 19-21, this note.

61. Removal of city officers.—Where removal of officer for misconduct of office is by a city charter vested exclusively in certain commissioners the provisions of the Penal Code do not apply and the superior court is without jurisdiction to proceed in an indictment found by the grand jury, and therefore, prohibition will lie.—Craig v. Superior Court, 157 Cal. 481, 485, 108 Pac. 310.

62. Removal of public officers.—In proceedings under section 772 of the Penal Code to remove an officer for misconduct, the accused is entitled to a writ of prohibition in a proper case; no appeal lies from the judgment of the superior court in such proceedings.—Ferguson v. Superior Court, 26 Cal. App. 554, 147 Pac. 603.

63. Same—Proceeding to remove public officer—Erroneous title—Prohibition will not lie.—In the case in which an officer was proceeded against under the provisions of section 772, of the Penal Code to secure summary removal, on a charge of refusing and neglecting to perform certain official duties the fact that the title of the petition seeking the removal was in the name of the person who verified the petition instead of in the name of the people of the state, on the accusation of such in-

dividual this defect of title, if it be conceded to be one, was not one which affects the jurisdiction of the court, and as the title is amendable, the defendant is not entitled to a writ of prohibition under the provisions of the above section and the following sections.—Cline v. Superior Court, 184 Cal. 331, 193 Pac. 929.

64. Right of appeal of a police court.—A police court may appeal from a judgment of the superior court prohibiting it from proceeding in an action pending before it.—Simpson v. Superior Court, 160 Cal. 532, 117 Pac. 553.

See, also, pars. 16 and 25, this note.

As to adequate, plain, and speedy remedy by appeal, see pars. 13, 19-21, 60, this note.

65. Supreme and district courts of appeal—Concurrent jurisdiction.—The district court of appeals having concurrent jurisdiction with the supreme court in original proceedings for writ of prohibition, and the denial of the writ by the district court of appeals being a bar to a subsequent application to the supreme court, the only method of obtaining a consideration of the application by the supreme court is by transfer as in other cases for reconsideration and decision.—Dawson v. Superior Court, 158 Cal. 73, 110 Pac. 109.

66. Under the constitution the supreme and district courts of appeal have concurrent jurisdiction in original proceedings for writ of prohibition, and application for and denial on its merits by the district courts is a bar to a subsequent application in the supreme court.—Dawson v. Superior Court, 158 Cal. 73, 110 Pac. 479.

67. To restrain appointment of receiver.—Prohibition does not lie to restrain the superior court from appointing a receiver to take charge of a corporation, pending an action by minority stockholders against those in control, if there are no circumstances incident to the case making inadequate an appeal, under section 939, ante, from the order of appointment.—Western Underwriting & Mortg. Co. v. Superior Court, 22 Cal. App. 413, 134 Pac. 732.

68. Trial upon defective appeal.—Prohibition will lie to prohibit superior court proceedings on appeal from justices' court where sureties on appeal bond fail to justify.—Crowley Launch & Tugboat Co. v. Superior Court, 10 Cal. App. 342, 344, 101 Pac. 935.

69. Trial upon merits.—Writ will not issue to prevent a trial upon the merits, where the very question of fact upon which the court's want of jurisdiction rests is denied, unless the want of jurisdiction is apparent upon the face of the application.—Macclay Co. v. Superior Court, 16 Cal. App. 495, 117 Pac. 568.

70. Two administrations—Prohibition to restrain second.—There can not be two administrations of the estate of a deceased person, and where letters have been issued

in two different counties, prohibition will lie to restrain the exercise of jurisdiction under the grant of letters subsequent in point of time, on the petition of one interested in the administration under first grant.—*Dungan v. Superior Court*, 149 Cal. 104, 84 Pac. 767. See, also, *Estate of Davis*, 149 Cal. 486, 87 Pac. 17.

As to when prohibition will issue, generally, see pars. 1, 2, this note.

71. Writ does not run against ministerial officers, and its operation is preventive rather than remedial, but where court has appointed receiver in excess of its jurisdiction, property in hands of receiver is in hands of court. Receiver is mere instrument of court, and what he does, court does. It is court, therefore, and not receiver, who holds, administers, and disposes of property in his hands, and so long as this property remains undisposed of, action of court is necessary. In such case, there is judicial action to be arrested, injury to be pre-

vented, and writ of prohibition is appropriate for that purpose.—*Havemeyer v. Superior Court*, 84 Cal. 327, 390, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

72. Writ of prohibition—Mentioned in constitution, is what.—The writ of prohibition mentioned in constitution is writ as known to common law.—*Maurer v. Mitchell*, 53 Cal. 289, 291.

73. Same—Will not issue when there is adequate and speedy remedy in due course of ordinary proceeding, as by appeal. Thus, it has been held that writ will not issue to restrain payment of inheritance-tax out of the estate, at suit of heir, on ground statute under which court is proceeding has been repealed, as that question can be raised on appeal from such order under subdivision 3 section 963, ante, or on appeal from a decree of final distribution; appeal is plain, speedy, and adequate remedy within the meaning of the statute.—*Cross v. Superior Court*, 2 Cal. App. 342, 83 Pac. 815.

See, post, § 1103 and note pars. 43-54.

§ 1103. WHERE AND WHEN ISSUED. It may be issued by any court except police or justices' courts, to an inferior tribunal or to a corporation, board, or person, in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It is issued upon the verified petition of the person beneficially interested.

History: Enacted March 11, 1872; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 184, held unconstitutional, see history, § 5 ante; amendment approved March 21, 1907, Stats. and Amdts. 1907, p. 838, Kerr's Stats. and Amdts. 1906-7, p. 476.

PROHIBITION—WHERE AND WHEN ISSUED.

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18. Justice of peace—Proposing to try misdemeanor charge without jury.

19. Justices' court judgment convicting of possession of cocaine—Prohibition will not prevent carrying into effect.

20. Levy of tax is not judicial act—Therefore prohibition will not lie.

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22. Order of court—Directing receiver to take charge of all property of insolvent.

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26. Police judge—Is not disqualified because he has formed an expressed opinion.
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30. Rehearing—Is proper practice in supreme court.
31. Superior court—May be prohibited from proceeding with trial, when.
32. Title and property—Can not be tried by prohibition.

II. ADEQUATE REMEDY AT LAW—A. IN GENERAL.

33. Defense to criminal proceeding must be presented.
34. Error of court—Not involving jurisdiction—Not corrected on prohibition.
35. Even though the lower tribunal is about to exceed its jurisdiction—No issue when.
- 36, 37. Objection to jurisdiction—In lower court, not necessary.
38. Objection to want of jurisdiction—Being first submitted to inferior court.
39. Remedy does not fail to be speedy and adequate, when.
40. Right to move court to set aside invalid order—Does not prevent party having writ of prohibition.
41. Statute implies that there may be plain remedy which is not speedy and adequate.
42. Writ of review may be adequate remedy.

III. ADEQUATE REMEDY AT LAW—B. RIGHT OF APPEAL—EFFECT OF.

43. Appeal to superior court is plain, speedy, and adequate remedy, when.
44. Certiorari will not lie—Where there is an appeal.
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46. Complete and adequate remedy being afforded.
47. Court being without jurisdiction—Petitioner has remedy by appeal.
48. Criminal case—Court vested with jurisdiction of person and offense.
49. Does not prevent writ of prohibition or mandamus.

50. Jurisdiction—Insufficiency of summons—Remedy by appeal—Prohibition will not lie.

- 51, 52. Statute does not say that writ will not issue.

53. Same—Where appeal will afford no remedy.

54. Writ will issue to restrain making appealable order, when.

I. IN GENERAL.

1. Action of inferior tribunal—Being completed, and nothing remaining to be done in pursuance of its void order, is only case where operation of writ of prohibition is excluded. If its action is not completed and ended, its further proceedings may be stayed, and if necessary for affording complete and adequate relief, what has been done will be undone.—*Havemeyer v. Superior Court*, 84 Cal. 327, 390, 391, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121. See *Hull v. Superior Court*, 63 Cal. 174; *Valentine v. Police Court*, 141 Cal. 616, 618, 75 Pac. 336.

As to annulment of acts completed not being had by prohibition, see pars. 3, 4, this note.

2. Acts simply ministerial or legislative in their nature, and in no sense judicial, can not be reached by prohibition.—*People ex rel. Taylor v. Board of Election Commissioners*, 54 Cal. 404, 406; *Le Conte v. Trustees of Berkeley*, 57 Cal. 269; *Hull v. Superior Court*, 63 Cal. 174.

As to ministerial acts, see pars. 20, 21, this note.

3. Annulment of proceedings already had—Can not be procured by prohibition.—*More v. Superior Court*, 64 Cal. 345, 346, 28 Pac. 117.

See par. 1, this note.

4. Compare: *Havemeyer v. Superior Court*, 84 Cal. 327, 391, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

5. Appeal staying proceedings—Lower court will be restrained.—Judgment set aside on ground that it was void may be appealed from as well as order setting it aside, and such appeal stays proceedings in lower court. Peremptory writ of prohibition will issue to prevent trial court from proceeding with cause until appeal is heard and determined.—*Livermore v. Campbell*, 52 Cal. 75, 77; *Kaufman v. Superior Court*, 108 Cal. 446, 450, 41 Pac. 476.

6. Assignee having sold property of insolvent, there is no office for writ of prohibition to perform in reference thereto.—*Chinette v. Conklin*, 105 Cal. 465, 466, 38 Pac. 1107.

7. Both supreme court and superior courts—Have original jurisdiction to issue writs of mandamus, certiorari, and prohibition.—*Santa Cruz G. T. J. S. Co. v. Board of Supervisors*, 62 Cal. 40, 41. See *Miller v. Board of Supervisors*, 25 Cal. 93, 95, 96.

8. Complaint—Must be taken as true upon appeal from order sustaining demurrer to petition for writ of prohibition. Plaintiff's case must be taken as he has stated it in his pleading without investigation or inquiry touching merits of action.—*Hevren v. Reed*, 126 Cal. 219, 221, 58 Pac. 536.

9. Denial of writ of prohibition—Where question of jurisdiction is not decided, does not take away right to have question decided by writ of review.—*Santa Monica, Town of, v. Eckert*, 4 Cal. Unrep. 92, 33 Pac. 880.

10. Election contest—Brought by elector, candidate intervening therein has complete remedy, if court has no jurisdiction, by withdrawing his intervention and letting proceedings alone. It is not issued against him, and there can be no judgment against him, even for costs. If court has jurisdiction, it can not be restrained from proceeding by prohibition. In either case, plaintiff will not be harmed, and has plain, speedy, and adequate remedy at law. Prohibition will not lie in such case.—*Gibson v. Superior Court*, 139 Cal. 4, 6, 72 Pac. 348.

As to election contests generally, see, post, § 1111 and note.

As to exclusive jurisdiction in common council, see par. 13, this note.

11. Enforcement of order of court in action to foreclose chattel mortgage—Prohibition will not restrain.—A writ of prohibition will not issue to restrain the superior court from enforcing obedience to an order made by it in an action for the foreclosure of a chattel mortgage directing a party defendant to deliver certain of the mortgaged chattels in her possession to the receiver appointed in the action, on the ground that the citation in contempt proceedings based upon her refusal to comply with the order was not personally served upon her, where she nevertheless appeared in obedience to the citation and admitted the possession, and the court thereupon made a new order directing her to make such delivery.—*Crouse v. Superior Court*, 28 Cal. App. 625, 153 Pac. 723.

12. In an action for the foreclosure of a chattel mortgage, prohibition will not lie to restrain the superior court from enforcing obedience to its order directing a party defendant to deliver certain of the mortgaged chattels in her possession to the receiver appointed in the action, where she was present in open court at the time of the making of such order, notwithstanding the order to show cause, based upon her refusal to comply with a previous order to turn over the property, was not properly served upon her.—*Crouse v. Superior Court*, 28 Cal. App. 625, 153 Pac. 723.

13. Exclusive jurisdiction—Being given to common council to hear and determine contest of election for city offices, superior court may be restrained from hearing contest for such municipal offices.—*Carter v. Superior Court*, 138 Cal. 150, 154, 70 Pac. 1067.

As to election contests brought by an elector, see par. 10, this note.

14. Inferior court can not, by mere haste and precipitancy, defeat appropriate remedy for excess of jurisdiction, at least in case where it may be intercepted before its action is fully complete.—*Havemeyer v. Superior Court*, 84 Cal. 327, 382, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

15. Injunction to restrain act provided for by law—Prohibition to restrain granting.—A writ of prohibition will issue to restrain a superior court from prosecuting an action on behalf of a county for an injunction restraining a reclamation district and its trustees from constructing certain levees as provided for by a valid act of the legislature, on the ground that under the provisions of subdivision 4 of section 3423, post, an injunction does not lie to restrain the execution of a public statute by public officers, and the court is therefore without jurisdiction to grant the relief sought.—*Reclamation Dist. N. 1500 v. Superior Court*, 171 Cal. 672, 154 Pac. 845.

16. Injury is directly due to action of court—Where court exceeds its jurisdiction in appointing receiver, or by directing him to take specific property out of hands of stranger, and wrong is in order of court, not in receiver's transgression of order. In such case, appropriate remedy is writ which operates upon court to restrain its judicial action, and not in resistance that may be opposed to ordinary wrong-doer, or in action as may be brought against private person who has committed trespass.—*Havemeyer v. Superior Court*, 84 Cal. 327, 397, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

17. Judge has jurisdiction—To decide question of his own bias and to try cause pending before him if he finds charge of bias unsustainable. Having jurisdiction to try cause, he can not be prohibited from doing so, and error, if there is any, is in denying motion which could only be reviewed on appeal.—*Talbot v. Pirkey*, 139 Cal. 326, 327, 73 Pac. 858.

18. Justice of peace—Proposing to try misdemeanor charge without jury does not propose to exceed jurisdiction; even though this proposed action be erroneous, it is only so as to mode of procedure in action of which court has jurisdiction. Commission of such error can not be arrested or corrected by prohibition.—*Powelson v. Lockwood*, 82 Cal. 613, 615, 23 Pac. 143.

19. Justices' court judgment convicting of possession of cocaine—Prohibition will not prevent carrying into effect.—Prohibition will not lie to prevent the justices' court from carrying into effect its judgment convicting certain persons of having in their possession cocaine, morphine and opium contrary to the state poison law, and from confiscating such drugs, upon the ground that the conditions under which the possession of the drugs were had showed a state

of facts which afforded a complete defense to the charge, since the justices' court, having jurisdiction of the offense, has the right to determine the sufficiency of such defense, and the remedy of the defendants is by appeal therefrom.—*McGinis v. Justices' Court*, 28 Cal. App. 680, 153 Pac. 728.

20. Levy of tax is not judicial act—Therefore prohibition will not lie to restrain such levy.—*City of Coronado v. San Diego*, 97 Cal. 440, 442, 32 Pac. 518.

See par. 21, this note.

21. Ministerial act—Prohibition does not lie to restrain.—The writ of prohibition does not lie to prohibit the doing of a ministerial act.—*McKamy v. City of Bakersfield*, 26 Cal. App. 315, 146 Pac. 910.

See pars. 2, 20, this note.

22. Order of court—Directing receiver to take charge of all property of insolvent, and directing that any person having same, or any part thereof, in his possession to deliver said property to receiver, and that said property be sold, is not an attempt to adjudicate title or claim of third party to such property, nor direction for sale of any specific property. Such order does not affect right of assignee of insolvent for benefit of creditors. Receiver taking any property belonging to petitioner under such order would be but mere trespasser, and prohibition will not lie to restrain him.—*Halle v. Superior Court*, 78 Cal. 418, 420, 20 Pac. 878.

23. Party beneficially interested—Corporation is party beneficially interested as representing stockholders, and proper plaintiff in proceeding by prohibition to restrain judge from signing certificates of election in excess of jurisdiction.—*Chollar M. Co. v. Wilson*, 66 Cal. 374, 375, 5 Pac. 670.

As to action to be in name of party in interest, see, ante, § 367 and note.

As to party beneficially interested who may bring action for certiorari, see, ante, § 1069 and note pars. 4-13.

As to party beneficially interested who may bring proceeding for mandamus, see, ante, § 1086 and note pars. 7-26.

24. Same—Court has no discretion to refuse writ in case where it has jurisdiction to issue it, and when demanded by real party in interest bringing himself clearly within law.—*Havemeyer v. Superior Court*, 84 Cal. 327, 400, 401, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

25. Same—Libeled party is not legally person beneficially interested so as to bring prohibition to restrain police court of city and county of San Francisco from proceeding to hear and determine preliminary examination of parties charged with criminal libel on complaint of third person on ground that charge is same identical libel as was then pending before justice of peace of city of Los Angeles upon complaint made by libeled party.—*Gage v. Fritz*, 137 Cal. 108, 109, 69 Pac. 854.

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26. Police judge—Is not disqualified because he has formed and expressed opinion as to merits of matter that he is to determine. Having jurisdiction of cause, prohibition will not lie for above reasons.—*Patterson v. Conlan*, 123 Cal. 453, 455, 56 Pac. 105.

27. Prohibition can not issue—To prevent trial of action over which court has jurisdiction.—*Thomas v. Justices' Court*, 80 Cal. 40, 41, sub nom. *In re Thomas*, 22 Pac. 80.

28. Prohibitory effect of statute limiting jurisdiction.—Court proceeding with trial of cause against express prohibition of statute is exceeding its jurisdiction, and may be prevented by prohibition.—*Hayne v. Justices' Court*, 82 Cal. 284, 285, 16 Am. St. Rep. 114, 23 Pac. 125.

29. Receiver—Having been appointed in excess of jurisdiction of court, writ runs to court and operates directly upon court, but indirectly upon receiver. If served upon receiver, it is only that he may have timely notice that proceedings of court are arrested and may stay his hand, as he is bound to do, having no power to act independently of court from which he derives his authority.—*Havemeyer v. Superior Court*, 84 Cal. 327, 390, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

As to writ of prohibition in case of order appointing receiver in excess of jurisdiction, see, ante, §§ 564, 565 and notes.

30. Rehearing—Is proper practice in supreme court for reopening case in which prohibition has been granted originally in such court, and not by motion for new trial.—*Granger's Bank v. Superior Court*, 101 Cal. 198, 199, 35 Pac. 642.

See, ante, § 1092 and note.

31. Superior court—May be prohibited from proceeding with trial of criminal action which it has no jurisdiction to try. Misdemeanor over which police courts have exclusive jurisdiction can not be tried by superior court originally.—*Green v. Superior Court*, 78 Cal. 556, 565, 21 Pac. 307, 541.

32. Title and property—Can not be tried by prohibition, but meaning of this is limited by true law that when court, by its order, has taken property out of actual possession of stranger to proceeding who claims it as his own, order is in excess of jurisdiction, irrespective of actual state of title. Whether party in possession really held title or not, order is void because no man can be deprived of his property without due process of law.—*Havemeyer v. Superior Court*, 84 Cal. 327, 400, 401, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

II. ADEQUATE REMEDY AT LAW—A. IN GENERAL.

33. Defense to criminal proceeding must be presented for determination as to its sufficiency to tribunal having jurisdiction of proceeding, which, in exercise of its jurisdiction, will determine as to sufficiency of

defense, and any error committed by such court in exercise of its jurisdiction in regard thereto can be corrected upon appeal. Writ of prohibition does not lie, although defense may be claimed to be full, complete, and absolute.—*Rebstock v. Superior Court*, 146 Cal. 308, 310, 311, 80 Pac. 65.

34. Error of court—Not involving jurisdiction—Not corrected on prohibition.—An error not involving a question of jurisdiction can not be corrected on prohibition.—*Judd v. Superior Court*, 29 Cal. App. 671, 157 Pac. 566.

35. Even though the lower tribunal is about to exceed its jurisdiction, the writ will not lie where there is "a plain, speedy and adequate remedy in the ordinary course of law."—*Reclamation Dist. No. 1500 v. Superior Court*, 171 Cal. 672, 154 Pac. 845.

36. Objection to jurisdiction—In lower court, not necessary.—Allegation to prove that before filing petition in supreme court petitioners had pleaded to jurisdiction of superior court, and that their plea had been overruled, is not necessary to give supreme court jurisdiction to grant peremptory writ of prohibition. It is only fair to lower court that objection should be brought to its attention in some proper form. If no objection is made, and party had opportunity to object, court may reasonably infer that no ground of objection exists.—*Havemeyer v. Superior Court*, 84 Cal. 327, 402, 403, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

37. Compare: *Chester v. Colby*, 52 Cal. 516, 517; *Southern Pac. R. Co. v. Superior Court*, 59 Cal. 471, 476.

38. Objection to want of jurisdiction—Being first submitted to inferior court or tribunal, and by it overruled before resort is had to higher court for writ of prohibition, is undoubtedly established rule of practice in this state, but it is not law, as it would inevitably happen in many cases that lower court would make its ruling on question of jurisdiction before any prohibition could be sued out, and if it held that it had jurisdiction and made orders in consonance with that view, writ would be of no avail unless it afforded means not only of arresting any further action, but also of undoing past action.—*Havemeyer v. Superior Court*, 84 Cal. 327, 391, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

39. Remedy does not fail to be speedy and adequate because, by pursuing it through ordinary course of law, more time would probably be consumed than in proceeding by way of prohibition.—*Agassiz v. Superior Court*, 90 Cal. 101, 103, 27 Pac. 49.

40. Right to move court to set aside invalid order—Does not prevent party having writ of prohibition, for were it so, there never could be writ of prohibition, such motion would always be possible. Most that can be claimed is that application should be made to lower court before moving for

writ.—*Havemeyer v. Superior Court*, 84 Cal. 327, 395, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

41. Statute implies that there may be plain remedy which is not speedy and adequate.—Where court is about to act without jurisdiction so as to injure litigant, law supposes that remedy by appeal may not be sufficiently speedy or adequate, and certainly is not adequate when to obtain relief by appeal, one who has never been legally tried must first submit to be formally branded as felon and then languish in jail for an indefinite period until supreme court on appeal shall at last declare that he has been outrageously treated.—*Terrill v. Superior Court*, 6 Cal. Unrep. 398, 60 Pac. 38. See 6 Cal. Unrep. 417, 60 Pac. 516.

42. Writ of review may be adequate remedy.—Prohibition will not ordinarily issue where certiorari will lie, unless it appears that applicant for writ will necessarily be injured if court sought to be prohibited is permitted to proceed at all, as that court may before final judgment discover its want of jurisdiction and dismiss proceedings; while if it should proceed to final judgment, party is not injured by entry of void judgment and proceedings to enforce such judgment may be prevented and judgment declared void under writ of review.—*Santa Monica, Town of, v. Eckert*, 4 Cal. Unrep. 92, 33 Pac. 880.

III. ADEQUATE REMEDY AT LAW—B. RIGHT OF APPEAL—EFFECT OF.

43. Appeal to superior court is plain, speedy, and adequate remedy from conviction in police court, and writ of prohibition to restrain trial will be denied on such grounds.—*Strouse v. Police Court*, 85 Cal. 49, 50, 24 Pac. 747; *Cross v. Superior Court*, 2 Cal. App. 342, 83 Pac. 815.

44. Certiorari will not lie—Where there is an appeal.—In this respect it differs from prohibition and mandamus, which lie in all cases where there is not plain, speedy, and adequate remedy in ordinary course of law.—*Stoddard v. Superior Court*, 108 Cal. 303, 305, 41 Pac. 278.

45. Change in rule of procedure.—When *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121, was decided there was no appeal from order appointing receiver, but in 1897 (Stats. 1897, p. 55) amendment to code provided for staying of order appointing receiver by undertaking on appeal. These amendments were apparently intended to afford remedy for prodigal, unwise, and unwarranted appointments of receivers, and to afford adequate remedies contemplated by above section. Fact that question of jurisdiction arises does not change rule as to adequacy of remedy by appeal to higher court.—*Jacobs v. Superior Court*, 133 Cal. 364, 365, 366, 85 Am. St. Rep. 204, 65 Pac. 826.

46. Complete and adequate remedy being afforded and same ends being accomplished by appeal, although perhaps in not so expeditious a manner, party is not entitled to extraordinary remedy of prohibition, but must resort to his remedy by appeal.—*White v. Superior Court*, 110 Cal. 54, 58, 42 Pac. 471. See *Murphy v. Superior Court*, 84 Cal. 592, 598, 24 Pac. 310; *Strouse v. Police Court*, 85 Cal. 49, 50, 24 Pac. 147; *Agassiz v. Superior Court*, 90 Cal. 101, 103, 27 Pac. 49; *Mines d'or de Quartz Mountain Soc. v. Superior Court*, 91 Cal. 101, 103, 27 Pac. 532; *Jacobs v. Superior Court*, 133 Cal. 364, 365, 85 Am. St. Rep. 204, 65 Pac. 826.

47. Court being without jurisdiction—Petitioner has remedy by appeal from adverse judgment, and it is not sufficient ground for interfering by prohibition that trial will be expensive and troublesome. Establishment of ruling allowing resort to writ of prohibition on ground of expensive and troublesome litigation would involve too serious and too frequent interruption of business of court.—*Lindley v. Superior Court*, 141 Cal. 220, 74 Pac. 765.

48. Criminal case—Court vested with jurisdiction of person and offense.—Where a court in a criminal case is vested with jurisdiction of the person and offense, mere errors or irregularities of procedure can be corrected on appeal only, the latter method furnishing a complete and adequate remedy.—*McGinis v. Justices' Court*, 28 Cal. App. 680, 153 Pac. 728.

49. Does not prevent writ of prohibition or mandamus.—Each of these latter writs may issue under provisions of statute where there is not plain, speedy, and adequate remedy in ordinary course of law—remedy competent to afford applicant relief sought. In this it differs from certiorari.—*North Bloomfield Gold Min. Co. v. Keyser*, 58 Cal. 315, 324.

50. Jurisdiction—Insufficiency of summons—Remedy by appeal—Prohibition will not lie.—In a case in which the service of a

summons is insufficient to vest a justices' court with jurisdiction, but the defendant's motion to quash the service of summons is denied, the defendant has a plain, speedy, and adequate remedy, by an appeal, by means of which he may have the erroneous ruling of the justice reviewed; the mere want of jurisdiction will not justify the issuance of a writ of prohibition, under the above section, the plaintiff having an adequate remedy by appeal.—*Germain Seed & Plant Co. v. Justices' Court*, 41 Cal. App. 397, 182 Pac. 784, following the doctrine in *Simpson v. Police Court*, 160 Cal. 530, 117 Pac. 553; *Burge v. Justices' Court*, 11 Cal. App. 213, 104 Pac. 581; *Hamburger v. Police Court*, 12 Cal. App. 153, 106 Pac. 894, 107 Pac. 614.

51. Statute does not say that writ will not issue in case where there is an appeal; there must be right of appeal, and also appeal must furnish adequate remedy.—*Havemeyer v. Superior Court*, 84 Cal. 327, 397, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121; *Bruner v. Superior Court*, 92 Cal. 239, 252, 28 Pac. 341.

52. Compare: *Levy v. Wilson*, 69 Cal. 105, 108, 10 Pac. 272; *Strouse v. Police Court*, 85 Cal. 49, 50, 24 Pac. 147.

53. Same—Where appeal will afford no remedy for the wrong with which the petitioner is threatened, e. g., the appointment of a receiver,—prohibition lies even though there is right of appeal.—*Havemeyer v. Superior Court*, 84 Cal. 327, 397, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

54. Writ will issue to restrain making appealable order, when.—When the superior court, although without jurisdiction proposes to vacate an order dismissing a case after transfer on change of venue, for failure to pay costs within one year, on the ground of the neglect of plaintiff's attorney to pay such costs, the supreme court may, in its discretion, grant prohibition, notwithstanding the appealability of the order.—*Davis v. Superior Court*, 184 Cal. 691, 195 Pac. 390, 392.

§ 1104. WRIT MAY BE ALTERNATIVE OR PEREMPTORY. FORM OF.

The writ must be either alternative or peremptory. The alternative writ must command the party to whom it is directed to desist or refrain from further proceedings in the action or matter specified therein, until the further order of the court from which it is issued, and to show cause before such court, at a specified time and place, why such party should not be absolutely restrained from any further proceedings in such action or matter.

The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he should not be absolutely restrained, etc., must be omitted, and a return day inserted.

History: Enacted March 11, 1872; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 184, act held unconstitutional, see history, § 5 ante; amendment approved March 21, 1907, Stats. and Amdts. 1907, p. 838, Kerr's Stats. and Amdts. 1906-7, p. 476.

As to alternative or peremptory writ of mandamus, see, ante, § 1087 and note.

As to rules of supreme court in relation to alternative and peremptory writs, see, ante, § 1068 and notes para. 129, 130.

§ 1105. CERTAIN PROVISIONS OF THE PRECEDING CHAPTER APPLICABLE. The provisions of the preceding chapter, except of the first four sections thereof, apply to this proceeding.

History: Enacted March 11, 1872.

CHAPTER IV.

WRITS OF REVIEW, MANDATE, AND PROHIBITION MAY ISSUE AND BE HEARD AT CHAMBERS.

§ 1108. Writs of review, mandate, and prohibition may issue and be heard at chambers.

§ 1108. WRITS OF REVIEW, MANDATE, AND PROHIBITION MAY ISSUE AND BE HEARD AT CHAMBERS. Writs of review, mandate, and prohibition issued by the supreme court, or by a superior court, may, in the discretion of the court issuing the writ, be made returnable, and a hearing thereon be had at any time.

History: Enacted March 11, 1872, founded on § 653 Practice Act, as amended 1854 (Stats. 1854, p. 84); amendment approved March 24, 1874, Code Amdts. 1873-4, p. 346; April 15, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 74; repeal by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 184, held unconstitutional, see history, § 5 ante.

1. As to affidavit to support application and its sufficiency, see *Edwards v. Ryan*, 45 Cal. 243.

As to powers of justices of the supreme court at chambers, see, ante, § 165.

As to powers of judges of superior court at chambers, see, ante, § 166 and note.

CHAPTER V.

RULES OF PRACTICE AND APPEALS.

§ 1109. Certain provisions of part two applicable.
§ 1110. Same.

§ 1110a. Appeal from writ of mandate ordering delivery of water.

§ 1109. CERTAIN PROVISIONS OF PART TWO APPLICABLE. Except as otherwise provided in this title, the provisions of part two of this code are applicable to and constitute the rules of practice in the proceedings mentioned in this title.

History: Enacted March 11, 1872; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 184, held unconstitutional, see history, § 5 ante.

1. Rules of practice.—The rules of practice and procedure are intended as a means and not as ends.—*Marshall v. Wentz*, 28 Cal. App. 540, 153 Pac. 244.

As to part II of this code—civil actions,—see, ante, §§ 307-1059 and notes.

§ 1110. **SAME.** The provisions of part two of this code relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title.

History: Enacted March 11, 1872; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 185, held unconstitutional, see history, § 5 ante.

As to provisions of Part II of this code, relative to new trials and appeals, see, ante, §§ 65C-663½, 936-980 and notes.

§ 1110a. **APPEAL FROM WRIT OF MANDATE ORDERING DELIVERY OF WATER.** If an appeal be taken from an order or judgment directing the issuance of a writ of mandate commanding a party to deliver water, for irrigation purposes, such appeal shall not stay the operation of the order, judgment or writ as to the delivery of such water, but such water must until the final determination of said appeal be delivered as commanded by said writ; provided, that if any expense is necessary to be incurred by the defendant in connecting the water supply with the land to be irrigated, said defendant shall not be obliged to furnish water unless the plaintiff shall provide a bond in such sum as the court may fix, conditioned that in the event of the judgment being reversed, plaintiff will pay defendant the amount of the expense so incurred not exceeding the amount of said bond.

History: Enactment approved May 18, 1919, Stats. and Amdts. 1919, p. 754. In effect July 22, 1919.

TITLE II.

OF CONTESTING CERTAIN ELECTIONS.

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| § 1111. Who may contest, and grounds of contest. | § 1121. Power of court. Adjournment of court. |
| § 1112. Irregularity and improper conduct of judges, when to annul elections. | § 1122. Rules to govern court in trial of contest. |
| § 1113. When not to. | § 1123. Court may declare who was elected. [Certificate to issue to whom.] |
| § 1114. Illegal votes, when not to vitiate election. | § 1124. Fees of officers and witnesses. [Repealed.] |
| § 1115. Proceedings on contest. | § 1124[a]. In case of tie vote. who may contest. |
| § 1116. Statement of cause of contest. | § 1124[b]. When canvassing board declares no election, who may contest. |
| § 1117. Statement of cause of contest. Want of form not to vitiate. | § 1125. Costs. |
| § 1118. Superior judge to hold special session for trial of contest. | § 1126. Appeal. |
| § 1118[a]. Same. | § 1126[a]. Same. |
| § 1119. Clerk to issue citation to respondent. | § 1127. When election void and office vacant. |
| § 1120. Witnesses, attendance of, how enforced. | |

§ 1111. **WHO MAY CONTEST, AND GROUNDS OF CONTEST.** Any elector of a county, city and county, city, or of any political subdivision of either, may contest the right of any person declared elected to an office to be exercised therein, for any of the following causes:

1. For malconduct on the part of the board of judges, or any member thereof.
2. When the person whose right to the office is contested was not, at the time of the election, eligible to such office.
3. When the person whose right is contested has given to any elector or inspector, judge, or clerk of the election, any bribe or reward, or has offered

any such bribe or reward for the purpose of procuring his election, or has committed any other offense against the elective franchise defined in title four, part one, of the Penal Code.

4. On account of illegal votes.

History: Enacted March 11, 1872; amendment approved March 11, 1876, Code Amdts. 1875-6, p. 100.

ELECTION CONTEST.

1. Appeal not remedy.
2. "Certificate of election"—Held to be the only commission referred to.
3. Citation—Failure to serve the original.
- 4, 5. Same—Same—Alias citation.
6. Same—No order of court directing clerk to issue.
7. Same—Service of.
8. Same—Same—Time of service.
9. Conceding appeal will lie in election contest.
- 10, 11. Construction of section—Act of 1850.
- 12-14. Same—As to privilege conferred.
15. Same—As to who may contest.
16. Same—Extent of inquiry.
17. Same—Part of system for regulation of elections.
18. Same—Points out procedure.
19. Same—Same—Is no part of substantive law.
20. Same—Provides plain, speedy, and adequate remedy.
21. Same—Repeal of former statutes—Charter of Oakland.
- 22, 23. Continuance—Limitation not jurisdictional.
24. Costs, apportionment in election contest—Amendment of 1907—Discretion of court.
25. Same—Same—Consolidation of contests.
26. Same—Same—Joinder of township and county contests.
27. Court is authorized to enter judgment declaring the election of another person.
28. Court must render judgment for costs.
29. Demurrer to statement of contest—Is an appearance.
- 30, 31. Distinction between ballot cast by illegal voter and illegal ballot.
32. Educational qualification of voters—Findings as to.
- 33, 34. Election contest—Is a special statutory proceeding.
- 35, 36. Filing with clerk of county.
37. Ground of contest—Promise not to qualify.
38. Intoxicating liquors—Election as to granting or restraining.
39. Judgment—As to generally.
40. Same—Annuling certificate.
41. Jurisdiction—As not dependent on, what.
- 42, 43. Same—Conferred by section 1124, post.
44. Same—Old county court.
45. Same—Old district court.
46. Municipal contests—City of Sacramento.
47. Same—City of San Francisco.
48. Same—City of Santa Rosa.
49. Same—Right of city council, in general.
50. New trial in.
51. Notification of court—Provision for.
52. Same—Time for notice depends upon what.
53. Plurality of votes—Essential to election of candidate.
54. Policy of law.
55. Premature filing and subsequent dismissal of election contest.
56. Primary election—Affidavit of the candidate.
57. Same—Canvass of returns.
58. Same—Five days' time provided.
- 59, 60. Same—Refusal of officers to receive votes.
61. Prior to amendment of 1907—Contests where the declared result was a tie.
62. Proceeding under above section.
63. Same—Four different cases.
64. Same—Ground of contest to be alleged in statement.
65. Same—May be instituted by any elector.
66. Same—Or by quo warranto.
67. Prohibition—General rule.
68. Same—In contest for municipal office.
69. Promises by candidate for superior judge—That he would fail to qualify.
70. Provision requiring clerk to notify the court.
- 71, 72. Recall election—An election for the recall of two commissioners.
73. Same—Canvass of votes.
- 74, 75. Same—Jurisdiction to render a decision or enter a judgment.
76. Same—Motion for nonsuit granted—Erroneous, when.
77. Same—Provisions of code not applicable to.

78. Same—Right of contest in a recall election.
79. Same—Sections governing directory, when.
80. Right to contest—Apparent official right.
81. Same—Must be invoked by elector.
82. Same—Not designed for trivial candidates alone.
83. Same—Object of contest.
84. Superior judge—Contest for office of.
85. Votes for ineligible candidate—Promise not to qualify, etc.
86. What is ground for contest—Malconduct of election officers.
87. Same—That some other person received more votes.
88. Same—Violation of law by contestant himself.
89. Same—Wrongful nomination—Illegal placing of name on ticket.
90. What is no ground for contest—Aiding and abetting illegal registration.

1. **Appeal not remedy.**—Conceding appeal will lie in election contest, it would not be a speedy and adequate remedy, as the term of office might expire before a determination in the appellate court.—*Hill v. Superior Court*, 15 Cal. App. 307, 114 Pac. 805.

2. **"Certificate of election"**—Held to be the only commission referred to except in the case of judge of the superior court.—*Wilson v. Fisher*, 148 Cal. 16, 82 Pac. 421.

As to judgment annulling certificate of election, see par. 40, this note.

3. **Citation—Failure to serve the original.**—Failure of the sheriff to serve the original citation as here provided held to affect only the power of the court to proceed with the contest on the day designated for the special session.—*Hagerty v. Conlan*, 15 Cal. App. 649, 115 Pac. 762.

4. **Same—Same—Alias citation.**—An alias citation may be ordered by the court where the original citation issued under the provisions of this section failed of proper service as therein prescribed.—*Hagerty v. Conlan*, 15 Cal. App. 649, 115 Pac. 762.

5. An alias citation becoming necessary by reason of the absence of the respondent who was not properly served with the original citation as provided by section 1119, post, the court may vacate the original order, and make another order fixing another date for a special session for the hearing of the contest.—*Hagerty v. Conlan*, 15 Cal. App. 649, 115 Pac. 762.

6. **Same—No order of court directing clerk to issue a citation is required.**—*Dudley v. Superior Court*, 13 Cal. App. 271, 275, 110 Pac. 146.

7. **Same—Service of.**—The failure of the sheriff to serve the citation within the time fixed does not divest the court of the juris-

isdiction it acquires of the contest by the filing of the statement, but a new citation may be issued, and another time for commencement of the hearing may be appointed.—*Busick v. Superior Court*, 16 Cal. App. 502, 118 Pac. 581, citing *O'Dowd v. Superior Court*, 158 Cal. 537, 111 Pac. 751.

8. **Same—Same—Time of service as herein provided is merely directory.**—*Busick v. Superior Court*, 16 Cal. App. 502, 118 Pac. 581, citing *O'Dowd v. Superior Court*, 158 Cal. 537, 111 Pac. 751.

9. **Conceding appeal will lie in election contest** it would not be a speedy and adequate remedy as the term of office might expire before a determination in the appellate court.—*Hill v. Superior Court*, 15 Cal. App. 307, 114 Pac. 805.

10. **Construction of section—Act of 1850.**—Act of 1850 (*Wood's Digest*, pp. 380-382), upon subject of election proceedings, is substantially same as provisions of this title upon subject.—*Packard v. Craig*, 114 Cal. 95, 96, 45 Pac. 1033.

11. Act of 1850 related to elections for officers and not to elections for county seats.—*Calaveras Co. v. Brockway*, 30 Cal. 325, 337.

12. **Same—As to privilege conferred.**—The only privilege given by this section is to "contest the right of any person declared elected to an office." . . . This language necessarily excludes the idea of a contest where no person has been declared elected.—*McGregor v. Board of Trustees*, 159 Cal. 441, 114 Pac. 566.

13. Where the power is shown to "determine contested elections" as in the *Municipal Corporation Act* it should not be interpreted in the narrow sense which the phrase "contested elections" as used in these code sections must be interpreted, and therefore under such power a contest may be instituted and determined where the return is of a tie vote.—*McGregor v. Board of Trustees*, 159 Cal. 441, 114 Pac. 566.

14. The legislature evidently contemplated that cases might arise in which the persons declared elected and who received the highest number of legal votes were at the time of the election ineligible to the office. In many cases the evidence as to the ineligibility of the candidate is conflicting and it requires a careful weighing and analysis by the trial court to determine the ultimate fact, and provision is made for a contest as to the right of a person declared elected to office, although he be at the time of the election ineligible.—*Campbell v. Board of Supervisors*, 7 Cal. App. 155, 157, 93 Pac. 1061.

15. **Same—As to who may contest.**—This and the following sections furnish a procedure for contesting the right of any person elected to an office to be exercised in any county, city, or political subdivision. There is contemplated an adversary proceeding in which the contestee is one who

has been declared elected and he is brought before the superior court by means of a citation issued and served after an order providing for a special session of court to hear the contest. These sections are not applicable to the contest of an election held under the Wyllie Local Option Act.—*Roche v. Superior Court*, 30 Cal. App. 255, 157 Pac. 830.

16. Same—Extent of inquiry.—Only matters of inquiry for court under this section are those prescribed in subdivisions 1, 2, 3, 4, unless person "declared elected" by canvassing board is charged with violation of provisions of Purity of Elections Law, in which event it may be that court may hear and determine such charge.—*Maddux v. Walthall*, 141 Cal. 412, 415, 74 Pac. 1026.

17. Same—Part of system for regulation of elections.—This and following sections of this title, providing for contest of elections, though separated from other cognate provisions by arrangement of code, constitute part of general system for regulation of elections in this state.—*Kirk v. Rhoads*, 46 Cal. 398, 399, 403.

18. Same—Points out procedure.—This section points out procedure and powers and duties of superior court with reference to contesting certain elections, and section 1126, post, gives an appeal to supreme court.—*Carter v. Superior Court*, 138 Cal. 150, 152, 70 Pac. 1067.

19. Same—Same—Is no part of substantive law.—This section provides that any elector may contest right of any person declared to have been elected to office for certain causes and subsequent sections provide how electors shall proceed to institute and conduct such contest. This section is clearly part of law of procedure and not substantive law. It provides by whom and by what proceedings such contests may be carried on. It does not prescribe any additional disqualifications of persons who hold office. It throws no new light upon question whether at time of his election contestee was "capable of being elected." One who may be eligible at time for qualifying is eligible to office at time of election.—*Ward v. Crowell*, 142 Cal. 587, 592, 76 Pac. 491.

20. Same—Provides plain, speedy, and adequate remedy.—This section provides plain, speedy, and adequate remedy in case of election contests. This and next succeeding sections of this title provide exclusive remedy for setting aside or cancelling certificate of election issued as result of official canvass by board of supervisors. To hold otherwise would lead to incongruous results.—*Gibson v. Twaddle*, 1 Cal. App. 126, 81 Pac. 727, 728.

21. Same—Repeal of former statutes—Charter of Oakland.—This section adopted uniform rule for all election contests and necessarily repealed all former statutes in consistent therewith. It repealed municipal charter of Oakland, giving common council

of that city exclusive jurisdiction to hear and determine election contests for office of councilman of city council of that city.—*McGivney v. Pierce*, 87 Cal. 124, 125, 25 Pac. 269.

22. Continuance—Limitation not jurisdictional.—Until the trial upon the merits has begun, the twenty-day limit fixed for continuance of the trial is not jurisdictional. It is not exclusive or mandatory as respects the service of citation.—*Busick v. Superior Court*, 16 Cal. App. 502, 118 Pac. 581, citing *O'Dowd v. Superior Court*, 158 Cal. 537, 111 Pac. 751.

As to continuance of an election contest, see, ante, § 1041 Pol. Code, note par. 21.

23. An order continuing the hearing of an election contest beyond the twenty days allowed by above section is unauthorized, and although the provisions of the section are merely directory, and their observance not essential to the jurisdiction of the court to complete the hearing after an unwarranted continuance, it is nevertheless the duty of the court to conform to the law as far as possible.—*Moore v. Conley*, 163 Cal. 609, 610, 126 Pac. 492.

24. Costs, apportionment in election contests—Amendment of 1907—Discretion of court.—The proviso of this amendment, as to apportionment of costs where there are two or more contests joined for the purpose of counting the votes, must be construed to mean a just apportionment as against the losing parties, in the sound discretion of the court, and it is error to adjudge that each of the parties should pay his own costs.—*Duley v. Peacock*, 17 Cal. App. 421, 119 Pac. 1086; *Cooper v. Nichols*, 17 Cal. App. 492, 120 Pac. 66.

As to duty of court, under section 1125, post, to render judgment for costs, see pars. 24-26, this note.

25. Same—Same—Consolidation of contests.—Where contests were consolidated and one was afterwards dismissed on motion of contestant, the contestee is entitled to his costs and expenses incurred in such contest, and it was error for the court to adjudge that each party should pay his own costs.—*Cooper v. Nichols*, 17 Cal. App. 492, 120 Pac. 66.

26. Same—Same—Joinder of township and county contests.—It is only where an item is incurred by two or more parties jointly that the court should apportion the amount between them, and where the expense with respect to one office is in excess of that as to another, as where the offices are township and county offices, an equitable adjustment of the same is called for.—*Duley v. Peacock*, 17 Cal. App. 424, 119 Pac. 1086.

27. Court is authorized to enter judgment declaring the election of another person than the one returned only where it appears that such other person "has the highest number of legal votes." The votes

cast for a candidate even if in consequence of unlawful inducements held out to the voters are not illegal votes and they can not therefore be disregarded so as to make another the recipient of the highest number of votes. The utmost relief that could be granted upon such a showing would be to have the election of the party returned (annulled).—*Bush v. Head*, 154 Cal. 277, 284, 97 Pac. 512.

As to judgments in election contests, see pars. 39, 40, this note.

28. Court must render judgment for costs, under section 1125, post, against a party contesting the litigation where the decision is against him, and has no jurisdiction to adjudge that each party pay his own costs.—*Campbell v. Free*, 7 Cal. App. 150, 151, 154, 93 Pac. 1060.

As to costs in election contest, see pars. 24-26, this note.

29. Demurrer to statement of contest—Is an appearance in the proceeding and waives any neglect of the clerk to properly issue citation.—*Dudley v. Superior Court*, 13 Cal. App. 271, 276, 110 Pac. 146.

30. Distinction between ballot cast by illegal voter, and an illegal ballot cast by a legal voter. Where a ballot is attacked as illegal because cast by an illegal voter the contestant is required to give notice of his intention to show that such vote was cast and by whom cast. It is the illegality of the voter that is the issue. But there may be illegal votes cast by a legal voter, e. g., a ballot bearing a distinguishing mark, a fact impossible of ascertainment except by a recount, the voter himself remains unidentified and only the ballot is considered as it appears on its face.—*Bass v. Leavitt*, 11 Cal. App. 582, 587, 105 Pac. 771.

31. In the case of an illegal voter where the ballot is unidentified but the evidence otherwise shows that he voted and how he voted, the written lists provided for in above section must be given to the respondent, but where it is the ballot and not the voter that is illegal, it is generally impossible for either the contestant or the contestee to have anticipated and foreseen what ballots were so illegal, as bearing distinguishing marks, etc., and the persons by whom they had been cast, so as to give such notice, and therefore, it can not be held to be necessary.—*Bass v. Leavitt*, 11 Cal. App. 582, 588, 105 Pac. 771.

32. Educational qualification of voters—Findings as to.—A finding of the trial court in an election contest that a voter was under sixty years of age at the time of the adoption of the constitutional amendment prescribing an educational qualification of voters is conclusive on appeal.—*Gray v. O'Banion*, 23 Cal. App. 468, 138 Pac. 977.

33. Election contest—Is a special statutory proceeding.—Under this section election contest is statutory proceeding. It is

to obtain recanvass of votes cast at election in which some person was declared elected, and contest is simply over right of person "declared elected."—*Austin v. Dick*, 100 Cal. 199, 201, 34 Pac. 655.

34. An election contest, under this section, is special statutory proceeding, designed to contest right of person "declared elected" to enter into and hold office.—*Maddux v. Walthall*, 141 Cal. 412, 415, 74 Pac. 1026.

35. Filing with clerk of county.—The clerk of the county is ex-officio clerk of the superior court and a paper filed with such clerk having reference to a special court proceeding is filed with him as ex-officio clerk of such court.—*Dudley v. Superior Court*, 13 Cal. App. 272, 274, 110 Pac. 146.

36. Filing of the statement of contest as provided in section 1115, post, is all that is required of a contestant under the statute, and he can not be deprived of his right to a hearing of his contest by the nonfeasance of the sheriff or the inaction of the court.—*Hagerty v. Conlan*, 15 Cal. App. 650, 115 Pac. 762.

37. Ground of contest—Promise not to qualify or enter upon the duties of the office, in the event of election, does not render a candidate for the office of judge of the superior court ineligible to the office, within the meaning of this subdivision, or within the meaning of any other statutory or constitutional provision.—*Bush v. Head*, 154 Cal. 280, 97 Pac. 512.

See, also, pars. 69, 85, this note.

As to grounds of contest, see par. 64, this note.

38. Intoxicating liquors—Election as to granting or restraining licensing of sale of.—Continuance of contest, see *Kerr's Cyc. Pol. Code*, 2d ed., § 4041.

39. Judgment—As to generally.—Where, in an election contest, the person receiving the highest number of votes is disqualified to hold the office, by reason of a violation of the Purity of Elections Act (Stats. 1893, p. 12), the court is without jurisdiction, under the provisions of this section, to enter any judgment other than one annulling the election.—*Bush v. Head*, 154 Cal. 284, 97 Pac. 512.

As to judgment declaring another person elected, see par. 27, this note.

40. Same — Annulling certificate.—An appeal within ten days operated as a suspension of the judgment and left the certificate in full force during its pendency (dictum).—*Chubbuck v. Wilson*, 151 Cal. 166, 90 Pac. 524.

As to certificate of election, see par. 2, this note.

41. Jurisdiction—As not dependent on, what.—Jurisdiction of court to entertain, or right of elector to commence an election contest, does not in any manner de-

pend upon whether person who was declared to be elected by board of supervisors qualifies for office by filing his official oath or bond or not. It is not necessary that he qualify to confer jurisdiction, nor can court be divested of jurisdiction because he fails to do so.—*Sweeny v. Adams*, 141 Cal. 558, 560, 75 Pac. 182.

42. Same—Conferred by section 1124, post, is concurrent with that conferred upon the trustees of towns by section 1860 of the Municipal Corporation Act. The principle is that the jurisdiction of the court remains unless it appears with unequivocal certainty that the legislature intended to take it away.—*McGregor v. Board of Trustees*, 159 Cal. 441, 114 Pac. 566.

43. Jurisdiction of the superior court to hear and determine election contests is included within the jurisdiction conferred upon such court by section 5, article VI of the constitution, said proceeding being special and the jurisdiction in relation to which is not otherwise provided for by the statute.—*Dudley v. Superior Court*, 13 Cal. App. 272, 274, 110 Pac. 146.

44. Same—Old county court.—Legality of election to city office in city of Sacramento could be investigated by old county court.—*Kirk v. Rhoads*, 46 Cal. 398, 402.

45. Same—Old district court had jurisdiction of contested election cases.—*People ex rel. Budd v. Holden*, 28 Cal. 123, 130.

46. Municipal contests—City of Sacramento.—Provisions of this title apply to election of city officers of city of Sacramento.—*Kirk v. Rhoads*, 46 Cal. 398, 402.

47. Same—City of San Francisco.—Determination of questions relating to qualification for office of tax-collector of San Francisco in an action to contest election of such officer under subdivision 2 of above section.—*Sheehan v. Scott*, 145 Cal. 684, 691, 79 Pac. 350. See *Scott v. Sheehan*, 145 Cal. 691, 692, 79 Pac. 353.

48. Same—City of Santa Rosa has power under its charter to determine contests of election for city officers, and its determination is final and conclusive.—*Carter v. Superior Court*, 138 Cal. 150, 153, 154, 70 Pac. 1067.

49. Same—Right of city council, in general.—Legislature may commit to city council right to determine question, in cases of contest, as to who has been legally chosen to be an officer of such city, and also to make such determination exclusive.—*Carter v. Superior Court*, 138 Cal. 150, 154, 70 Pac. 1067.

50. New trial in.—A complete scheme of procedure being provided, from the commencement of the action to and including entry of judgment, without provision being made for a new trial, it is held that no right to a new trial is available in such proceedings (dictum).—*People v. Bank of San Luis Obispo*, 152 Cal. 270, 92 Pac. 481.

51. Notification of court—Provision for was intended to prescribe the limit of time beyond which the said notification and order should not be permitted. In other words a statement of contest upon certain grounds must be filed within thirty days and upon other grounds within six months after the result of the election has been announced and the time for said notification and order is enlarged five days beyond the expiration of this period, but this does not necessarily mean that six months and five days constitute the limit in all cases.—*Hill v. Superior Court*, 15 Cal. App. 307, 114 Pac. 805.

As to notification of court by clerk, see par. 70, this note.

52. Same—Time for notice depends upon character of contest being limited to thirty-five days except in particular instances where longer period is allowed.—*Hill v. Superior Court*, 15 Cal. App. 307, 114 Pac. 805.

53. Plurality of votes—Essential to the election of candidate, yet it does not follow that because no candidate is declared elected there has been no election. If one or the other has received a plurality of the legal votes he is in fact elected and should be so declared and a grant in general terms of power to determine "contested elections" or "election contests" may well be interpreted to cover the case of an attack upon the correctness of a finding that there was a tie vote as well as that of a return that one candidate rather than the other had been elected.—*McGregor v. Board of Trustees*, 159 Cal. 441, 114 Pac. 566.

54. Policy of the law is to have election contests determined as speedily as possible in order that the rightful claimant may enjoy as nearly as practicable the entire term for which he has been chosen, and this consideration should be kept in view in construing the code sections upon the subject.—*Hill v. Superior Court*, 15 Cal. App. 307, 114 Pac. 805.

55. Premature filing and subsequent dismissal of election contest is not a bar to a second contest filed within the statutory time.—*Broadbent v. Keith*, 15 Cal. App. 382, 114 Pac. 996.

56. Primary election—Affidavit of the candidate, provided for by section 28 of said act, is the basis of the contest in which the ballots may be recounted before the superior court.—*Miller v. Superior Court*, 25 Cal. App. 607, 144 Pac. 978.

57. Same—Canvass of returns.—The portion of the primary election law relating to the canvass of returns contemplates prompt action in order that the names of the persons nominated may be known in due time, so that they may be placed upon the ballot for the November election, and careful compliance with the provisions of the law as to the time within which the several acts shall be done is necessary; but this does

not compel a construction of the statute, which, in some instances of neglect or misconduct, would make it impossible to ascertain the candidates between whom the notice must be made at the final election. If, by reason of neglect or misconduct, it should appear, after the expiration of the time named in the statute, that the board of supervisors would not declare the result of the canvass, any elector within the county or district might institute appropriate proceedings to compel action by these officers.—*Miller v. Superior Court*, 25 Cal. App. 607, 144 Pac. 978.

58. Same—Five days' time provided by the primary election law of 1913 (Stats. 1913, p. 1379) for filing of contests to nominations of candidates for office does not begin to run until the Board of supervisors has declared the result of the canvass of the returns, and contests filed on the fifth day after the supervisors have declared the result of the canvass of the returns are filed within due time.—*Miller v. Superior Court*, 25 Cal. App. 607, 144 Pac. 978.

59. Same—Refusal of officers to receive votes.—The refusal of the election officers in a primary election to receive the votes of electors whose names did not appear upon the register, and whose original affidavits or duplicates thereof were not at the time in the office of the county clerk, where they were required by law to be, which voters, the affidavit of contest alleges, registered in accordance with law, and would have voted for the contestants, if permitted to cast their ballots, is not a proper ground of contest, and the superior court in a contest to nominations is without right or jurisdiction to receive offered evidence of such facts.—*Miller v. Superior Court*, 25 Cal. App. 607, 144 Pac. 978.

60. Ordinarily the acceptance of such testimony and the use of it by the court in determining the contest would be merely an appealable error, committed by the court in the exercise of its jurisdiction and not in excess of such jurisdiction; but since the contest provided for in section 28 of the Primary Election Law of 1913 is a special proceeding, concerning which it is provided that "such a decision or judgment of the court shall be final in every respect and no appeal can be taken therefrom," it follows that there would be no adequate remedy at law if the superior court, assuming jurisdiction of an alleged contest, should attempt to hear and determine said contest upon allegations which do not legally constitute a ground of contest, and a judgment based upon such alleged fact would be in excess of the jurisdiction of the court and constitutes a proper subject for a writ of prohibition.—*Miller v. Superior Court*, 25 Cal. App. 607, 144 Pac. 978.

61. Prior to amendment of 1907—Contests where the declared result was a tie was not authorized. This limitation of the scope of the proceeding resulted from the

restricted language employed in this and other code sections.—*McGregor v. Board of Trustees*, 159 Cal. 441, 114 Pac. 566.

62. Proceeding under above section.—If person without proper qualifications is elected to office and enters upon discharge of its duties, he becomes officer de facto, and proper method of inquiring into his eligibility or ineligibility is proceeding to contest his election, or one by writ of quo warranto.—*Satterlee v. San Francisco*, 23 Cal. 314, 320.

63. Same—Four different cases.—Proceeding under this section is statutory, and can be inaugurated in four different cases stated therein.—*Snibley v. Palmtag*, 128 Cal. 283, 284, 60 Pac. 860.

64. Same—Ground of contest to be alleged in statement.—Where ground for contest specified in above section is relied on, it should be alleged in statement of contest.—*McCarthy v. Wilson*, 146 Cal. 323, 329, 82 Pac. 243.

As to grounds of contest, see par. 37, this note.

65. Same—May be instituted by any elector.—The proceedings provided for by this section may be instituted by any elector.—*Maddux v. Walthall*, 141 Cal. 412, 415, 74 Pac. 1026.

66. Same—Or by quo warranto.—There are two separate and distinct modes by which to test title to office; one is by proceeding in nature of quo warranto against any person who usurps or intrudes into public office; other is by contesting an election under provisions of this title.—*Powers v. Hitchcock*, 129 Cal. 325, 326, 61 Pac. 1076.

67. Prohibition—General rule.—Prohibition will not lie to prevent superior court from determining election contest, whether such court has or has not jurisdiction. If it has, supreme court can not prohibit it; if it has not, petitioner can not be harmed by its proceedings.—*Gibson v. Superior Court*, 139 Cal. 4, 6, 72 Pac. 348.

68. Same—In contest for municipal office.—Superior court may be prevented, by prohibition from hearing contest of election for municipal office, of which contest city council has been given exclusive jurisdiction.—*Carter v. Superior Court*, 138 Cal. 150, 155, 70 Pac. 1067.

69. Promises by candidate for superior judge.—That he would fail to qualify does not render him ineligible to the office, nor can it be said to constitute the giving or offering of a bribe, and is therefore no ground of contest under this section.—*Bush v. Head*, 154 Cal. 277, 281, 97 Pac. 512.

As to promise by candidate for superior judge, see par. 37, this note.

As to promise not to qualify, see pars. 37, 85, this note.

70. Provision requiring clerk to notify the court of the filing of the contest is a

means provided for calling the pendency of the contest to the attention of the court in order that the court may make a timely order calling a special session for the hearing of such action. There is nothing in the statute indicating that the notification to the court of the filing of such proceeding must be in writing, and where the court is apprised of the pendency of the proceeding there is no necessity for the clerk giving it a formal notification thereof.—*Dudley v. Superior Court*, 13 Cal. App. 271, 275, 110 Pac. 146.

See, also, pars. 51, 52, this note.

71. Recall election—An election for the recall of the two commissioners of the city of Vallejo, whose terms were of different lengths, is void for uncertainty, and mandamus will not lie to compel the city council to canvass the returns of the election, where the ballot used at such election failed to separately designate the candidates for each term, notwithstanding the provisions of subdivision 17 of section 5 of the charter of the city, which declares that on the ballot "offices to be filled shall be arranged in separate columns in the following order:

... For commissioner (if any) vote for (giving number)," and the provisions of subdivision 21 of the same section that "in case there is but one person to be elected to an office, the candidate receiving the majority of the votes cast for all the candidates of that office shall be declared elected. In case there are two or more persons to be elected to an office, as that of commissioner or school director, then those candidates equal in number to the number to be elected who receive the highest number of votes for such office shall be declared elected.—*Wilson v. Blake*, 49 Cal. Dec. 273, 147 Pac. 129.

72. While it is permissible to hold such elections at one time, the offices of the commissioners sought to be recalled, because of their different terms, are separate offices, and they should be so designated upon the ballot as provided by subdivision 8 of section 1197 of the Political Code, and the names of the candidates for such offices against each of the incumbents placed respectively in the proper places set apart on the ballot for that purpose.—*Wilson v. Blake*, 49 Cal. Dec. 273, 147 Pac. 129.

73. Same—Canvass of votes.—It is the intentment of section 1252 of the Political Code that the election board shall commence their count of the votes at once upon the close of the election and that they shall publicly and in the presence of the bystanders conduct the same without adjournment until such count is completed and the result declared and recorded, and when this is done and the ballots, together with their official returns, have been deposited with the clerk of the school district as other sections of the act require, the powers and duties of the election board are at an end, and their jurisdiction over any

matter concerned in the election ceases.—*Bernardo v. Rue*, 26 Cal. App. 108, 146 Pac. 79.

74. Same—Jurisdiction to render a decision or enter a judgment in an election contest is not lost under section 1118a, post, by reason of the court's failure to file its findings and enter judgment within ten days after the submission of the case.—*Bernardo v. Rue*, 26 Cal. App. 108, 146 Pac. 79.

75. A proceeding pursuant to the provisions of such title is a statutory proceeding for the summary determination of the right to an office, limited and restricted to cases only mentioned therein and upon the grounds specified therein.—*Waite v. Brendlin*, 26 Cal. App. 31, 145 Pac. 739.

76. Same—Motion for nonsuit granted—Erroneous, when.—The granting of a motion for a nonsuit in an election contest for the office of high-school trustee is erroneous, where it is shown from the undisputed facts before the court at the time the motion was made, that the election board in one of the precincts disregarded the requirement of section 1253 of the Political Code, which provides that the count by the election board of the number of votes cast at the close of the polls should be compared with the poll-list of voters, and likewise disregarded the succeeding section of the code, which provides the procedure to be followed where two ballots are folded together as a single ballot, and on the night of the day following the election and after the result had been declared, withdrew their official returns from the custody of the clerk of the school district with whom they had been deposited, and altered the same by adding to the recorded vote of one of the candidates the ballots folded together as one, which changed the result of the election.—*Bernardo v. Rue*, 26 Cal. App. 108, 146 Pac. 79.

77. Same—Provisions of code not applicable to.—The provisions of title II, part II. of the Code of Civil Procedure relating to the contesting of certain elections are not applicable to a contest by one recalled from an office.—*Waite v. Brendlin*, 26 Cal. App. 31, 145 Pac. 739.

78. Same—Right of contest in a recall election does not exist by implication as to such provisions.—*Waite v. Brendlin*, 26 Cal. App. 31, 145 Pac. 739.

79. Same—Sections governing directory, when.—The sections of the act governing the court's action upon the trial of proceedings of this character are directory in the absence of an express provision of the statute declaring them to be mandatory.—*Bernardo v. Rue*, 26 Cal. App. 108, 146 Pac. 79.

80. Right to contest—Apparent official right.—This section provides for contest of apparent official right only, created by declaration of board of supervisors sitting as canvassing board. When this section concerning contests says that elector may

"contest right of any person declared elected to office," it means apparent right which declaration of such board creates. No other right is involved.—Sweeny v. Adams, 141 Cal. 558, 560, 75 Pac. 182.

81. Same—Must be invoked by elector.—No special right of contest is given to candidate as such. The right is conferred upon any elector and can only be invoked as elector, and when so invoked, contest is regarded as of public nature, where irregularities and frauds at ballot-box or in vote, or official misconduct of officers are investigated, so that, by purgation of polls, if necessary, right of electors to have such public officers as have been honestly and legally elected by them assume their offices is sustained and enforced.—Sweeny v. Adams, 141 Cal. 558, 561, 75 Pac. 182.

82. Same—Not designed for rival candidates alone.—Right to contest election is not designed exclusively for benefit of rival candidates in election. Right to public office is not a matter which concerns them alone, nor is it interest alone of contending individuals that is to be considered in contest. As far as they are concerned, their interest is exclusively personal and pecuniary one. Paramount to their claim is deep public concern involved as to who are entitled to hold office for which suffrages of electors have been cast.—Sweeny v. Adams, 141 Cal. 558, 561, 75 Pac. 182.

83. Same—Object of contest which is initiated upon ground of malconduct on part of board of judges of election is not to examine into matters transpiring subsequent to declaration of canvassing board and which may strengthen or weaken claim of person declared elected by it. It has far more effective and extended purpose. The contest attacks election itself. It is not concerned with certificate of election or proceedings subsequent thereto, which are merely indicia of right to enter upon duties of office, but goes back to all these to fountain source of official title and ascertains whether sovereign will, as expressed at polls and upon which canvassing board assumes to declare result of election, has by such declaration been fairly, honestly, and legally expressed. It probes into and examines conduct of election officers upon whose returns canvassing board acts. It re-

canvasses votes cast and ascertains whether person who was declared elected by such board had highest number of legal votes.—Sweeny v. Adams, 141 Cal. 558, 560, 75 Pac. 182.

84. Superior judge—Contest for office of.—The office of judge of the superior court is a proper subject of a contest hereunder.—Bush v. Head, 154 Cal. 280, 97 Pac. 512.

85. Votes for ineligible candidate—From—ise not to qualify, etc.—Votes cast for a candidate with knowledge that such candidate has made a promise not to qualify or enter upon the duties of the office in the event of election, are not "illegal votes" within the meaning of this subdivision, authorizing a contest on that ground.—Bush v. Head, 154 Cal. 280, 97 Pac. 512.

See, also, pars. 37, 69, this note.

86. What is ground for contest—Malconduct of election officers.—Malconduct on part of board of judges of election or any member thereof is good ground for contest of election.—Russell v. McDowell, 83 Cal. 70, 79, 82, 23 Pac. 183.

87. Same—That some other person received more votes.—The fact that some other person received more votes than person declared elected, or an equal number with such person, is not made ground of contest under the above section.—Snibley v. Palmtag, 128 Cal. 283, 284, 60 Pac. 860.

88. Same—Violation of law by contestant himself.—It was never designed that contestee might prevent determination as to his right of office by showing that contestant himself had violated certain laws, and was himself, therefore, not entitled to office.—Maddux v. Walthall, 141 Cal. 412, 415, 74 Pac. 1026.

89. Same—Wrongful nomination—Illegal placing of name on ticket.—Fact that defendant wrongfully procured his nomination or had his name illegally placed upon tickets, not being within provisions of this section, is not ground for contest.—Powers v. Hitchcock, 129 Cal. 325, 327, 61 Pac. 1076.

90. What is no ground for contest—Aiding and abetting illegal registration.—Aiding and abetting registering officer in illegal registry of voters does not constitute ground for contesting an election.—Meredith v. Christy, 64 Cal. 95, 27 Pac. 863.

§ 1112. IRREGULARITY AND IMPROPER CONDUCT OF JUDGES, WHEN TO ANNUL ELECTIONS. No irregularity or improper conduct in the proceedings of the judges, or [of] any of them, is such malconduct as avoids an election, unless the irregularity or improper conduct is such as to procure the person whose right to the office is contested to be declared elected, when he had not received the highest number of legal votes.

History: Enacted March 11, 1872.

JUDGES OF ELECTION—IRREGULAR OR IMPROPER CONDUCT.

1. Construction of section.
2. Rejecting vote of precinct, when justified.
3. Same—Disregarding requirements—Fraud.

See, ante, § 1111 and note.

1. **Construction of section.**—If concluding provision of this section, viz.: "when he had not received highest number of legal votes," be read as meaning "when he had not received as many votes as were given to some other person," construction supported by Political Code, section 1067, section is brought into harmony with section 1114, post.—*Wright v. Ashton*, 143 Cal. 544, 547, 77 Pac. 477.

See Kerr's Cyc. Pol. Code, 2d ed., § 1067 and note.

2. **Rejecting vote of precinct—When justified.**—Where officers of an election disregard provisions of sections 1225, 1226,

Political Code, and are not called as witnesses in an election contest to explain their conduct and to show that they either acted through ignorance of law or were not actually guilty of any fraudulent intent, it can not be presumed that they erred through ignorance of law and were not guilty of such intent, and if a prima facie case of fraudulent voting is made out, court is justified in rejecting entire vote of precinct.—*Russell v. McDowell*, 83 Cal. 70, 79, 23 Pac. 183.

See Kerr's Cyc. Pol. Code, 2d ed., §§ 1225, 1226 and notes.

3. **Same—Disregarding requirements—Fraud.**—Disregard of mandatory requirements of election law, or of merely directory provisions, coupled with such actual fraud as makes true result doubtful, is ground for throwing out entire vote of precinct where there are no means of purging poll.—*Russell v. McDowell*, 83 Cal. 70, 79, 23 Pac. 183.

§ 1113. WHEN NOT TO. When any election held for an office exercised in and for a county is contested on account of any malconduct on the part of the board of judges of any township election, or any member thereof, the election can not be annulled and set aside upon any proof thereof, unless the rejection of the vote of such township, or townships, would change the result as to such office in the remaining vote of the county.

History: Enacted March 11, 1872.

IRREGULARITIES, ETC.—WHEN NOT.

1. Construction of section—In general.
2. Same—Intention of legislature.
3. Burden of proof—On whom.
4. Same—Shifts to contestee, when.
5. Same—Contestant must show, what.
6. Disregard of directory provisions—Does not justify rejection of vote, when.
7. Same—Effect of departure.
8. Same—Effect of, if followed by actual fraud.
9. Same—Reasonable observance of prescribed conditions required.
10. Irregularities not vitiating an election—Arrangement of polling-places.
11. Same—Important question is, what.
12. Same—No injury of candidacy.
13. Same—Not affecting final result.
14. Same—Unless fraud, etc., is shown.
15. Same—Unless in case of failure to receive highest number of legal votes.
16. Malconduct or official delinquency.
17. Same—Election of county officer, not avoided, when.
18. Same—Entire vote of ward not to be rejected, when.
19. Rule applied in case of errors, or wrongful acts of officers.

20. Test of departures from requirements of law.

21. What does not invalidate election—Delay in opening polls.

22. Same—Failure to return tally-lists.

23. Same—Failure to write names across seal of envelope.

24. Same—Mere receiving and counting of votes improperly given.

25. Same—Neglect of officers to be sworn.

26. Same—Preserving purity of ballot-box.

See, ante, § 1111 and note.

As to counting and rejection of ballots. see Kerr's Cyc. Pol. Code, 2d ed., § 1211 and note pars. 8-26.

As to mandatory and directory provisions. see Kerr's Cyc. Pol. Code, 2d ed., § 1204 and note par. 3.

As to what is not official malconduct, see Kerr's Cyc. Pol. Code, 2d ed., § 1225 and note par. 9.

Irregularities which do not justify throwing out of precinct.—See Kerr's Cyc. Pol. Code, 2d ed., § 1203 and note par. 1; § 1204 and note par. 2; § 1205 and note par. 14; § 1211 and note par. 8.

"Returns" means, what.—See Kerr's Cyc. Pol. Code, 2d ed., § 1261 and note par. 1; § 1263 and note par. 1.

That mere irregularities on part of election officers do not vitiate election, see

authorities cited in notes 33 Am. St. Rep. 510; 58 Am. St. Rep. 807; 90 Am. St. Rep. 72, 73.

What failure or disregard of directory provisions of statute by election officers shall not prejudice voters, see Kerr's Cyc. Pol. Code, 2d ed., § 1261 and note pars. 3-5.

What will not invalidate election.—See Kerr's Cyc. Pol. Code, 2d ed., § 1258 and note pars. 1-4.

1. Construction of section—In general.—Language of this section is equally applicable to mandatory as to directory provisions of election laws, and it must receive construction reconcilable with doctrine as to effect of disregarding mandatory provisions. We conclude its meaning to be merely that election of county officer as sheriff will not be avoided unless enough precincts are excluded for misconduct of election boards to destroy his majority.—*Russell v. McDowell*, 83 Cal. 70, 78, 23 Pac. 183.

2. Same—Intention of legislature.—Legislature did not mean that returns of candidate should be set aside when election was held at proper time and place and for proper office, unless it affirmatively appears that there was such irregularity as affected result of election. When these irregularities of mere mode occur, it rests with contestant to show that they change result.—*Whitley v. McKune*, 12 Cal. 352, 362.

3. Burden of proof—On whom.—One who relies upon overcoming prima facie correctness of official canvass by resort to ballots must first show that they, as presented to court, are intact and genuine; and where mode of preservation is enjoined by statute, proof must be made of substantial compliance with requirements of that mode. But such requirements are construed as directory merely, object looked to being to preservation inviolate of ballots. If this is established, it would be manifestly unjust to reject them merely because directory mode of reaching it had not been followed.—*Tebbe v. Smith*, 108 Cal. 101, 107, 49 Am. St. Rep. 68, 29 L. R. A. 673, 41 Pac. 454.

As to burden of proving spoilation of ballots, see, post, § 1122 and note par. 7.

4. Same—Shifts to contestee, when.—When a substantial compliance with provisions of statute has been shown, burden of proof shifts to contestee of establishing that, notwithstanding this compliance, ballots have in fact been tampered with, or that they have been exposed under such circumstances that a violation of them may have taken place. But this proof is not made by naked showing that it was possible for one to have molested them. Law can not guard against mere possibility, and no judgment of any of its courts is ever rendered upon one.—*Tebbe v. Smith*, 108 Cal. 101, 107, 49 Am. St. Rep. 68, 29 L. R. A. 673, 41 Pac. 454.

5. Same—Contestant must show, what.—As returns are prima facie evidence of facts they import, and as returned candidate, especially after being commissioned, is prima facie entitled to office, contestant must show not only that irregularities occurred in conduct of election, but that in consequence of irregularities, declared result was different from what it otherwise would have been.—*Whitley v. McKune*, 12 Cal. 352, 362.

6. Disregard of directory provisions—Does not justify rejection of vote, when.—An honest or mistaken disregard by election officers of directory provisions of statute relating to elections and which does not result in manifest fraud does not justify rejection of entire vote of precinct.—*Davis v. Grunig*, 143 Cal. 336, 339, 76 Pac. 1102.

7. Same—Effect of departure.—Mandatory provisions for holding election must be followed, or failure will vitiate it, while departure from terms of directory provisions will not render it void, in absence of further showing that result has been changed or rights of voters injuriously affected thereby.—*Tebbe v. Smith*, 108 Cal. 101, 111, 49 Am. St. Rep. 68, 29 L. R. A. 673, 41 Pac. 454.

8. Same—Effect of, if followed by actual fraud.—Honest or mistaken disregard of directory provisions of statute not resulting in manifest fraud does not afford ground for rejecting entire vote of precinct; but neglect of directory provisions of statute designed to prevent fraudulent voting, followed by actual fraud of that character, sufficient in extent to throw doubt on result of election, is ground for rejecting entire vote of precinct, if there is no means of purging poll.—*Russell v. McDowell*, 83 Cal. 70, 77, 23 Pac. 183.

9. Same—Reasonable observance of prescribed conditions required.—Substantial compliance with terms of directory provisions is, after all, required, and such substantial compliance is not had by strictly following some provisions, while essentially failing to observe others. There must be reasonable observance of all prescribed conditions.—*Tebbe v. Smith*, 108 Cal. 101, 112, 49 Am. St. Rep. 68, 29 L. R. A. 673, 41 Pac. 454.

10. Irregularities not vitiating an election—Arrangement of polling-places.—It must be remembered that neither voters nor those voted for have any control over officers of election; and to upset election because such officers have failed to strictly comply with law, such as in matters relating to arrangement of polling-places, or slight irregularities in conduct of election, and where it appears that no harm was done thereby, would be to encourage irregularities committed for very purpose of invalidating an election.—*Hayes v. Kirkwood*, 136 Cal. 396, 402, 69 Pac. 30.

11. Same—Important question is, what.—The important question in election contest

is, whether qualified voters have been deprived of fair opportunity of expressing their preference. Mere irregularities which do not affect result should be disregarded.—*Preston v. Culbertson*, 58 Cal. 198, 209.

12. Same—No injury of candidacy.—Mere irregularities on part of officers of election can not prevent count of vote against contestee, where there was no misconduct on part of boards of judges whereby he was injured in his candidacy in any way; no misconduct which in any way prevented full and fair expression of will of qualified electors of precinct or to have diminished number of legal votes that contestee would otherwise have received.—*Abbott v. Hartley*, 143 Cal. 484, 486, 77 Pac. 410.

13. Same—Not affecting final result.—Mere irregularities which do not affect final result of election, or in other words, which do not produce different result from that which would have otherwise happened, do not vitiate such election.—*Sprague v. Norway*, 31 Cal. 173, 175.

14. Same—Unless fraud, etc., is shown.—Irregularities on part of election officers will not invalidate an election, unless fraud, collusion, or some suspicious circumstances are shown.—*Whipley v. McKune*, 12 Cal. 352, 361.

15. Same—Unless in case of failure to receive highest number of legal votes.—No irregularity or improper conduct in proceedings of judges, or any of them, is such misconduct as will avoid an election, unless irregularity or improper conduct is such as to procure person whose right to office is contested to be declared elected when he has not received highest number of legal votes.—*Freshour v. Howard*, 142 Cal. 501, 504, 77 Pac. 1101.

16. Malconduct or official delinquency.—Where votes were cast by duly qualified electors, on lawful occasion and proper place, their effect can not be defeated by reason of mere official delinquency of election officers.—*Bourland v. Hildreth*, 26 Cal. 161, 214.

17. Same—Election of county officer, not avoided, when.—Election of county officer such as sheriff will not be avoided unless enough precincts are excluded for misconduct of election boards to destroy his majority.—*Russell v. McDowell*, 83 Cal. 70, 78, 23 Pac. 183.

18. Same—Entire vote of ward not to be rejected, when.—Entire vote of ward of city should not be rejected for misconduct on part of election board, where it affirmatively appears by testimony of officers of election, and finding of court, that everything was done in good faith and that no fraud was committed.—*Atkinson v. Lorbeer*, 111 Cal. 419, 420, 423, 424, 44 Pac. 162.

19. Rule applied in case of errors, or wrongful acts of officers.—Those provi-

sions of Political and Penal Codes which make it felony to act as election officer without having been appointed and qualified as such, and which impose penalties upon person who so acts, do not declare that election is void for that cause. The principle underlying decisions on this question is that rights of voters shall not be prejudiced by errors or wrongful acts of officers of election unless it shall appear that fair election and honest count were thereby prevented.—*People ex rel. Lee v. Prewett*, 124 Cal. 7, 12, 56 Pac. 619; *Davis v. Grunig*, 143 Cal. 336, 342, 76 Pac. 1102.

20. Test of departures from requirements of law.—It is practically impossible to lay down any general rule covering all cases, but true test to be applied to departures from requirements of laws, relating to conduct of elections, on proper day, and at proper place, be those requirements mandatory or directory, is as to whether or not particular departure is of such nature as to make it impossible or extremely difficult to determine, under circumstances of case, whether fraud had been committed, or anything done which would affect result.—*Kenworthy v. Mast*, 141 Cal. 268, 271, 74 Pac. 841.

21. What does not invalidate election—Delay in opening polls.—Slight delay in opening polls does not invalidate vote of precinct where officers acted without fraudulent intent and result could not have been changed.—*Kenworthy v. Mast*, 141 Cal. 268, 272, 273, 74 Pac. 841.

As to delay in opening polls, see par. 25, this note.

22. Same—Failure to return tally-lists.—Mere failure of election officers properly to return tally-lists, as required by law, does not preclude court from counting ballots returned where election was otherwise valid at precinct.—*Davis v. Grunig*, 143 Cal. 336, 338, 341, 342, 76 Pac. 1102.

23. Same—Failure to write names across seal of envelope.—Failure of election officers to write their names across seal of envelope containing ballots does not invalidate election where ballots are properly preserved and no injury results.—*McCarthy v. Wilson*, 146 Cal. 323, 328, 82 Pac. 243.

24. Same—Mere receiving and counting of votes improperly given does not invalidate election.—*Whipley v. McKune*, 12 Cal. 352, 357.

25. Same—Neglect of officers to be sworn.—Delay of half hour in opening polls, or neglect of officers of election to be sworn, does not affect validity of election unless it appears that fair election and honest count were thereby prevented.—*People ex rel. Lee v. Prewett*, 124 Cal. 7, 12, 13, 56 Pac. 619. See *Whipley v. McKune*, 12 Cal. 352, 357.

As to delay in opening polls, see par. 21, this note.

26. Same—Preserving purity of ballot-box.—While courts are very indulgent respecting omissions, inadvertencies, and mistakes of officers of elections, they should

be required so to perform their duties as to preserve ballot-box pure.—*Knowles v. Yates*, 31 Cal. 82, 93.

§ 1114. ILLEGAL VOTES, WHEN NOT TO VITIATE ELECTION. Nothing in the fourth ground of contest, specified in section eleven hundred and eleven, is to be so construed as to authorize an election to be set aside on account of illegal votes, unless it appear that a number of illegal votes has been given to the person whose right to the office is contested, which, if taken from him, would reduce the number of his legal votes below the number of votes given to some other person for the same office, after deducting therefrom the illegal votes which may be shown to have been given to such other person.

History: Enacted March 11, 1872.

ILLEGAL VOTES—DO NOT VIOLATE, WHEN.

1. Construction of section with section 1122, post.
 2. Ballots—How construed—Parol evidence.
 3. Counting of ballots.
 4. Same—Refusal to count.
 - 5, 6. Illegal votes—Do not vitiate election, when.
 7. Setting election aside—Another receiving higher number of legal votes.
 8. Same—Result procured by illegal votes.
- See, ante, § 1111 and note.

1. Construction of section with section 1122, post.—Under above section and section 1122, post, judgment in contested election case is authorized to be one of three,—viz.: 1. Of dismissal, if statement of cause of contest be insufficient; 2. Confirming election; 3. Setting aside and annulling election of respondent if number of his legal votes be reduced below number of votes given to some other person.—*Soto v. Vannoy*, 65 Cal. 285, 286, 3 Pac. 895.

2. Ballots—How construed—Parol evidence.—A ballot is to be construed as any other writing, and, while resort to parol evidence of extrinsic circumstances may be had for purpose of interpreting what would otherwise be doubtful, it can not be shown by case or any evidence that intention of voter was anything different from what plainly appears upon face of ballot.—*Rutledge v. Crawford*, 91 Cal. 526, 531, 25 Am. St. Rep. 212, 13 L. R. A. 761, 27 Pac. 779.

3. Counting of ballots.—When ballot intelligently shows that particular person is voted for to fill particular office, it can not be counted differently because court may believe that voter made mistake in prepar-

ing his ballot.—*Rutledge v. Crawford*, 91 Cal. 526, 532, 25 Am. St. Rep. 212, 13 L. R. A. 761, 27 Pac. 779.

4. Same—Refusal to count.—In township where only one justice of peace should have been elected, but proclamation of board of supervisors calls for election of two constables, and contest is instituted, court may properly refuse to count any ballot cast on which more than one person's name appears for office of constable.—*Sanchez v. Fordyce*, 141 Cal. 427, 428, 431, 75 Pac. 56.

5. Illegal votes—Do not vitiate election, when.—The mere receiving and counting of votes, improperly given, does not invalidate election.—*Whiple v. McKune*, 12 Cal. 352, 357.

6. Mere fact that illegal votes are received is no ground for rejecting whole vote of precinct.—*Packwood v. Brownell*, 121 Cal. 478, 480, 53 Pac. 1079.

7. Setting election aside—Another receiving higher number of legal votes.—It seems to have been intention of legislature that election shall not be set aside either for misconduct on part of judges or illegal votes, where true result can be, and is with certainty, ascertained by trial court, unless it appears that another person than one declared elected has, in fact, received higher number of legal votes.—*Wright v. Ashton*, 143 Cal. 544, 547, 77 Pac. 477.

8. Same—Result procured by illegal votes.—There is apparently no sound reason why election should be annulled, where one of two persons, receiving equal and highest vote, has been declared to have been elected because of irregularity or improper conduct in proceedings of judges of election, and not be annulled when such result was procured by illegal votes.—*Wright v. Ashton*, 143 Cal. 544, 547, 77 Pac. 477.

§ 1115. PROCEEDINGS ON CONTEST. When an elector contests the right of any person declared elected to such office he must file with the county clerk a written statement setting forth specifically:

1. The name of the party contesting such election and that he is an elector
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of the district, county or township, as the case may be, in which such election was held.

2. The name of the person whose right to the office is contested.
3. The office.
4. The particular grounds of such contest.

Such statement must be verified by the contesting party as provided by section four hundred and forty-six of this code, and must be filed within thirty days after the declaration of the result of the election by the body canvassing the returns thereof, except in cases where the contest is brought on any of the grounds mentioned in subdivision three of section one thousand one hundred and eleven, when it must be brought within six months after the declaration of the result of the election by the body canvassing the returns thereof.

History: Enacted March 11, 1872; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 185, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 642; Kerr's Stats. and Amdts. 1906-7, p. 477, also March 23, 1907, Stats. and Amdts. 1907, p. 912 [the latter act simply omits the comma following the words "he must," in second line], Kerr's Stats. and Amdts. 1906-7, p. 477; March 25, 1909, Stats. and Amdts. 1909, p. 718.

PROCEEDING ON CONTEST.

1. Construction of section—In general.
2. Same—"Return day."
3. Amendment—Amended complaint relates to what.
4. Same—How to be construed.
5. Same—Not error to refuse, when.
- 6, 7. Same—Should be permitted, when.
8. Election contest—Is special proceeding.
9. Same—Should be inaugurated, when.
10. Same—What does not affect remedy—Time—Appeal.
11. Statement of contest—Certainty of allegation required.
12. Same—Dismissal of, for insufficiency.
13. Same—Effect of, when defective.
14. Same—Filing—Time—Matter of defense.
15. Same—Ground of ineligibility should be stated in.
16. Verification—How made.
- 17, 18. Same—On information and belief.

See, ante, § 1111 and note.

1. **Construction of section—In general.**—Purpose of this law is very plain. Party who is declared elected, and whose right to hold office is questioned, should have notice, in advance of trial, of grounds on which his right to office is contested.—*Freshour v. Howard*, 142 Cal. 501, 504, 77 Pac. 1101.

2. **Same—"Return day."**—The codes do not in any other place than in above section speak of any "return day," but several sections in Political Code direct precinct officers to transmit to county clerk certain matters pertaining to election. The papers to be

transmitted must be in packages, and in Political Code section 1278 are spoken of as "returns."—*Carlson v. Burt*, 111 Cal. 129, 131, 43 Pac. 533.

See Kerr's Cyc. Pol. Code, 2d. ed., § 1278 and note.

"Returns," what are.—See Kerr's Cyc. Pol. Code, 2d ed., § 1261 and note par. 1.

3. **Amendment—Amended complaint relates to what.**—An amended complaint under above section which does not allege cause of action against any new party, relates to commencement of contest and is not subject to demurrer on ground that it appears therefrom that it was filed more than statutory time after "return day."—*Preston v. Culbertson*, 58 Cal. 198, 207.

4. **Same—How to be construed.**—An amendment to statement of contest is to be construed by same rule as amendment to complaint. Unless from nature of fact, alleged or otherwise, contrary appears, it is to be deemed statement of facts existing at commencement of action or proceeding. It takes effect as if it had been originally incorporated in the statement.—*Doty v. Jenkins*, 142 Cal. 497, 498, 77 Pac. 1104.

5. **Same—Not error to refuse, when.**—After trial of election contest it is not error to refuse to allow contestant to amend his statement under above section by alleging new charge of fraudulent conduct against contestee.—*Freshour v. Howard*, 142 Cal. 501, 505, 77 Pac. 1101.

6. **Same—Should be permitted, when.**—If statement of contest as filed lacks clearness and distinctness of statement always desirable in judicial proceedings, it should not for that reason be peremptorily dismissed, but opportunity to amend it should be afforded, in order than controverted

points may be developed for determination, and contest disposed of on its merits if it has any.—*Minor v. Kidder*, 43 Cal. 229, 237.

7. An amendment to statement of contest may be permitted where only purpose of it is to make such statement show that plaintiff is entitled to maintain proceeding.—*Doty v. Jenkins*, 142 Cal. 497, 499, 77 Pac. 1104.

8. Election contest—Is special proceeding.—An election contest is special proceeding and requirements of code in reference thereto must be strictly followed.—*Freshour v. Howard*, 142 Cal. 501, 504, 77 Pac. 1101.

9. Same—Should be inaugurated, when.—Right to contest election is purely statutory, and public policy requires that it should be inaugurated at once. It is not right given to enable candidate to vindicate his right, but is one given to any elector, and should be instituted before commencement of term of person declared elected.—*Carlson v. Burt*, 111 Cal. 129, 132, 43 Pac. 583.

10. Same—What does not affect remedy—Time—Appeal.—Party is not deprived of remedy to contest election because board of canvassers met more than forty days after return of legal votes; and, acting on returns then made, declared person elected to office who was not elected by legal votes first returned. For purpose of contest, time would be held to run from day on which returns were made, on which board made canvass which was subject of controversy. On other hand, losing party is not deprived of his appeal because successful party commenced proceedings in court below at later date than law authorizes.—*Day v. Jones*, 31 Cal. 261, 262.

11. Statement of contest—Certainty of allegation required.—Certainty of allegation required by statute in statement of contest of election is not, and, from nature of action, can not reasonably be expected to be, highest degree of certainty known in pleadings. It is not insufficient if grounds of contest set forth apprise contestee of nature of attack which is made.—*Minor v. Kidder*, 43 Cal. 229, 231, 235; *Abbott v. Hartley*, 143 Cal. 484, 485, 77 Pac. 410.

12. Same—Dismissal of, for insufficiency.—Statement of contest of election is not sufficient, and should be dismissed, where

it is based upon malconduct of judges of election, respecting opening of polls, keeping them open, and allowing persons to vote whose names do not appear upon precinct register, and upon fact that all judges of election were not present during all of time that voting was in progress, where such irregularities were not of serious nature and did not apparently change result of election.—*Packwood v. Brownell*, 121 Cal. 478, 479, 481, 53 Pac. 1079.

13. Same—Effect of, when defective.—Defective statement of contest is subject to special demurrer, but is cured by the judgment.—*Abbott v. Hartley*, 143 Cal. 484, 486, 77 Pac. 410.

14. Same—Filing—Time—Matter of defense.—This section which provides for requisites of written statement or complaint does not require that it shall show, by averment, that it has been filed within time prescribed. That complainant has not proceeded within statutory time is therefore matter of defense to be made by answer in nature of plea to jurisdiction, or to be taken advantage of by motion to dismiss proceedings.—*Preston v. Culbertson*, 58 Cal. 198, 208.

15. Same—Ground of ineligibility should be stated in.—Section 1111, subdivision 2, ante, specifies various grounds of contest, one of which is that person whose right to office is contested was not, at time of election, eligible to said office. Where this ground is relied on, it should be alleged in statement.—*McCarthy v. Wilson*, 146 Cal. 323, 329, 82 Pac. 243.

16. Verification—How made.—Written statement of grounds of contest of election may be verified by affidavit in ordinary form of verification of pleadings, averring that statement is true except as to matters set forth on information and belief, and that as to those matters affiant believes it to be true.—*Kirk v. Rhoads*, 4 Cal. 398, 403.

17. Same—On information and belief.—As to whether written statement of ground of contest of election may be verified on information and belief.—See *Kirk v. Rhoads*, 46 Cal. 308, 403.

18. Affirmed: *McCardle v. Barstow*, 145 Cal. 135, 136, 78 Pac. 371 (holding contest may be instituted by petition verified like ordinary pleading).

§ 1116. STATEMENT OF CAUSE OF CONTEST IN ILLEGAL VOTING.

When the reception of illegal votes is alleged as a cause of contest, it is sufficient to state generally that in one or more specified voting precincts illegal votes were given to the person whose election is contested, which, if taken from him, will reduce the number of his legal votes below the number of legal votes given to some other person for the same office;

[When based on reception of illegal votes.] But no testimony can be received of any illegal votes, unless the party contesting such election deliver to the opposite party, at least three days before such trial, a written list of the

number of illegal votes, and by whom given, which he intends to prove on such trial; and no testimony can be received of any illegal votes except such as are specified in such list.

History: Enacted March 11, 1872; amendment approved April 15, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 74.

**STATEMENT OF CAUSE OF CONTEST—
ILLEGAL VOTING.**

1. Construction of section—Knowledge.
2. Same—Notice of alleged illegal votes.
3. Same—Requirement of section.
4. Same—Same—Is equivalent to what.
5. Prerequisite to receiving testimony.
6. Very clear evidence necessary to justify deducting of vote.
7. Waiver of compliance with statute.

See, ante, § 1111 and note.

1. Construction of section—Knowledge.—It was intended by this section that opposite party should know what votes contestant will attempt to show are illegal, in order than he may come prepared with evidence upon that subject.—*Smith v. Thomas*, 121 Cal. 533, 534, 52 Pac. 1079, 54 Pac. 71.

2. Same—Notice of alleged illegal votes.—In an election contest it was intention of legislature to require each party to give to other notice of such votes as he intends to assall as illegal. Any other reading of statute would result in distinction where there ought to be none, and give to one of parties undue advantage over other.—*Norwood v. Kenfield*, 30 Cal. 393, 399.

3. Same—Requirement of section.—This section only requires that contestant shall serve notice containing "the number of illegal votes and by whom given." It does not, by fair construction, require that names of alleged illegal voters shall be written out in full on list, although such would be safer practice. The notice serves object of law if by it, three days before trial, defendant is informed as to whose votes plain-

tiff intends to attack.—*Preston v. Culbertson*, 58 Cal. 198, 211.

4. Same—Same—Is equivalent to what.—Requirement of this section is equivalent to one that opposite party shall have three days' notice of illegal votes which party serving list expects to prove at trial. The case is therefore covered by section 12, ante, and list served on December 7th could properly be relied upon and proved at trial on December 10th.—*Misch v. Mayhew*, 51 Cal. 514, 516.

5. Prerequisite to receiving testimony.—When reception of illegal votes is alleged in election contest, no testimony in reference thereto can be received, unless contestant shall deliver to opposite party, at least three days before trial, written list of number of illegal votes and by whom given.—*Freshour v. Howard*, 142 Cal. 501, 504, 77 Pac. 1101.

6. Very clear evidence necessary to justify deducting of vote.—In an election contest evidence must be very clear as to how one did vote, before his vote can be deducted from votes of any candidate. Secret ballot brings many inconveniences, and we must take the bitter with the sweet.—*Smith v. Thomas*, 121 Cal. 533, 536, 52 Pac. 1079, 54 Pac. 71.

7. Waiver of compliance with statute.—Where no objection was made to offers of proof by plaintiff as to illegal votes cast by defendant, on ground that plaintiff had failed to furnish list of votes claimed to be illegal, prior to trial, such failure to object is waiver of compliance with statute, if not an admission that statute had been complied with.—*Patterson v. Hanley*, 136 Cal. 265, 277, 68 Pac. 821.

§ 1117. STATEMENT OF CAUSE OF CONTEST. WANT OF FORM NOT TO VITIATE. No statement of the grounds of contest will be rejected, nor the proceedings dismissed by any court for want of form, if the grounds of contest are alleged with such certainty as will advise the defendant of the particular proceeding or cause for which such election is contested.

History: Enacted March 11, 1872.

**STATEMENT OF CAUSE OF CONTEST—
FORM IMMATERIAL.**

1. Allegation as to being a qualified voter.
- 2, 3. Amendment of statement.
4. Code expressly dispenses with necessity of, what.
5. No particular form of citation is prescribed.

See, ante, § 1111 and note.

1. Allegation as to being qualified voter.—Contestant is not required to allege anything further respecting his qualifications as voter than that he is, at time he files written statement of contest, qualified elector of county.—*Minor v. Kidder*, 43 Cal. 229, 231.

2. Amendment of statement.—Where the notice of contest first filed set out various irregularities or acts of misconduct as grounds of the contest, but did not specify

particularly the ground afterward relied upon, and later and after the time had expired within which the proceeding might be instituted the contestant was permitted to amend his statement of contest by adding the ground on which the contest was made, such an amendment was not in effect making a statement of a new cause or ground of contest.—*Thornber v. Hart*, 29 Cal. App. 284, 155 Pac. 99.

3. The contestee is entitled to have stated the particulars in which it is charged that malconduct was committed on the part of the officers conducting the election. Where in the statement of contest first filed the ground upon which the contestant afterward relied was not alleged, but other acts of malconduct were alleged, it is to indulge great liberality to the contestant to permit him to amend his statement after the time had expired within which the proceedings might be instituted by adding the later

ground of contest upon which he relied in the proof.—*Thornber v. Hart*, 29 Cal. App. 284, 155 Pac. 99.

4. Code expressly dispenses with necessity of any great particularity, formality, or nicety of pleading, in statement of contest; and such statement is sufficient where it informs contestee that ground of contest was malconduct of board of election officers in counting ballot containing distinguishing marks.—*Hannah v. Green*, 143 Cal. 19, 21, 76 Pac. 708.

5. No particular form of citation is prescribed by statute in an election contest, nor is it necessary that statement should contain prayer for relief. Statute dictates course to be pursued if causes of contest are found to be true, and court owes it to public to pursue that course, whether contestant formally demands it or not.—*Norwood v. Kenfield*, 30 Cal. 393, 400.

§ 1118. SUPERIOR JUDGE TO HOLD SPECIAL SESSION FOR TRIAL OF. Upon the statement being filed, the county clerk must inform the superior court of the county thereof, which shall thereupon set some day to be named by it, not less than ten nor more than twenty days from the date of such order, to hear and determine such contested election.

History: Enacted March 11, 1872; amendment approved April 15, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 75; amended March 13, 1907, Stats. and Amdts. 1907, p. 564, Kerr's Stats. and Amdts. 1906-7, p. 477. See § 1118[a] post.

SUPERIOR JUDGE—TO HOLD SPECIAL SESSION FOR.

1. Construction of section—In general.
- 2, 3. Same—Amendment of 1907.
4. Same—Refusing motion to dismiss is proper, when.

See, ante, § 1111 and note.

1. **Construction of section—In general.**—This section directs that "the superior court"—not the judge—"shall order special session of such court to be held," etc. The "court" therefore, does not cease to exist as such by continuance of cause. The statute contemplates prompt and speedy determination of election contests; but court has power of its own motion to adjourn session otherwise than from day to day, as circumstances may require, and court does not lose jurisdiction by reason of such adjournment.—*Falltrick v. Sullivan*, 119 Cal. 613, 616, 51 Pac. 947. See *Keller v. Chapman*, 34 Cal. 635, 640.

2. **Same — Amendment of 1907.**—Two amendments of above section seem to have been made in 1907 (Stats. 1907, cc. 292, 341), reading them together so far as the point of notice is concerned. They are as follows: "Upon the statement being filed the county clerk must inform the superior court of the county thereof. . . . Within five days after the end of the time allowed for filing such statements the county clerk must notify," etc. Substitute for "within"

one of its familiar equivalents "not longer than," the direction simply amounts to this: "Upon the statement being filed the county clerk must inform the superior court of the county thereof but it must not be longer than five days after the end of the time allowed for filing such statements."—*Hill v. Superior Court*, 15 Cal. App. 307, 114 Pac. 805.

3. If it be assumed that the amendment approved March 18, 1907, was superseded by the amendment approved March 19 the result so far as notice is concerned is not affected. Manifestly no notification should be given of the filing until the statement has been actually filed. This latter date is necessarily implied as the initial point and the later amendment simply undertakes to provide that the notification and order shall not be "later than five days after the end of the time for filing such statement."—*Hill v. Superior Court*, 15 Cal. App. 307, 114 Pac. 805.

4. **Same—Refusing motion to dismiss is proper, when.**—There is no error in denying motion to dismiss contested election proceeding upon ground that there was not compliance with this section, in that date named in order for special session of court to hear contest was less than ten days from date of order, where statement of contest was filed December 1st and order was made on that date, fixing December 11th for hearing. This was "not less than ten days."—*Hannah v. Green*, 143 Cal. 19, 21, 76 Pac. 708.

§ 1118[a]. SAME. Within five days after the end of the time allowed for filing such statements the county clerk must notify the superior court of the county or city and county of all statements filed.

The court shall thereupon order a special session to be held, on some day to be named by it, not less than ten nor more than twenty days from the date of such order, at which session the ballots shall be opened and a recount taken, in the presence of all the parties, of the votes cast for the various candidates in all contests where it appears from the statements filed that a recount is necessary for the proper determination of such contest or contests.

The court shall continue in special session to hear and determine all other issues arising in such contested elections and within ten days after the submission thereof, the court shall file its findings of fact and conclusions of law and immediately thereafter judgment thereon shall be entered.

History: Amendment of March 19, 1907, without a repealing clause, Stats. and Amdts. 1907, p. 643, Kerr's Stats. and Amdts. 1906-7, p. 477.

SPECIAL SESSION TO HEAR CONTEST.

1, 2. Construction of section—In general.

3. Same—Use of the word "thereupon."

See, ante, § 1111 and note.

1. **Construction of section—In general.**—Held not mandatory in the sense that the order for a special session to hear the contest shall be made on the same day the court is notified by the clerk of the institution of the contest.—Hagerty v. Conlan, 15 Cal. App. 649, 115 Pac. 762.

As to the two amendments of 1917, see, ante, § 1118, note pars. 2, 3.

2. The requirement that the court file its findings and enter its judgment within ten days after submission are directory. While this amendment was intended to hasten the work of the courts it was not

intended to provide that the parties to an election contest should lose valuable rights because of the delay of the judge in making or filing his findings and judgment.—Bernardo v. Rue, 26 Cal. App. 108, 146 Pac. 79.

3. **Same—Use of the word "thereupon"** in the clause providing for the court order upon receipt of the notification does not of necessity mean immediately. That it should file within a reasonable time is the most that can be claimed and it can not be said that a delay of six days in making the order was an unreasonable time when it is considered that in so far as the public is concerned the time fixed for the special session was within the limit of twenty days when the court was first authorized to act and exceeded the ten days, the minimum of time designated.—Dudley v. Superior Court, 13 Cal. App. 271, 276, 110 Pac. 146.

§ 1119. CLERK TO ISSUE CITATION TO RESPONDENT. The clerk shall thereupon issue a citation for the person, whose right to the office is contested, to appear at the time and place specified in the order, which citation must be delivered to the sheriff, and served either upon the party in person, or, if he can not be found, by leaving a copy thereof at the house where he last resided, at least five days before the time so specified.

History: Enacted March 11, 1872; amendment approved April 15, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 75.

1. **Construction of section.**—Held to be directory and not jurisdictional.—Hagerty v. Conlan, 15 Cal. App. 647, 115 Pac. 762,

following O'Dowd v. Superior Court, 158 Cal. 537, 111 Pac. 751.

See, ante, § 1111 and note.

§ 1120. WITNESSES, ATTENDANCE OF, HOW ENFORCED. The clerk must issue subpoenas for witnesses at the request of either party, which must be served as other subpoenas; and the superior court shall have full power to issue attachments to compel the attendance of witnesses who have been subpoenaed to attend.

History: Enacted March 11, 1872; amendment approved April 15, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 75.

See, ante, § 1111 and note.

As to forfeiture by witness for disobeying subpoena, see, post, § 1992 and note.

As to how concealed witness may be compelled to attend, see, post, § 1988.

As to how disobedience to subpoena, or to answer as a witness, is punished, see, post, § 1991 and note.

As to subpoenas for witness, definition, how issued, and how served, see, post, §§ 1985-1987 and notes.

As to when witness is compelled to attend, see, post, § 1989 and note.

That person present may be compelled to testify, see, post, § 1990 and note.

That warrant may issue to bring witness, see, post, § 1993 and note.

§ 1121. POWER OF COURT. ADJOURNMENT OF COURT. The court must meet at the time and place designated, to determine such contested election, and shall have all the powers necessary to the determination thereof. It may adjourn from day to day until such trial is ended, and may also continue the trial, before its commencement, for any time not exceeding twenty days, for good cause shown by either party upon affidavit, at the costs of the party applying for such continuance.

History: Enacted March 11, 1872.

POWER OF COURT—ADJOURNMENT OF COURT.

1. Construction of section.
- 2, 3. Power to adjourn session.

See, ante, § 1111 and note.

1. Construction of section.—Under above section court has all power necessary to determine question of contested election.—Falltrick v. Sullivan, 119 Cal. 613, 616, 51 Pac. 947.

2. Power to adjourn session.—If court has other engagements it may adjourn session of contested election case for several days where such interruption is unavoidable.—Falltrick v. Sullivan, 119 Cal. 613, 616, 51 Pac. 947.

3. See Keller v. Chapman, 34 Cal. 635, 640, holding that continuance for seven days against respondent's objection and without affidavit showing cause is unauthorized and operates as discontinuance of proceedings.

§ 1122. RULES TO GOVERN COURT IN TRIAL OF CONTEST. The court must be governed, in the trial and determination of such contested election, by the rules of law and evidence governing the determination of questions of law and fact, so far as the same may be applicable; and may dismiss the proceedings if the statement of the cause or causes of the contest is [in]sufficient, or for want of prosecution. After hearing the proofs and allegations of the parties, the court must pronounce judgment in the premises, either confirming or annulling and setting aside such election.

History: Enacted March 11, 1872.

RULES GOVERNING COURTS IN ELECTION CONTESTS.

- 1, 2. Ballots—As evidence.
3. Same—Actually cast ballots control.
- 4, 5. Same—Same—Establishment of integrity.
6. Same—Both sides should have opportunity to inspect.
7. Same—Burden of proving spoliation—Presumption.
8. Same—Compelling disclosure of contents.
9. Same—Court's power to order clerk to bring them in.
10. Same—How to be construed—Parol evidence.
11. Same—Inquiry, in supreme court, as to condition of—Presumption.
12. Same—Necessity of presence of, to determine validity.
13. Same—Original condition—Question for trial court.
14. Same—Prima facie correctness of returns.
15. Same—Rejection of those improperly marked.
16. Same—Secrecy of—Policy of law—Illegal votes.
17. Same—Taking results of recount.
18. Same—Torn ballots, counting of.
19. Same—Waiver of objection to sufficiency of preliminary proof as to condition of.
20. Consolidation of contests—Contestant retains what right.
21. Same—Effect of order of.

22. Denying motion for reasonable continuance—Abuse of discretion.
23. Dismissal—Retraxit—No bar to another contest.
24. Evidence—Admissibility of tally-sheets.
25. Same—Compelling production of best evidence.
26. Same—Evidence inadmissible in election contest.
27. Same—Same—Declaration of voter as to how he voted.
28. Same—Presumption.
29. Same—Proof of negative.
30. Same—Right to prove basis of exception.
31. Findings must be what.
32. Finding upon matter of jurisdiction.
33. Judgment—Contestant can not take, by default.
34. Same—Contestee is entitled to what.
35. Same—May be what.
36. No distinction between what elections.
37. No motion for new trial.
38. Practical operation of dismissal of election contest.
39. Precinct will not be disfranchised, when.
40. Proceedings are special and summary.
41. Provisions are mandatory—Liberal construction.
42. Returns—Adopting result of recount.
43. Same—As legal evidence.
44. Same—Will not be rejected, when.
45. Scope of inquiry—Is limited by pleadings.
46. Same—Is limited, how.
47. Same—Intention of voter.
48. Same—Legality of special election.
49. Same—Recanvass, when unauthorized.
50. Test of departures from requirements of law.
51. Tie vote—Certificate will not be annulled in case of.
52. Title to office must be shown.
53. Trial by jury—Refusal of, when proper.
54. Violation of Purity of Elections Law—Is no defense.
55. Same—Need not be considered.

See, ante, § 1111 and note.

1. **Ballots—As evidence.**—In contest over result of election, ballots are not only competent and material evidence, but evidence of very high order.—*Davis v. Grunig*, 143 Cal. 336, 342, 76 Pac. 1102.

2. Ballots, though they have been in possession of contestant as de facto county clerk for short time, are admissible in evidence on election contest.—*Coglan v. Beard*, 67 Cal. 303, 306, 7 Pac. 738.

3. **Same—Actually cast ballots control in determining the official canvass as furnished,** provided the original ballots have been duly preserved and protected from the reach of any unauthorized intermeddling or tampering.—*Hartman v. Young*, 17 Oreg. 150, 11 Am. St. Rep. 787, 2 L. R. A. 596, 20 Pac. 17.

As to when ballots produced at an election contest are, and when they are not, to be regarded as best evidence of vote cast, see note 11 Am. St. Rep. 798-800.

4. **Same—Same—Establishment of integrity.**—In case of contest ballots are primary and best evidence of number of votes received by any candidate, provided they have not in any way been tampered with, and burden is on contestant to show that fact.—*Coglan v. Beard*, 67 Cal. 303, 306, 7 Pac. 738.

5. In an election contest ballots are best evidence of manner in which electors have voted, when their integrity can be satisfactorily established.—*Tebbe v. Smith*, 108 Cal. 101, 107, 49 Am. St. Rep. 68, 29 L. R. A. 673, 41 Pac. 454.

6. **Same—Both sides should have opportunity to inspect.**—In contested election case counsel on both sides should have opportunity of inspecting ballots for purpose of preparing bills of exception.—*Langley v. Head*, 142 Cal. 368, 371, 75 Pac. 1088.

7. **Same—Burden of proving spoliation—Presumption.**—In an election contest burden of proving spoliation of ballots is on him who asserts it and, in absence of evidence, it will be presumed that officers obeyed law and preserved ballots unaltered.—*McMenomy v. Ruch*, 142 Cal. 77, 79, 75 Pac. 661.

As to burden of proof to overcome prima facie correctness of returns, see, ante, § 1113 and note par. 3.

8. **Same—Compelling disclosure of contents.**—Election officers are not compelled to disclose contents of ballots of assisted voters.—*Patterson v. Hanley*, 136 Cal. 265, 278, 68 Pac. 821.

9. **Same—Court's power to order clerk to bring them in.**—In contest over result of election, ballots are not only competent and material evidence but evidence of very high order; and court has power to order clerk to bring in packages of ballots and to order them opened, whether election is an election for officers or for any other purpose.—*Gibson v. Board of Supervisors*, 80 Cal. 359, 361, 22 Pac. 225.

10. **Same—How to be construed—Parol evidence.**—In election contest ballot is to be construed as any other writing, and, while resort to parol evidence of extrinsic circumstances may be had for purpose of interpreting what would otherwise be doubtful, it can not be shown by such or any evidence that intention of voter was anything different from what plainly appears upon face of ballot.—*Rutledge v. Crawford*, 91

Cal. 526, 531, 25 Am. St. Rep. 212, 13 L. R. A. 761, 27 Pac. 779.

As to evidence to explain ambiguities in ballots, see note 10 Am. St. Rep. 317, 322.

As to evidence to show for whom a ballot was cast at an election, see note 18 Am. St. Rep. 567.

11. Same—Inquiry, in supreme court, as to condition of—Presumption.—Ballots are presumed to be in same condition as when court ordered clerk to seal them up and take care of them. If it be contended in supreme court that they are not in same condition, matter can be inquired into there.—*Jennings v. Brown*, 109 Cal. 290, 293, 41 Pac. 1085.

12. Same—Necessity of presence of, to determine validity.—There can be no proper determination of validity of ballot under our present election laws without inspection of ballot itself, and appeal involving validity of ballots would be empty proceeding without presence of ballots to which plaintiff objects.—*Jennings v. Brown*, 109 Cal. 290, 292, 41 Pac. 1085.

13. Same—Original condition—Question for trial court.—The question as to whether ballots cast at city election have been so guarded as to preclude suspicion that they are not in their original condition is one which is largely within judgment and discretion of trial court.—*Trafton v. Quinn*, 143 Cal. 469, 470, 77 Pac. 164.

As to preservation of ballots as evidence, see *Kerr's Cyc. Pol. Code*, 2d ed., § 1266 and note par. 1.

14. Same—Prima facie correctness of returns.—While ballots themselves are best evidence of their contents, and must prevail over returns, where there is conflict, returns are prima facie correct, and constitute proof of result only until they are impeached by evidence showing that they are incorrect.—*Merkley v. Trainor*, 142 Cal. 265, 267, 75 Pac. 656.

15. Same—Rejection of those improperly marked.—In an election contest all ballots improperly marked must be rejected regardless of their number.—*Merkley v. Trainor*, 142 Cal. 265, 266, 75 Pac. 656.

As to counting and rejection of ballots, see *Kerr's Cyc. Pol. Code*, 2d ed., § 1211 and note pars. 8-26.

As to distinguishing mark in general, see *Kerr's Cyc. Pol. Code*, 2d ed., § 1211 and note pars. 27-56.

As to what are distinguishing marks, see *Kerr's Cyc. Pol. Code*, 2d ed., § 1211 and note pars. 27-56.

As to what are not distinguishing marks, see *Kerr's Cyc. Pol. Code*, 2d ed., § 1211 and note pars. 57-82.

That ballots should not be rejected for trivial reasons, see *Kerr's Cyc. Pol. Code*, 2d ed., § 1215 and note par. 8.

16. Same—Secrecy of—Policy of law—Illegal votes.—Policy of law is to preserve secrecy of ballots, but this does not extend

to illegal votes. If elector disregards terms upon which he is allowed to vote and thereby secures counting of illegal ballot, he forfeits privilege of secrecy in favor of superior right of party injured by his act to have truth disclosed.—*Patterson v. Hanley*, 136 Cal. 265, 276, 68 Pac. 821.

17. Same—Taking results of recount.—Where judgment of superior court on election contest is reversed on appeal and remanded for new trial that court may, upon such new trial, omit recount of ballots to which no objection was made at first trial, taking results as they have been ascertained, so far as said ballots are concerned.—*Patterson v. Hanley*, 136 Cal. 265, 278, 68 Pac. 821.

18. Same—Torn ballots, counting of.—Torn ballots, where there is no evidence to explain when or how they were torn, may be counted upon assumption that they were torn after voters delivered them to election officers.—*Pratt v. O'Neil*, 140 Cal. 539, 540, 74 Pac. 27.

19. Same—Waiver of objection to sufficiency of preliminary proof as to condition of.—Where preliminary proof is offered that ballots are in same condition as they were when enclosed in packages, sealed by election officers, failure to make any objection waives objection to sufficiency of such preliminary proof.—*McMenomy v. Ruch*, 142 Cal. 77, 78, 75 Pac. 661.

20. Consolidation of contest—Contestant retains what right.—Election contests, although consolidated, remain distinct and several as before, and each contestant retains right to dismiss his proceedings if he choose.—*Coghlan v. Alpers*, 140 Cal. 648, 650, 74 Pac. 145.

21. Same—Effect of order of.—For sake of convenience court may consolidate number of election contests into one case, so as to allow proceedings to be conducted substantially as one trial. This order, however, would not have effect of making each contestant responsible for pleadings or course of proceeding of any other contestant. The findings and judgment, respectively, although each might be embraced in one document, would have to state right of each party with respect to his particular pleadings the same as if there had been no consolidation. Costs would be allowed, and judgment given therefor, in same manner as if cases had not been consolidated, except that if any items should be incurred by two or more parties jointly, same would either be apportioned equitably among them or it be provided in judgment that there should be one payment by party held liable in case separate judgments are given for same sum in favor of different parties.—*Coghlan v. Alpers*, 140 Cal. 648, 650, 74 Pac. 145.

22. Denying motion for reasonable continuance—Abuse of discretion.—After trial of election contest has ended and court has met for decision, it is error and abuse of discretion for court to deny motion for rea-

sonable continuance, where showing is made upon affidavit that some one has been guilty of committing gross fraud. The public interests imperatively require that ultimate determination of contest should in every instance, if possible, reach very right of case. *Lord v. Dunster*, 79 Cal. 477, 486, 488, 21 Pac. 865.

23. Dismissal—Retraxit—No bar to another contest.—Dismissal of prior contest made by plaintiff's attorney before citation served upon defendant and before any appearance made therein, does not operate as retraxit, and is no bar to institution of another contest.—*Lord v. Dunster*, 79 Cal. 477, 489, 21 Pac. 865.

24. Evidence — Admissibility of tally-sheets.—In an election contest tally-sheets themselves are admissible in evidence, and testimony of officers of election that ballots were properly counted and that tally-sheets were properly filled up, etc., may also be admitted in evidence. It can not be said to be incompetent or immaterial.—*Packard v. Craig*, 114 Cal. 95, 99, 45 Pac. 1033.

25. Same—Compelling production of best evidence.—As a general rule all courts have power to compel production of best evidence within reach of their process, and material to issue to be tried, and parties to litigation have right to production of such evidence for enforcement or defense of their rights, but legislature has power to set aside this general rule, and in pursuance of policy which it deems of paramount importance. Hence, where purpose of statute is to protect ballots in custody of proper officer until their production is authorized, in contested election case, court can not compel production of such ballots in evidence in criminal prosecution.—*Ex parte Brown*, 97 Cal. 83, 88, 90, 31 Pac. 840.

26. Same—Evidence inadmissible in election contest.—*People ex rel. Drew v. Rodgers*, 118 Cal. 393, 397, 46 Pac. 740, 50 Pac. 668.

27. Same—Same—Declaration of voter as to how he voted.—In an election contest declaration of voter made after election as to how he voted is not admissible in evidence.—*Lauer v. Estes*, 120 Cal. 652, 656, 53 Pac. 262.

28. Same—Presumption.—In absence of averment to contrary, presumption is that defendant was nominated and that he was elected, and that certificate of election was duly issued to him.—*Powers v. Hitchcock*, 129 Cal. 325, 328, 61 Pac. 1076.

29. Same — Proof of negative. — Slight proofs, in an election contest, make out prima facie case where negative is to be proved. In all such cases rebuttal is comparatively easy and is consequently of imperative obligation.—*Russell v. McDowell*, 83 Cal. 70, 81, 23 Pac. 183.

30. Same—Right to prove basis of exception.—Right to prove exception in election contest probably involves right, when necessary, to prove upon what it was based.

—*Jennings v. Brown*, 109 Cal. 290, 293, 41 Pac. 1085.

31. Findings must be what.—Findings in election contest must be either of ultimate facts, or of such probative facts that court is enabled to say that ultimate facts necessarily result therefrom.—*Coglan v. Beard*, 65 Cal. 58, 63, 2 Pac. 737.

32. Finding upon matter of jurisdiction.—In election contest finding that no one was declared elected is upon matter of jurisdiction.—*Austin v. Dick*, 100 Cal. 199, 201, 34 Pac. 655.

33. Judgment—Contestant can not take, by default.—A contestant is not permitted to take judgment by default. He must prove allegations of his statement.—*Keller v. Chapman*, 34 Cal. 635, 640.

34. Same—Contestee is entitled to what.—Upon proper showing contestee is entitled to judgment confirming his election, and practical effect of judgment of dismissal may amount to such judgment of confirmation.—*Langley v. Head*, 142 Cal. 368, 373, 75 Pac. 1088.

35. Same—May be what.—Under section 1114, ante, and under above section, judgment in contested election case is authorized to be one of three, viz.: 1. Of dismissal, if statement of cause of contest be insufficient. 2. Confirming election. 3. Setting aside and annulling respondent's claim if number of his legal votes be reduced below number of votes given to some other person.—*Soto v. Vannoy*, 65 Cal. 285, 286, 3 Pac. 895.

As to judgment in contested election cases, see, ante, § 1114 and note.

36. No distinction between what elections.—There is no difference in principle between election to determine county seat and election to determine whether bonded indebtedness shall be increased, and superior court has jurisdiction of subject-matter of each action.—*Gibson v. Board of Supervisors*, 80 Cal. 359, 365, 22 Pac. 225.

37. No motion for new trial.—There can be no motion for new trial of election contest.—*Packard v. Craig*, 114 Cal. 95, 98, 45 Pac. 1033.

38. Practical operation of dismissal of election contest is to confirm election of contestee who holds certificate of election.—*Langley v. Head*, 142 Cal. 368, 369, 373, 75 Pac. 1088.

39. Precinct will not be disfranchised, when.—Party must allege ultimate facts which he must prove; and if statement of contest shows that thirty-two votes are polled at election held at certain precinct, and bald fact relied on to invalidate is that polls were not open at sunrise, court would be unwilling to allow that proof of this and no more, would justify disfranchisement of precinct. A contrary doctrine would probably lead to more fraud than it would prevent.—*Packwood v. Brownell*, 121 Cal. 478, 481, 53 Pac. 1079.

40. Proceedings are special and summary.—Proceedings instituted to contest election of county officers are special and summary in their character.—*Keller v. Chapman*, 34 Cal. 635, 640.

41. Provisions are mandatory—Liberal construction.—Provisions of election law are mandatory, but should be liberally construed.—*Jennings v. Brown*, 114 Cal. 307, 309, 34 L. R. A. 45, 46 Pac. 77.

As to mandatory and directory provisions of election laws and construction thereof, see *Kerr's Cyc. Pol. Code*, 2d ed., § 1197 and note par. 10; § 1204 and note par. 3; § 1211 and note pars. 30-31; § 1215 and note pars. 6, 7; § 1225 and note pars. 2, 3, 6.

42. Returns—Adopting result of recount.—Returns of election boards should be received by court as prima facie true, and, in order to overcome this evidence by recount of ballots, contestant must show affirmatively that they have not been tampered with. If it appear to court's satisfaction that they have not been tampered with, it should adopt result of recount and not returns by election board.—*Coglan v. Beard*, 65 Cal. 58, 60, 61, 63, 2 Pac. 737.

43. Same—As legal evidence.—Either party may impeach return if issues made by pleadings are such as to warrant proof, by ballots showing different result, but there is no principle requiring either party to attack official returns of any precinct in case where he is satisfied to accept such returns as correct. Unless attacked and overcome by other evidence, such official returns stand, and constitute legal evidence showing true vote of precinct.—*Merkley v. Trainor*, 142 Cal. 265, 267, 75 Pac. 656.

44. Same—Will not be rejected, when.—Election returns will not be rejected because of irregularity by which no injurious results accrue, either by reception of illegal votes or rejection of legal votes.—*Keller v. Chapman*, 34 Cal. 635, 640.

As to "returns," see *Kerr's Cyc. Pol. Code*, 2d ed., § 1268 and note pars. 2, 3.

That certain papers are to be sealed up, see *Kerr's Cyc. Pol. Code*, 2d ed., § 1261 and note.

45. Scope of inquiry—Is limited by pleadings.—In contest of election of certain person declared elected supervisor of city and county of San Francisco at an election named, scope of inquiry, as in every other action, is limited by pleadings.—*Coghlan v. Alpers*, 140 Cal. 648, 651, 74 Pac. 145.

46. Same—Is limited, how.—In election contest, inquiry is limited to examination of right of person declared elected at election, canvass of which is questioned.—*Austin v. Dick*, 100 Cal. 199, 201, 34 Pac. 655.

47. Same—Intention of voter.—Under our present election laws, courts can not confine themselves to mere inquiry as to what voter

intended to express by his ballot.—*Lauer v. Estes*, 120 Cal. 652, 653, 53 Pac. 252.

48. Same—Legality of special election.—In election contest, court can not inquire into legality of special election called after result of canvass declaring that no one was elected at election in question.—*Austin v. Dick*, 100 Cal. 199, 201, 34 Pac. 655.

49. Same—Recanvass, when unauthorized.—In election contest where election has been declared to have resulted in election of no one, recanvass of votes is not authorized by statute. In such case new election must be called, although it may be that candidate may question correctness of canvass in different proceeding.—*Austin v. Dick*, 100 Cal. 199, 201, 34 Pac. 655.

50. Test of departures from requirements of law.—True test to be applied to departures from requirements of laws relative to conduct of elections on proper day and place, be those requirements called mandatory or directory, is as to whether or not particular departure is of such nature as to make it impossible or extremely difficult to determine, under circumstances of case, whether fraud has been committed or anything done which would affect result.—*Kenworthy v. Mast*, 141 Cal. 268, 271, 74 Pac. 841.

51. Tie vote—Certificate will not be annulled in case of.—Where question on election contest is as to whether person declared elected did in fact receive highest number of legal votes, election will not be annulled unless it appears that no person received higher vote; hence certificate of election will not be annulled in case of tie vote.—*Wright v. Ashton*, 143 Cal. 544, 548, 77 Pac. 477.

52. Title to office must be shown.—Contestant, in order to succeed to office, must show title in himself.—*Coghlan v. Alpers*, 140 Cal. 648, 651, 74 Pac. 145.

53. Trial by jury—Refusal of, when proper.—Whether it is proper to refuse contestant, in election contest, trial by jury, such refusal is perfectly proper where demand was not made for jury trial until after trial had commenced, and it appears by stipulation of parties, and by record in cause, that no question of fact was involved which could have been submitted to jury.—*Maddux v. Walthall*, 141 Cal. 412, 414, 74 Pac. 1026.

54. Violation of Purity of Elections Law—Is no defense.—It is no defense in election contest that contestant had violated Purity of Elections Law. That is properly matter for determination in separate proceeding.—*Maddux v. Walthall*, 141 Cal. 412, 415, 416, 74 Pac. 1026; *Treanor v. Williams*, 145 Cal. 315, 319, 78 Pac. 884.

55. Same—Need not be considered.—Want of compliance with Purity of Elections Law need not be considered in an election contest.—*Treanor v. Williams*, 145 Cal. 315, 319, 78 Pac. 884.

§ 1123. COURT MAY DECLARE WHO WAS ELECTED. [CERTIFICATE TO ISSUE TO WHOM.] If in any such case it appears that another person than the one returned has the highest number of legal votes, the court must declare such person elected.

The person declared elected by the superior court shall be entitled to a certificate of election; and, if a certificate has not already been issued to him, the county clerk must immediately make out and deliver to such person a certificate of election signed by him, and authenticated with the seal of the superior court.

If the clerk has issued any certificate for the same office to any other person than the one declared elected by the court, such certificate shall be annulled by the judgment.

[Saving clause.] Sec. 3. None of the provisions of this act shall be held to apply to any pending contest or any contest in which the decision of the superior court shall have been rendered prior to the passage of this act.

History: Enacted March 11, 1872; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 649, Kerr's Stats. and Amdts. 1906-7, p. 477.

1. Construction of section—With sections 1111, 1114, ante.
2. Same—Duty of court—As to annulling election.
- 3, 4. Same—Same—To declare person elected.
5. No choice, when—Special election must be ordered.

See, ante, § 1111 and note.

1. **Construction of section—With sections 1111 and 1114, ante.**—Under sections 1111, 1114, ante, and above section, court is not authorized to annul an election upon finding that contestant and contestee have "received an equal and highest number of votes cast for said office." Judgment should be that contestant takes nothing by proceeding and that it be dismissed.—*Snibley v. Palmtag*, 128 Cal. 283, 284, 60 Pac. 860.

2. **Same—Duty of court—As to annulling election.**—In an election contest where court finds in first instance that contestee was not elected, or, in second instance, that neither contestant nor contestee was elected, but that some other candidate was, court must, under above section, annul election of person returned, and declare such other person elected. This result could never be attained if right which is to be contested is absolute

right or title to office; but it is matter of plain and easy accomplishment if right which section declares may be contested is simply right to office which accrued only from having been "declared elected" by canvassing board.—*Sweeny v. Adams*, 141 Cal. 558, 563, 75 Pac. 182.

3. **Same—Same—To declare person elected.**—Under this section it is duty of court to declare any other person elected, though this person may be neither contestant nor contestee, if result of recount should so disclose.—*Maddux v. Walthall*, 141 Cal. 412, 416, 74 Pac. 1026.

4. If it appears that another person than one returned has highest number of votes, it is duty of court, under this section, to declare such person elected.—*Sweeny v. Adams*, 141 Cal. 558, 561, 75 Pac. 182.

5. **No choice, when—Special election must be ordered.**—A person to be elected to an office must receive a plurality or highest number of votes cast for such office; and where two or more persons received an equal and highest number of votes, there is no choice, and a special election to fill such office must be ordered by proper board or officer (*Van Dyke, J., dis. op.*)—*Wright v. Ashton*, 143 Cal. 544, 549, 77 Pac. 477.

§ 1124. FEES OF OFFICERS AND WITNESSES. [Repealed.]

History: Enacted March 11, 1872; repeal approved April 15, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 76; enactment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 185, held unconstitutional, see history, § 5 ante.

§ 1124[a]. IN CASE OF TIE VOTE, WHO MAY CONTEST. Whenever the body canvassing the returns of any such election declares that no person has received the highest number of votes given for that particular office, any

elector of the county, city and county, city or political subdivision of either, in which such office is to be exercised may, within twenty days after such declaration, contest the same by filing with the clerk a written statement setting forth the matters stated in subdivisions one, three and four of section eleven hundred and fifteen, and also the names of the persons shown by such declaration to have received the highest and equal number of votes; which statement must be verified.

[Proceedings.] A citation must thereupon be issued to and served upon such of said persons receiving an equal number of votes as are not contestants as provided in section eleven hundred and nineteen.

[What to govern.] Thereupon like proceedings must be had as are provided in this title for contesting the right of a person declared elected; and all the provisions of this title so far as applicable thereto must govern in such proceedings.

[Who to be declared elected.] If the court finds that some person has received the highest number of votes such person must be declared elected.

History: Enacted March 19, 1907, Stats. and Amdts. 1907, p. 678, Kerr's Stats. and Amdts. 1906-7, p. 478.

A similar provision, enacted March 23, 1907, without a repealing clause, given below as § 1124[b].

§ 1124[b]. WHEN CANVASSING BOARD DECLARES NO ELECTION, WHO MAY CONTEST. Whenever the body canvassing the returns of any such election declares that no person has received the highest number of votes given for that particular office, any elector of the county, city and county, city, or political subdivision of either, in which such office is to be exercised, may, within twenty days after such declaration, contest the same by filing with the county clerk a written statement, setting forth specifically the matters stated in subdivisions one, three and four of section eleven hundred and fifteen, and also the names of the persons shown by such declaration to have received an equal number of votes; which statement must be verified as provided in said section eleven hundred and fifteen.

A citation must thereupon be issued for and served upon the persons so declared to have received an equal number of votes, as provided in section eleven hundred and nineteen, unless one of such persons is the contestant, in which case the citation need not be issued for or served upon him. Thereupon like proceedings must be had as are provided in this title for contesting the right of a person declared elected; and all the provisions of this title, so far as applicable thereto, must govern in such proceedings.

History: Enactment of March 23, 1907, Stats. and Amdts. 1907, p. 913, Kerr's Stats. and Amdts. 1906-7, p. 478.

A similar provision was enacted March 19, 1907, given herein as § 1124[a].

§ 1125. COSTS. If the proceedings are dismissed for insufficiency, or for want of prosecution, or the election is by the court confirmed, judgment must be rendered against the party contesting such election, for costs, in favor of the party whose election was contested; but if the election is annulled or set

aside, judgment for costs must be rendered against the party whose election was contested, in favor of the party contesting the same; provided, that where two or more contested elections are joined for the purpose of recounting votes as in this title provided, the costs shall be apportioned among the parties in the discretion of the court.

Primarily each party is liable for the costs created by himself, to the officers and witnesses entitled thereto, which may be collected in the same manner as similar costs are collected in other cases.

History: Enacted March 11, 1872; amendment approved April 15, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 75; March 19, 1907, Stats. and Amdts. 1907, p. 643, Kerr's Stats. and Amdts. 1906-7, p. 479.

COSTS IN CONTESTED ELECTION CASES.

1. Construction of section.
2. Court has no discretion to dismiss contest.
3. Liability for costs.
4. Same—Contestant, and his estate.
5. Same—In case of tie vote.
6. Same—Judgment for costs.

See, ante, § 1111 and note.

1. Construction of section.—Above section merely recognizes power of court, in case where facts warrant it, to render judgment annulling election (Van Dyke, J., dis. op.).—Wright v. Ashton, 143 Cal. 544, 549, 77 Pac. 477.

2. Court has no discretion to dismiss contest, nor has state's attorney. Case is prosecuted like any other action instituted by private citizen subject only to provisions of statute.—Searcy v. Grow, 15 Cal. 117, 122.

3. Liability for costs.—Any citizen who desires to contest an election may do so, and by institution of suit he becomes party to

proceeding, but is responsible for costs if he falls.—Searcy v. Grow, 15 Cal. 117, 122.

4. Same—Contestant, and his estate.—If contest is unsuccessful, neither contestant nor his estate can escape liability for the costs.—Snibley v. Palmtag, 127 Cal. 31, 33, 59 Pac. 200.

5. Same—In case of tie vote.—Where there was tie vote at election, and such election is contested, neither party can recover costs.—Soto v. Vannoy, 65 Cal. 285, 286, 3 Pac. 895.

6. Same—Judgment for costs.—Under above section, if proceedings are dismissed for insufficiency or want of prosecution, or if election of respondent be confirmed, judgment must be against person contesting for costs; if election be annulled and set aside, judgment for costs must be against respondent. Each party is primarily liable for his own costs to officers and witnesses entitled thereto, but he can not recover them from the other party to proceeding unless he brings himself within statute authorizing such recovery. In case of tie vote neither party can recover costs.—Soto v. Vannoy, 65 Cal. 285, 286, 3 Pac. 895.

§ 1126. APPEAL. Either party, aggrieved by the judgment of the court, may appeal therefrom to the district court of appeal, as in other cases of appeal thereto from the superior court; provided, that during the pendency of proceedings on appeal, and until final determination of such proceedings, the person declared elected by the superior court shall be entitled to the office in like manner as if no appeal had been taken.

[**Saving clause of Act of 1907.** The amendatory act of 1907 contained the following section:

Sec. 3. None of the provisions of this act shall be held to apply to any pending contest or any contest in which the decision of the superior court shall have been rendered prior to the passage of this act.]

History: Enacted March 11, 1872; amendment approved April 15, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 75; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 186, held unconstitutional, see history, § 5 ante; amendment approved March 19, 1907, Stats. and Amdts. 1907, p. 649, Kerr's Stats. and Amdts. 1906-7, p. 479; April 16, 1909, Stats. and Amdts. 1909, p. 975.

Editorial Note: This section was amended by a different provision March 23, 1907, without a repealing clause, which act is given herein as § 1126[a]; amended April 16, 1909, Stats. and Amdts. 1909, p. 975.

APPEAL IN ELECTION CONTEST.

1. Appeal does not operate as stay, when.
2. Same—Declaration of judge contestee unlawfully holding office.
3. Appellate jurisdiction of supreme court.
4. Death of contestant pending appeal—Contestee's right of appeal.
5. Same—Substitution of administrator.
6. Exceptions—Effect of failure to incorporate rulings in bill of.
7. Same—Have not been allowed, when.
8. Same—Necessity of.
9. Final judgment can not be ordered, when.
10. Judgment will be affirmed—Where bill of exceptions fails to show error.
11. Same—Where errors result in net gain for contestant.
12. Matters concerning ballots—Appellate court should not be transformed into canvassing board.
13. Same — Conclusiveness of superior court's determination.
- 14, 15. Same — Determination as to proper care of ballots.
16. Same—Harmless error.
17. Same—Necessity of first objecting in lower court.
18. Same—What ballots only can be considered.
19. New trial—May be ordered by supreme court upon reversal.
20. Same—No motion for permitted.
21. Objection as to point not in issue can not be raised.
22. Objections to be preserved by exceptions.
23. Omission of findings—When not prejudicial.
24. Remedy of defeated party.
25. Reversal of judgment — Must be ordered, when.
26. Same—Proper order, when.
27. Same—Return to trial court for further hearing.
28. Same—Where record fails to disclose exceptions.
29. Within sixty days — Decision not sustained by evidence.
30. Same—Questions as to error in admitting or rejecting evidence not foreclosed by failure to appeal within sixty days.

See, ante, § 1111 and note.

1. **Appeal does not operate as stay, when.**—As general rule, appeal to supreme court, accompanied by proper undertaking, stays execution of judgment, except in judgments in certain enumerated kinds of cases, and as appeal in contested election case is accorded to either party under this section, it must

follow that, unless judgment which court is authorized to enter in such case, belongs to one or another of excepted cases, appeal does not operate to stay its enforcement.—*Day v. Gunning*, 125 Cal. 527, 528, 58 Pac. 172.

2. **Same—Declaration of judge contestee unlawfully holding office** does not change the rule. Such a declaration on the part of the trial judge is unauthorized in an election contest; such a judicial declaration is warranted in quo warranto, or usurpation of office, which is an entirely distinct proceeding from an election contest.—*Day v. Gunning*, 125 Cal. 257, 258, 58 Pac. 172.

3. **Appellate jurisdiction of supreme court.**—Supreme court has appellate jurisdiction in contested election cases, under constitution of 1879.—*Lord v. Dunster*, 79 Cal. 477, 485, 486, 21 Pac. 865.

4. **Death of contestant pending appeal—Contestee's right of appeal.**—If contest is successful, action does not abate by contestant's death after judgment annulling election of contestee, and contestee can not be deprived of his right of appeal.—*Snibley v. Palmtag*, 127 Cal. 31, 33, 59 Pac. 200.

5. **Same — Substitution of administrator.**—In contested election case, where judgment is entered annulling election, and contestant dies pending appeal, his administrator, upon motion of supreme court, may be substituted and case may be heard on its merits.—*Snibley v. Palmtag*, 127 Cal. 31, 33, 59 Pac. 200.

6. **Exceptions—Effect of failure to incorporate rulings in bill of.**—It seems to be incumbent on respondent in election contest cases to incorporate in his bill of exceptions rulings of court by way of amendment, so that supreme court may finally determine them; but his failure to do so would not, in proper case, prevent such court from making final disposal of contest.—*Kenworthy v. Mast*, 141 Cal. 268, 275, 74 Pac. 841.

7. **Same—Have not been allowed, when.**—It can not be said that judge of trial court has allowed exception to ruling admitting certain ballot in evidence when ballot itself, very thing objected to, was excluded from bill.—*Jennings v. Brown*, 109 Cal. 290, 293, 41 Pac. 1085.

8. **Same — Necessity of.**—Supreme court will not review ruling of trial court upon any particular ballot, in absence of exception reserved thereto by party complaining.—*McCarthy v. Wilson*, 146 Cal. 323, 325, 82 Pac. 243.

9. **Final judgment can not be ordered, when.**—Supreme court can not, in face of finding of trial court that election officers are guilty of misconduct, order final judgment, where it is not shown and can not be determined how much or in what way vote was affected by such misconduct.—*Kenworthy v. Mast*, 141 Cal. 268, 275, 74 Pac. 841.

10. Judgment will be affirmed—Where bill of exceptions fails to show error.—Where appeal is taken from judgment with bill of exceptions and bill fails to show error, judgment will be affirmed.—*Jennings v. Brown*, 114 Cal. 307, 308, 310, 34 L. R. A. 45, 46 Pac. 77.

11. Same—Where errors result in net gain for contestant.—If, upon appeal from judgment in election contest in favor of contestant, all errors result in net gain for him, such judgment will be affirmed.—*Tout v. Hawkins*, 143 Cal. 104, 106, 76 Pac. 897.

12. Matters concerning ballots—Appellate court should not be transformed into canvassing board.—Upon appeal from judgment in contested election case, there should not be abandonment of all attempts to describe disputed ballots in bill of exceptions. It is objectionable to take to supreme court all ballots objected to for examination by that court, thus transforming it into canvassing board.—*Langley v. Head*, 142 Cal. 368, 370, 75 Pac. 1088.

13. Same—Conclusiveness of superior court's determination.—Action of superior court in construing ambiguous marks must be held conclusive.—*People ex rel. Bledsoe v. Campbell*, 138 Cal. 11, 19, 70 Pac. 918.

14. Same—Determination as to proper care of ballots.—Determination of lower court, in election contest, that ballots have been properly identified and have not been tampered with will not be disturbed upon appeal where evidence fairly justifies such conclusion.—*Hannah v. Green*, 143 Cal. 19, 22, 76 Pac. 708.

15. Question whether ballots have been sufficiently taken care of so as to preclude any reasonable suspicion that they are not in their original condition, is question which is largely within judgment and discretion of trial court, and its determination of that question should not be disturbed on appeal if evidence fairly warrants conclusion which court reached on subject.—*Davis v. Grunig*, 143 Cal. 336, 342, 76 Pac. 1102; *McCardle v. Barstow*, 145 Cal. 135, 136, 78 Pac. 371.

16. Same—Harmless error.—After both parties have rested, in election contest, it is error for court to count other ballots against objections of parties, but such error is harmless on appeal, where it appears that it would not have changed result.—*Hannah v. Green*, 143 Cal. 19, 24, 76 Pac. 708.

17. Same—Necessity of first objecting in lower court.—In election contest, objection to ballot will not be considered on appeal unless it was first made in superior court.—*Langley v. Head*, 142 Cal. 368, 371, 75 Pac. 1088.

18. Same—What ballots only can be considered.—On appeal in election contest, where bill of exceptions contained original ballots by stipulation of counsel, it is only ballots which have been specially objected

to that can be considered.—*Patterson v. Hanley*, 136 Cal. 265, 274, 68 Pac. 821.

19. New trial—May be ordered by supreme court upon reversal.—On appeal to supreme court, that court may, upon reversal of judgment, if it be found necessary or proper, order new trial in lower court.—*Dorsey v. Barry*, 24 Cal. 449, 456.

20. Same—No motion for permitted.—There can be no motion for new trial of election contest. Defeated party's remedy is confined to appeal from judgment.—*Packard v. Craig*, 114 Cal. 95, 98, 45 Pac. 1033. See *Casgrave v. Howland*, 24 Cal. 457, 458.

21. Objection as to point not in issue can not be raised.—In election contest, where validity of election under charter was not issue raised by pleadings, contestee can not object on appeal by contestant, that election was invalid.—*Trafton v. Quinn*, 143 Cal. 469, 472, 77 Pac. 164.

22. Objections to be preserved by exceptions.—Rule that objections to adverse ruling in election contests should be preserved by exceptions should apply in such proceedings as in any other proceeding.—*Lay v. Parsons*, 104 Cal. 661, 664, 38 Pac. 447.

23. Omission of findings—When not prejudicial.—Omission of findings as to immaterial matters, not stated as ground for contest, or as to facts admitted by answer, are not prejudicial.—*McCarthy v. Wilson*, 146 Cal. 323, 329, 82 Pac. 243.

24. Remedy of defeated party in election contest is limited to appeal from judgment.—*Packard v. Craig*, 114 Cal. 95, 98, 45 Pac. 1033.

25. Reversal of judgment—Must be ordered, when.—Where particular ballot is regarded as piece of evidence, ruling of court on objection thereto, when excepted to by injured party, is reviewable by appellate court, on appeal from judgment, to same extent as any other ruling in matter of admission or rejection of other evidence. Such rulings can be reviewed in no other way; if they are erroneous and sufficient in number to materially affect judgment, judgment must be reversed.—*McCarthy v. Wilson*, 146 Cal. 323, 325, 82 Pac. 243.

26. Same—Proper order, when.—If one who is neither citizen nor tax-payer institutes proceeding to contest election held for purpose of determining proposition to incur large indebtedness and to issue bonds of city in large amount for construction of waterworks, case should come to end when fact appears, and tax-payers and electors of city ought not to be bound by litigation which plaintiff has no right to institute or maintain, and judgment binding upon those who are citizens and tax-payers ought not to be affirmed on appeal. The proper order to make is to reverse or remand cause with directions to superior court to dismiss action.—*McConoughy v. San Diego*, 128 Cal. 366, 367, 60 Pac. 925.

27. Same—Return to trial court for further hearing.—Supreme court on appeal may return an election contest to trial court for further hearing when judgment has been reversed, but this is not fixed rule which will necessarily be followed in every case of this character.—*Farnham v. Boland*, 134 Cal. 151, 155, 66 Pac. 200, 366.

28. Same—Where record fails to disclose exceptions.—Judgment in favor of appellant upon record in election contest will not be rendered without further delay, where record fails to disclose exceptions taken to rulings of court below, but judgment will be reversed and cause remanded to trial court for further hearing.—*Farnham v. Boland*, 134 Cal. 151, 155, 66 Pac. 200, 366 (Beatty, C. J., dissented from order denying modification of judgment).

29. Within sixty days—Decision not sustained by evidence.—Appeal from superior court to supreme court in contested election case is subject to provision that upon such

appeal, point that decision is not sustained by evidence can not be raised, unless such appeal shall have been taken within sixty days after judgment.—*Packard v. Craig*, 114 Cal. 95, 98, 45 Pac. 1033; *McCarthy v. Wilson*, 146 Cal. 323, 325, 82 Pac. 243.

30. Same—Questions as to error in admitting or rejecting evidence not foreclosed by failure to appeal within sixty days.—While section 939, ante, which provides that exception to decision on ground that it is not supported by evidence can not be reviewed on an appeal from judgment, unless such appeal is taken within sixty days after rendition of judgment, is applicable to election contests, yet questions as to whether court erred in admission or rejection of evidence are questions at law, which are not foreclosed by failure to appeal within sixty days.—*McCarthy v. Wilson*, 146 Cal. 323, 325, 82 Pac. 243.

As to when appeal may be taken to supreme court, see, ante, §§ 963-966 and notes.

§ 1126[a]. SAME. Either party aggrieved by the judgment of the court may, within thirty days after notice of the entry thereof, appeal therefrom to the supreme court, as in other cases of appeal thereto from the superior court.

History: Amendment to § 1126 of March 23, 1907, Stats. and Amdts. 1907, p. 913, Kerr's Stats. and Amdts. 1906-7, p. 479. An amendment by a different provision March 19, 1907, given above as § 1126 as amended April 16, 1909.

§ 1127. WHEN ELECTION VOID AND OFFICE VACANT. Whenever an election is annulled, or set aside by the judgment of the superior court, and no appeal has been taken within ten days thereafter, the commission, if any has issued, is void, and the office vacant.

History: Enacted March 11, 1872; amended April 15, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 76.

FAILURE TO APPEAL—NOT ENTITLED TO SALARY.

1. Construction of section.
2. Failure to appeal in ten days—Subsequent settling bill of exceptions.
3. Same—Not entitled to salary.

See, ante, § 1111 and note.

1. Construction of section.—Held to apply only to contests covered by the title of which it is a section; i. e., contests in regard to offices "to be exercised" in "a county, city and county, city, or any po-

litical subdivision of either."—*Wilson v. Fisher*, 148 Cal. 16, 82 Pac. 421.

2. Failure to appeal in ten days—Subsequent settling bill of exceptions ineffectual.—*Wilson v. Arnot*, 2 Cal. App. 670, 84 Pac. 293.

3. Same—Not entitled to salary.—Under Political Code, section 936, where a judgment annulling an officer's certificate of election was not appealed from within ten days, under above section he was not entitled to salary pending an appeal subsequently taken.—*Wilson v. Fisher*, 148 Cal. 13, 82 Pac. 421.

TITLE III.

OF SUMMARY PROCEEDINGS.

Chapter I. CONFESSION OF JUDGMENT WITHOUT ACTION, §§ 1132-1135.

II. SUBMITTING A CONTROVERSY WITHOUT ACTION, §§ 1138-1140.

III. DISCHARGE OF PERSONS IMPRISONED ON CIVIL PROCESS, §§ 1143-1154.

IV. SUMMARY PROCEEDINGS FOR OBTAINING POSSESSION OF REAL PROPERTY IN CERTAIN CASES, §§ 1159-1179.

CHAPTER I.

CONFESSION OF JUDGMENT WITHOUT ACTION.

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| <p>§ 1132. Judgment may be confessed for debt due or contingent liability.</p> <p>§ 1133. Statement in writing and form thereof.</p> | <p>§ 1134. Filing statement and entering judgment.</p> <p>§ 1135. How, in justices' courts.</p> |
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§ 1132. JUDGMENT MAY BE CONFESSED FOR DEBT DUE OR CONTINGENT LIABILITY. A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter. Such judgment may be entered in any court having jurisdiction for like amounts.

History: Enacted March 11, 1872, re-enactment of § 374 Practice Act, last sentence added.

1. **Construction of section.**—This section contemplates technical confession of judgment.—*Levy v. Irvine*, 134 Cal. 664, 672, 66 Pac. 953.

As to power of state court to annul an order of the federal court vacating a judg-

ment pro confesso in that court after adjournment of term, see, ante, § 577 and note.

As to warrant of attorney to confess judgment, see note 132 Am. St. Rep. 626.

§ 1133. STATEMENT IN WRITING AND FORM THEREOF. A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect.

1. It must authorize the entry of judgment for a specified sum;
2. If it be for money due, or to become due, it must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due, or to become due;
3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and show that the sum confessed therefor does not exceed the same.

History: Enacted March 11, 1872, re-enactment of § 375 Practice Act.

STATEMENT.

1. Object of statute in requiring statement.
2. Statement—Is insufficient, when.
3. Same—Not signed by parties.
4. Same—Omission to state facts out of which indebtedness arose.
5. Same—When presumptively fraudulent.

6. Statutory authority for confession of judgment—Must be strictly pursued.

1. **Object of statute in requiring statement** is to put creditors upon track of inquiry and to enable them to discover fraud if any; and to discourage perjury by requiring definite and particular account of transaction, which might thus be exposed if it were fraudulent; and it is obvious

that vague statement subserves no purpose within contemplation of statute.—*Cordier v. Schloss*, 18 Cal. 576, 581.

2. Statement—Is insufficient, when.—Mere statement that indebtedness is by note is not sufficient under this section.—*Cordier v. Schloss*, 18 Cal. 576, 581.

3. Same—Not signed by parties.—Statement for confession of judgment not signed by parties personally, as required by statute, is insufficient. Signature of defendant's attorney is not enough.—*Reynolds v. Lincoln*, 71 Cal. 183, 184, 9 Pac. 176, 12 Pac. 449.

4. Same—Omission to state facts out of which indebtedness arose.—Statement for confession of judgment showing that plaintiffs are owners of note and that note was given for goods sold and delivered by

plaintiffs to defendants, and money had and received by defendants, is insufficient, where mere statement is that indebtedness is by note, and auxiliary statement does not show kind, quantity, price of goods, or time of sale, or that money was received, or under what circumstances, nor how much indebtedness for money, and how much for goods, and judgment rendered upon such confession is *prima facie* fraudulent.—*Cordier v. Schloss*, 18 Cal. 576, 581.

5. Same—When presumptively fraudulent.—Statement for judgment on note by confession is presumptively fraudulent where it omits to set forth consideration of note and fact out of which indebtedness arose.—*Pond v. Davenport*, 44 Cal. 481, 487.

6. Statutory authority for confession of judgment—Must be strictly pursued.—*Chapin v. Thompson*, 20 Cal. 681, 687.

§ 1134. FILING STATEMENT AND ENTERING JUDGMENT. The statement must be filed with the clerk of the court in which the judgment is to be entered, who must indorse upon it, and enter in the judgment-book, a judgment of such court for the amount confessed, with ten dollars costs. The statement and affidavit with the judgment indorsed, thereupon becomes the judgment-roll.

History: Enacted March 11, 1872, re-enactment of § 376 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 186, held unconstitutional, see history, § 5 ante.

ENTERING JUDGMENT—VACATING JUDGMENT.

1. Authority to enter judgment.
2. Creditor not bound to accept judgment, when.
3. Judgment by confession—Is void, if not properly signed.
4. Same—Is void if suffered to delay collection of plaintiff's debt.
5. Same—Merger of claim.
6. Vacating judgment—Application of party will be denied, when.
7. Same—Attaching creditor may institute proceeding for.
8. Same—Complaint insufficient, when.
9. Same—Defendant's right to prove matters explanatory of statement.
10. Same—Fraudulent confession of judgment does not conclude rights of judgment-creditor.
11. Same—How presumption of fraud may be rebutted.
12. Same—Necessity of averring facts to show fraud.
13. Same—No collateral attack, when.
14. Same—*Prima facie* evidence of fraud—Burden of proof.
15. Same—Resort to chancery, when necessary.
16. Same—Right of assignee in insolvency.
17. Same—When improper.

1. Authority to enter judgment against four persons does not justify confession of judgment against less number.—*Chapin v. Thompson*, 20 Cal. 681, 687.

2. Creditor not bound to accept judgment, when.—Creditor is not bound to accept judgment based upon confession made without any request on his part and without his knowledge, and entered up at instance of debtor alone, as measure of his rights.—*Wilcoxson v. Burton*, 27 Cal. 228, 234, 87 Am. Dec. 66.

3. Judgment by confession—Is void, if not properly signed.—Judgment by confession which is void as to certain defendants who did not sign is equally so as to those who did sign.—*Chapin v. Thompson*, 20 Cal. 681, 687.

4. Same—Is void if suffered to delay collection of plaintiff's debt.—Confession of judgment suffered for purpose of injuring and delaying collection of plaintiff's debt is void as to him.—*Ryan v. Daly*, 6 Cal. 238, 239.

5. Same—Merger of claim.—Judgment by confession merges no claim of creditor, except such as is included in it by some form of direct statement.—*Wilcoxson v. Burton*, 27 Cal. 228, 237, 87 Am. Dec. 66.

6. Vacating judgment—Application of party will be denied, when.—Application of party to set aside his confession of judgment will be denied where it does not appear that claim was not just and that

judgment ought not to have been confessed.—*Arrington v. Sherry*, 5 Cal. 513, 514.

7. Same—Attaching creditor may institute proceeding for.—Attaching creditor has right to institute proceeding, based on ground of fraud, to set aside judgment by confession.—*Scales v. Scott*, 13 Cal. 76, 78.

8. Same—Complaint insufficient, when.—If creditor obtains judgment by confession and attempts to reach money of judgment-debtor in hands of junior judgment-creditor, on ground that he has prior lien thereon, his complaint fails to state facts sufficient to constitute cause of action where there is no averment therein that money for which judgment was confessed was unpaid at time judgment was confessed or then due.—*St. Clair v. Burton*, 28 Cal. 549, 550.

9. Same—Defendant's right to prove matters explanatory of statement.—While defendant may prove matters explanatory of his statement for judgment by confession, he can not go any further and prove claim which statement not only does not include, but excludes by necessary intendment.—*Wilcoxson v. Burton*, 27 Cal. 228, 237, 87 Am. Dec. 66.

10. Same — Fraudulent confession of judgment does not conclude rights of judgment-creditor, although his rights are acquired by levy upon such property during pendency of litigation. No obligation, either legal or moral, withholds one from setting up his vendor's title as against one who has fraudulently contrived with his vendor to weaken and destroy it after he has conveyed property to him. No principle or policy of convenience requires that such judgment should conclude his rights.—*Leonis v. Biscalluz*, 101 Cal. 330, 332, 35 Pac. 875.

11. Same—How presumption of fraud may be rebutted.—Presumption that statement for judgment on promissory note by confession was fraudulent may be rebutted by proof of necessary facts omitted from statement, but fact proved must be consistent with and in support of averments of statements.—*Pond v. Davenport*, 44 Cal. 481, 487.

12. Same—Necessity of averring facts to show fraud.—In proceeding to vacate judgment, it is not sufficient to allege that confessions of judgment are fraudulent, but facts showing that they are such must be averred, so that court can perceive that such instruments are fraudulent. Facts showing fraud must be made to appear by averment.—*Pehrson v. Hewitt*, 79 Cal. 594, 598, 21 Pac. 950.

13. Same—No collateral attack, when.—Where court has jurisdiction of subject-matter and parties judgment by confession rendered upon such insufficient statement is not nullity on its face, and can not be collaterally attacked. Creditors of defendant can call it in question only on ground of fraud and in direct proceeding.—*Lee v. Figg*, 37 Cal. 328, 336, 337, 99 Am. Dec. 271.

14. Same—Prima facie evidence of fraud—Burden of proof.—In confession of judgment, want of statement fulfilling requirements of statute in description of indebtedness confessed is prima facie evidence of fraud, and casts upon defendants burden of showing by clear and satisfactory proof that no fraud existed.—*Cordier v. Schloss*, 18 Cal. 576, 581, affirming *Richards v. McMillan*, 6 Cal. 419, 422, 65 Am. Dec. 521.

15. Same—Resort to chancery, when necessary.—Junior judgment-creditor who is dissatisfied with confession of judgment by defendant, and who has no right whatever in proceeding by defendant to set aside such confession, must resort to court of chancery.—*Arrington v. Sherry*, 5 Cal. 513, 514.

16. Same—Right of assignee in insolvency.—Where confessions of judgment are prohibited by insolvent laws, assignee in insolvency can have them adjudged void, and, on proper proceeding, they will be so adjudged.—*Pehrson v. Hewitt*, 79 Cal. 594, 599, 21 Pac. 950.

17. Same—When improper.—Judgment by confession should not be set aside where debt was honestly due, and where it can not be inferred that there was any intention to take undue advantage of other creditors.—*Meeker v. Harris*, 19 Cal. 278, 289, 290, 79 Am. Dec. 218.

§ 1135. HOW, IN JUSTICES' COURTS. In a justice's court, where the court has authority to enter the judgment, the statement may be filed with the justice, who must thereupon enter in his docket a judgment of his court for the amount confessed, with three dollars costs. If a transcript of such judgment be filed with the county clerk, a copy of the statement must be filed with it.

History: Enacted March 11, 1872.

CONFESSION OF JUDGMENT—IN JUSTICES' COURT.

1. Confession of judgment—When not fraudulent.
2. Same—When void.

That justices' court has power to take and enter judgment for recovery of money on confession of defendant, when amount confessed, exclusive of interest, does not amount to three hundred dollars, see, ante, § 112, subdivision 6 and note.

1. Confession of judgment—When not fraudulent.—There can be no fraud in pursuance of remedy allowed by law. Hence, if it sufficiently appears that confessions of judgment were filed in justices' court, that judgments for debts justly due were entered on them and that execution issued on the judgments, the creditor can not assail such judgment in equity on ground of

fraud.—*Pehrson v. Hewitt*, 79 Cal. 594, 598, 599, 21 Pac. 950.

2. Same—When void.—Confession of judgment in justices' court for more than amount of such justices' jurisdiction is void. Consent of parties can not give jurisdiction which the constitution denies.—*Feillett v. Engler*, 8 Cal. 76, 77.

CHAPTER II.

SUBMITTING A CONTROVERSY WITHOUT ACTION.

- § 1138. Controversy, how submitted without action. § 1140. Judgment may be enforced or appeal from as in an action.
- § 1139. Judgment on, as in other cases, but without costs prior to notice of trial.

§ 1138. CONTROVERSY, HOW SUBMITTED WITHOUT ACTION. Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought; but it must appear, by affidavit, that the controversy is real and the proceedings in good faith, to determine the rights of the parties. The court must thereupon hear and determine the case, and render judgment thereon, as if an action were depending.

History: Enacted March 11, 1872, re-enactment of § 377 Practice Act.

SUBMITTING CONTROVERSY WITHOUT ACTION.

1. Construction of section.
2. Same—Consideration restricted to facts.
3. Same—Interested parties.
4. Same—Same—Validity of tax.
5. Affidavit—Is insufficient, when.
6. Same—Must contain requisite facts—No substitute.
7. Agreed statement of facts—Disregarding provision of.
8. Moot questions—Will not be considered.
9. Officer ought not to stipulate as to what facts.
10. Question as to issuance of search-warrant—Jurisdiction.
11. Special jurisdiction conferred by this section is limited, how.
12. Stipulation can not affect any question of law.
13. What controversy can not be submitted to court without action.
14. What is no subject of "civil action" in state court.
15. What questions will not be considered.
16. Who can not litigate as party.

1. Construction of section.—Under above section various controversies have been submitted without action.—*Crandall v. Am-*

ador Co., 20 Cal. 72, 73 (to determine liability of county for payment of juror's fees in certain criminal actions before justices of peace); *Mellois v. Chaine*, 20 Cal. 679, 680 (to determine and obtain opinion as to validity of foreign miners' license-tax); *People ex rel. Tyler v. Pratt*, 30 Cal. 223, 225 (to determine right of attorney to practise law); *Collins v. Lean*, 68 Cal. 284, 285, 9 Pac. 173 (to determine right to obtain search-warrant); *Cannon v. Handley*, 72 Cal. 133, 140, 13 Pac. 315 (to determine whether deed was in escrow); *Johnson v. Malloy*, 74 Cal. 430, 431, 16 Pac. 228 (to determine moot questions of law); *San Diego v. Granniss*, 77 Cal. 511, 513, 514, 19 Pac. 875 (to determine whether peninsula of San Diego is within limits of city of San Diego); *Prince v. Fresno*, 88 Cal. 407, 408, 26 Pac. 606 (to determine whether city or county of Fresno was liable to recorder for his fees); *Green v. County of Fresno*, 95 Cal. 329, 330, 30 Pac. 544 (to determine liability of county to constable for official services rendered in criminal cases and for money expended); *In re Wetmore*, 99 Cal. 146, 148, 33 Pac. 769 (to determine validity of municipal bonds); *Derby v. Modesto*, 104 Cal. 515, 517, 38 Pac. 900 (to determine validity of municipal bonds); *Skinner v. Santa Rosa*, 107 Cal. 464, 465, 29 L. R. A. 512, 40 Pac. 742 (to determine validity of municipal bonds); *City of Los Angeles v. State L. & T. Co.*, 109 Cal. 396, 397, 42 Pac. 149 (to de-

termine defendant's liability for certain taxes); *Market St. R. Co. v. Hellman*, 109 Cal. 571, 577, 42 Pac. 225 (to determine liability of defendants to purchase certain bonds); *White v. Clarke*, 111 Cal. 425, 427, 44 Pac. 164 (to obtain judgment upon agreed case); *McHenry v. Downer*, 116 Cal. 20, 21, 45 L. R. A. 737, 47 Pac. 779 (to determine liability of tax imposed upon plaintiff, and right of defendant as tax-collector to enforce payment thereof); *Board of Education v. Grant*, 118 Cal. 39, 40, 50 Pac. 5 (to determine ownership of certain permanent buildings erected by defendant upon certain school lots owned by city and county of San Francisco); *Bailey v. Johnson*, 121 Cal. 562, 54 Pac. 80 (to determine validity of tax); *Kiernan v. Swan*, 131 Cal. 410, 411, 63 Pac. 768 (to determine right to fees as constable in criminal cases); *Matter of Dodge*, 135 Cal. 512, 513, 67 Pac. 973 (to determine assessor's right to fifteen per cent of entire amount of poll-tax collected); *County of Humboldt v. Stern*, 136 Cal. 63, 64, 68 Pac. 324 (to determine right of county clerk as ex officio clerk of board of supervisors to receive extra compensation for extra work done by him in preparing data for claim of county against state); *San Francisco L. Co. v. Bibb*, 139 Cal. 325, 326, 73 Pac. 864 (to determine question whether failure of plaintiff as materialman to file lien relieves sureties on bond); *County of San Diego v. Schwartz*, 145 Cal. 49, 78 Pac. 231 (to determine right of county treasurer to recover commission on sum collected as collateral inheritance-taxes); *Matter of De Lucca*, 146 Cal. 110, 111, 112, 113, sub nom. *De Lucca v. Price*, 79 Pac. 853 (to determine question as to unexecuted search-warrant); *County of Los Angeles v. Kellogg*, 146 Cal. 590, 80 Pac. 861 (to determine right of county to commissions allowed by superior court to public administrator for services rendered after expiration of his term).

2. Same—Consideration restricted to facts.—Under this section, consideration of court is restricted to facts admitted, and its judgment can not be based upon any other facts which it may have supposed plaintiff could establish.—*Green v. County of Fresno*, 95 Cal. 329, 334, 30 Pac. 544.

3. Same—Interested parties.—This provision has reference to interested parties, authorized and capable of litigating question involved; and only such parties may by their agreement confer jurisdiction upon court "to hear and determine case and render judgment thereon as if action were depending."—*Matter of De Lucca*, 146 Cal. 110, 112, sub nom. *De Lucca v. Price*, 79 Pac. 853.

4. Same—Same—Validity of tax.—This section has reference to interested parties, authorized and capable of litigating question involved. Where validity of tax is in question, tax-collector has no right, without intervention of action, to submit to adjudication controversy regarding validity of such tax, in which rights of county are di-

rectly involved, without opportunity on its part to be heard; and objection to jurisdiction, interposed by district attorney on behalf of county, should be sustained. Taxpayer and county are only parties to "question in difference" involving validity of tax.—*Bailey v. Johnson*, 121 Cal. 562, 563, 54 Pac. 80.

5. Affidavit—Is insufficient, when.—Affidavit annexed to agreed case, under above section, is insufficient to authorize court to entertain proceeding where, instead of showing that controversy is real, its language is that "statement of case" is "real controversy"; and, instead of stating that proceedings are in good faith, it states that "contention" is in good faith.—*White v. Clarke*, 111 Cal. 425, 428, 44 Pac. 164.

6. Same—Must contain requisite facts.—No substitute.—Under above section it is necessary that there should be affidavit that controversy is real, and proceedings in good faith. Such affidavit must contain all requisite facts, and agreed statement that there is such affidavit in justices' court can not be taken as substitute for affidavit.—*Mellois v. Chaine*, 20 Cal. 679, 680.

7. Agreed statement of facts—Disregarding provision of.—Parties must agree on facts, and such agreed facts are facts on which case is to be determined. But, if agreed statement of facts contains provision in these words: "It is expressly agreed by parties hereto that facts herein admitted are to be taken by court subject to all objections of competency, relevancy, and admissibility, where nature of evidence necessary to establish facts is apparent on face of such statement, and same shall be admitted or excluded, in whole or in part, as court may determine after hearing objections thereto." It may well be doubted whether court, on such agreed statement, with this provision, should not refuse to hear the case at all, or, if hearing it, disregard its provisions.—*Cannon v. Handley*, 72 Cal. 133, 143, 144, 13 Pac. 315.

8. Moot questions—Will not be considered.—No agreement of parties can be invoked to call for decision of what, to them, or either of them, is merely moot question, and court should not render judgments which can not be enforced by any process known to law.—*Johnson v. Malloy*, 74 Cal. 430, 432, 16 Pac. 228.

9. Officer ought not to stipulate as to what facts.—An officer, either of state or of county, or city, having public funds or property under his control, ought not to enter into stipulation in respect to facts in case, affecting such funds or property, without acting under advice of counsel.—*Uhler v. Boyd*, 41 Cal. 60.

10. Question as to issuance of search-warrant—Jurisdiction.—Superior court is without jurisdiction, upon submission of controversy to it without action, to determine question as to whether search-warrant (requiring search of premises of plain-

tiff for certain property, and taking of it, if found), already issued by defendant, as justice of peace, and in hands of sheriff of county, who was to execute same, was issued without jurisdiction and authority of law.—*Matter of De Lucca*, 146 Cal. 110, 111, sub nom. *De Lucca v. Price*, 79 Pac. 853.

11. **Special jurisdiction conferred by this section is limited in terms to hearing and determination of such questions in difference as will, at time of submission, be subject of "civil action" between parties making submission, and it must appear in such proceeding by affidavit that controversy is real, and proceedings in good faith "to determine rights of parties"; in other words, there must be, at time of submission, real controversy between parties thereto, which might then be settled in civil action brought by one or more of such parties against others.**—*Matter of De Lucca*, 146 Cal. 110, 111, 79 Pac. 853.

12. **Stipulation can not affect any question of law.**—Counsel, under above section, may agree as to facts, but they can not control supreme court by stipulation as to sole, or any, question of law to be determined under them. When particular legal conclusion follows from given statement of facts, no stipulation can prevent court from so declaring.—*San Francisco L. Co. v. Bibb*, 139 Cal. 325, 326, 73 Pac. 864.

13. **What controversy can not be submitted to court without action.**—Where justice of peace has issued search-warrant, requiring search of premises of person named for certain property, which warrant is in hands of sheriff, who is threatening to execute it, and such person's only claim is that justice has, in exercise of duties of his office, exceeded his jurisdiction in issuance of such warrant, and that another officer,

not party to proceeding, acting under void warrant, is about to cause him damage, there is, manifestly, no civil action known to our law which could be maintained by him against justice. If any "question in difference" then exists which might be subject of civil action, it is question between himself and officer who is proceeding to execute warrant. There is no authority for submission of such controversy to court without action.—*Matter of De Lucca*, 146 Cal. 110, 112, sub nom. *De Lucca v. Price*, 79 Pac. 853.

14. **What is no subject of "civil action" in state court.**—Statement that plaintiff duly "claimed" land as homestead, falls far short of conferring upon him any interest in land or right to question defendant's title; and whether plaintiff would have right to enter land as homestead under United States Revised Statutes, section 2289, post, if patent under which defendant claims title is void, can not be subject of civil action in courts of this state.—*White v. Clarke*, 111 Cal. 425, 427, 44 Pac. 164.

15. **What questions will not be considered.**—It is no part of duty of supreme court to investigate and decide questions not regularly arising in due course of litigation for gratification of curiosity of counsel, or to serve some ulterior purpose of parties who choose to procure them to be raised by themselves against others who feel no interest in contest.—*People ex rel. Tyler v. Pratt*, 30 Cal. 223, 225.

16. **Who can not litigate as party.**—Tribunal, board, or officer exercising judicial functions is not authorized to litigate as party mere question as to whether it has, in doing of official act, exceeded its jurisdiction.—*Matter of De Lucca*, 146 Cal. 110, 113, sub nom. *De Lucca v. Price*, 79 Pac. 853.

§ 1139. JUDGMENT ON, AS IN OTHER CASES, BUT WITHOUT COSTS PRIOR TO NOTICE OF TRIAL. Judgment must be entered in the judgment-book as in other cases, but without costs for any proceeding prior to the trial. The case, the submission, and a copy of the judgment, constitute the judgment-roll.

History: Enacted March 11, 1872, re-enactment of § 378 Practice Act.

As to what constitutes judgment-roll, see, ante, § 670 and note.

§ 1140. JUDGMENT MAY BE ENFORCED OR APPEALED FROM AS IN AN ACTION. The judgment may be enforced in the same manner as if it had been rendered in an action, and is in the same manner subject to appeal.

History: Enacted March 11, 1872, re-enactment of § 379 Practice Act.

As to how money judgments, and others, are enforced, see, ante, § 684 and note.

As to who may appeal, see, ante, § 936 and note.

CHAPTER III.

DISCHARGE OF PERSONS IMPRISONED ON CIVIL PROCESS.

- § 1143. Persons confined may be discharged.
- § 1144. Notice of application.
- § 1145. Service of notice.
- § 1146. Examination before judge.
- § 1147. Interrogatories may be in writing.
- § 1148. Oath to be administered.
- § 1149. Order of discharge.
- § 1150. If not discharged, prisoner may again apply, when.
- § 1151. Discharge final.
- § 1152. Judgment remains in force.
- § 1153. Plaintiff may order discharge of the prisoner, who shall not thereafter be liable to imprisonment for the same cause of action.
- § 1154. Plaintiff to advance funds for support of prisoner.

§ 1143. PERSONS CONFINED MAY BE DISCHARGED. Any person confined in jail, on an execution issued on a judgment rendered in a civil action, must be discharged therefrom upon the conditions in this chapter specified.

History: Enacted March 11, 1872.

PERSONS CONFINED—CONTEMPT—DISCHARGE.

1. Construction of section.
2. Contempt in refusing to pay alimony—Discharge.
3. Same—Immediate re-examination of matter.
4. Same—Same—Ability to obey order of court is an element.
5. Prisoner is in custody as under an execution, when.

1. Construction of section.—Above and next succeeding section of this chapter provide that person confined in jail on an execution rendered in civil action, may, upon notice, apply to judge of superior court of county for his discharge; that judge must examine him under oath as to his property and effects, and his ability to pay, etc., and hear such other and pertinent evidence as may be produced by him or creditor; and that if, upon examination, judge is satisfied that prisoner should be discharged, he must, after administering prescribed oath, order his discharge. But prisoner in jail for contempt for non-compliance with general order of court for payment of alimony to his wife, is person included in above section, and can not be confined for a lifetime, especially where his inability to pay is clearly established.—In matter Wilson, 75 Cal. 580, 582, 17 Pac. 698.

2. Contempt in refusing to pay alimony—Discharge.—If husband is committed for contempt for refusing to obey an order directing him to pay alimony to his wife, he is entitled to be discharged under above and next succeeding section, upon proof of his inability to pay.—In matter Wilson, 75 Cal. 580, 582, 17 Pac. 698.

3. Same—Immediate re-examination of matter.—Where defendant, in divorce suit, has been ordered to pay alimony to his wife, and has been adjudged guilty of contempt for refusing to do so after an examination as to his ability to pay, and makes no application under above section to be discharged from custody, court can not be required to immediately examine into matter again before expiration of ten days.—Spencer v. Lawler, 79 Cal. 215, 217, 21 Pac. 742.

4. Same—Same—Ability to obey order of court is an element entering into the offense of failure to obey; "a person can not be imprisoned indefinitely for the non-performance of an impossibility."—Ex parte Overend, 122 Cal. 201, 202, 54 Pac. 740.

5. Prisoner is in custody as under an execution, when.—In case of civil contempt, that is, when defendant in civil action is ordered to pay money generally to plaintiff, and is committed until he shall have paid it, prisoner is in custody as under execution.—In matter Wilson, 75 Cal. 580, 582, 584, 17 Pac. 698.

§ 1144. NOTICE OF APPLICATION. Such person must cause a notice in writing to be given to the plaintiff, his agent, or attorney, that at a certain time and place he will apply to a judge of the superior court of the county in

which such person may be confined, for the purpose of obtaining a discharge from his imprisonment.

History: Enacted March 11, 1872; amendment approved April 16, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 114.

As to construction of section, see, ante, § 1143 and note.

That real party in interest must be named, and served with notice, and other papers, at his residence, or through post-office, see, ante, § 1011 and note.

As to how notice and papers are to be served, see, ante, §§ 1010 et seq. and notes.

§ 1145. SERVICE OF NOTICE. Such notice must be served upon the plaintiff, his agent, or attorney, one day at least before the hearing of the application.

History: Enacted March 11, 1872.

As to service on nonresidents, see, ante, § 1015 and note.

§ 1146. EXAMINATION BEFORE JUDGE. At the time and place specified in the notice, such person must be taken before such judge, who must examine him under oath concerning his estate and property and effects, and the disposal thereof, and his ability to pay the judgment for which he is committed; and such judge may also hear any other legal and pertinent evidence that may be produced by the debtor or the creditor.

History: Enacted March 11, 1872.

As to construction of section, see, ante, § 1143 and note.

§ 1147. INTERROGATORIES MAY BE IN WRITING. The plaintiff in the action may, upon such examination, propose to the prisoner any interrogatories pertinent to the inquiry, and they must, if required by him, be proposed and answered in writing, and the answer must be signed and sworn to by the prisoner.

History: Enacted March 11, 1872.

As to construction of section, see, ante, § 1143 and note.

§ 1148. OATH TO BE ADMINISTERED. If, upon the examination, the judge is satisfied that the prisoner is entitled to his discharge, he must administer to him the following oath, to wit: "I, — — —, do solemnly swear that I have not any estate, real or personal, to the amount of fifty dollars, except such as is by law exempted from being taken in execution; and that I have not any other estate now conveyed or concealed, or in any way disposed of, with design to secure the same to my use, or to hinder, delay, or defraud by creditors, so help me God."

History: Enacted March 11, 1872.

§ 1149. ORDER OF DISCHARGE. After administering the oath, the judge must issue an order that the prisoner be discharged from custody, and the officer, upon the service of such order, must discharge the prisoner forthwith, if he be imprisoned for no other cause,

History: Enacted March 11, 1872.

1. **Order of discharge—No appeal after sixty days.**—Order discharging judgment-creditor from imprisonment is special order entered after final judgment, and no appeal lies therefrom after expiration of

sixty days from entry of order.—Wells F. & Co. v. Anthony, 35 Cal. 696, 699.

As to when and from what an appeal may be taken, see, ante, § 939 and note.

§ 1150. IF NOT DISCHARGED, PRISONER MAY AGAIN APPLY, WHEN. If such judge does not discharge the prisoner, he may apply for his discharge at the end of every succeeding ten days, in the same manner as above provided, and the same proceedings must thereupon be had.

History: Enacted March 11, 1872.

§ 1151. DISCHARGE FINAL. The prisoner, after being so discharged, is forever exempted from arrest or imprisonment for the same debt, unless he be convicted of having wilfully sworn falsely upon his examination before the judge, or in taking the oath before prescribed.

History: Enacted March 11, 1872.

1. **Contempt for refusing to pay alimony and counsel fees—Right to discharge.**—Where party has been committed for contempt for disobeying order in divorce suit to pay his wife alimony, and has been discharged, but is subsequently committed by an order requiring his imprisonment until he has complied with order of superior court to pay all alimony and counsel fees accrued prior to his last discharge, as well as

monthly alimony accruing since that time, order is certainly invalid so far as it requires payment of counsel fees and alimony, whether permanent or temporary, due prior to first discharge of prisoner, and he is entitled to his discharge on habeas corpus for refusal to comply with order.—Ex parte Batchelder, 96 Cal. 233, 234, 31 Pac. 45.

§ 1152. JUDGMENT REMAINS IN FORCE. The judgment against any prisoner who is discharged remains in full force against any estate which may then or at any time afterward belong to him, and the plaintiff may take out a new execution against the goods and estate of the prisoner, in like manner as if he had never been committed.

History: Enacted March 11, 1872.

§ 1153. PLAINTIFF MAY ORDER DISCHARGE OF THE PRISONER, WHO SHALL NOT THEREAFTER BE LIABLE TO IMPRISONMENT FOR THE SAME CAUSE OF ACTION. The plaintiff in the action may at any time order the prisoner to be discharged, and he is not thereafter liable to imprisonment for the same cause of action.

History: Enacted March 11, 1872.

§ 1154. PLAINTIFF TO ADVANCE FUNDS FOR SUPPORT OF PRISONER. Whenever a person is committed to jail on an execution issued on a judgment recovered in a civil action, the creditor, his agent, or attorney must advance to the jailer, on such commitment, sufficient money for the support of the prisoner for one week, and must make the like advance for every successive week of his imprisonment; and in case of failure to do so, the jailer must forthwith discharge such prisoner from custody, and such discharge has the same effect as if made by order of the creditor.

History: Enacted March 11, 1872.

CHAPTER IV.

SUMMARY PROCEEDINGS FOR OBTAINING POSSESSION OF REAL PROPERTY IN CERTAIN CASES.

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| § 1159. Forcible entry defined. | § 1172. Showing required of plaintiff in forcible entry or detainer. Of defendant. |
| § 1160. Forcible detainer defined. | § 1173. Complaint must be amended in certain cases. |
| § 1161. Unlawful detainer defined. | § 1174. Verdict and judgment. [What shall declare.] |
| § 1162. Service of notice. | § 1175. Verification of complaint and answer. [Repealed.] |
| § 1163. Jurisdiction of superior courts. | § 1176. Effect of an appeal upon the judgment. |
| § 1164. Parties defendant. | § 1177. Rules of practice. |
| § 1165. Parties, generally. | § 1178. Appeals, how taken, etc. |
| § 1166. Complaint. When summons must be issued. | § 1179. Relief against forfeiture of lease. |
| § 1167. Summons, form and service of. | |
| § 1168. Arrest. | |
| § 1169. Judgment by default. | |
| § 1170. Defendant may appear, etc. | |
| § 1171. Trial by jury. | |

§ 1159. FORCIBLE ENTRY DEFINED. Every person is guilty of a forcible entry who either:

1. By breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstance of terror enters upon or into any real property; or,
2. Who, after entering peaceably upon real property, turns out by force, threats, or menacing conduct, the party in possession.

History: Enacted March 11, 1872.

FORCIBLE ENTRY—WHAT CONSTITUTES.

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| 1. Construction—Of code sections. | 24. Same—Personal presence unnecessary. |
| 2. Same—Of statute of 1866. | 25. Same—Personal violence. |
| 3. Essential elements — Entry without force. | 26. Same — Peaceable entry — Subsequent exclusion by force. |
| 4. Findings—Insufficiency of evidence. | 27. Same—What constitutes. |
| 5. Same—Title in defendant—When immaterial. | 28. Unlawful entry—Entry during absence of occupant and removing his furniture is not, when. |
| 6-8. Forcible entry—Acts more than trespass. | 29, 30. Same—Entry on actual possession is—Good or bad faith does not affect right of recovery. |
| 9. Same—Acts to be considered. | 31. Same—Same—Entry on mining claim—Want of good faith. |
| 10. Same—Breaking doors. | 32. Same—Peaceable entry in good faith is not. |
| 11, 12. Same—Display of force. | 33. Same—What remedy was intended for—Entry in good faith. |
| 13. Same—Destruction of property. | 34. Same—What will sustain charge of. |
| 14. Same — Disturbance of possession — Damages. | |
| 15. Same—Entry by fraudulent pretense. | |
| 16. Same—Entry by removal of lock from door—Guilty of “forcible entry.” | As to what is forcible entry, see note 18 Am. Dec. 139. |
| 17. Same—Evidence of force. | |
| 18. Same—Facts which do not show. | 1. Construction—Of code sections. —Above section and sections 160-179, post, provide for entire field of forcible entry and detainer (including holding over of tenants, etc.), and complete mode of procedure in those cases is herein prescribed. All prior statutes upon subject were thereby repealed. —Hemstreet v. Wassum, 49 Cal. 273, 274. |
| 19. Same—Force is necessary element. | |
| 20. Same—Intention of statute. | 2. Same—Of statute of 1866. —Under old statute of 1866 (Stats. 1865-6 p. 768), there were two distinct offenses defined: 1. Forcible entry; 2. Forcible detainer; and there |
| 21. Same—Is prohibited by law. | |
| 22. Same—Nice distinction as to amount of force unnecessary. | |
| 23. Same—No implied right to maintain trespass, when. | |

were, under that statute, four separate causes of action, or grounds for relief: 1. Forcible entry; 2. Forcible detainer, as defined in second section; 3. Forcible detainer, as defined in third section; 4. Fraud as an adjunct of each. These causes of action might all be united in same complaint, but it was necessary to state them separately, or complaint would be demurrable on that ground.—*Shelby v. Houston*, 38 Cal. 410, 419.

3. Essential elements—Entry without force.—Under the provisions of the above section, a person is not guilty of forcible entry where his entry upon the premises is not accompanied by any violence or circumstances of terror, and he does not turn out by force, threats, or menacing conduct the party in possession.—*Edwards v. Bodkin*, 43 Cal. App. 405, 185 Pac. 423.

4. Findings—Insufficiency of evidence.—In an action for forcible entry and detainer to recover the possession of a tract of land, a finding of the making of such entry as is defined in the above section is not sustained in those cases in which there is no evidence of violence, or offer of violence, or show of superior force attendant upon the entry of the defendant upon the land.—*Ingram v. Slayton*, 33 Cal. App. 360, 165 Pac. 1026, following the doctrine in *Castro v. Tewksbury*, 69 Cal. 562, 11 Pac. 359.

5. Same—Title in defendant—When immaterial.—In an action for forcible entry to recover possession of a tract of land where it is shown that at the time of the defendant's entry the plaintiff was in the actual peaceable possession of the land, the question of the defendant's title is not material to recovery, for one who enters where actual possession has been acquired by another, may do so only in a peaceable way or under authority of a judgment of court, excepting where he enters under some form of permission given by the occupant.—*Ingram v. Slayton*, 33 Cal. App. 360, 165 Pac. 1026, following the doctrine in *Carteri v. Roberts*, 140 Cal. 164, 73 Pac. 818.

6. Forcible entry—Acts more than trespass.—Acts which are more than trespass constitute forcible entry.—*Ely v. Yore*, 71 Cal. 130, 131, 11 Pac. 868.

See pars. 9, 11, this note.

As to nice distinction as to amount of force necessary, see par. 22, this note.

7. Thus where a man enters upon land in the peaceable possession of another, with a number of men acting under his direction and control, and takes and maintains possession with a display of force, accompanied with such acts as are calculated to intimidate the occupant and prevent his resisting the intrusion, this constitutes forcible entry under the above section.—*Knowles v. Crocker Estate Co.*, 149 Cal. 278, 86 Pac. 715.

8. Where plaintiff was in actual and peaceable possession of premises, upon which defendant, at unusual time and with large number of men, entered by tearing down fence and removing its materials to another part of land, such acts are more than trespass; they constitute forcible entry.—*Ely v. Yore*, 71 Cal. 130, 133, 11 Pac. 868.

9. Same—Acts to be considered.—To determine whether entry is forcible or not within meaning of this statute, all that transpired between coming of one of parties and going of other should be taken into account.—*Valencia v. Couch*, 32 Cal. 339, 345, 91 Am. Dec. 589.

See pars. 6-8, this note.

10. Same—Breaking doors.—Forcible entry is committed by breaking doors, etc., of building, without doing any violence to person in possession of such building.—*Brawley v. Risdon I. Works*, 38 Cal. 676, 677.

As to entry by removal of lock, see par. 16, this note.

11. Same—Display of force.—Where entry is made with such display of force, accompanied by destruction of property upon land upon which entry is made, it is forcible entry, whether owner of land was or was not present at scene of action.—*Ely v. Yore*, 71 Cal. 130, 133, 11 Pac. 868; *Knowles v. Crocker Estate Co.*, 149 Cal. 278, 86 Pac. 715.

See pars. 6-8, this note.

12. Under the code, peaceable entry upon land is permissible, but entry by force and violence is prohibited. The code expression of an entry by "violence or circumstances of terror" is equivalent of English statutory law expression of "with strong hand a multitude of people." To constitute such entry under either law, it is not necessary that it should be accompanied with tumult or riot, directed against person of party in possession. It will be sufficient if it is attended with such display of force as manifests an intention to intimidate party in possession, or deter him from defending his rights or to excite him to repel invasion of his possession, and thus bring about condition of things which law is intended to prevent and punish, namely, acts tending to excite breach of peace.—*Ely v. Yore*, 71 Cal. 130, 133, 11 Pac. 868.

13. Same—Destruction of property.—Where entry is made with such display of force, accompanied by destruction of property, upon land on which entry is made, it is forcible entry whether owner of land was or was not present at scene of action.—*Ely v. Yore*, 71 Cal. 130, 133, 11 Pac. 868.

14. Same—Disturbance of possession—Damages.—A tenant from month to month is as much entitled to damages for illegal interference with his premises as is any

other tenant.—*Alden v. Mayfield*, 163 Cal. 793, 127 Pac. 44.

As to the measure of damages when the lessee is evicted or prevented from taking possession, see note 100 Am. Dec. 428.

As to measure of damages for breach of covenant for quiet possession, see note 58 Am. Rep. 606.

As to what may amount to eviction, see note 17 Am. Rep. 62.

15. Same—Entry by fraudulent pretense.—Where, while negotiating for an exchange of properties, one of the parties, by a fraudulent pretense that she desired to make a temporary inspection of the house, took actual possession and permanent occupancy of the premises without consent of the owner, and refused to surrender possession after written demand, this constitutes unlawful entry.—*White v. Pfeffer*, 165 Cal. 740, 134 Pac. 321.

16. Same—Entry by removal of lock from door—Guilty of "forcible entry."—Under the provisions of the above section where a landlord, in the absence of a tenant removes the lock from the door by means of which access was had to the premises, to which lock the tenant had the key, and substituted another lock in place thereof, he thereafter removed from the premises the property belonging to the tenant, moved into the premises property belonging to himself and associates and thereafter continued to occupy the premises to the exclusion of the lessor, is guilty of forcible entry.—*California Products, Inc. v. Mitchell*, — Cal. App. —, 198 Pac. 646, applying the doctrine in *Winchester v. Becker*, 4 Cal. App. 382, 88 Pac. 296.

As to entry by breaking doors, see par. 10, this note.

17. Same—Evidence of force.—Where party of four or five men enter building occupied by another, in night-time, during hours of sleep, and take possession, and avow intention to keep possession, and actually do keep possession, it is sufficient evidence of force to maintain action of forcible entry and detainer.—*Scarlett v. Lamarque*, 5 Cal. 63.

18. Same—Facts which do not show forcible entry.—*Castro v. Tewksbury*, 69 Cal. 562, 565, 566, 11 Pac. 339.

19. Same—Force is necessary element.—In cases of forcible entry, force is necessary element.—*Giddings v. '76 L. & W. Co.*, 83 Cal. 96, 100, 23 Pac. 196.

As to nice distinction as to amount of force necessary, see par. 22, this note.

20. Same—Intention of statute was to meet case where entry is accomplished without force, but is restrained, and rightful owner or person entitled to possession is driven off and excluded by force and violence. Complaint in such case is not demurrable, because unlawful entry and forcible detainer are alleged in one count.

—*Kerr v. O'Keefe*, 138 Cal. 415, 422, 71 Pac. 447.

As to theory and purpose of statute, see, post, 1161, note par. 1.

21. Same—Is prohibited by law.—Law prohibits forcible entry, even by person entitled to possession, as it necessarily tends to breach of peace.—*Brown v. Perry*, 39 Cal. 23, 24.

22. Same—Nice distinction as to amount of force unnecessary.—In forcible entry and detainer, no nice distinction as to amount of force necessary to constitute an entry, if forcible one, should be made. "Circumstances of terror which leave no room to doubt that entry was not of peaceable character which law permits to be made, are sufficient."—*Gray v. Collins*, 42 Cal. 152, 158.

As to force, see pars. 6-8, this note.

As to force being a necessary element, see par. 19, this note.

23. Same—No implied right to maintain trespass, when.—If person has right to possession of real property, and to make forcible entry thereon, one in wrongful possession has no implied right to maintain trespass in such case.—*Canavan v. Gray*, 64 Cal. 5, 8, 27 Pac. 788.

24. Same—Personal presence unnecessary.—It is not necessary that person should be actually present in order to be guilty of forcible entry, nor that he should actually assist therein; he is guilty of forcible entry if entry made with force is made by another under his direction, agency, or procurement.—*Minturn v. Burr*, 20 Cal. 48, 49.

25. Same—Personal violence.—In forcible entry, there must be something of personal violence, either threatened or actual. If, when possession of premises is demanded of party, he, by word or act, look or gesture, gives reasonable ground to apprehend use of force to prevent rightful claimant from obtaining peaceable possession, this would be sufficient. It is not necessary for claimant to wait until actual violence is resorted to.—*Dickinson v. Maguire*, 9 Cal. 46, 49.

26. Same—Peaceable entry—Subsequent exclusion by force.—Although entry was peaceably made, subsequent exclusion of plaintiff by force and threats constitutes forcible entry under statute.—*Kerr v. O'Keefe*, 138 Cal. 415, 421, 71 Pac. 447.

As to entry by removing lock, substituting another, and removing personal property from building, see par. 16, this note.

27. Same—What constitutes.—Where one party has actual and peaceable possession, it is forcible entry for another party to invade that possession with multitude of people not needed for taking peaceable possession of his own, especially where there is not only show of force, but it is actually used in repeated instances while engaged

in effecting an entry and ouster.—Valencia v. Couch, 32 Cal. 339, 346, 91 Am. Dec. 589.

As to what constitutes force, see pars. 6-8, 9, 11, 12, this note.

28. Unlawful entry—Entry during absence of occupant and removing his furniture is not, when.—If person has title to house, with present right of possession, he may enter during occupant's absence, and remove latter's furniture without being guilty of unlawful entry.—Powell v. Lane, 45 Cal. 677, 678.

29. Same—Entry on actual possession is—Good or bad faith does not affect right of recovery.—Under the code, all entries on actual possession of another are unlawful, and question of good or bad faith on part of defendant no longer affects right of recovery in this form of action.—Voll v. Hollis, 60 Cal. 569, 575; Holland v. Green, 62 Cal. 67, 68; Giddings v. The '76 L. & W. Co., 83 Cal. 96, 101, 23 Pac. 196; Kerr v. O'Keefe, 138 Cal. 415, 421, 71 Pac. 447.

30. Cases of Thompson v. Smith, 28 Cal. 527, 532; Shelby v. Houston, 38 Cal. 410, 422, have no application, as to this point, under this code.—Voll v. Hollis, 60 Cal. 569, 575.

31. Same—Same—Entry on mining claim—Want of good faith.—A person who knows that mining claim is in actual possession of another can not honestly believe that it is vacant and subject to entry and relocation, and entry, under such circumstances, can not be made in good faith, unless it is made under some right, or color of right, or claim of legal right to make entry. Such claim of right must exist before entry, to constitute good faith in making entry. If it does not, entry is made with-

out right, or color of title, and is an entry in bad faith; for actual possession in another is prima facie evidence of title in possessor, and is protected by law as against lawless invasion with right, or color of right; but one who has title and present right of possession may always take peaceable possession of what he claims to be his own.—Phenix M. & M. Co. v. Lawrence, 55 Cal. 143, 145.

32. Same—Peaceable entry in good faith is not.—An entry is not unlawful which was made peaceably and in good faith.—Powell v. Lane, 45 Cal. 677, 678, approving Shelby v. Houston, 38 Cal. 410, 422; Townsend v. Little, 45 Cal. 673, 676.

33. Same—What remedy was intended for—Entry in good faith, under color of right, is not within statute of forcible entry and detainer. This remedy was not intended for adjustment of adverse claims, but as means of redress and punishment in cases of wilful wrong. It was not intended as substitute for action of ejectment, as it undoubtedly would be if statute were construed as applying in all cases where entry is wrongful. It should be regarded as applying only in those cases where entry is mala fide as well as wrongful; and its provisions can not, with propriety, be further extended.—Janson v. Brooks, 29 Cal. 214, 221.

34. Same—What will sustain charge of.—It seems that possession which is sufficient to sustain charge of forcible entry is sufficient to sustain charge of unlawful entry.—Shelby v. Houston, 38 Cal. 410, 423.

As to complaint in unlawful detainer, see, post, § 1166 and note.

§ 1160. FORCIBLE DETAINER DEFINED. Every person is guilty of a forcible detainer who either:

1. By force, or by menaces and threats of violence, unlawfully holds and keeps possession of any real property, whether the same was acquired peaceably or otherwise; or,

2. Who, in the night-time, or during the absence of the occupant of any lands, unlawfully enters upon real property, and who, after demand made for the surrender thereof, for the period of five days, refuses to surrender the same to such former occupant.

The occupant of real property, within the meaning of this subdivision, is one who, within five days preceding such unlawful entry, was in the peaceable and undisturbed possession of such lands.

History: Enacted March 11, 1872.

FORCIBLE DETAINER.

1. Construction of section—Constructive forcible detainer.
2. Same—Demand made for surrender of premises.
- 3, 4. Elements of—Entry during absence of plaintiff.
5. Same—Prior possession of plaintiff.
6. First section of statute of 1866.
7. Same—Inclosure of land—Actual personal presence need not be proved.
8. Same—Legislative power.
9. Same—No substitute for ejectment.
10. Same—Substantially same as act of 1866.

11. Same—What will not be tolerated.
12. Forceful detainer—After ejectment—Mistake in remedy.
- 13, 14. Same—Can not be maintained, when.
15. Same—Constructive—Temporary absence from premises.
16. Same—Demand and refusal must be after entry.
17. Same—Demand for surrender, when necessary.
18. Same—Entry on public lands in absence of occupant.
19. Same—Entry within one year—Variance.
20. Same—Landlord, relying on possession of tenant, can not recover.
21. Same—“Peaceable and undisturbed possession,” what it is.
- 22, 23. Same—Peaceable possession without actual presence.
24. Same—Plaintiff must show, what.
25. Same—Plaintiff need not show that defendants hold by force.
- 26, 27. Same—Though entry was without force.
28. Same—What does not amount to force.
29. Same—What is not.
30. Same—What must be proved—Force.
- 31, 32. Injuries sustained by trespasser—Action against owner.
- 33-35. Manager refusing to surrender possession.
36. Nonsuit—Should be granted, when.
37. Same—Should not be granted, when.
38. Owner with right of entry.
39. Term “force” as used in subdivision 1.
40. Title, evidence of, not admissible—Right of possession can not arise.
41. Unlawful entry—Necessity for demand of possession.
42. Same—Damages allowed, when.

See, also, ante, § 1159 and note; post, §§ 1161-1179 and notes.

1. Construction of section—Constructive forcible detainer.—Demand for surrender of possession, and refusal for period of five days, are essential to constitute constructive forcible detainer under subdivision 2 of above section.—*Brawley v. Risdon Iron Works*, 38 Cal. 676, 678.

2. Same—Demand made for surrender of premises of which defendant is not in possession is not sufficient to bring case within provisions of this section. It was not intended by this section to charge party with responsibility for forcible detainer by construction, and who, in fact, does not detain premises.—*Brawley v. Risdon Iron Works*, 38 Cal. 676, 678.

3. Elements of—Entry during absence of plaintiff.—Where the plaintiff was the

occupant and in peaceable possession of the property, defendant's entry thereon during his absence and without his consent, followed by refusing to make restoration thereof after a period of five days to a demand in writing that he do so, was as to the plaintiff unlawful, within the meaning of the term as used in above section, subdivision 2. The entry being unlawful, the act of withholding was likewise unlawful.—*Dutcher v. Sanders*, 20 Cal. App. 549, 129 Pac. 809, 810.

4. Where entry is made upon the actual possession of another without his consent, the retaining of possession for a period of five days after demand therefor is unlawful; and, in an action brought upon such provision, defendant's right to possession, unless based upon a claim that the entry was made with consent of plaintiff, is not in issue, and hence immaterial.—*Dutcher v. Sanders*, 20 Cal. App. 549, 129 Pac. 809, 811.

5. Same—Prior possession of plaintiff.—One who, though not residing on the land, has held peaceable possession thereof for several years, subject to the rights of his tenants, is to be considered the occupant thereof upon the expiration of such lease, and therefore any one who enters thereon during his absence and refuses possession upon demand is guilty of a forcible detainer according to the provisions of above section subdivision 2.—*Dutcher v. Sanders*, 20 Cal. App. 549, 129 Pac. 809, 810.

6. First section of statute of 1866 (Stats. 1865-6, p. 768), in relation to forcible entries and unlawful detainers, defined forcible entry; the second, forcible detainer; and third declared that unlawful entry, if made in night-time, or during absence of occupant of premises, followed by demand and refusal to surrender for period of five days, should be deemed to be forcible detainer; provided that party should be deemed to be actual occupant of lands within meaning of that section, if he had been in peaceable and undisturbed possession of such land within five days next preceding such unlawful entry.—*Shelby v. Houston*, 38 Cal. 410, 417.

7. Same—Inclosure of land—Actual personal presence need not be proved.—Under above section it is not material in proceeding by forcible detainer to recover possession of tract of land that land is not inclosed. It is sufficient that it was occupied and used by plaintiff in same manner that owners of land commonly occupied and used their land. Neither is it necessary for plaintiff to prove his actual personal presence on land for five days continuously preceding unlawful entry.—*Giddings v. The '76 Land & Water Co.*, 83 Cal. 96, 97, 23 Pac. 196.

That actual manual occupation is not necessary, see, post, § 1172 and note pars. 45, 46.

8. **Same—Legislative power.**—It is competent for Legislature to declare that persons shall be guilty of forcible detainer where they enter lands or tenements in night-time and refuse to surrender possession on demand.—*Mecham v. McKay*, 37 Cal. 154, 161, 162, affirming *Caulfield v. Stevens*, 28 Cal. 118, 122.

9. **Same—No substitute for ejectment.**—Action of forcible detainer was not intended as substitute for action of ejectment.—*Hodgkins v. Jordan*, 29 Cal. 577, 578.

10. **Same—Substantially same as act of 1866.**—The provision of above section is substantially same as that of section 3 of act of 1866 (*Laws 1865-6*, p. 769).—*Bank of California v. Taaffe*, 76 Cal. 626, 627, 18 Pac. 781.

11. **Same—What will not be tolerated.**—A construction of forcible entry and detainer law will not be tolerated which leads to result that, if one be peaceably, but unlawfully, in possession of another's dwelling-house, and if true owner, in absence of occupant, peaceably, and without violence or threats, regains possession of his own property, and then refuses to permit intruder to re-enter, he would be guilty of forcible entry under section 1159, subdivision 2, ante, or forcible detainer under above section, subdivision 1. The statute was not intended to apply to such case.—*Potter v. Mercer*, 53 Cal. 667, 674.

12. **Forcible detainer—After ejectment—Mistake in remedy.**—If plaintiff mistakes his remedy and brings his action of ejectment against tenant, whose right of possession has not terminated, this does not prevent him from subsequently availing himself of action of forcible detainer to recover premises, after tenant's possession has become wrongful.—*Agar v. Winslow*, 123 Cal. 587, 590, 591, 69 Am. St. Rep. 84, 56 Pac. 422.

13. **Same—Can not be maintained, when.**—A person who is prospecting mining ground, but after doing some work thereon ceases work and abandons ground, can not maintain an action for forcible detainer against one who afterwards enters thereon.—*Laird v. Waterford*, 50 Cal. 315, 316.

14. A defendant who, having right of entry, peaceably takes possession, can not, by any possibility, be guilty of wrong by defending his possession, while he is entitled to it; and if his right to possession has expired, while he is in possession, person thereupon entitled to succeed to possession can not, by his own act and without aid of proper court, put defendant out of possession; and if he attempts to do so, and force is used, or threatened by defendant, plaintiff can not call on courts to punish defendant for acts of force which he, plaintiff, provoked.—*Owen v. Doty*, 27 Cal. 502, 505.

15. **Same—Constructive—Temporary absence from premises.**—In action for an alleged constructive forcible detainer, where

plaintiff's occupancy is solely through his servants, plaintiff can not claim that he was absent temporarily from premises within meaning of this statute, and unless he was so absent, he can not recover in such action.—*Hammel v. Zobelein*, 51 Cal. 532, 533.

16. **Same—Demand and refusal must be after entry.**—Where statute makes demand and refusal evidence of forcible detainer, it follows, of necessity, that such demand and refusal must be after, and not before, entry complained of.—*Mecham v. McKay*, 37 Cal. 154, 166.

17. **Same—Demand for surrender, when necessary.**—Where person intrudes upon another's land during latter's temporary absence, he can not maintain action of forcible entry and detainer against such intruder until he first makes demand for surrender of premises under subdivision 2 of above section.—*Tivnen v. Monahan*, 76 Cal. 131, 133, 18 Pac. 144.

As to necessity for demand when there has been an unlawful entry, see par. 42, this note.

18. **Same—Entry on public lands in absence of occupant.**—It is unlawful for person to enter upon public land in actual occupancy of another, though with hope or expectation that land may become subject to homestead at some future time, and if such entry is made in absence of occupant, and party refuses to surrender possession, after proper demand, such case comes within subdivision 2 of above section.—*Randall v. Falkner*, 41 Cal. 242, 246.

19. **Same—Entry within one year—Variance.**—In an action of forcible detainer, plaintiff is entitled to prove that defendants entered at any time within one year next before commencement of action. Within that period, therefore, no variation from date alleged in complaint is material.—*Amador Gold Min. Ltd. v. Amador G. M.*, 114 Cal. 346, 347, 48 Pac. 80.

20. **Same—Landlord, relying on possession of tenant, can not recover.**—A landlord, relying on possession of his tenants, can not recover in action of forcible detainer, under subdivision 2 of above section.—*Hammel v. Zobelein*, 51 Cal. 532, 533.

21. **Same—"Peaceable and undisturbed possession," what it is.**—Plaintiff may have had "peaceable and undisturbed possession" of premises within five days before entry thereon, notwithstanding fact that he did not reside in house during any portion of that time.—*Shelby v. Houston*, 38 Cal. 410, 423, approved in *Wilson v. Shackelford*, 41 Cal. 630, 631.

22. **Same—Peaceable possession without actual presence.**—Person may be an occupant and have peaceable and undisturbed possession of premises within five days preceding unlawful entry without actual presence of himself or any person on his behalf.—*Shelby v. Houston*, 38 Cal. 410, 423.

23. **Affirmed** in *Wilson v. Shackelford*, 41 Cal. 630, 631, 639.

24. **Same—Plaintiff must show, what.**—To maintain action of forcible detainer, plaintiff must show that within five days before unlawful entry by defendant he was in peaceable and actual possession of demanded premises.—*McCormick v. Sheridan*, 77 Cal. 253, 256, 19 Pac. 419.

25. **Same—Plaintiff need not show that defendants hold by force.**—In an action of forcible detainer to recover possession of tract of land, it is not necessary for plaintiff to show that defendants hold possession of premises by force or threats of force.—*Giddings v. The '76 Land & Water Co.*, 83 Cal. 96, 100, 23 Pac. 196.

26. **Same—Though entry was without force.**—If detainer is unlawful and forcible, defendant is liable for forcible detainer, whether he originally obtained possession peaceably or otherwise. It is immaterial whether entry was peaceable or violent, provided it was unlawful, and detainer was forcible. In either event, he is liable for forcible detainer; and finding in verdict of unlawful entry by defendants, and forcible detainer by them, is in strict accordance with subdivision 1 of above section.—*Conroy v. Duane*, 45 Cal. 597, 606.

27. If rightful owner or person entitled to possession of real property is driven off or excluded by force and violence, though intruder's entry is accomplished without force, but is retained, this constitutes unlawful entry and forcible detainer.—*Kerr v. O'Keefe*, 138 Cal. 415, 422, 71 Pac. 447.

28. **Same—What does not amount to force.**—Naked avowal of intention to keep possession, and actually keeping possession, do not necessarily amount to force or threat of force.—*Fogarty v. Kelly*, 24 Cal. 317, 319.

29. **Same—What is not.**—A person who enters upon mining land which has been prospected by another, but who ceased work thereon and abandoned it for some length of time, is not guilty of forcible entry; and fact that more than five days before commencement of action plaintiff served upon defendants written demand for surrender of such ground described in complaint, but with which demand defendants failed to comply, does not make defendants guilty of forcible detainer.—*Laird v. Waterford*, 50 Cal. 315, 316.

30. **Same—What must be proved—Force.**—It is not indispensable to recovery for forcible detainer that actual force be proved, but in absence of such proof of threats, personal violence, or such conduct as clearly evinces determination to resist by force entry of plaintiff, must be shown. Mere surmise or apprehension of plaintiff that if he attempts to regain possession he will be repelled by force, is not enough; but words or acts of defendant must manifest present purpose to resort to force and to defeat attempt then being made by plaintiff. C. C. P.—158

tiff to re-enter into possession of premises.—*Hodgkins v. Jordan*, 29 Cal. 577, 578.

31. **Injuries sustained by trespasser—Action against owner.**—A person wrongfully in possession, dispossessed by the owner of the property having the right of entry, and no excessive force being used, is not entitled to maintain any other action than is afforded for a forcible entry by the code.—*Walker v. Chanslor*, 153 Cal. 127, 94 Pac. 606.

32. The right of the owner to exercise his right of entry, and use whatever force may be necessary to secure possession, in this state, is the right recognized by the common law, as modified by the code; and having the right of entry and exercising it, he would not be subject to an action in tort for damages resulting either from his entry or from any assault upon or physical injury sustained by one in wrongful possession, provided he used no more force than was necessary to dispossess him.—*Walker v. Chanslor*, 153 Cal. 127, 94 Pac. 606.

33. **Manager refusing to surrender possession.**—Where the manager of the business of a real estate corporation was placed in possession of its property under an agreement which provided for termination of the employment upon sixty days' notice by either party, and such notice was duly given, and the employment terminated, and the discharged manager resisted dispossession of the property in his possession, in an action of forcible entry and forcible and unlawful detainer, an instruction of the court to the jury which eliminated the question of forcible entry from their consideration was held proper.—*San Francisco & Suburban Home Bldg. Soc. v. Leonard*, 17 Cal. App. 261, 119 Pac. 405.

34. Where the manager of the business of a real estate corporation was placed in possession of its property under an agreement which provided for the termination of the employment upon sixty days' notice, the forcible resistance to dispossession of the discharged manager will not authorize the agents of the corporation to take forcible possession. The sixty days' notice can not be physically enforced against the employee, and if the latter should have been forcibly driven from the premises, the corporation itself would have been guilty of forcible entry.—*San Francisco & Suburban Home Bldg. Soc. v. Leonard*, 17 Cal. App. 261, 119 Pac. 405.

35. Where the defendant's possession was peaceful, and he never abandoned or surrendered the same, it is held that the termination of the employment under which he took possession did not ipso facto work a change of the actual possession of the property so as to render him liable for forcible entry under the provisions of subdivision 2, by resisting dispossession with force, and by forcibly ejecting plaintiff's agents.—*San Francisco*

& Suburban Home Bldg. Soc. v. Leonard, 17 Cal. App. 261, 119 Pac. 405.

36. Nonsuit—Should be granted, when.—A nonsuit should be granted, under this section, where plaintiff fails to prove such possession of demanded premises as entitles him to maintain his action, and where there is no proof of forcible entry or detainer.—*Laird v. Waterford*, 50 Cal. 315, 317.

37. Same—Should not be granted, when.—Evidence in action of forcible detainer which shows that plaintiff had house in which he had lived on tract of land; that he took possession of and cultivated land to grain for several years; that he had volunteer crop of grain growing on land; and that he afterwards was absent from house for several days for work for one of his neighbors; that when he came back he found that house was taken down, and defendants were plowing up volunteer grain; tends to prove such possession in plaintiff as makes him an occupant under subdivision 2 of above section, and court commits error in nonsuiting him in such action.—*Leroux v. Murdock*, 51 Cal. 541, 543.

38. Owner with a right of entry of lands unlawfully in the possession of another may during the absence of such occupant peaceably and without force or violence take possession thereof and his subsequent refusal to deliver possession to such occupant does not make him guilty of either a forcible entry or forcible detainer.—*Goldstein v. Webster*, 7 Cal. App. 705, 708, 95 Pac. 677.

39. Term "force"—As used in subdivision 1 of above section contemplates actual force or such conduct on the part of the defendant as tends to inspire a just apprehension of violence.—*Amos v. Cohn*, 7 Cal. App. 432, 434, 94 Pac. 590.

40. Title, evidence of, not admissible—Right of possession can not arise.—Under our statute evidence of title in action of forcible detainer is not admissible. The inquiry, in such case, is confined to actual peaceable possession of plaintiff, and unlawful and forcible ouster by defendant—object of law being to prevent disturbance of public peace by forcible assertion of private right. Questions of title or right of possession can not arise; and forcible entry upon actual possession of plaintiff being proven, he would be entitled to restitution, though fee simple title and present right of possession are shown to be in defendant.—*McCauley v. Weller*, 12 Cal. 500, 524; *Giddings v. The '76 Land & Water Co.*, 83 Cal. 96, 100, 23 Pac. 196.

41. Unlawful entry—Necessity for demand of possession.—In a case in which a person's entry upon premises is an unlawful entry made during the absence of occupant, an action of forcible detainer can not be maintained against him, under the provisions of subdivision 2 of the above section unless the former occupant has made demand upon such intruder for the surrender of the premises, and he has for the period of five days refused to surrender the same.—*Edwards v. Bodkin*, 43 Cal. App. 405, 185 Pac. 423.

As to when demand for surrender necessary, see par. 17, this note.

42. Same—Damages allowed, when.—In an action in forcible entry or forcible detainer where the plaintiff recovers possession of the premises he is entitled to damages; but no damages are to be awarded where no such recovery is had.—*Edwards v. Bodkin*, 43 Cal. App. 405, 185 Pac. 423, following doctrine in *Brawley v. Risdon Iron Works*, 38 Cal. 676.

§ 1161. UNLAWFUL DETAINER DEFINED. A tenant of real property, for a term less than life, is guilty of unlawful detainer:

1. [Continuing in possession of property after term.] When he continues in possession, in person or by subtenant, of the property, or any part thereof, after the expiration of the term for which it is let to him, without the permission of his landlord, or the successor in estate of his landlord, if any there be; but in case of a tenancy at will it must first be terminated by notice, as prescribed in the Civil Code.

2. [Continuing in possession without permission after default—Three days' notice.] When he continues in possession, in person or by subtenant, without the permission of his landlord, or the successor in estate of his landlord, if any there be, after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and three days' notice, in writing, requiring its payment stating the amount which is due, or possession of the property, shall have been served upon him and if there is a subtenant in actual occupation of the premises, also upon such subtenant.

Such notice may be served at any time within one year after the rent becomes due. In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than sixty days after the expiration of the term without any demand of possession or notice to quit by the landlord, or the successor in estate of his landlord, if any there be, he shall be deemed to be holding by permission of the landlord, or the successor in estate of his landlord, if any there be, and shall be entitled to hold under the terms of the lease for another full year, and shall not be guilty of an unlawful detainer during said year, and such holding over for the period aforesaid shall be taken and construed as a consent on the part of a tenant to hold for another year.

3. **[Continuing in possession after failure to perform condition—Proceedings to obtain possession.]** When he continues in possession, in person or by subtenant, after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than the one for the payment of rent, and three days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him, and if there is a subtenant in actual occupation of the premises, also, upon such subtenant. Within three days after the service of the notice, the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform the conditions or covenants of the lease or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture; provided, if the conditions and covenants of the lease, violated by the lessee, can not afterward be performed, then no notice, at last prescribed herein, need be given to said lessee or his subtenant, demanding the performance of the violated conditions or covenant of the lease.

A tenant may take proceedings, similar to those prescribed in this chapter, to obtain possession of the premises let to a subtenant, in case of his unlawful detention of the premises underlet to him.

4. **[Assigning, subletting, or committing waste.]** Any tenant or subtenant assigning or subletting or committing waste upon the demised premises, contrary to the conditions or covenants of his lease, thereby terminates the lease, and the landlord, or his successor in estate, shall upon service of three days' notice to quit upon the person or persons in possession, be entitled to restitution of 'possession of such demised premises under the provisions of this chapter.

History: Enacted March 11, 1872; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 346; March 13, 1876, Code Amdts. 1875-6, p. 101; April 1, 1878, Code Amdts. 1877-8, p. 104; on the same day another amendment on the same subject given the same sectional number was passed Code Amdts. 1877-8, p. 106; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 100-1, p. 186, held unconstitutional, see history, § 5 ante; the two sections numbered 1161 were repealed by Act February 28, 1905, and the enactment of present section substituted therefor, Stats. and Amdts. 1905, p. 29.

UNLAWFUL DETAINER.

- 1, 2. As to theory and purpose of statute.
- 3, 4. Action to quiet title—Tenants holding over—Right to possession.
5. Appeal—No stay pending an.
6. Breach of collateral covenant—Action lies.
7. Breach of covenants of lease—Demand of possession—Alternative notice not necessary when.
8. Same—Other than failure to pay rent—Demand not necessary when.
9. Chattel mortgage to secure faithful performance—Foreclosure of not barred by judgment in unlawful-detainer action.
10. Construction of section—As to generally.
- 11, 12. Same—Action lies only when tenant continues in possession.
13. Same—Creates a mere presumption of law.
14. Same—Performance of conditions or covenants.
15. Same—Plaintiff must come within terms of statute.
- 16, 17. Same—Power of court to give judgment for rent—Does not transform action to one on contract.
18. Same—Proviso that notice need not be given.
19. Same—Reasons for preliminary demand.
20. Same—Subdivision 1.
- 21, 22. Same—Subdivision 2.
23. Same—Tenant's death during term of lease.
24. Same—With section 1582, post—Actions "against" executors, etc.
25. Same—Same—Actions "by" executors, etc.
26. Ejectment—As to generally.
27. Same—Against hold-over tenants.
28. Failure to pay rent—Termination of lease for—Lease for fixed period—Right to growing crops.
29. Forfeiture of lease—Demand for rent.
30. Same—Necessity for demand for rent, etc.
- 31, 32. Same—Re-entry.
33. Furnished hotel—Personalty.
34. Holding over—Rights of landlord—Action for use and occupation.
35. Same—Pleading—Essential allegations.
36. Lease in not forfeited—By act of landlord in assigning it.
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- 38, 39. No re-entry without three days' notice.
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- 42, 43. Same—Is not insufficient, when.
44. Same—Possession to be demanded—Basis for action.
45. Notice of election to renew lease—In general.
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47. Notice to perform—Demand alone is sufficient, when.
- 48, 49. Same—Not required, when.
50. Notice to quit—As to sufficiency of.
51. Same—Same—Where it describes premises.
52. Same—Same—Where it is properly signed.
53. Same—Performance of covenant—Need not be demanded, when.
54. Same—Service upon one of two lessees—Sufficiency of.
55. Same—Termination of tenancy—Thirty days' notice—Demand for possession.
56. Same—Same—Same—Prerequisites to action.
57. Same—Same—Same—Tenant at will.
58. Same—Three days' notice to quit.
59. Same—Waiver of right to serve.
- 60, 61. Same—When not required.
62. Parties defendant—Subtenant not in actual occupancy—Judgment against tenant.
63. Prerequisites to action.
64. Receipt of rent—As waiver of breach of covenant in lease.
- 65, 66. Recovery of possession—Right of action.
67. Remedy as landlord—Contract of sale.
68. Rent—Who liable for.
69. Same—Necessity for demand of.
70. Rent due and accruing rent—Right to recover.
- 71-76. Same—Separate counts for rent, etc.
- 77-79. Security for rent—Effect of taking.
80. Tenancy for years—Notice to quit—Does not of itself terminate the lease.
81. Same—Construction as to forfeiture.
82. Tenant is guilty of unlawful detainer, when.
83. Tender of rent each month, which the landlord refuses to accept.
84. Termination of tenancy—Suit for use and occupation.
85. Unlawful detainer can be maintained, when—Against tenant after assignment of his interest.
86. Same—Against tenant who sublets.
87. Same—By "successor in estate" of landlord.
88. Same—Breach of covenant or condition of lease.
89. Same—Land let upon shares.

90. Same—Tenant holding over after fixed term.
91. Same — Tenant holding under void agreement.
92. Same — Where person remained in house moved onto premises.
93. Same—Construction of old constitution.
94. Same—Counter-claim—Has no place in proceeding.
95. Same—Landlord's right to possession of premises after expiration of tenant's lease.
96. Same—Liability of tenant.
- 97, 98. Same—Relation of landlord and tenant can not be predicated on, what.
99. Same—What will not defeat action.
100. Unlawful detainer can not be maintained, when—After forfeiture, unless demand is made.
101. Same—Against tenant who has vacated premises.
102. Same—By "successor in estate" of landlord.
103. Same—Unlawful entry upon possession of tenant.
104. Same—Unlawful entry upon premises of landlord, whose right to possession has passed.
105. Same—Where proper notice was not given.
106. Same—Where relation of landlord and tenant does not exist.
107. Same—Where tenancy was terminated before demand.
108. Waiver of forfeiture — Continuing covenant—Estoppel.
109. Same—Clause in lease — Covenant or condition — Immateriality of question.
110. Waste—Forfeiture for commission of —Demand of performance not necessary.

See, ante, note to §§ 1159, 1160 and notes; post, §§ 1162-1179 and notes.

As to complaint in unlawful detainer, see, post, § 1166 and note.

As to right to a civil action for forcible entry and detainer, see note 121 Am. St. Rep. 172.

As to what is unlawful detainer, see note 120 Am. St. Rep. 32.

1. As to theory and purpose of statute.—The theory and purpose of the forcible entry and forcible and unlawful detainer statute is to secure a judicial adjustment of differences as to the right of possession of property, and thus prevent the parties themselves from redressing or attempting to redress their own wrongs in a way that

would be likely to lead to serious wrongs against the public or society.—*San Francisco & Suburban Home Bldg. Soc. v. Leonard*, 17 Cal. App. 262, 119 Pac. 405.

As to intention of statute, see, ante, § 1159, note par. 20.

As to purpose of the action, see, post, § 1166, note par. 54.

2. The summary remedy here provided is the only remedy for a forcible entry provided by the code; and a right of action is here given to one in actual possession, where a forcible entry is made, as here defined, even by the owner, and damages and restitution of property may be recovered.—*Walker v. Chanslor*, 153 Cal. 127, 94 Pac. 606.

3. Action to quiet title—Tenants holding over—Right to possession.—Under the provisions of the above section in an action in which a landlord seeks to quiet his title and recover possession of the demised premises where the cross-complaint shows that the defendants held over and remained in possession of the land after the expiration of their first year's possession thereof under the lease alleged to exist, for a sufficient length of time to comply with the provisions of subdivision 2 of the above section, without any demand of possession or notice to quit by the lessor, such possession after the end of the term raises presumption that the lessees are holding the possession by permission of the lessor and are so entitled to hold such possession under the lease for an additional full term (dictum).—*Durst v. Jolly*, 35 Cal. App. 184, 169 Pac. 449.

As to holding over, see pars. 34, 35, this note.

4. When the answer of the lessee contains nothing showing precisely when the defendant went into possession of the land under the agreement whereby the lessor is alleged to have agreed to execute a five years' lease of the land to the lessee, and there is no allegation showing when the first year of possession under such agreement expired the pleading is insufficient to set up an issue of right to possession for another term under the claimed lease, within the provisions of the above section.—*Durst v. Jolly*, 35 Cal. App. 184, 169 Pac. 449.

5. Appeal—No stay pending an.—There can be no stay of proceedings upon an appeal from a judgment of restitution in an action of unlawful detainer, unless the trial judge so directs, and in such case mandamus does not lie to compel him to order a stay, in the absence of an abuse of discretion on his part in refusing to make such order.—*Kaiser v. Hancock*, 25 Cal. App. 323, 143 Pac. 614.

As to appeals generally, see, post, § 1178 and note.

6. Breach of collateral covenant—Action *in rem*.—Although a covenant to give secu-

rity for the payment of rent is collateral to the lease it accompanies, yet an action in unlawful detainer will lie for a breach thereof just the same as for the breach of a covenant running with the land.—*Knight v. Black*, 19 Cal. App. 518, 126 Pac. 512.

As to agreement to give security for rent being a condition and not a covenant, see I Kerr's Cumulative Current Code Annotations, Civil Code, § 1922, No. II.

7. Breach of covenants of lease—Demand of possession—Alternative notice not necessary when.—In those cases in which the conditions and covenants in a lease violated by the lessee are such that they can not be performed within three days after the giving of a written notice and demand of possession, the lessor is not required to serve therewith the alternative three days' notice to perform the covenants of said lease or to deliver possession, provided for in subdivision 3 of the above section.—*Matthews v. Digges*, 45 Cal. App. 561, 188 Pac. 283, following the doctrine in *Schnittger v. Rose*, 139 Cal. 656, 73 Pac. 449; *Zucco v. Farulo*, 37 Cal. App. 562, 174 Pac. 929.

As to demand and notice to quit, see pars. 41-44, 48-61, this note.

8. Same—Other than failure to pay rent.—Demand not necessary when.—In an action by a lessor against the lessee in which it is alleged that the lessee breached a covenant to plant a ranch to beets, by planting a part of it to corn, and also committed waste in that he unlawfully diverted from the leased premises water developed thereon and used or sold it for use on other lands the violated conditions of the covenant being such that they can not be performed within the three days' notice required by subdivision 3 of the above section no notice demanding the performance of the violated conditions or covenants of the lease need be given under the provisions of subdivision 4 of the above section; that is, the notice in such case need not be in the alternative, but it will be sufficient simply to give the three days' notice demanding the possession of the property, such demand for possession being a statutory prerequisite to a forfeiture of the lease.—*Horton-Howard v. Payton*, 44 Cal. App. 108, 186 Pac. 167, following the doctrine in *Schnittger v. Rose*, 139 Cal. 662, 73 Cal. 451.

As to demand, see pars. 48-61, this note.

9. Chattel mortgage to secure faithful performance—Foreclosure of not barred by judgment in unlawful-detainer action.—The right of a lessor upon default of the lessee in the payment of rent to maintain an action for the foreclosure of a chattel mortgage given to secure the faithful performance of the covenants and conditions of the lease is not barred by the recovery by the lessor of a previous judgment for

such unpaid rent in an unlawful detainer proceeding, when the mortgage expressly gives the mortgagee the right to take possession of the mortgaged property upon default.—*Ashcroft Estate Co. v. Nelson*, 26 Cal. App. 400, 147 Pac. 101.

As to security for rent, see pars. 77-79, this note.

10. Construction of section.—As to generally.—In order to maintain the action of unlawful detainer, it is essential that the conventional relationship of landlord and tenant be shown, or, in other words, the action is limited to those cases in which the tenant is estopped to deny the landlord's title.—*Francis v. West Virginia Oil Co.*, 174 Cal. 168, 162 Pac. 394.

11. Same—Action lies only when tenant continues in possession.—Action, under above section, can be maintained only when tenant continues in possession, "in person or by subtenant." Hence, it can not be maintained against executor of last will and testament of decedent, who, in his lifetime, was tenant, for he is not person mentioned in statute, or subtenant. Proceeding is statutory, and can be resorted to only in cases, and by and against parties, mentioned in statute.—*Martel v. Meehan*, 63 Cal. 47, 50.

12. Distinguished in *Knowles v. Murphy*, 107 Cal. 107, 112, 40 Pac. 111.

13. Same—Creates a mere presumption of law.—Above section creates presumption of law merely, and it is always permissible for either of parties to lease to show circumstances tending to rebut legal implications arising thereunder from continuous occupation of premises after expiration of original term.—*Ambrose v. Hyde*, 145 Cal. 555, 557, 79 Pac. 64.

14. Same—Performance of conditions or covenants.—Above section provides that where conditions or covenants of lease can be performed, lessee may, within three days after service of notice, perform them and so save forfeiture of his lease. By performing, tenant may defeat landlord's claim for possession. Where, however, covenants can not be performed, law recognizes that it would be an idle and useless ceremony to make demand for performance and so dispenses with such demand. And this is all that it does dispense with. It does not dispense with demand for possession of premises. It requires that in any event.—*Schnittger v. Rose*, 139 Cal. 656, 662, 73 Pac. 449.

15. Same—Plaintiff must come within terms of statute.—One who seeks summary remedy allowed by this section must clearly bring himself within its terms.—*Opera House & A. Assoc. v. Bert*, 52 Cal. 471, 472.

16. Same—Power of court to give judgment for rent—Does not transform action to one on contract.—The fact that the

statute provides that the court shall give judgment for the rent found due does not transform an action in unlawful detainer into an action on contract.—*Arnold v. Krigbaum*, 169 Cal. 131, 146 Pac. 423.

17. An action of unlawful detainer is not one for the recovery of a debt, but is an action which has for its primary purpose the recovery of the possession of real property, and the part of the judgment awarding damages for unpaid rent is merely incidental thereto.—*Ashcroft Estate Co. v. Nelson*, 26 Cal. App. 400, 147 Pac. 101.

18. Same—*Proviso* that notice need not be given.—*Proviso* of above section that notice need not be given, where covenants and conditions of lease are impossible of performance, does not apply where the lease has been terminated and no longer exists.—*Martin v. Splivalo*, 56 Cal. 128, 130.

19. Same—*Reason for preliminary demand*.—As landlord has right to elect whether he will consider tenancy ended or not, upon breach of covenant, it would border upon extreme hardship to construe above section so as to subject tenant to an action of unlawful detainer, with its severe consequences, without requiring preliminary demand, and giving him opportunity to comply with it and surrender premises. The right to damages, and to have those damages trebled, would accrue to landlord immediately upon filing his suit, notwithstanding tenant might immediately after bringing of action be willing to allow plaintiff to have possession, or would have surrendered it without suit if demanded of him.—*Schnittger v. Rose*, 139 Cal. 656, 663, 73 Pac. 449.

As to demand of possession, see pars. 48-61, this note.

20. Same—*Subdivision 1*.—A vendee in the possession of land under a contract of sale does not, upon making default in a payment on the purchase-price, become a tenant at will subject to removal from the land by the summary method of a suit in unlawful detainer.—*Francis v. West Virginia Oil Co.*, 174 Cal. 168, 162 Pac. 394.

21. Same—*Subdivision 2*.—Holding over, in view of the circumstances outlined by subdivision 2 of above section, establishes a presumption *prima facie* of the renewal of the lease for another year upon the terms formerly existing, but such presumption may be rebutted by evidence offered by either party to the lease.—*Cowell v. Snyder*, 171 Cal. 291, 152 Pac. 920.

22. Where the relation of landlord and tenant is denied by the latter, the three-day notice provided by above section, is not required to be given.—*Levy v. Henderson*, 31 Cal. App. 789, 161 Pac. 1004.

23. *Tenant's death during term of lease*.—Landlord, when he rents his property, must be presumed to anticipate possible contingency of tenant's death during term

of lease, and to know, in that event, that he will not be entitled to resort to extraordinary remedy provided for by above section; and there is no good reason why language of code should be strained so as to uphold judgment against an estate in nature of penalty for three times amount which would be due for rent if tenant had lived.—*Martel v. Meehan*, 63 Cal. 47, 50.

24. Same—*With section 1582, post—Actions "against" executors, etc.*—Reasons why provisions of section 1582, post, do not apply to action brought under provisions of above section "against" an executor of one who, in his lifetime, had been tenant of plaintiff, do not exist in case of action "by" executors.—*Knowles v. Murphy*, 107 Cal. 107, 109, 112, 40 Pac. 111.

25. Same—*Same—Actions "by" executors, etc.*—It is expressly provided in section 1582, post, that executors and administrators may bring action for recovery of any property in all cases in which same might have been brought by their testator, and while they are engaged in administration of estate such executors are to be regarded as "successors of estate of landlord," for purpose of giving notice authorized by above section, and enforcing against tenant, who is guilty of unlawful detainer, remedy provided by law.—*Knowles v. Murphy*, 107 Cal. 107, 112, 40 Pac. 111.

26. *Ejectment—As to generally*.—Whenever landlord is entitled to bring action of forcible entry and detainer against tenant at sufferance, after having given requisite notice to quit, he may, instead of proceeding under that form of action, maintain action of ejectment.—*McCarthy v. Yale*, 39 Cal. 585, 587.

27. Same—*Against hold-over tenants*.—After tenancy at will has been terminated, by giving of notice required for that purpose, position and rights of parties are changed; tenants are in position of holding over after end of their lease, and right of re-entry upon premises accrues to lessor. This right is enforceable by lessor by one of two remedies. He may maintain ejectment against hold-over tenants, without further notice of them, or he may commence action of unlawful detainer against them, after he had made demand for possession, by giving them three days' notice as provided in above section. Without such notice and demand, summary proceeding of action of unlawful detainer is not maintainable.—*Martin v. Splivalo*, 56 Cal. 128, 129.

As to holding over, see pars. 34, 35, this note.

28. *Failure to pay rent—Termination of lease for—Lease for fixed period—Right to growing crops*.—In a case in which there is a lease for a fixed term of years, with the rent payable at stated times, which is terminated by the act of the lessee alone, by his failure to pay the rent when due,

the lessee has no such estate in the land as would entitle him or his subtenant to claim the growing crops or emblements after such termination of the lease.—*Agoure v. Plummer*, 175 Cal. 543, 166 Pac. 311.

29. Forfeiture of lease—Demand for rent.—To work forfeiture of lease for nonpayment of rent, landlord must make demand for precise sum due on premises, or wherever rent is payable.—*Gage v. Bates*, 40 Cal. 384, 385.

As to demand for rent, see pars. 41-44, this note.

As to demand for possession, see pars. 48-61, this note.

30. Same—Necessity for demand for rent, etc.—As a general rule, a demand for unpaid rent is a condition precedent to any action to enforce a forfeiture of the lease for such nonpayment, whether it be an action of ejectment brought by the lessor, or the summary proceeding in unlawful detainer provided for by statute. But, as exceptions to such rule, the common-law necessity for a previous demand of the rent may be obviated by a statute providing otherwise, or by provision in the lease dispensing with a demand, or by acts of the tenant amounting to a waiver thereof.—*Mossi v. Fairbanks*, 19 Cal. App. 355, 125 Pac. 1071.

As to equitable relief from forfeiture for nonpayment of rent, see note Ann. Cas. 1913A, 828.

As to tender of rent by tenant before declaration of forfeiture by landlord, as a valid tender, see note Ann. Cas. 1912D, 1009.

31. Same—Re-entry.—The general rule is that a demand for rent must be made before a forfeiture of a lease can be decreed, and this rule is not abrogated by Civil Code section 793, authorizing an action for the possession of real property at any time after the right of re-entry has accrued; nor is the rule changed by Civil Code section 791, providing that whenever the right of re-entry is given to a grantor, such re-entry may be made at any time after the right has accrued upon three days' notice, as provided in above section and section 1162, post. In other words, the right of re-entry for nonpayment of rent does not accrue until a demand has been made for its payment regardless of the section of the code under which the action is brought.—*Mossi v. Fairbanks*, 19 Cal. App. 355, 125 Pac. 1071.

32. Since a substantial performance of the conditions of a lease is all that the law requires, equity will not declare a forfeiture for breach of condition which the tenant has offered substantially to perform, and in good faith to protect the rent due or to become due under the lease.—

Knight v. Black, 19 Cal. App. 518, 126 Pac. 512.

33. Furnished hotel—Personalty.—The action of unlawful detainer will lie notwithstanding the leased premises consist of a furnished hotel and cover both real and personal property.—*Wilson v. Sadleir*, 26 Cal. App. 357, 146 Pac. 1061.

34. Holding over—Rights of landlord—Action for use and occupation may be maintained by a landlord, in view of the provisions of the above section and of section 3334 Civil Code, where a tenant holds over, and he is not confined to an action for mesne profits, notwithstanding that after the holding over of a tenant the landlord never changed the contract of tenancy by sufferance into a tenancy at will upon like terms as the original tenancy.—*Richmond Wharf & Dock Co. v. Blake*, 181 Cal. 454, 185 Pac. 184.

See, also, par. 27, this note.

As to action to quiet title against tenants holding over, see par. 3, this note.

As to tenant holding over after fixed term, see par. 90, this note.

35. Same—Pleading—Essential allegations.—A land owner who brings a suit for the use and occupation of his property need only allege his ownership of the land, occupation by defendant, the reasonable value of the use of the property for the period of occupation and that such sum is unpaid.—*Richmond Wharf & Dock Co. v. Blake*, 181 Cal. 454, 185 Pac. 184.

As to complaint, requirements of and sufficiency, see, post, § 1166 and note.

36. Lease is not forfeited—By act of landlord in assigning it, and act of assignee in making demand for rent where fact of assignment is not made known to tenant.—*O'Connor v. Kelly*, 41 Cal. 432, 434.

37. Lease of oil lands—Lessors tenants in common—Provision for forfeiture—Notice to terminate tenancy, requisites of.—In the case of a lease of oil lands in which the lessors are tenants in common, and the lease provides that a failure on the part of the lessees to perform any of the conditions embodied in the lease for a period of thirty days shall render the lease null and void if the lessor shall so elect, upon breach of the conditions in the lease, a forfeiture of the leasehold interest for such breach of conditions can be declared only by the joint or concurrent action of all the lessors, under the provisions of the above section.—*Jameson v. Chanslor-Canfield Midway Oil Co.*, 176, Cal. 1, 167 Pac. 369.

38. No re-entry without three days' notice.—Whenever right of re-entry is given to grantor or lessor in any grant or lease, or otherwise, such re-entry may be made at any time after right has accrued, upon three days' notice, as provided in above and

next succeeding section (Civ. Code § 791).—See *Smith v. Hill*, 63 Cal. 51, 62.

As to effect of notice upon right of landlord to re-enter, or proceed according to law, to recover possession, see *Kerr's Cyc.* Civ. Code, 2d ed., § 790 and note.

As to how and when re-entry is to be made, see *Kerr's Cyc.* Civ. Code, 2d ed., § 791 and note.

As to necessity of three days' notice where right of re-entry has been reserved, see, post, § 1162 and note par. 6.

As to notice to quit and demand for payment of rent, see pars. 41-44, 50-59, this note.

39. Where right of re-entry has accrued under lease no action for unlawful detainer can be had until three days' notice has been given as provided in this and next succeeding section.—*Smith v. Hill*, 63 Cal. 51, 52.

40. **Notice declaring lease forfeited—When insufficient.**—Under subdivision 3 of above section, notice declaring lease forfeited because of non-performance of covenant, other than nonpayment of rent, and demanding possession of demised premises forthwith, is insufficient.—*Opera House & A. Assoc. v. Bert*, 52 Cal. 471, 472.

41. **Notice demanding rent—Is necessary.**—Where lessee fails to pay rent, it is essential prerequisite, to maintain unlawful detainer under this section, that three days' notice demanding payment of rent due or possession of leased premises should be served upon defendants as subdivision 2 of above section requires. It is equally essential to allege the service of such demand in the complaint, and if controverted, prove it on trial.—*Lacrabere v. Wise*, 141 Cal. 544, 556, 75 Pac. 185.

As to necessity for demand of rent, see par. 69, this note.

As to notice to quit, see pars. 50-61, this note.

42. **Same—Is not insufficient, when.**—Notice demanding rent is not insufficient by reason of calling for rent of preceding month without denoting what such preceding month was, where fuller specification of acts would not have given defendant any clearer conception of meaning and purpose of such notice.—*Newman v. Bird*, 60 Cal. 372, 374, 375.

43. A notice to quit is not insufficient for failure to show whether the representative who signed it for the owner as "her attorney" was the attorney in fact or at law.—*Arnold v. Krigbaum*, 169 Cal. 131, 146 Pac. 423.

44. **Same—Possession to be demanded—Basis for action.**—Where tenant holds over, and rent remains unpaid for space of three days after it becomes due, landlord's demands for payment of rent and delivery

of possession, if both are made at same time, are sufficient on which to base an action for unlawfully holding over.—*Brummagim v. Spencer*, 29 Cal. 661, 664.

As to notice to quit, see pars. 50-61, this section.

45. **Notice of election to renew lease—In general.**—In case of lease with privilege of renewal it is incumbent upon lessee desiring to exercise his option to give notice of his election before expiration of original term.—*Shamp v. White*, 106 Cal. 220, 222, 39 Pac. 537.

46. **Same—Inadmissible evidence of notice of intention to renew lease in action for unlawful detainer.**—*Shamp v. White*, 106 Cal. 220, 223, 39 Pac. 537.

47. **Notice to perform—Demand alone is sufficient, when.**—If covenants in lease can be performed, notice required by this section is in alternative, either to perform them or deliver possession. When covenants are beyond performance, and alternative notice would be useless, demand for possession alone is necessary. If, upon demand, tenant surrenders possession, necessity for any summary proceeding is at an end, and by demand is accomplished what law otherwise would accord him under such proceeding.—*Schnittger v. Rose*, 139 Cal. 656, 662, 73 Pac. 449.

48. **Same—Not required, when.**—Under subdivision 3 of above section, landlord's right of action against tenant accrues upon latter's continuing in possession of demised premises in person, or by subtenant, after neglect or failure to perform any condition or covenant of lease, and no notice to him to perform is required, if it appears that covenant or condition can not afterwards be performed by him.—*Kelly v. Teague*, 63 Cal. 68, 69.

49. Where premises have been leased with covenant not to sublet, and lessee violates such covenant by subletting, it is difficult to imagine any purpose that could be subserved by landlord's serving notice on lessee to perform covenant not to sublet when he had already sublet. If notice were served it would be impossible for tenant not to do that which he had already done. The notice mentioned in this statute has no application to conditions or covenants that can not be performed after notice.—*Harloe v. Lambie*, 132 Cal. 133, 135, 64 Pac. 88.

50. **Notice to quit—As to sufficiency of.**—In action for unlawful detainer of leased premises, where it is found that defendants entered, under lease, into possession, and continued during term, paying rent reserved, until term ended, when they refused to surrender possession, and held over against lessor's consent, there was no tenancy at will and notice given to defendants under this and next succeeding section to quit and surrender possession was suffi-

cient.—*Perine v. Teague*, 66 Cal. 446, 447, 6 Pac. 84.

As to notice to quit and demand of possession being basis for action, see par. 44, this note.

As to notice to quit where tenancy for years, see par. 80, this note.

As to notice to quit, sufficiency and effect of.—See, post, § 1162 and note pars. 2-5.

51. Same—Same—Where it describes premises.—Notice to quit is sufficient if it describes premises demanded with such certainty that tenant is not misled thereby, although there may be inexactness in some particulars respecting description of premises.—*King v. Connolly*, 44 Cal. 236, 238.

52. Same—Same—Where it is properly signed.—In action of unlawful detainer, notice to tenant to quit, which purports to come from landlord, and is signed by authority, by latter's attorney, is valid, though it was signed without any written authorization.—*Felton v. Millard*, 81 Cal. 540, 541, 21 Pac. 533, 22 Pac. 750.

53. Same—Performance of covenant—Need not be demanded, when.—In the case of the breach of a covenant in a lease other than covenants for the payment of rent, a notice to quit because of non-performance of covenants of lease need not demand a performance of a covenant to take care of trees, cultivate the ground, or furnish the landlord vegetables, because such covenants could not be performed afterward.—*Zucco v. Farullo*, 37 Cal. App. 562, 174 Pac. 927, following the doctrine in *Schnittger v. Rose*, 139 Cal. 656, 73 Pac. 449.

54. Same—Service upon one of two lessees—Sufficiency of.—In a case in which lessees had bound themselves together as copartners to the lease, standing thus in opposition to the lessor, that occupied, as between themselves, and as to the lessor, a relation kindred to that of copartners, if, in fact, that may not actually have been regarded by the lessor as copartners of the service upon one of such lessees of a notice to quit, the notice being addressed to both lessees, is a sufficient notice to terminate the tenancy and to justify the commencement of an action in unlawful detainer.—*Gentry v. Citron*, 36 Cal. App. 288, 171 Pac. 1079.

55. Same—Termination of tenancy—Thirty days' notice—Demand for possession.—To maintain action of unlawful detainer, against tenant at will for holding over, it is incumbent upon landlord to terminate tenancy by first giving thirty days' notice, and, at expiration of that time, make demand for possession.—*King v. Connolly*, 51 Cal. 181, 183.

As to demand of possession, see pars. 48-61, this note.

56. Same—Same—Same—Prerequisite to action.—When it is provided in lease that, in case of sale of demised premises, thirty days' notice instead of three days' notice

to quit shall be given, lease is terminated by sale of property and tenant is entitled to thirty days' notice to quit before action in unlawful detainer will lie. No further notice is required.—*Buhman v. Nickels & Brown Bros.*, 1 Cal. App. 266, 82 Pac. 85, 86.

As to prerequisites of action, see par. 56, this note.

57. Same—Same—Same—Tenant at will.—One who enters upon land by permission of owner, under void parol contract or under void lease, or pending unexecuted negotiations for written lease, is tenant at will, and, being lawfully in possession, his tenancy can be terminated only by thirty days' notice.—*Carterl v. Roberts*, 140 Cal. 164, 167, 73 Pac. 818.

As to tenancy at will and notice to quit, see, post, § 1162 and note pars. 7-16.

58. Same—Three days' notice to quit provided for in subdivision 2 of above section is not required to be given in case where tenant to real property continues in possession without consent of his landlord, after expiration of fixed term for which it has been let to him.—*Earl Orchard Co. v. Fava*, 138 Cal. 76, 79, 70 Pac. 1073.

59. Same—Waiver of right to serve.—The unconditional acceptance by a landlord of money as rent, which rent had accrued after the time the tenant should have surrendered possession, would constitute strong evidence that the landlord waived his notice to quit.—*Alden v. Mayfield*, 163 Cal. 793, 127 Pac. 44.

60. Same—When not required.—Where an action of unlawful detainer is based upon subdivision 1 of above section, and tenancy alleged in complaint is tenancy at sufferance and not at will, no notice to quit is required.—*Lee Chuck v. Quan Wo Chong & Co.*, 91 Cal. 593, 597, 28 Pac. 45.

61. After death has terminated tenancy at sufferance, or at will, tenant's possession thereafter as against heirs, who are vested with right of entry, is wrongful. The tenant is not, therefore, in possession as tenant from year to year and is not entitled to notice to quit under above section.—*Joy v. McKay*, 70 Cal. 445, 446, 11 Pac. 763.

62. Parties defendant—Subtenant not in actual occupancy—Judgment against tenant.—In a case of unlawful detainer, after notice of forfeiture of lease for default in payment of rent, a judgment against the tenant for the rent due and for restitution of the premises is binding on a subtenant, who is not in the actual occupancy of the premises whether at the time of the service of the three days' notice of demand for payment of the rent or for possession of the premises, or at the time of the commencement of the action, and who was not made a party defendant therein, under the provisions of subdivision 4 of the above section and of section 1164, post.—*Agoure v. Plummer*, 175 Cal. 543, 166 Pac. 311.

As to parties defendant generally, see post, § 1164 and note.

63. Prerequisites to action.—It is not essential to the maintenance of an action of unlawful detainer to recover the possession of premises described in the lease as a certain building "on the southwesterly line of California and Larkin streets" in San Francisco, to first bring an independent action to reform the description by substituting the word "corner" for the word "line," as judicial notice will be taken of the fact that there is no southwesterly line of such streets.—*Olcovich v. Deremberg*, 27 Cal. App. 194, 149 Pac. 375.

As to prerequisites of action, see par. 56, this note.

64. Receipt of rent—As waiver of breach of covenant in lease.—Receipt of rent accruing after breach of covenant in lease, with full notice thereof, is waiver of breach, and lessor having once waived such breach has no right of entry thereafter for forfeiture.—*McGlynn v. Moore*, 25 Cal. 384, 396.

65. Recovery of possession—Right of action.—The right to maintain an action by "the successor in estate of his landlord" is expressly conferred by above section. Also section 829 of the Civil Code provides: "A person to whom any real property is transferred or devised, upon which rent has been reserved, or to whom any such rent is transferred, is entitled to the same remedies for the recovery of rent, for nonperformance of any of the terms of the lease, or for any waste or cause of forfeiture, as his grantor or deviser might have had." Hence attornment of the tenant is not necessary to enable plaintiffs, as vendees of the leased lands, to maintain the action.—*Plummer v. Agoure*, 20 Cal. App. 319, 128 Pac. 1014, 1015.

66. Where, by an ex parte order made by the court, the assignee of a lease was substituted as defendant in an action thereon, such order was clearly erroneous, and hence it was not error for the court to vacate the same, since such assignee is not a necessary party to the action.—*Plummer v. Agoure*, 20 Cal. App. 319, 128 Pac. 1014, 1015.

67. Remedy as landlord—Contract of sale.—Where written contract of sale is executed contemporaneously with lease, refusal upon vendee's part to perform may put an end to contract of sale at option of lessor, and leave him at liberty to pursue his remedy as landlord.—*Norton v. Sturla*, 83 Cal. 559, 561, 23 Pac. 527.

68. Rent—Who liable for.—One unlawfully withholding the possession of land and in default for the rent thereof can not escape his obligation by assigning the liability to another.—*Plummer v. Agoure*, 20 Cal. App. 319, 128 Pac. 1014, 1015.

69. Same—Necessity for demand of.—The general rule is that a demand for the rent must be made before forfeiture will be decreed.—*Mossi v. Fairbanks*, 19 Cal. App. 355, 125 Pac. 1071, 1072.

As to necessity for demand of rent, see pars. 41-44, this note.

70. Rent due and accruing rent—Right to recover.—In an action for unlawful detainer the plaintiff is entitled to recover not only the rent due and demanded at the time of giving notice, but all rent accruing and unpaid up to the time of the trial.—*Holland v. Eastern Outfitting Co.*, 16 Cal. App. 443, 117 Pac. 562.

As to complaint in action to recover rent, see, post, § 1166 and note.

71. Same—Separate counts for rent, etc.—The fact that the pleader in unlawful detainer sets forth the nonpayment of rent accruing after service of the notice in separate counts does not constitute such matters separate causes of action.—*Holland v. Eastern Outfitting Co.*, 16 Cal. App. 443, 117 Pac. 562.

72. Damages, in an action to recover the rents, issues, and profits of a tract of land, may be established either by showing rents and profits actually received or by proving the annual rental value of the land.—*Nathan v. Dierssen*, 164 Cal. 607, 130 Pac. 12, 14.

73. Interest upon the rents, issues, and profits of the premises during the period of the withholding may be allowed when necessary to a complete indemnity.—*Nathan v. Dierssen*, 164 Cal. 607, 130 Pac. 12, 14.

74. If the action is one in which, under the issues framed, a judgment for restitution and rents and profits might properly have been rendered, the fact that the plaintiff came into possession of the premises after the commencement of the action did not deprive him of his right to a judgment for mesne profits.—*Nathan v. Dierssen*, 164 Cal. 607, 130 Pac. 12, 14.

75. A plaintiff, unlawfully dispossessed of land, may unite in one and the same action a claim to recover specific real property or one for damages for withholding thereof, or for waste committed thereon, and the rents and profits of the same.—*Nathan v. Dierssen*, 164 Cal. 607, 130 Pac. 12, 14.

76. It was without doubt the established rule at common law that an action against a wrongful disseizor, for mesne profits, could not be maintained except by a plaintiff who had regained actual possession of the premises, or, at least, had recovered a judgment in ejectment.—*Nathan v. Dierssen*, 164 Cal. 607, 130 Pac. 12, 13.

77. Security for rent—Effect of taking.—Unlawful detainer is primarily a possessory action, which can not be defeated or delayed by the fact that the landlord has taken security for his rent, without destroying the manifest design of the legislature to provide a summary remedy for the recovery of the possession of the premises withheld by a tenant in violation of the covenants of a lease or other agreement.—*Toplitz v. Standard Co.*, 25 Cal. App. 575, 143 Pac. 52.

As to right to foreclose chattel mortgage given to secure faithful performance, notwithstanding judgment for rent in forcible detainer proceedings, see par. 9, this note.

78. Incidentally a judgment for the plaintiff in an action of unlawful detainer may award such actual damages as may have been occasioned by a withholding over after a breach of the covenants of the lease; and in addition may, if the circumstances of the case justify it, award to the plaintiff by way of punitive damages a sum equal to treble the amount of the rent then due; but in no sense is an action of unlawful detainer one for the recovery of a debt or the enforcement of a right secured by a mortgage given for security of the rent reserved in the lease under which the premises are held, and therefore the existence of such mortgage can not be pleaded as a bar to the action, under the provisions of section 726, ante.—*Toplitz v. Standard Co.*, 25 Cal. App. 575, 143 Pac. 52.

79. In an action of unlawful detainer, where the trial court found, in substantial accord with the admitted allegations of the complaint, in favor of the plaintiffs in so far as concerned the execution of the lease and the breach of the covenant to pay the rent reserved, but further found that a mortgage given as security for the rent had not been resorted to and exhausted prior to the institution of the action, and from the latter finding deduced the conclusion of law that by reason of the provisions of section 726, ante, the action is barred, the existence of the mortgage being no defense, the finding in relation thereto is immaterial, and the judgment should have been for plaintiffs, and will be so ordered on appeal.—*Toplitz v. Standard Co.*, 25 Cal. App. 575, 143 Pac. 52.

80. **Tenancy for years—Notice to quit—Does not of itself terminate the lease.**—Under the provisions of subdivisions 2 and 3 of the above section the object of the service of a three days' notice to quit the premises, in the event of default of payment of the rent reserved, the object of such notice is to terminate the lease; but under the provisions of the section the lessee, or any one for him, may pay the rent reserved, in which case the lease is not terminated by the notice to quit, and remains in force for the remainder of the original term, or until it is ended in some manner by some subsequent act or agreement.—*Downing v. Cutting Packing Co.*, 183 Cal. 91, 190 Pac. 455.

As to notice to quit, see pars. 50-61, this note.

81. **Same—Construction as to forfeiture.**—The established rule is that, where the right of a forfeiture is created by contract or by law it is always necessary to restrain it to the most technical limits of the terms and conditions upon which the right is to be exercised; and under this rule of interpretation on a notice to quit, under a lease for a term of years, for failure to pay the rent reserved when due, a forfeiture of the leaseholder does not occur until the expiration of the third day.—*Downing v. Cutting Packing Co.*, 183 Cal. 91, 190 Pac. 455, applying the doctrine in *Randol v. Scott*, 110

Cal. 596, 42 Pac. 976; *Jameson v. Chanslor-Canfield Midway Oil Co.*, 176 Cal. 1, 11, 167 Pac. 369.

82. **Tenant is guilty of unlawful detainer when he fails to pay rent when it becomes due, and refuses and neglects for space of three days after demand therefor to pay such rent and to quit possession.**—*Roussel v. Kelly*, 41 Cal. 360, 362.

83. **Tender of rent each month, which the landlord refuses to accept, and which rent is not deposited in bank to his credit is not a payment of the rent and upon a subsequent demand therefor the tenant must pay the same within the time limited by above section or be guilty of an unlawful detainer of the property.**—*Occidental Real Estate Co. v. Gantner*, 7 Cal. App. 727, 731, 95 Pac. 1042.

84. **Termination of tenancy—Suit for use and occupation.**—Under the provisions of the above section, and of section 3334 of the Civil Code a landowner may sue for the use and occupation of his property, and is not confined to an action for mesne profits notwithstanding the fact that after the holding over of a tenant, he never by contract changed the tenancy by sufferance into a tenancy at will upon like terms with the original tenancy.—*Richmond Wharf & Dock Co. v. Blake*, 181 Cal. 454, 185 Pac. 184.

85. **Unlawful detainer can be maintained, when—Against tenant after assignment of his interest.**—Forcible entry and unlawful detainer may be maintained against a tenant by landlord where tenant assigns his interest in lease to his landlord, but holds over, although his lease has not expired.—*Kower v. Gluck*, 33 Cal. 401, 406.

86. **Same—Against tenant who sublets.**—If tenant, in violation of his lease, sublets demised premises, landlord may maintain unlawful detainer against him, under subdivision 4 of above section, upon giving required three days' notice.—*Bernero v. Allen*, 68 Cal. 505, 506, 9 Pac. 429.

As to parties defendant, see, post, § 1164 and note.

87. **Same—By "successor in estate" of landlord.**—Where real property was leased to tenant from month to month, and owner made lease in present to plaintiff, in action of unlawful detainer, for five years, and no attornment was made to plaintiff, and latter never entered into possession, but gave notice to defendant raising his rent, and, no rent being paid, he gave three days' notice, and commenced his action to have defendant removed from possession, and for increased rent, such third person is "a successor in estate" of landlord, within meaning of subdivision 1, of above section, and has right to maintain his action.—*McDonald v. Hanlon*, 79 Cal. 442, 443, 21 Pac. 861.

As to parties plaintiff generally, see, post, § 1165 and note.

As to when unlawful detainer can not be maintained by "successor in estate" of landlord, see par. 102, this note.

88. Same—For breach of covenant or condition of lease.—Provisions of subdivision 1 of above section were taken literally from statutes of New York, in which state summary proceedings can not be instituted on ground of expiration of term by forfeiture. In some other states it is provided that landlords are entitled to benefit of summary proceedings "where lease is terminated by forfeiture, for breach of its provisions"; but in this state, summary process will lie upon breach of any covenant or condition of lease, and a demand for possession, but three days' notice required by subdivisions 2 and 3 of above section must be given.—*Silva v. Campbell*, 84 Cal. 420, 423, 424, 24 Pac. 316.

89. Same—Land let upon shares.—Where land has been let upon shares, its owner may maintain an action of unlawful detainer to recover possession upon breach of conditions of lease.—*Jones v. Durrer*, 96 Cal. 95, 97, 99, 30 Pac. 1027.

90. Same—Tenant holding over after fixed term.—Where lessee was not tenant at will, but for fixed term, which expired at given date, and notice was served only to effect that plaintiff would not renew lease, and that lessee must give up possession of property, owner had right to re-enter when term expired, and to maintain action for possession without any previous notice or demand.—*McKissick v. Ashby*, 98 Cal. 422, 425, 33 Pac. 729.

As to tenant holding over, see pars. 84, 35, this note.

91. Same—Tenant holding under void agreement.—If person enters upon premises and holds them, under void agreement, he is tenant at will, against whom action of unlawful detainer may be maintained after proper notice given.—*Hall v. Wallace*, 88 Cal. 434, 436, 26 Pac. 360.

92. Same—Where person remained in house moved onto premises.—Where lessee of lot entered into possession and put another person in possession of part thereof, by somewhat novel method of moving house (in which such third person was and who refused to leave), onto leased lot, and such third person voluntarily remained thereon, he became subtenant of lessor, subject to be removed under proceedings in unlawful detainer in default of payment of rent by lessee.—*Pardee v. Gray*, 66 Cal. 524, 525, 6 Pac. 389.

93. Same—Construction of old constitution.—The general terms, "action of forcible entry and detainer," as employed in old constitution of this state, included action for unlawful holding over by tenants.—*Brumagin v. Spencer*, 29 Cal. 661, 662.

94. Same—Counter-claim—Has no place in proceeding for unlawful detainer.—*Kelly v. Teague*, 63 Cal. 68, 69.

As to counter-claim and cross-complaint not being allowable, see, post, § 1700 and note.

95. Same—Landlord's right to possession of premises after expiration of tenant's lease.—It would be monstrous doctrine to affirm that landlord does not get possession of premises upon expiration of his tenant's lease, if some third party can slip in between moving out of tenant and moving in of landlord.—*Porter v. Murray*, 2 Cal. Unrep. 687, 12 Pac. 425, 427.

96. Same—Liability of tenant.—If tenant holds over contrary to his agreement, he is liable to be proceeded against under forcible entry and unlawful detainer act.—*Kower v. Gluck*, 33 Cal. 401, 406.

97. Same—Relation of landlord and tenant can not be predicated on, what.—In an action of unlawful detainer relation of landlord and tenant can not be predicated on production of lease signed without evidence of delivery. It is essential that there be finding on issue of delivery.—*Davidson v. Ellmaker*, 84 Cal. 21, 22, 23, 23 Pac. 1026.

98. Title is not involved in action of unlawful detainer and lessee can not avoid obligation assumed under his lease by showing that lessor did not have title to demised premises.—*Knowles v. Murphy*, 107 Cal. 107, 114, 40 Pac. 111.

As to when title may be given in evidence in action of forcible entry and unlawful detainer, see notes 77 Am. Dec. 552-557.

That questions of title or right of possession can not be tried, see, post, § 1172 and note pars. 28, 30.

99. Same—What will not defeat action.—An action for unlawful detainer brought by landlord against his tenant, because of holding over after demand of rent due under lease, and failure to pay such rent for space of three days, is not defeated by mere fact that defendant had been in quiet and peaceable possession for one year before commencement of such suit, where rent was demanded within one year before it so became due.—*Johnson v. Chely*, 43 Cal. 299, 304.

Action for unlawful detainer after three days' notice.—See, post, § 1162 and note par. 9.

100. Unlawful detainer can not be maintained, when—After forfeiture, unless demand is made.—An action for unlawful detainer can not be sustained against tenant of real property who continues in possession after forfeiture of lease for breach of covenants therein, unless demand for possession has been made.—*Schnittger v. Rose*, 139 Cal. 656, 662, 73 Pac. 449.

As to demand for possession, see pars. 48-61, this note.

101. Same—Against tenant who has vacated premises.—Landlord can not maintain action of forcible entry and detainer against tenant who has vacated premises and surrendered keys.—*Walls v. Preston*, 28 Cal. 224, 226.

102. Same—By "successor in estate" of landlord.—Plaintiff who is vendee of origi-

real or conventional landlord and as to lease merely his assignee, can not avail himself of remedy provided by forcible entry and detainer act. This remedy is conferred upon landlord alone, and is not given, in terms at least, to his successor in estate.—*Reay v. Cotter*, 29 Cal. 168, 170.

As to when unlawful detainer can be maintained by "successor in estate" of landlord, see par. 87, this note.

103. Same—Unlawful entry upon possession of tenant.—Landlord can not sue in his own name in forcible entry and unlawful detainer for an unlawful entry upon possession of his tenant.—*Treat v. Stuart*, 5 Cal. 113, 114.

104. Same—Unlawful entry upon premises of landlord, whose right to possession has passed.—Though an entry upon landlord's premises has been unlawful, he can not maintain unlawful detainer if right to possession of such premises has passed from him before demand for surrender is made.—*Polack v. Shafer*, 46 Cal. 270, 278.

105. Same—Where proper notice was not given.—An action of forcible detainer, brought under third subdivision of above section, can not be maintained where notice contemplated by statute was not given. Such notice must, in alternative, require lessee to perform within three days condition of covenant in question, or surrender possession of property.—*Opera House & A. Assoc. v. Bert*, 52 Cal. 471, 472.

106. Same—Where relation of landlord and tenant does not exist.—Landlord's summary remedy of forcible entry and detainer does not apply to case where conventional relation of landlord and tenant does not exist, because, where landlord as plaintiff can not rest upon lease and is compelled, in addition thereto, to make proof of his title to reversion, he must seek redress elsewhere. For him this remedy was not intended.—*Reay v. Cotter*, 29 Cal. 168, 170.

107. Same—Where tenancy was terminated before demand.—An action for unlaw-

fully holding over can not be maintained unless relation of landlord and tenant is shown to exist between plaintiff and defendant at time of preliminary demand for possession by plaintiff. If tenancy is terminated before such demand, an action by lessor can not be maintained in this form.—*Steinback v. Krone*, 36 Cal. 303, 309.

108. Waiver of forfeiture—Continuing covenant—Estoppel.—The general rule applicable between lessors and lessees is that where a particular act or omission entitles a landlord to declare a forfeiture, the receipt of rent accruing subsequent to the act waives the forfeiture in those cases where the lessor had knowledge of the facts at the time of receipt of the rent; but there is a distinction to be drawn between a covenant or condition which is of a continuing nature and one which is not of that nature. In those cases in which the general course of dealing between the parties had led one of them to believe that a strict compliance with the terms of a condition binding on him would not be required, the other party may be estopped from claiming the forfeiture.—*Myers v. Herskowitz*, 33 Cal. App. 581, 165 Pac. 1031.

109. Same—Clause in lease—Covenant or condition—Immateriality of question.—In an action in unlawful detainer to recover the possession of a portion of a store-room for violation of a clause in the sublease and of prohibiting the placing of goods in the aisle-space reserved for the common use of tenants, it is immaterial whether such clause constituted a covenant or condition as the provisions of the above section apply equally to conditions or covenants.—*Myers v. Herskowitz*, 33 Cal. App. 581, 165 Pac. 1031.

110. Waste—Forfeiture for commission of—Demand of performance not necessary.—In a case in which a tenant has committed waste, a notice to quit need not demand performance of the covenants against the commission of waste, in view of the provisions of subdivision 4 of the above section.—*Zucco v. Farullo*, 37 Cal. App. 562, 174 Pac. 929.

§ 1162. SERVICE OF NOTICE. The notices required by the preceding section may be served, either:

1. By delivering a copy to the tenant personally; or,
2. [By leaving copy with person of suitable age, etc., when.] If he be absent from his place of residence, and from his usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his place of residence; or,
3. [By affixing copy in conspicuous place on property, when.] If such place of residence and business can not be ascertained, or a person of suitable age or discretion there can not be found, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if

such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a subtenant may be made in the same manner.

History: Enacted March 11, 1872; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 347.

NOTICE TO QUIT—DEMAND FOR POSSESSION.

1. Breach of covenants of lease—Forfeiture—Necessity for notice to quit.
 - 2-5. Notice to quit—As to sufficiency and effect of.
 6. Right of re-entry reserved—Necessity of three days' notice.
 7. Tenant, who is not—Action without notice.
 8. Termination of tenancy—Notice to quit and demand for possession.
 9. Unlawful detainer—Action for, after three days' notice.
 10. Same—Breach of covenant of lease—Necessity for demand of possession.
 11. Same—Same—Same—Form of notice.
 12. Same—Same—Same—Insufficiency of demand for possession.
 13. Who is not a tenant at will—Action without thirty days' notice.
 14. Same—Ejectment without three days' notice.
 15. Same—What notice and demand are sufficient.
 16. Same—Who is not entitled to notice.
- See, also, ante, §§ 1159-1161 and notes; post, §§ 1163-1179 and notes.

1. Breach of covenants of lease—Forfeiture—Necessity for notice to quit.—The right of a lessor to recover possession of the demised premises in an action for unlawful detainer based upon the theory that the tenant has forfeited his leasehold, a prerequisite to such action is the service upon the lessor of a demand for possession, or a notice to quit, as contemplated by the provisions of the above section. Forfeitures are not favored by the courts; even intentment and presumption is against the person seeking to enforce a forfeiture; statutes creating forfeitures must be strictly construed, and one who seeks the summary remedy of unlawful detainer must bring himself clearly within the terms of the statute.—*Horton-Howard v. Payton*, 44 Cal. App. 108, 186 Pac. 167, following the doctrine in *Opera House Assoc. v. Bert*, 52 Cal. 571; *Savings & L. Soc. v. McKoon*, 120 Cal. 179, 52 Pac. 305; *Lacrabere v. West*, 141 Cal. 554, 75 Pac. 185.

2. Notice to quit—As to sufficiency and effect of.—A notice to quit served upon original lessee is sufficient, and binds under-tenants, especially those who acquired possession after such notice was served on original lessee.—*Schilling v. Holmes*, 23 Cal. 227, 231.

3. No particular form of notice is required. It may be deficient in spelling or in grammatical construction, but if it states the thing required by the section in plain language so that a person of ordinary understanding would know what is intended, it is sufficient.—*Berryman v. Gibson*, 7 Cal. App. 679, 682, 95 Pac. 671.

4. It is not necessary that the notice or demand specify the three days. Demand in writing must be made, the amount of rent due must be stated, and the payment thereof required. Then after such demand if the tenant without permission of his landlord remains in possession without paying his rent after three days, he has had three days' notice in writing. The statute fixes the period of three days and it must be read in connection with the notice and when the period of three days has expired the tenant has had notice for three days, which is in substance three days' notice in writing.—*Berryman v. Gibson*, 7 Cal. App. 679, 681, 95 Pac. 671.

5. Three-day notice provided for in above section is not necessary where tenant is holding over without the consent of the landlord after the termination of his time.—*Bettens v. Hoover*, 12 Cal. App. 313, 315, 107 Pac. 329.

6. Right of re-entry reserved—Necessity of three days' notice.—To maintain an action of unlawful detainer, when right of re-entry is reserved in lease, it is necessary that three days' notice be given as provided in above and next preceding section.—*Smith v. Hill*, 63 Cal. 51, 52.

7. Tenant, who is not—Action without notice.—A person who has control and management of a farm, and who is simply laborer or hired man, subject to be discharged at any time, is not a tenant, and action to recover possession of land may be commenced against him without notice prescribed in this section.—*Todhunter v. Armstrong*, 6 Cal. Unrep. 27, 53 Pac. 446, 448.

8. Termination of tenancy—Notice to quit and demand for possession.—To maintain action of unlawful detainer against a tenant at will, landlord must first terminate tenancy, by giving thirty days' notice in writing to quit, and then giving three days' notice in writing to surrender possession. Without demand for possession summary proceedings of action of unlawful detainer is not maintainable; and these things must be made to appear by express averments in complaint.—*Martin v. Splivalo*, 56 Cal. 128, 129, 130.

9. Unlawful detainer—Action for, after three days' notice.—After expiration of

three days from notice given in conformity with next preceding section, plaintiff may maintain action for unlawful detainer under provisions of this code.—*Diggs v. Porteus*, 5 Cal. Unrep. 753, 33 Pac. 447, 448.

10. Same—Breach of covenant of lease—Necessity for demand of possession.—Before an action of unlawful detainer to recover the possession of land upon forfeiture of a lease for a term of years by reason of breach of a covenant to plant all the land to a designated crop, and because of waste, it is necessary that a demand or notice requiring possession to be surrendered to the lessor shall be given and served as required by the provisions of the above section.—*Horton-Howard v. Payton*, 44 Cal. App. 108, 186 Pac. 167.

11. Same—Same—Same—Form of notice.—No particular form or words are prescribed for a notice of demand for possession, and no special form is indispensable; any written demand is sufficient if from it the person to whom it is given, as a person of common understanding, must know and understand from it that the landlord is absolutely and unconditionally demanding possession of the demised premises.—*Horton-Howard v. Payton*, 44 Cal. App. 108, 186 Pac. 167, approving the doctrine in *Gardner v. Ingram*, 61 L. T. (N. S.) 729.

12. Same—Same—Same—Insufficiency of demand for possession.—A letter written by the attorney of the lessor to the lessee simply saying: "You have repeatedly violated the terms of this lease and the lessor demands possession. You have sold water, which you had no right to do, and have made no accounting for same. You will please now make a full statement of details of water sold from the premises, and remit to the lessor. Again, the ranch you know very well was to be all put into

beets which you have not done. Please let me hear from you at once,"—does not constitute a sufficient demand for possession or notice to quit effective to work a forfeiture of the lease.—*Horton-Howard v. Payton*, 44 Cal. App. 108, 186 Pac. 167.

13. Who is not a tenant at will—Action without thirty days' notice.—Where agricultural lands are leased to defendant for fixed period, and, on expiration of lease, defendant refuses to give up possession, he is not tenant at will, and, upon expiration of his term, it is his duty to move without notice, and landlord may bring action to eject him without giving him thirty days' notice required under above section.—*Kuhn v. Smith*, 125 Cal. 615, 617, 73 Am. St. Rep. 79, 58 Pac. 204. See *Perine v. Teague*, 66 Cal. 446, 447, 6 Pac. 84.

14. Same—Ejectment without three days' notice.—It is not law of this state that tenant who remains in possession, per chance single day, after expiration of his lease, thereby becomes tenant at will, and must be served with three days' notice before he may be ejected.—*Kuhn v. Smith*, 125 Cal. 615, 617, 73 Am. St. Rep. 79, 58 Pac. 204.

15. Same—What notice and demand are sufficient.—Where tenant enters under lease into possession, and continues in possession during term, paying rent reserved by lease until term ends, when he refuses to surrender possession and holds over against consent of lessor, there is no tenancy at will, and notice given to him under above and preceding sections to quit and surrender possession is sufficient.—*Perine v. Teague*, 66 Cal. 446, 447, 6 Pac. 84.

16. Same—Who not entitled to notice.—Though one has entered into possession, if he has made no agreement to pay rent, he is not in possession as a tenant from year to year, and is not entitled, under above section, to notice to quit.—*Joy v. McKay*, 70 Cal. 445, 446, 11 Pac. 763.

§ 1163. JURISDICTION OF SUPERIOR COURTS. The superior court of the county in which the property, or some part of it, is situated, shall have jurisdiction of proceedings under this chapter; provided, that justices' courts, within their respective townships or cities, or cities and counties, shall have concurrent jurisdiction with the superior courts in cases of forcible entry and detainer, when the rental value does not exceed twenty-five dollars per month and when the whole amount of damages claimed does not exceed two hundred dollars.

History: Enacted March 11, 1872; amendment approved March 9, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 8, repeal by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 187, held unconstitutional, see history, § 5 ante.

JURISDICTION.

1, 2. Justices' courts—Concurrent jurisdiction with superior courts.

3. Same—Exclusive jurisdiction—How determined.

4. Same—Have no jurisdiction, when.

See, also, ante, §§ 1159-1162 and notes; post, §§ 1164-1179 and notes.

1. Justices' courts—Concurrent jurisdiction with superior courts.—Justices' courts

have concurrent jurisdiction with superior courts in actions for forcible entry and detainer, where rental value of property entered upon or unlawfully detained does not exceed twenty-five dollars per month, and whole amount of damages claimed does not exceed two hundred dollars.—*Ivory v. Brown*, 137 Cal. 603, 604, 70 Pac. 657.

2. Where leasing appears to have been from month to month, and thirty days' notice has been given to tenant to vacate premises, followed by three days' notice to quit, but defendant neither pays rent nor heeds notice, plaintiff is entitled to maintain action of unlawful detainer; and where amount is within jurisdiction of justices' court, it has concurrent jurisdiction with superior court of such action.—*Ivory v. Brown*, 137 Cal. 603, 604, 605, 70 Pac. 657.

3. **Same—Exclusive jurisdiction—How determined.**—Jurisdiction of superior courts

or exclusive jurisdiction of justices' courts is determined by amount sued for, exclusive of interest; and this principle must also apply to concurrent jurisdiction of justices' courts in cases of forcible entry and detainer, where rental value does not exceed twenty-five dollars per month, and where whole amount of damage claimed does not exceed two hundred dollars.—*Hoban v. Ryan*, 130 Cal. 98, 98, 62 Pac. 296.

4. **Same—Have no jurisdiction, when.**—A justices' court does not have jurisdiction of action for unlawful detainer, and for recovery of possession and value of use and occupation, where rental value is ten dollars a month, and aggregate amount sued for is one hundred and twenty dollars, and complaint prays that such sum be trebled as damages for unlawful detention of premises, besides cost of suit.—*Hoban v. Ryan*, 130 Cal. 96, 99, 62 Pac. 296.

§ 1164. PARTIES DEFENDANT. No person other than the tenant of the premises and subtenant, if there be one, in the actual occupation of the premises when the complaint is filed, need be made parties defendant in the proceeding, nor shall any proceeding abate, nor the plaintiff be nonsuited for the non-joinder of any person who might have been made party defendant, but when it appears that any of the parties served with process, or appearing in the proceeding, are guilty of the offense charged, judgment must be rendered against him. In case a defendant has become a subtenant of the premises in controversy, after the service of the notice provided for by part two of section eleven hundred and sixty-one of this code, upon the tenant of the premises, the fact that such notice was not served on each subtenant shall constitute no defense to the action. In case a married woman be a tenant, or a subtenant, her coverture shall constitute no defense; but in case her husband be not joined, or unless she be doing business as a sole trader, an execution issued upon a personal judgment against her can only be enforced against property on the premises at the commencement of the action. All persons who enter the premises under the tenant, after the commencement of the suit, shall be bound by the judgment, the same as if he or they had been made party to the action.

History: Enacted March 11, 1872; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 348; March 14, 1885, Stats. and Amdts. 1884-5, p. 129; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 187, held unconstitutional, see history, § 5 ante.

PARTIES DEFENDANT.

1. Assignee of lease as defendant.
2. Sheriff as defendant.
3. Wife properly joined, when.

As to parties generally, see, post, § 1165 and note.

1. **Assignee of lease as defendant.**—An assignee, who has assigned his lease to another assignee and delivered possession of demised property to his assignee, prior to service of notice to quit, is not liable in

forcible entry and detainer.—*Ben Lomond Water Co. v. Sladky*, 141 Cal. 619, 623, 75 Pac. 332.

2. **Sheriff as defendant.**—An action of forcible entry and detainer can not be maintained against sheriff for serving writ of restitution.—*Janson v. Brooks*, 29 Cal. 214, 216.

3. **Wife properly joined with husband** when they entered on premises together.—*Porter v. Murray*, 2 Cal. Unrep. 687, 12 Pac. 425.

§ 1165. PARTIES GENERALLY. Except as provided in the preceding section the provisions of part two of this code, relating to parties to civil actions, are applicable to this proceeding.

History: Enacted March 11, 1872.

PARTIES PLAINTIFF.

1. Agent may be party plaintiff.
2. Tenant at will may be party plaintiff.
3. Who can not be party plaintiff—Constructive possession.
4. Same—Landlord, for unlawful entry upon possession of tenant.
5. Same—Landlord, where tenant has entered under lease.
6. Same—One tenant in common against another.
7. Same—Party put out under process.
8. Same—Person not in actual possession.
9. Same—Railroad corporation—Ejectment—Right of private individual to maintain.
10. Same—Same—Same—Necessary parties.
11. Same—Same—Right of way—Abandonment.

As to parties defendant, see, ante, § 1161 and note pars. 86, 90, 91, 101, and § 1164, ante, and note.

As to parties to civil actions in general, see, ante, §§ 367-390 and notes.

As to right of tenant in common to bring action of forcible entry and detainer, see note 50 Am. St. Rep. 843-848.

1. Agent may be party plaintiff.—An agent may maintain action of forcible entry and detainer.—*Minturn v. Burr*, 16 Cal. 107, 108, 110.

2. Tenant at will may be party plaintiff.—Where plaintiff's proof shows that, at time of forcible entry and detainer complained of, plaintiff was in actual and peaceable possession of premises in controversy, not merely as servant of another, but as tenant at will, such possession enables him to maintain action of forcible entry and detainer in his own name.—*Jones v. Shay*, 50 Cal. 508, 509.

3. Who can not be party plaintiff—Constructive possession.—Forcible entry and detainer can not be sustained by one who shows merely constructive possession or right of possession.—*Barlow v. Burns*, 40 Cal. 351, 354.

4. Same—Landlord, for unlawful entry upon possession of tenant.—Landlord can not sue in forcible entry and detainer for unlawful entry upon possession of his tenant.—*Treat v. Stuart*, 5 Cal. 113, 114; *Mitchell v. Davis*, 20 Cal. 45, 47.

5. Same—Landlord, where tenant entered under lease.—After tenant has entered into possession under lease, forcible entry or unlawful detainer can not therefore be maintained by landlord for such entry.—*Polack v. Shafer*, 46 Cal. 270, 277.

6. Same—One tenant in common against another.—Action of forcible entry and unlawful detainer can not be maintained by one tenant in common against another tenant in common at will where the latter holds over.—*Lick v. O'Donnell*, 3 Cal. 59, 63.

7. Same—Party put out under process.—Forcible entry and detainer does not lie by party put out under process running against him or any one with whom he was in privity.—*Janson v. Brooks*, 29 Cal. 214, 216.

8. Same—Person not in actual possession.—An action of forcible entry and detainer can not be prosecuted by person not in actual possession, whatever may be his right of possession.—*Mitchell v. Davis*, 20 Cal. 45, 47.

9. Same—Railroad corporations—Ejectment—Right of private individual to maintain.—A private individual can not maintain an action of ejectment against a corporation which has entered upon his land, where the effect of a recovery would be to stop a public service which has grown up in consequence of plaintiff's acquiescence in the entry and use. But the rule relied on has, obviously, no application where the findings are that the appellant has not been, and is not, using the line for a public service.—*Home Real Estate Co. v. Los Angeles Pac. Co.*, 163 Cal. 710, 126 Pac. 972, 974.

10. Same—Same—Same—Necessary parties.—In an action of ejectment by the owners of the fee to recover possession of a strip of land held by a railroad company under an easement of right of way, but claimed by plaintiff to have been abandoned, persons holding no interest in the land or right to its possession are not necessary parties. To say that every member of the public who may desire or require the service of a railroad company must be joined in an action of this character would virtually abrogate the rule that where a right of way has been given, ejectment may be maintained by the owner of the land upon abandonment of the easement.—*Home Real Estate Co. v. Los Angeles Pac. Co.*, 163 Cal. 710, 126 Pac. 972.

11. Same—Same—Right of way—Abandonment.—It is no doubt true that mere nonuser, not accompanied by an intent to abandon, will not divest the right of the railroad company to the easement, consisting of a right of way over land. But in this class of cases, as in others, the intention with which an act is done is a question of fact, to be determined by the trial court or jury from a consideration of the conduct of the party and the surrounding circum-

stances.—Home Real Estate Co. v. Los Angeles Pac. Co., 183 Cal. 710, 126 Pac. 972, 973.

As to the circumstances establishing the abandonment by a railroad of its right of way, see note 11 Ann. Cas. 760.

§ 1166. COMPLAINT. [VERIFICATION.] WHEN SUMMONS MUST BE ISSUED. The plaintiff, in his complaint, which shall be verified, must set forth the facts on which he seeks to recover, and describe the premises with reasonable certainty, and may set forth therein any circumstances of fraud, force, or violence which may have accompanied the alleged forcible entry or forcible or unlawful detainer, and claim damages therefor. In case the unlawful detainer charged is after default in the payment of rent, the complaint must state the amount of such rent. Upon filing the complaint, a summons must be issued thereon.

History: Enacted March 11, 1872; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 348; March 9, 1878, Code Amdts. 1877-8, p. 107; March 9, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 8; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 187, held unconstitutional, see history, § 5 ante; amendment approved March 16, 1907, Stats. and Amdts. 1907, p. 322, Kerr's Stats. and Amdts. 1906-7, p. 479.

COMPLAINT IN FORCEABLE ENTRY OR UNLAWFUL DETAINER.

1. Complaint in general — Forcible entry as gist of action.
2. Same—Detention at time of institution of action—Should be alleged.
3. Same — Must show plaintiff's actual possession.
4. Same—Need not allege how notice was served.
5. Same — Purpose of action — Requirements of complaint.
6. Complaint sufficient, when—Action to recover rent.
7. Same — Averment of refusal to surrender possession.
8. Same—Cause of action for damages—Not shown when.
9. Same—Description of premises.
10. Same—Failure to mention state, in description.
11. Same—Failure to state amount of rent to be paid.
12. Same — Illustration of sufficient complaint.
13. Same—In unlawful detainer—Allegations necessary.
- 14-16. Same—Notice to quit — Sufficiency of pleading of.
17. Same—Threats of violence.
18. Same—When not demurrable.
19. Distinct causes of action—In general.
20. Same—May be united in same complaint.
21. Same—Separate statement.
22. Same—What can not be joined.
23. Fraudulent acts—Do not constitute independent cause of action.
24. Same—Should be separately stated.

25. Illustration of sufficient complaint.
26. Same—Failure to allege force.
27. Same — Failure to aver that holding over was wrongful.
28. Same—Failure to state existence of relation of landlord and tenant.
- 29, 30. Misjoinder of causes of action — Waiver of objection.
31. Misjoinder of parties plaintiff — Waiver of objection.
32. Presentation of issue—In answer.
33. Same—Same—None raised, when.
34. Same—Same—Rules of pleading.
35. Unlawful detainer — Complaint not based on overdue rent—Amount of rent due need not be alleged.
36. Same—Same — Statement of incorporation—Variance—Error immaterial, when.

As to actions for recovery of real property, see, ante, §§ 315-329 and notes.

As to amendments, and enlarging time of pleadings, and relieving from judgments, etc., see, ante, § 473 and note.

As to amendments of course, and effect of demurrer, see, ante, § 472 and note.

As to amendment to conform pleading to proof, see, post, § 1173 and note.

As to complaint generally and what to contain, see, ante, § 426 and note.

As to damages generally, see, post, § 1174 and note.

As to definition of forcible detainer, see, ante, § 1160 and note.

As to definition of forcible entry, see, ante, § 1159 and note.

As to parties defendant, see, ante, § 1164 and note.

As to parties, generally, see, ante, § 1165 and note.

As to pleadings in civil actions, see, ante, §§ 420-476 and notes.

As to showing required in forcible entry and detainer, see, post, § 1172 and note.

As to unlawful detainer, see, ante, § 1161 and note.

As to use of abbreviations and figures in court proceedings, see, ante, § 186 and note.

As to verification of pleadings, see, ante, §§ 446-449 and notes; also, post, § 1175 and note.

As to what causes of action may be joined, see, ante, § 427 and note.

As to what rules of practice govern, see, post, § 1177 and note.

As to when objections are deemed to have been made, see, ante, § 434 and note.

1. **Complaint in general—Forcible entry as gist of action.**—Where complaint charges "forcible entry with multitude of persons" and "forcible and unlawful detainer," forcible entry is gist of action, averment of forcible detainer not being stated as an independent ground of relief, but as mere continuance or consequence of first action.—*McMinn v. Bliss*, 31 Cal. 122, 126.

2. **Same—Detention at time of institution of action—Should be alleged.**—It is essential in an action of forcible entry that the complaint should allege a detention of the premises at the time of the institution of the action, and a complaint which fails to contain such an allegation is insufficient to sustain a judgment for the restitution of the premises and damages.—*Davies v. Stark*, 25 Cal. App. 519, 144 Pac. 315.

3. **Same—Must show plaintiff's actual possession.**—In action of forcible entry, plaintiff must show by his pleading that he was in actual possession of property when it was invaded by defendant, since it is intrusion upon actual possession as distinguished from constructive, for which statute was designed to afford summary remedy.—*Knowles v. Crocker Estate Co.*, 125 Cal. 264, 265, 57 Pac. 998.

4. **Same—Need not allege how notice was served.**—In action of unlawful detainer against lessee, it is not necessary for complaint to allege manner in which notice to pay rent, or surrender possession, was served. Fact of service being distinctly alleged, this allegation, upon general demurrer, will be construed to include everything necessary to constitute sufficient service.—*Knowles v. Murphy*, 107 Cal. 107, 112, 40 Pac. 111.

5. **Same—Purpose of action—Requirements of complaint.**—The purpose of the action is to regain possession of the premises and it necessarily follows that it must appear that the defendants at the time of the commencement of the action withheld and detained possession thereof from the plaintiff and a complaint showing forcible en-

try alone unaccompanied by an allegation that the defendant detains possession of the premises so forcibly entered will not warrant an action under the provisions of this title.—*Bell v. Haun*, 9 Cal. App. 41, 43, 97 Pac. 1126.

As to theory and purpose of the statute, see, ante, § 1161, note para. 1, 2.

6. **Complaint sufficient, when—Action to recover rent.**—In an action at law to recover a specific sum of money as the rent of land under a lease, an allegation that the defendant had occupied the premises or had possession of them during the period when the rent accrued is unnecessary to the cause of action. In such an action no right of possession is involved.—*O'Meara v. Hables*, 163 Cal. 240, 124 Pac. 1003.

7. **Same—Averment of refusal to surrender possession.**—Complaint in forcible detainer sufficiently avers defendant's refusal to surrender possession within five days after demand where demand was alleged to have been made on March 4th, and that defendant refused, and has, ever since demand, refused, and still refuses, to surrender, etc.; and, where complaint was verified on September 3d of same year, and filed September 8th of that year, and contained allegation that defendant continued to refuse to surrender possession up to September 3d of same year.—*Rimmer v. Blasingame*, 94 Cal. 139, 140, 29 Pac. 857.

8. **Same—Cause of action for damages—Not shown when.**—Notwithstanding a general allegation in the complaint by the lessor that the lessee has "renounced and repudiated" the lease, no cause of action for damages is shown, where it affirmatively appears therefrom that there has been no actual repudiation, and nothing more than a mere threat on the part of the lessee that he would not be further bound by the lease, notwithstanding which he continued to occupy the premises, and did not actually default in the performance of any of the conditions of the lease.—*Oliver v. Loydon*, 163 Cal. 124, 124 Pac. 731.

9. **Same—Description of premises.**—Where the description is sufficient to enable the lessee to take possession of demised premises, it is sufficient to enable him to know what property is demanded that he surrender.—*Olcovich v. Deremberg*, 27 Cal. App. 194, 149 Pac. 375.

10. **Same—Failure to mention state, in description.**—In complaint for forcible entry and detainer failure to mention state in describing where land is situated is not fatal defect.—*More v. Del Valle*, 28 Cal. 170, 173.

11. **Same—Failure to state amount of rent to be paid.**—Complaint for unlawful detainer against tenant after expiration of his term is not defective because it does not state amount of rent to be paid. It is enough that it avers that lease was given for "certain yearly rent," which had been paid.—*Odell v. Buttrick*, 126 Cal. 551, 552, 59 Pac. 133.

12. Same—Illustration of sufficient complaint in forcible entry and detainer.—*Holland v. Green*, 62 Cal. 67, 68.

13. Same—In unlawful detainer—Allegations necessary.—In a complaint in unlawful detainer, it is only required to allege the ultimate fact of the service of notice. The statute provides three general methods of serving the notice and the evidence of course must show that the notice was served but it is not necessary to inform the defendant by pleading minutely as to every detail of the manner of service.—*Cowell v. Linforth*, 10 Cal. App. 3, 4, 100 Pac. 1071.

14. Same—Notice to quit—Sufficiency of pleading of.—Where a copy of the three days' notice to quit is pleaded in full in the complaint, and service thereof is alleged to have been made upon the defendants, the pleading is sufficient in this respect.—*Arnold v. Krigbaum*, 169 Cal. 131, 146 Pac. 423.

As to notice to quit, see, ante, § 1161, note pars. 48-61.

15. The right to maintain an action in unlawful detainer for the possession of leased premises on failure to pay rent upon giving the statutory three days' notice to quit, is not affected by the giving of a previous ten days' notice, pursuant to the terms of the lease, which declared that the lessor elected to consider the lease null and void, and notified the defendant that at the expiration of ten days the plaintiff would re-enter the premises.—*Wilson v. Sadleir*, 24 Cal. App. 357, 146 Pac. 1061.

16. The complaint in such an action is not defective in failing to allege whether the amount of rent was specified in the three days' notice, where the amount of rent due is stated in the complaint and demand for payment alleged, and a copy of the notice attached to the complaint supplying the claimed defect.—*Wilson v. Sadleir*, 24 Cal. App. 357, 146 Pac. 1061.

17. Same—Threats of violence.—Complaint in forcible entry and detainer is sufficient where it avers that on date named defendants unlawfully entered and turned plaintiff out, by threats and menacing conduct, and ever since such time defendants have, and still do hold, possession, by threats of violence against the plaintiff.—*Holland v. Green*, 62 Cal. 67, 68.

18. Same—When not demurrable.—Complaint in action of forcible entry and detainer is not demurrable because unlawful entry and forcible detainer are alleged in one count.—*Kerr v. O'Keefe*, 138 Cal. 415, 422, 71 Pac. 447.

19. Distinct causes of action—In general.—Forcible entry and forcible detainer are distinct offenses, and separate causes of action, and ought, therefore, to be separately stated. If not so stated, complaint is bad on demurrer, but if not demurred to, objection is waived.—*Valencia v. Couch*, 32 Cal. 339, 342, 91 Am. Dec. 589.

20. Same—May be united in same complaint.—Forcible entry and forcible detainer are distinct offenses, or separate causes of action, and ought to be separately stated, and fraud, if relied on, should be separately stated.—*Valencia v. Couch*, 32 Cal. 339, 342, 343, 91 Am. Dec. 589.

21. Same—Separate statement.—Plaintiff in complaint for forcible entry and detainer may unite causes of action for forcible entry and forcible detainer, either form of action for forcible detainer, and fraud as an adjunct of each, but they must be separately stated, or complaint will be demurrable on that ground.—*Shelby v. Houston*, 38 Cal. 410, 419.

22. Same—What can not be joined.—Count for cause of action in forcible entry and detainer can not be joined in such action with count for holding over as tenants of plaintiff after expiration of lease and notice to quit.—*Polack v. Shafer*, 46 Cal. 270, 276.

23. Fraudulent acts—Do not constitute independent cause of action.—Fraudulent acts which merely go to enhancement of damages when cause of action for forcible entry or unlawful detainer is made out, do not of themselves constitute an independent cause of action.—*Polack v. Shafer*, 46 Cal. 270, 278.

24. Same—Should be separately stated.—In an action of forcible entry and detainer, where fraud is relied on, its facts constituting it should be separately stated as ground for distinct relief.—*Valencia v. Couch*, 32 Cal. 339, 343, 91 Am. Dec. 589.

25. Illustration of insufficient complaint in forcible entry and detainer.—*Barlow v. Burns*, 40 Cal. 351, 353.

26. Same—Failure to allege force.—Complaint in forcible entry and detainer does not state facts sufficient to constitute cause of action unless it alleges force, either in entry or detainer.—*McEvoy v. Igo*, 27 Cal. 375, 376.

27. Same—Failure to aver that holding over was wrongful.—Complaint in forcible entry and detainer brought against tenant who holds over, fails to state facts sufficient to constitute cause of action where it appeared that defendant remained in possession eight months after end of his original term without any notice to quit being given, and there is no allegation in complaint averring that such holding over was wrongful, nor that demand was made within year ensuing lease, for surrender of premises.—*Uridias v. Morrell*, 25 Cal. 31, 34, 35.

28. Same—Failure to state existence of relation of landlord and tenant.—Complaint for forcible entry and detainer against tenant holding over fails to state cause of action where it avers license to enter, and fails to state that relation of landlord and tenant existed between parties.—*Owen v. Doty*, 27 Cal. 502, 506.

20. Misjoinder of causes of action—Waiver of objection.—If complaint in forcible entry and detainer states two different causes of action in same count, and no demurrer is interposed for such misjoinder, objection is waived.—*Treat v. Forsyth*, 40 Cal. 484, 487.

30. A complaint which contains averments as to unlawful detainer in the first count and as to claims of rent due and unpaid in the second and third counts can not be regarded as setting out more than one cause of action—unlawful detainer. Demurrer held properly overruled.—*Holland v. Eastern Outfitting Co.*, 16 Cal. App. 442, 117 Pac. 562.

31. Misjoinder of parties plaintiff—Waiver of objection.—In action of forcible entry, where there is misjoinder of parties plaintiff, which does not appear upon face of complaint, defendant should make objection by answer, or such objection will be deemed to have been waived.—*Gillam v. Sigman*, 29 Cal. 638, 640.

32. Presentation of issue—In answer.—In action for unlawful detainer, if complaint avers defendant's entry under lease, pleaded, not in precise words, but by its legal effect, and answer denies making of lease pleaded in complaint, and affirmatively sets forth in full contract between parties, this sufficiently presents issue for determination.—*Shamp v. White*, 106 Cal. 220, 221, 39 Pac. 537.

As to answer in this action generally, see, post, § 1170 and note.

33. Same—Same—None raised, when.—Where only denial contained in answer to complaint in forcible entry and detainer is defective, and no material new matter is set up, answer raises no material issue.—*More v. Del Valle*, 28 Cal. 170, 173.

34. Same—Same—Rules of pleading prescribed by Practice Act as to denials, and upon all other points not otherwise provided for in actions of forcible entry and detainer, govern in actions of forcible entry and detainer.—*More v. Del Valle*, 28 Cal. 170, 173.

35. Unlawful detainer—Complaint not based on overdue rent—Amount of rent due need not be alleged.—In an action by a landlord to obtain possession of certain leased premises, where the cause of action is not based upon overdue rent, an allegation as to the amount of rent due is not necessary.—*Tropical Invest. Co. v. Brown*, 45 Cal. App. 205, 187 Pac. 133.

36. Same—Same—Statement of incorporation—Variance—Error immaterial when.—In an action by a landlord to recover possession of certain leased premises, where the cause of action is not based upon overdue rent, an allegation in the verified complaint that the plaintiff was incorporated under the laws of California, whereas it appeared at the trial that the incorporation was under the laws of Utah, the variance was held to be too trivial to warrant a reversal.—*Tropical Invest. Co. v. Brown*, 45 Cal. App. 205, 187 Pac. 133.

§ 1167. SUMMONS, FORM AND SERVICE OF. The summons must require the defendant to appear and answer within three days after the service of the summons upon him, and must notify him that if he fails to so appear and answer, the plaintiff will apply to the court for the relief demanded in the complaint. In all other respects the summons or any alias summons in such proceedings, must be issued and served and returned in the same manner as summons in a civil action.

History: Enacted March 11, 1872; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 349; March 9, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 8; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 188, held unconstitutional, see history, § 5 ante; amendment re-enacted March 20, 1905, Stats. and Amdts. 1905, p. 428; amendment approved March 16, 1907, Stats. and Amdts. 1907, p. 323, Kerr's Stats. and Amdts. 1906-7, p. 479.

SUMMONS—FORM AND SERVICE.

1. Only purpose of summons.
2. Provision of code.
3. Three-day summons—Default judgment—Reformation of lease.

1. Only purpose of summons in forcible detainer is to bring defendant into court, and if he appears and answers, he waives any defect in summons.—*Randall v. Falkner*, 41 Cal. 242, 245.

2. Provision of code.—The whole field of forcible entry and detainer was provided

for by Code of Civil Procedure when adopted, and, among other things, above section of the code provides that summons must be served and returned in same manner as summons in civil action is served and returned.—*Hemstreet v. Wassum*, 49 Cal. 273.

3. Three-day summons—Default judgment—Reformation of lease.—A default judgment in an action in unlawful detainer predicated on a three-days' summons is not void cause of the fact that a reformation of the lease was also asked for in the complaint, since the court had the right to

construe the lease to determine its true meaning, reformation being immaterial.—

Zucco v. Farullo, 37 Cal. App. 562, 174 Pac. 927.

§ 1168. ARREST. If the complaint presented establishes, to the satisfaction of the judge or justice, fraud, force, or violence, in the entry or detainer, and that the possession held is unlawful, he may make an order for the arrest of the defendant.

History: Enacted March 11, 1872; amendment approved March 9, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 9.

As to arrest and bail, in general, see, ante, §§ 478-504 and notes.

§ 1169. JUDGMENT BY DEFAULT. If, at the time appointed, the defendant do not appear and defend, the court must enter his default and render judgment in favor of the plaintiff as prayed for in the complaint.

History: Enacted March 11, 1872.

As to judgment by default upon three-day summons, and reformation of lease, see, ante, § 1168, note par. 3.

As to judgment upon failure to answer, see, ante, § 585 and note.

§ 1170. DEFENDANT MAY APPEAR, ETC. On or before the day fixed for his appearance, the defendant may appear and answer or demur.

History: Enacted March 11, 1872.

ANSWER IN FORCIBLE DETENTION.

1-4. Answer—As to sufficiency generally.

5. Answer in justices' court—Is sufficient, when.

6-8. Counter-claim and cross-complaint—Not allowable.

9. Defendant may demur or answer.

10. Equitable defense to forfeiture.

11. Same—Issue as to lawfulness where entry is admitted.

12. Landlord's lease to third party—When no defense.

As to amendments of course, and effect of demurrer, see, ante, § 472 and note.

As to amendments to conform to proof, see, post, § 1173 and note.

As to answer, generally, see, ante, § 437 and note.

Same—Scope of.—See, post, § 1172 and note.

Same—Verification.—See, post, § 1175 and note.

As to appearance, generally, see, ante, § 1014 and note.

As to complaint, and what it must contain, see, ante, § 426 and note; also § 1166 and note.

As to rules of practice, see, post, § 1177 and note.

As to showing required in forcible entry or detainer, see, post, § 1173 and note.

As to verification of pleadings, see, post, § 1175 and note.

As to what causes of action may be joined, see, ante, § 427 and note.

As to when defendant appears, see, ante, § 1014 and note.

1. Answer—As to sufficiency generally.

—An allegation in the answer in such action that the defendant bought the pasture upon the premises from some person, whom he names but does not show to have had any interest in the premises or any right to dispose of its pasture or possession, fails to show entry upon any sufficient claim of right.—Brown v. Martin, 23 Cal. App. 736, 139 Pac. 823.

2. A denial, upon want of information or belief, of the averment of the prior peaceable possession of the plaintiff, is insufficient. The defendant in an action for forcible entry and unlawful detainer, being charged with notice and put upon inquiry as to the possession of and right of possession in and to the property he is invading, can not in such action predicate his denial of the plaintiff's alleged peaceable possession upon his want of information and belief.—Brown v. Martin, 23 Cal. App. 736, 139 Pac. 823.

3. Where the complaint in an action for forcible entry and unlawful detainer alleges that on a certain date the plaintiff was in the peaceable possession of certain land, and that on that date the defendant, forcibly, unlawfully and wrongfully entered upon and has since retained possession of the premises, and the answer admits the taking and holding of such possession, but denies that the defendant did so "forcibly, unlawfully or wrongfully," these adverbial forms of denial are not sufficient to tender any issue as to the rightfulness or legality of the defendant's entry.—Brown v. Martin, 23 Cal. App. 736, 139 Pac. 823.

4. Where the complaint in ejectment alleges that the defendants ousted the plain-

tiff and unlawfully withheld possession from him, a denial in the answer "that defendants, or either of them, now unlawfully withhold possession from plaintiff of any of the lands described in plaintiff's said complaint," is not only evasive, but a mere conclusion, and hence insufficient to raise an issue as to the defendants being in possession of the land. The allegation of the complaint in this regard must therefore be deemed admitted.—*Kerr v. Snowden*, 24 Cal. App. 152, 140 Pac. 704.

5. Answer in justices' court—Is sufficient, when.—In action of forcible entry and detainer brought before justice of peace, answer which denies generally allegations of complaint is sufficient, as strict rules of pleadings do not apply in such courts.—*Henderson v. Allen*, 23 Cal. 519, 520.

6. Counter-claim or cross-complaint—Not allowable.—Neither a counter-claim nor a cross-complaint is permissible in an action in unlawful detainer regardless of whether or not the subject-matter of the attempted pleading arises out of a violation of the terms of the lease upon which the action is brought.—*Arnold v. Krigbaum*, 169 Cal. 131, 146 Pac. 423.

As to counterclaims having its proceedings in unlawful detainer, see, ante, § 1161, note par. 94.

7. The defendant in an action in unlawful detainer can not set up a counter-claim and cross-complaint for damages arising out of an alleged violation by the lessor of a covenant to make repairs, which covenant is independent of the covenant to pay rent.—*Arnold v. Krigbaum*, 169 Cal. 131, 146 Pac. 423.

8. A counter-claim or cross-complaint of any kind or character is neither proper nor permissible in actions in unlawful detainer. The reason, however, is obviously to be found in the fact that the unlawful detainer act was intended to provide a summary remedy for the restitution of the possession of premises withheld by tenants in violation of the covenants of their lease, which remedy would be frustrated and rendered wholly inadequate by the interposition of the defenses usually permitted in

ordinary cases at law.—*Knight v. Black*, 19 Cal. App. 518, 126 Pac. 512, 516.

9. Defendant may demur or answer.—In forcible entry and detainer defendant may demur or answer, or do both; if he demurs only and his demurrer is overruled, court may allow him to answer upon terms.—*Maumus v. Hamblon*, 38 Cal. 539, 541.

10. Equitable defense to forfeiture.—Where the answer to the complaint in unlawful detainer set up, as an equitable defense to the forfeiture of the lease, that defendant had subleased the premises to the codefendant, whose furnishings exceeded the requirement of the lease, and who had agreed to give to defendant a chattel mortgage as security for the rent, which defendant agreed to assign to plaintiff and plaintiff had agreed to accept, but said codefendant in possession broke her contract, rendering exact compliance with the security for rent impossible, and that defendant had sued her in unlawful detainer, but that defendant had offered to plaintiff to deposit gold coin to the full amount of the security, in any bank named by plaintiff, and, upon plaintiff's refusal, tendered the same in court, as security, until such time as the identical security could be given, equity will not, upon such showing of substantial compliance with security, permit the forfeiture of the lease.—*Knight v. Black*, 19 Cal. App. 518, 126 Pac. 512.

11. Same—Issue as to lawfulness where entry is admitted.—In action of forcible entry and detainer, where complaint avers that defendant unlawfully entered upon demanded premises, and answer denies that defendant entered unlawfully, entry is admitted, and only issue raised is as to its lawfulness.—*Leroux v. Murdock*, 51 Cal. 541, 543.

12. Landlord's lease to third party—When no defense.—In action of unlawful detainer against tenant who continues in possession against will of landlord after expiration of term, it is no defense that landlord has leased premises to third party, where defendant does not connect himself with title of such third party.—*Commissioners v. Barnard*, 98 Cal. 199, 202, 32 Pac. 982.

§ 1171. TRIAL BY JURY. Whenever an issue of fact is presented by the pleadings, it must be tried by a jury, unless such jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in the court in which the action is pending.

History: Enacted March 11, 1872; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 349; March 9, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 9.

As to formation of jury, see, ante, §§ 600-604 and note.

As to trial by jury, see, ante, §§ 600-628 and notes.

Same—When and how waived.—See, ante, § 631 and note.

As to trials in justices' courts, see, ante, §§ 878-887 and notes.

Issue of fact, how raised.—See, ante, § 590 and notes.

§ 1172. SHOWING REQUIRED OF PLAINTIFF IN FORCIBLE ENTRY OR DETAINER. OF DEFENDANT. On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer. The defendant may show in his defense, that he or his ancestors, or those whose interest in such premises he claims, have been in the quiet possession thereof for the space of one whole year together next before the commencement of the proceedings, and that his interest therein is not then ended or determined; and such showing is a bar to the proceedings.

History: Enacted March 11, 1872.

FORCIBLE DETAINER—SHOWING REQUIRED OF PLAINTIFF—OF DEFENDANT.

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35. Same—That time has not expired.

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 97. Presumption as to possession.
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 99. Proof of forcible detainer—Not proof of forcible entry.
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 101. What is immaterial.
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 103. What is not evidence of possession.
1. Action can be maintained, when—Against one who intruded during absence of occupant.—If man enters on public land, after staying there few days, leaves, with intention of bringing his family to his new home, but finds his wife too ill to be removed, and he does not return for several months, he may maintain an action for unlawful detainer against one who has intruded upon such premises during his absence, and who refuses to surrender.—*Wilson v. Shackelford*, 41 Cal. 630, 631.
 2. Same—Against several defendants.—In action of forcible entry and detainer against several defendants, where it is found that possession was taken by acts, agency, and procurement of all defendants, and holding whether by one, or more, or all was in pursuance of such arrangement or preconcert, then defendants are guilty of forcible entry and detainer.—*Minturn v. Burr*, 16 Cal. 107, 109, 110.
 3. Same—Immateriality of defendant's remaining in possession.—In forcible entry and detainer, it is not material whether defendant personally remains in possession of land upon which he entered by violence; this does not affect character of his entry.—*Ely v. Yore*, 71 Cal. 130, 134, 11 Pac. 860.
 4. Same—Only in cases prescribed by law.—An action of unlawful detainer can be resorted to only in cases and by and against parties mentioned in statute.—*Ben Lomond Wine Co. v. Sladky*, 141 Cal. 619, 623, 75 Pac. 332.
 5. Same—Purpose of statute.—A person may maintain action either of forcible entry or forcible detainer. Purpose of statute is to secure speedy, if not summary, restitution of premises to party who is deprived of his possession by means specified

in statute.—*Brawley v. Risdon Iron Works*, 38 Cal. 676, 677.

6. **Same—Upon what showing.**—In an action of forcible detainer, plaintiff is entitled to recover on showing forcible detainer, and that he is entitled to possession at time of such forcible detainer.—*Murphy v. Snyder*, 67 Cal. 451, 452, 8 Pac. 2.

7. **Same—Where entry was peaceable, but subsequent exclusion forcible.**—Although an entry was peaceably made upon possession of another, his subsequent exclusion by force and threats constitutes forcible entry.—*Kerr v. O'Keefe*, 138 Cal. 415, 421, 71 Pac. 447.

8. **Action can not be maintained under above section when defendant has been in the quiet possession of the premises for a period of more than a year prior to the institution of the suit.**—*Wilson v. Carson*, 14 Cal. App. 572, 112 Pac. 735.

9. **Same—As to remainder of property.**—Where man goes upon premises, and does not disturb possession of occupant beyond immediate vicinity of particular spot where defendant erects his house, plaintiff can not maintain action of forcible entry and detainer as to remainder of property.—*Thompson v. Smith*, 28 Cal. 527, 531.

10. **Same—"After the expiration of the term" as used in section 1161, ante, should be construed to mean an ending of the term by the lapse of the time provided in the lease for its duration.**—*Pringle v. Wilson*, 156 Cal. 313, 317, 104 Pac. 316.

11. **Same—Premature suit to be dismissed.**—A premature suit for forcible entry and detainer must be dismissed.—*Ray v. Armstrong*, 4 Cal. 208, 209.

12. **Same—Where act of violence is not apprehended.**—Action of forcible entry and detainer can not be maintained where it appears from evidence that plaintiff was maneuvering to acquire, without violence, if possible, right of action for forcible entry, while defendant was maneuvering to avoid that result, and these objects of respective parties were clearly manifest to each other, where it does not appear from evidence that either apprehended, or had any ground to apprehend, any positive act of violence from other.—*Thompson v. Smith*, 28 Cal. 527, 534.

13. **Same—Where defendant-owner took peaceable possession during plaintiff's absence.**—An action of forcible entry and detainer can not be maintained where defendant was owner of a tract of land on which was vacant house, and into which plaintiff entered without right, and continued in peaceable possession of it for several months, and where, during absence of plaintiff, defendant entered peaceably and removed furniture from building, and, upon plaintiff's return, defendant refused to permit her to enter.—*Potter v. Mercer*, 53 Cal. 667, 674, 675, approving *Powell v. Lane*, 45 Cal. 677, 678.

14. **Same—Where evidence does not support complaint.**—Complaint in forcible entry and detainer of mining claim can not be maintained where there is no evidence showing that plaintiffs, or any of them, were in actual, peaceable, or exclusive possession of any of land mentioned and described in complaint, at time defendants entered thereon.—*Laird v. Waterford*, 50 Cal. 315, 316.

15. **Same—Where plaintiff was ousted from part of premises.**—Where plaintiff, in forcible entry and detainer, was ousted from part only of premises, he is not entitled to recover damages for detainer of whole.—*Thompson v. Smith*, 28 Cal. 527, 531.

16. **Construction of section—Commissioners' note.**—The present provisions of the code upon subject of forcible entry and detainer are quite similar to previous statutes upon this subject.

17. **Same—Counting of prior possession.**—Prior possession, if it existed within one year next before commencement of proceedings, can not be counted as part of that quiet possession, "for space of one whole year together next before commencement of proceedings," which is required by above section to constitute defense to action, where it has been interrupted within year.—*Amador Gold Min. Ltd. v. Amador G. Mine*, 114 Cal. 346, 349, 46 Pac. 80.

18. **Same—Object of law.**—One great object of forcible entry and detainer law is to prevent even rightful owners from taking law into their hands, and attempting to recover by violence what remedial process of court would give them in peaceable mode.—*Voll v. Hollis*, 60 Cal. 569, 574.

19. **Same—Proof of possession required.**—Above section requires that plaintiff shall prove that he was peaceably in actual possession at time of forcible entry, or was entitled to possession at such time.—*Knowles v. Crocker Estate Co.*, 125 Cal. 264, 265, 57 Pac. 998.

20. **Findings.**—Findings in an action to recover the possession of a strip of land and damages for the use and detention thereof, "that the plaintiff had peaceful, adverse and uninterrupted possession of the property described in plaintiff's second amended complaint from 1903 to 1911, paying taxes on same during the eight years above mentioned," and "that about April 1, 1911, defendants commenced claiming right and title to (the property in question)," are not sufficient to warrant the conclusion that the plaintiff was seized or possessed of the land at the time of entry by the defendant, and do not support a judgment for possession or for damages.—*Nichols v. Wolf*, 20 Cal. App. Dec. 481, 148 Pac. 799.

21. **Landlord's forcible entry—Tenant in arrears—Showing required by tenant.**—In the case of a tenant at arrears for the agreed rental under a lease providing that in case the rent reserved was at any time

unpaid it should be lawful for the lessors, "without previous notice or demand, to re-enter the demised premises and the same peaceably to hold and enjoy thereafter as if this lease had not been made," where the rent was in arrears, and in the absence of the lessee the lessor forcibly entered the premises by removing the lock from the door, substituting another in its place, and excluding the lessor from the premises, in an action against the landlord for forcible entry and detainer, the lessee is simply required to show that, in addition to the forcible entry, at the time when the entry was made, he was peaceably in the actual possession of the demised property under the provisions of the above section.—*California Products, Inc. v. Mitchell*, — Cal. App. —, 198 Pac. 646.

22. Same—Title and right to possession—Not involved.—In the case of a forcible entry by a landlord into the demised premises, during the absence of the lessee, the latter being in peaceable possession at the time, the question of title does not arise in an action by the lessee against the landlord for forcible entry and detainer, nor can even the question as to the right of possession be considered, under the provisions of the above section.—*California Products, Inc. v. Mitchell*, — Cal. App. —, 198 Pac. 646, following the doctrine in *Kerr v. O'Keefe*, 138 Cal. 415, 71 Pac. 447; *White v. Pfeiffer*, 165 Cal. 740, 134 Pac. 321.

As to evidence of title inadmissible, see pars. 28, 30, 84, this note.

23. Necessary element of action—In general.—It is necessary element to action for forcible detainer that entry of defendant upon land should have been unlawful with respect to relations between defendant and plaintiff; and it is always proper, in action of this sort, to show, on behalf of defendant, that this entry was made under plaintiff's permission.—*Carteri v. Roberts*, 140 Cal. 164, 166, 73 Pac. 818.

24. Same—Plaintiff must show, what.—To maintain forcible entry, plaintiff must show: 1. That he was in actual and peaceable possession of property entered upon; 2. That defendant by some kind of violence, or circumstance of terror, entered into or upon property and so turned plaintiff out, and took and held possession of it himself; or, 3. That after making peaceable entry, defendant, by force, threats, or menacing conduct, turned plaintiff out and took possession.—*Castro v. Tewksbury*, 69 Cal. 562, 563, 11 Pac. 339.

25. Question of good or bad faith.—Under law as it stood prior to adoption of code, defendant in an action for unlawful entry was sometimes allowed to produce evidence of title, not for purpose of establishing or trying title, but for purpose of showing that his entry, if wrongful, was not made with wrongful intent, but in good faith and in belief that he had legal right to enter.—*Thompson v. Smith*, 28 Cal. 527,

532; *Shelby v. Houston*, 38 Cal. 410, 422; *Randall v. Falkner*, 41 Cal. 242, 246; *Conroy v. Duane*, 45 Cal. 597, 607; *Townsend v. Little*, 45 Cal. 673, 676; *Dennis v. Wood*, 48 Cal. 361, 364; *Phenix M. & M. Co. v. Lawrence*, 55 Cal. 143, 145.

26. Same—Liability of defendant.—Where defendants, in an action of forcible entry and detainer, entered peaceably and in good faith, under claim of title, they would not be liable in such case, even though they resisted entry of plaintiff with force.—*Roche v. Duane*, 45 Cal. 597, 600.

27. Same—No longer affects right of recovery—What entries are unlawful.—Under code, all entries of actual possession of another are unlawful and questions of good or bad faith on part of defendant in action of forcible entry or unlawful detainer no longer affect right of recovery in this form of action.—*Voll v. Hollis*, 60 Cal. 569, 575; *Holland v. Green*, 62 Cal. 67, 68; *Bank of California v. Taaffe*, 76 Cal. 626, 630, 23 Pac. 196; *Giddings v. The '76 L. & W. Co.*, 83 Cal. 96, 100, 23 Pac. 196; *Kerr v. O'Keefe*, 138 Cal. 415, 421, 71 Pac. 447; *Carteri v. Roberts*, 140 Cal. 164, 166, 73 Pac. 818.

28. Question of title or right of possession—Can not be tried in forcible entry and detainer.—*McCauley v. Weller*, 12 Cal. 500, 524; *Minturn v. Burr*, 16 Cal. 107, 109; *Henderson v. Allen*, 23 Cal. 519, 520; *Warburton v. Doble*, 38 Cal. 619, 621; *Mason v. Wolff*, 40 Cal. 246, 250; *Sanchez v. Loureiro*, 46 Cal. 641, 642; *Voll v. Hollis*, 60 Cal. 569, 573, 574; *Bostwick v. Mahoney*, 73 Cal. 238, 239, 14 Pac. 832; *Felton v. Millard*, 81 Cal. 540, 542, 21 Pac. 533, 22 Pac. 750; *Giddings v. The '76 L. & W. Co.*, 83 Cal. 96, 100, 23 Pac. 196; *Knowles v. Murphy*, 107 Cal. 107, 114, 40 Pac. 111.

As to evidence of title being inadmissible, see pars. 22, 30, 84, this note.

29. Same—Construction of statute.—Forcible entry and detainer act was not intended to apply to any case where title to land could be made question, but only to cases where, from nature of relation between parties, no such question could be made because prohibited by law.—*Reay v. Cotter*, 29 Cal. 168, 170.

30. Same—Evidence of title inadmissible.—Under our statutes evidence of title in actions of forcible detainer is inadmissible.—*Giddings v. The '76 Land & Water Co.*, 83 Cal. 96, 100, 23 Pac. 196.

See, also, pars. 23, 84, this note.

As to evidence generally, see Part III, this note.

As to when title may be given in evidence in actions of forcible entry and detainer, see note 77 Am. Dec. 552-557.

31. What is defense—Eviction.—In action of forcible entry and detainer by landlord against his tenant, defense of eviction is admissible, as matters of excuse, justification, or avoidance may be given in evi-

dence.—*Wheelock v. Warschauer*, 21 Cal. 309, 316.

32. Same—Eviction as to part.—Where partial eviction is wrongful act of landlord himself, lease is not forfeited by reason of non-payment of rent for substantial part of demised premises from which tenant has been evicted, wherever notice or demand was given or made; and landlord can not recover possession from tenant by reason of such non-payment so long as such eviction continues.—*Skaggs v. Emerson*, 50 Cal. 3, 6.

33. Same—Fraud and undue influence.—Defendant in action of unlawful detainer may show as part of transaction leading up to lease and as evidence bearing upon questions of fraud and undue influence in execution of lease, that deed under which plaintiff holds, as well as lease, was executed through fraud and undue influence, and to show relation of each to other as one transaction. When defendant is not seeking rescission nor asking to have such deed set aside as void, but is simply defending against plaintiff's action on ground of fraud and undue influence and is asking no affirmative relief, he may set up in defense that plaintiff procured deed and agreement of lease by fraud and undue influence without first rescinding.—*Simon Newman Co. v. Lassing*, 141 Cal. 174, 178, 74 Pac. 761.

34. Same—Subsequently entering into co-partnership.—In action of unlawful detainer against lessee to recover possession of leased hotel for failure to pay rent, it is good defense that, after lease was made, defendant and plaintiff entered into co-partnership in keeping such hotel.—*Pico v. Cuyas*, 47 Cal. 180, 48 Cal. 639, 642.

35. Same—That time has not expired.—In an action of unlawful detainer for holding over after expiration of term, it is complete defense that time during which defendant was entitled to occupy land under terms of agreement set forth had not expired when demand for possession was made.—*Rogers v. Hackett*, 49 Cal. 121, 123.

36. What is no defense—Prior possession of defendants.—Possession of defendants prior to and at time of entry of plaintiff does not constitute defense to action of forcible entry and detainer, and will not justify or excuse forcible entry.—*Brown v. Perry*, 39 Cal. 23, 24.

37. Same—Tender of payment after refusal.—Where tenant fails to pay rent when it becomes due and refuses or neglects to pay for three days after demand therefor and to quit possession, it is no defense to action for unlawful detainer that he afterwards tendered payment of such rent with interest and costs.—*Roussel v. Kelly*, 41 Cal. 360, 363.

38. Same—Theory that lease was intended as mortgage.—Defendant in an action of unlawful detainer can not defend on theory that lease was intended to be

mortgage.—*Bostwick v. Mahoney*, 73 Cal. 238, 239, 14 Pac. 832.

39. Same—What may be stricken out.—If defendant in forcible entry and detainer seeks to justify his entry under lease giving right of entry for rent due and unpaid, and also under crop mortgage, such defense may properly be stricken out.—*Kerr v. O'Keefe*, 138 Cal. 415, 422, 71 Pac. 447.

II. ACTUAL AND PEACEABLE POSSESSION.

40. As to generally.—Plaintiff in action of forcible entry or unlawful detainer must show an actual, peaceable possession in himself at time of entry.—*Treat v. Stuart*, 5 Cal. 113, 114; *Preston v. Kehoe*, 15 Cal. 315; *Mitchell v. Davis*, 20 Cal. 45, 47; *Cummins v. Scott*, 23 Cal. 526, 527; *Hoag v. Pierce*, 28 Cal. 187, 191; *Shelby v. Houston*, 38 Cal. 410, 423; *Warburton v. Doble*, 38 Cal. 619, 620; *Buel v. Frazier*, 38 Cal. 693, 697; *Barlow v. Burns*, 40 Cal. 351, 354; *Bowers v. Cherokee Bob*, 45 Cal. 495, 500, 502; *Conroy v. Duane*, 45 Cal. 597, 601; *Voll v. Butler*, 49 Cal. 74, 76; *Laird v. Waterford*, 50 Cal. 315, 316; *Spires v. Duane*, 54 Cal. 176, 177; *Castro v. Tewksbury*, 69 Cal. 562, 564, 11 Pac. 339; *Knowles v. Crocker Estate Co.*, 125 Cal. 264, 265, 57 Pac. 998.

41. In summary proceedings under forcible detainer to obtain possession of property the inquiry is confined to the peaceable possession of the property by plaintiff, the unlawful entry therein and forcible detention by defendant.—*White v. Pfeiffer*, 165 Cal. 740, 134 Pac. 321.

42. That the premises were vacant when entered by the defendant and they had theretofore been occupied by tenants of the plaintiff was sufficient to support the action.—*White v. Pfeiffer*, 165 Cal. 740, 134 Pac. 321.

43. The plaintiff in ejectment must recover, if at all, upon the strength of his own title, regardless of the weakness of that of his adversary; and it must be a legal title as distinguished from a mere equity.—*Sawyer v. Osterhaus*, 212 Fed. 765.

44. Same—Plaintiff must show an actual and peaceable possession; that defendant, by some kind of violence or circumstance of terror, entered into or upon property and so turned plaintiff out and held possession of it himself; or that, after making peaceable entry, defendant, by fierce threats or menacing conduct, turned plaintiff out and took possession.—*Castro v. Tewksbury*, 69 Cal. 562, 563, 11 Pac. 339.

45. Same—Actual, manual occupancy not necessary.—In forcible entry and detainer it is not necessary that owner should always be on land, either by himself or his agent, for sake of actual manual occupation, or for purpose of warning off intruders or trespassers. If an entry is made with intention of retaining permanent possession and clearing and improving land

and fitting it for cultivation, it may be sufficient and authorize inference that possession is actual.—*Taylor v. Scott*, 10 Oreg. 483, 485.

That actual, personal presence on land need not be proved, see, ante, § 1160 and note par. 7.

46. Same—Under above section it is not necessary for the plaintiff in an action of forcible detainer, based upon an unlawful entry, to show actual physical possession of the property when the alleged unlawful entry was made. Plaintiff is required to show only that he is entitled to the possession.—*White v. Pfeffer*, 165 Cal. 740, 134 Pac. 321.

47. Same—Actual or constructive, question for jury.—What is actual and what is constructive possession in many cases must be question of fact for jury.—*O'Callaghan v. Booth*, 6 Cal. 63, 65.

48. Same—"Actual possession" means, what—"Actual occupancy" is unnecessary.—To maintain action of forcible entry and detainer it is not necessary for plaintiff to have "actual occupancy" of premises. "Actual possession" consists as much of present power and right of dominion, as actual corporal presence on premises.—*Minturn v. Burr*, 16 Cal. 107, 109; *Knowles v. Crocker Estate Co.*, 149 Cal. 278, 86 Pac. 715.

49. Same—As between parties struggling for possession.—As between parties struggling for possession neither can maintain action of forcible entry and detainer against other until he has acquired an actual possession which has ripened into peaceable possession, that is to say, peaceable as between themselves.—*Voll v. Butler*, 49 Cal. 74, 75.

50. Same—Contest of, in court, not material.—Plaintiff's actual and peaceable possession of premises at time of entry complained of is sufficient to maintain an action of forcible entry and detainer, although such possession is contested in courts.—*Spiers v. Duane*, 54 Cal. 176, 177.

51. Same—Facts not showing.—Facts not showing such actual and peaceable possession in plaintiff as is necessary to enable him to maintain action of forcible entry, action dismissed.—*Castro v. Tewksbury*, 69 Cal. 562, 566.

52. Same—Grantee's possession under deed is lawful.—Grantee in possession of land under deed of premises described therein is in lawful possession thereof.—*Hoag v. Pierce*, 28 Cal. 187, 190.

53. Same—Immateriality of how possession was originally obtained.—If detainer in unlawful and forcible, defendant is liable for forcible detainer, whether he originally obtained possession by "permission or otherwise." It is immaterial whether entry was peaceable or violent, provided it is unlawful and detainer was forcible. In either event

he is liable for forcible detainer.—*Conroy v. Duane*, 45 Cal. 597, 606.

54. Same—Residence or house on land unnecessary.—Plaintiff in forcible entry and detainer may have peaceable and actual possession of land without residing thereon or having house on the land.—*Gray v. Collins*, 42 Cal. 152, 156, 157; *Knowles v. Crocker Estate Co.*, 149 Cal. 278, 86 Pac. 715.

55. Same—What constitutes.—In forcible entry and detainer, subjection of premises to exclusive will and control of possessor by means of exercise by him of visible and notorious acts of dominion over them constitute actual possession.—*Gray v. Collins*, 42 Cal. 152, 157.

56. Same—Same—Inclosing land by fences and a natural barrier is appropriation of it to his notorious use and control and constitutes possession within meaning of above section.—*Knowles v. Crocker Estate Co.*, 149 Cal. 278, 86 Pac. 715.

57. Same—What holding is unlawful.—In forcible entry and detainer, where defendants are shown to have been in possession of premises, their entry was unlawful, and where nothing thereafter occurred to give them right of possession as against plaintiff, their holding is unlawful.—*Treat v. Forsyth*, 40 Cal. 484, 488.

58. Same—Within five days of unlawful entry.—To maintain action of forcible detainer, plaintiff must show that within five days before unlawful entry by defendant he was in peaceable and actual possession of demanded premises.—*McCormick v. Sheridan*, 77 Cal. 253, 256, 19 Pac. 419.

59. Same—Same—Action not maintainable.—Plaintiff can not maintain action of forcible entry and detainer where lands in controversy had never been inclosed by plaintiff, or those under whom he claimed, and where plaintiff at or within five days of date alleged entry of defendant did not have possession of land entered upon by defendant, and where there is entire absence of evidence tending to establish that defendant exercised or threatened force of any character in obtaining or continuing his possession.—*Wilbur v. Cherry*, 39 Cal. 660, 661.

60. Inclosure—Equivalent of, must be shown by plaintiff.—To sustain forcible entry and detainer plaintiff must show an actual inclosure, or something equivalent, as evidence of an actual exclusive appropriation and dominion. Merely putting down stakes or making line of boundary is not sufficient.—*Preston v. Kehoe*, 15 Cal. 315, 318.

61. Same—Is not necessary.—Neither good and substantial fence nor residence on premises is necessary to a peaceable and actual possession of land. There may be actual possession without fence or inclosure of any kind.—*Goodrich v. Van Landigham*, 46 Cal. 601, 603.

62. Same—Is of itself actual possession.—In forcible entry and detainer, sufficient inclosure is of itself actual possession of land without residence upon it, cultivation, or other act of dominion. It is open and visible appropriation to it of exclusive use and dominion of person erecting inclosure, and protects his appropriation against intrusion.—*Conroy v. Duane*, 45 Cal. 597, 603.

63. Same—Not necessary to possession of agricultural lands.—To constitute possession of agricultural land it is not necessary that land should be inclosed, but in action of forcible detainer plaintiff must show that he exercised exclusive dominion and control over it, in order to maintain his action.—*McCormick v. Sheridan*, 77 Cal. 253, 256, 19 Pac. 419.

64. Same—What possession is not acquired by entry upon inclosed premises.—By entering into another's inclosure, erecting house on some part of premises, and asserting claim to whole or large part, while other party is himself living within same general inclosure, occupying premises, and also asserting his possession to whole, intruder does not acquire such actual possession of whole portion claimed as is required to enable him to maintain action of forcible entry.—*Ross v. Roadhouse*, 36 Cal. 580, 583.

65. Same—When defendant is guilty.—Defendant may be found guilty of forcible entry and detainer where he entered upon another's inclosed land with armed men and commenced to erect house and refused to deliver up peaceable possession on demand and made show of force to retain premises.—*Watson v. Whitney*, 23 Cal. 375, 376.

66. Mere "scrambling" or interrupted possession—Not enough to support action of forcible entry and detainer.—*House v. Keiser*, 8 Cal. 499, 501; *Hoag v. Pierce*, 28 Cal. 187, 191; *Bowers v. Cherokee Bob*, 45 Cal. 495, 504, distinguished in *Bank of California v. Taaffe*, 76 Cal. 626, 629, 18 Pac. 781; *Conroy v. Duane*, 45 Cal. 507, 601; *Voll v. Butler*, 49 Cal. 74, 76; *Spiers v. Duane*, 54 Cal. 176, 177; *Castro v. Tewksbury*, 69 Cal. 562, 564, 11 Pac. 339; *Tivnen v. Monahan*, 76 Cal. 131, 133, 18 Pac. 144.

67. Same—Ceasing of.—It may frequently be difficult to define precise point at which possession ceased to be a "scrambling" possession, maintained it may be by threats and menaces, and had ripened into peaceable possession. No rule of universal application can be established in such cases, and each case must of necessity be determined by its own circumstances.—*Bowers v. Cherokee Bob*, 45 Cal. 495, 502.

68. Same—What is meant by.—By "scrambling possession" in forcible entry and detainer is meant struggling for possession of land itself—not such contest as is waged in courts.—*Spiers v. Duane*, 54 Cal. 176, 177.

III. EVIDENCE.

As to evidence of title being inadmissible, see pars. 21, 30, this note.

69. Abandonment of railroad right of way—Sufficiency of evidence.—In an action of ejectment by the owner of the fee in certain land, to recover possession from a railroad company holding under an easement, evidence held sufficient to show an abandonment of the right of way by such railroad company.—*Home Real Estate Co. v. Los Angeles Pac. Co.*, 163 Cal. 710, 126 Pac. 972.

70. Acts amounting to forcible entry and detainer.—*Watson v. Whitney*, 23 Cal. 375, 376; *Hussey v. McDermott*, 23 Cal. 413, 415.

71. Actual force—Need not be proved.—It is not necessary to prove actual force to maintain action of forcible entry and detainer, but threats and menaces of hostile character, showing determination to resort to violence if resistance is offered, are all that is necessary. It would certainly be strange rule if party were compelled to procure an assault to be made upon himself to enable him to maintain his action for recovery of possession.—*O'Callaghan v. Booth*, 6 Cal. 63, 66.

72. Desert land entry—Certificate primary evidence.—While the issuance of a certificate of purchase of desert land does not in fact transfer the government title, still, by virtue of section 1925, post, the certificate is made primary evidence that the holder or assignee thereof is the owner of the land described therein; but in the absence of this provision of the code an assignee of the certificate could not maintain ejectment, since one can recover in that action only upon a legal title.—*Kerr v. Snowden*, 24 Cal. App. 152, 140 Pac. 704.

73. If, in an action of ejectment by the assignee of a certificate to purchase desert land, neither the certificate nor the assignment is offered in evidence, nor any proof made tending to show that the same have been lost or destroyed, a certified copy of a "tract book" from the office of the register of United States lands, showing the issuance of the certificate and the assignment thereof, is not admissible to establish the plaintiff's title.—*Kerr v. Snowden*, 24 Cal. App. 152, 140 Pac. 704.

74. Same—Title acquired after commencement of action—Evidence of, not admissible.—The final certificate of purchase, obtained by the plaintiff months after the commencement of his action in ejectment, is not admissible as evidence of title; for in ejectment the plaintiff must recover, if at all, upon the state of his title as it existed at the time when he commenced the action.—*Kerr v. Snowden*, 24 Cal. App. 152, 140 Pac. 704.

75. The provision contained in section 1925, post, which is in derogation of the common law, can not be construed as authority under which the memoranda and

entries made by the register of United States land can be deemed competent evidence of the issuance in form, substance and execution of a certificate of purchase, or the legal assignment thereof.—*Kerr v. Snowden*, 24 Cal. App. 152, 140 Pac. 704.

76. In such action evidence is not admissible that the plaintiff obtained an order restraining the defendants from interfering with him in the making of improvements upon the land, required by the government as a prerequisite to the issuance of a final certificate of purchase therefor, and that by virtue of such order she went upon the land and made improvements, as a result of which she made her final proof in the United States land office; since the question involved is whether she in fact acquired the government's title, not how she acquired it.—*Kerr v. Snowden*, 24 Cal. App. 152, 140 Pac. 704.

77. Entry, if unlawful—Need not be proved to have been forcible.—In an action of forcible entry and detainer, where plaintiff alleges an entry during his absence, and demand for surrender of premises, it is not incumbent on him to prove entry which was in fact forcible, where entry proved was clearly unlawful and there is evidence tending to show plaintiff's possession at time of defendant's entry.—*Treat v. Forsyth*, 40 Cal. 484, 488.

78. Evidence admissible.—As to generally.—As to the evidence admissible in forcible entry and unlawful detainer.—*Hoag v. Pierce*, 28 Cal. 187, 190; *Buel v. Frazier*, 38 Cal. 693, 695; *Bowers v. Cherokee Bob*, 45 Cal. 495, 501-509; *Conroy v. Duane*, 45 Cal. 597, 606, 607; *Flint v. Lovdall*, 122 Cal. 551, 554, 55 Pac. 424.

79. Same.—All matters of excuse, etc.—In forcible entry and detainer, all matters of excuse, justification, or avoidance may be given in evidence under general denial of allegations of complaint.—*Watson v. Whitney*, 23 Cal. 375, 378.

80. Same.—Causing arrest of plaintiff to obtain possession.—Evidence is competent and admissible in action of forcible entry and detainer to show that plaintiff was arrested as means resorted to to get him away from place in order that defendant might enter upon and take possession of it, and should be admitted. As defendant had no right to take possession of premises in such way, he is guilty of forcible detainer under subdivision 2 of above section.—*Lasserot v. Gamble*, 5 Cal. Unrep. 510, 46 Pac. 917, 919.

81. Same.—Judgment to prove plaintiff's right—Estoppel.—On trial of action of forcible entry and detainer, judgment against defendant awarding possession of land is competent and admissible evidence to prove right and extent of possession of plaintiff, and that defendant was estopped from contesting his suit.—*Michell v. Davis*, 23 Cal. 381, 382.

82. Same.—Lease to show right of possession.—In an action of forcible entry and detainer, lease is admissible to show that plaintiff is entitled to possession.—*Murphy v. Snyder*, 67 Cal. 451, 452, 8 Pac. 2.

83. Same.—Of entry within one year.—Immaterial variance.—In an action of forcible detainer, plaintiff is entitled to prove that he entered at any time within one year next before commencement of action, and within that period no variation from date alleged in complaint as to entry is material.—*Amador G. Mine Ltd. v. Amador G. Mine*, 114 Cal. 346, 348, 46 Pac. 80.

84. Evidence inadmissible.—As to generally.—As to evidence inadmissible in forcible entry and detainer.—*Bowers v. Cherokee Bob*, 45 Cal. 495, 501.

As to evidence of title being inadmissible, see pars. 22, 28, 30, this note.

85. Same.—Extending possession beyond limits of lease.—In action of forcible entry and detainer against tenant to enforce forfeiture for non-payment of rent, evidence of permission by lessor to his lessee to extend his possession beyond limits of leased premises is inadmissible to prove title to outside lands in lessor.—*Mason v. Wolff*, 40 Cal. 246, 248, 249.

86. Same.—Lease from third person to defendant.—In action of forcible entry and detainer, lease from third person to defendant is not admissible in evidence.—*Holland v. Green*, 62 Cal. 67, 68.

87. Same.—Of set-off or counter-claim.—A set-off or counter-claim is not admissible in action of forcible entry and detainer.—*Warburton v. Doble*, 38 Cal. 619, 620.

As to counter-claim and set-off or cross-demand not being allowed, see, ante, § 1170 and note.

88. Same.—Oral evidence of transfer of title or interest.—In an action of forcible entry and detainer, oral evidence of transfer of title or interest to land claimed is not admissible.—*Buel v. Frazier*, 38 Cal. 693, 696.

89. Same.—That defendant's signature was obtained through fraud or mistake, not set up in answer.—It is error in action of unlawful detainer to permit defendant, against plaintiff's objection, to introduce evidence tending to prove that defendant's signature to lease was obtained through fraud or by mistake, neither of which is set up in answer.—*McCreary v. Marston*, 56 Cal. 403, 404.

90. Facts which do not show forcible entry or unlawful detainer.—In general.—See discussion in *Polack v. McGrath*, 25 Cal. 54, 59; *Thompson v. Smith*, 28 Cal. 527, 531, 534; *Conroy v. Duane*, 45 Cal. 597, 606; *Castro v. Tewksbury*, 69 Cal. 562, 566, 11 Pac. 339.

91. Same.—Something more than mere trespass is required.—Act necessary to sustain action for forcible entry or forcible and unlawful detainer requires something

more than mere trespass upon property.—*Castro v. Tewksbury*, 69 Cal. 562, 563, 11 Pac. 339.

92. Forcible entry must be proved—When.—In action of forcible entry and detainer, where complaint alleges forcible entry and that defendant forcibly detained premises so unlawfully taken, it is necessary to prove forcible entry, fact of detainer being stated, not as independent ground of relief, but as mere continuation or consequence of first act.—*Preston v. Kehoe*, 15 Cal. 315, 318.

93. Forcible entry or forcible detainer must be proved, when.—To maintain action of forcible entry or detainer it is essential to prove that defendant made forcible entry or forcibly detains premises from plaintiff.—*Conroy v. Duane*, 45 Cal. 597, 601.

94. Plaintiff must prove actual possession.—Plaintiff must prove that he was in actual possession of premises at time of entry in order to support action for forcible entry.—*Cummins v. Scott*, 23 Cal. 526, 527.

95. Same—Showing inclosure by substantial fences and natural barrier and exercise of uninterrupted dominion is proof of actual peaceable possession.—*Knowles v. Crocker Estate Co.*, 149 Cal. 278, 86 Pac. 715.

96. Plaintiff should be nonsuited, when.—Plaintiff in forcible entry and detainer should be nonsuited where there is no proof of any act of defendant making him amenable to action.—*Kennedy v. Hamer*, 19 Cal. 374, 387.

97. Presumption as to possession.—In an action of ejectment, plaintiff, having established a legal title to the property, is presumed to have been possessed thereof within the time required by law and the occupation of the property by defendant to have been under and in subordination to the legal title, and this presumption can only be overcome by sufficient evidence on the part of appellant that he had held and possessed the property adversely to such legal title for five years before the commencement of the action (Code Civ. Proc.,

§ 321).—*People's Water Co. v. Lewis*, 19 Cal. App. 622, 127 Pac. 506.

98. Proof that person other than defendant procured third person to take possession or to make entry.—Action of forcible entry and detainer can not be defeated by proof of fact that defendant himself did not go into actual corporal possession of premises or did not personally take possession or make entry. If he procures another to take possession or to make entry, that is sufficient ground for action.—*Minturn v. Burr*, 16 Cal. 107, 110.

99. Proof of forcible detainer—Not proof of forcible entry.—Forcible detainer, apart from any question of prior possession, or right to it, is not equivalent to and does not prove forcible entry.—*Preston v. Kehoe*, 15 Cal. 315, 318.

100. Proof of fraudulent acts—Go to enhancement of damages.—Fraudulent acts which may be established in an action of forcible entry and detainer go to enhancement of damages merely, when case is made out for plaintiff.—*Polack v. Shafer*, 46 Cal. 270, 277.

101. What is immaterial.—In action of forcible entry and detainer, evidence of lease is immaterial as justification for entry, and so also is crop mortgaged, and where defense is set up thereunder is properly stricken out.—*Kerr v. O'Keefe*, 138 Cal. 415, 422, 71 Pac. 447.

102. What is not evidence of forcible detainer, or even of forcible resistance.—Declaration of defendant, in forcible entry and detainer, to plaintiff that he would remain on premises until plaintiff put him off by force or by law is not forcible detainer. It is not even threat of forcible resistance if plaintiff should proceed to put him off by force.—*Hodgkins v. Jordan*, 29 Cal. 577, 578.

103. What is not evidence of possession.—Stock ranging over uninclosed public lands is not evidence of such possession of specific portion of such lands in owner of stock as will enable him to maintain action of forcible entry and detainer.—*Buel v. Frazier*, 38 Cal. 693, 697.

§ 1173. COMPLAINT MUST BE AMENDED IN CERTAIN CASES. When, upon the trial of any proceeding under this chapter, it appears from the evidence that the defendant has been guilty of either a forcible entry or a forcible or unlawful detainer, and other than the offense charged in the complaint, the judge must order that such complaint be forthwith amended to conform to such proofs; such amendment must be made without any imposition of terms. No continuance shall be permitted upon account of such amendment unless the defendant, by affidavit filed, shows to the satisfaction of the court good cause therefor.

History: Enacted March 11, 1872; amendment approved March 12, 1885. Stats. and Amdts. 1884-5, p. 102.

AMENDMENT OF COMPLAINT.

1, 2. Court should order complaint amended—Where neither cause of action is proved.

3. Same—Where proof is of cause of action not stated in complaint.

4. A "sport" in law—To be lopped off.

1. Court should order complaint amended—Where neither cause of action is proved.—If complaint states cause of action in forcible entry or forcible detainer, but neither cause of action is proved, it is court's duty of its own motion to order complaint to be amended to suit testimony.—*Valencia v. Couch*, 32 Cal. 339, 343, 91 Am. Dec. 589.

2. Amendment to conform pleadings to proof. An amendment proposed two days before the commencement of trial is not

an amendment such as is contemplated here, which can only be applied after evidence has been adduced; but such amendment rests upon the general power of the court under the provisions of section 473, ante.—*San Francisco & Suburban Home Bldg. Soc. v. Leonard*, 17 Cal. App. 265, 119 Pac. 405.

3. Same—Where proof is of cause of action not stated in complaint.—In forcible entry and detainer, where plaintiff sues upon one cause of action only and testimony makes another, court on its own motion should order complaint amended to suit testimony.—*Valencia v. Couch*, 32 Cal. 339, 342, 91 Am. Dec. 589.

4. A "sport" in law—To be lopped off, is the doctrine in above case, which has taken root in this state. Duty of court to confine evidence to case made in pleadings.—See 63 Cent. L. J. 395.

§ 1174. VERDICT AND JUDGMENT. [WHAT SHALL DECLARE.] If, upon the trial, the verdict of the jury, or, if the case be tried without a jury, the finding of the court be in favor of the plaintiff and against the defendant judgment shall be entered for the restitution of the premises; and if the proceedings be for an unlawful detainer after neglect, or failure to perform the conditions or covenants of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of such lease or agreement.

[Assessment of damages.] The jury or the court, if the proceeding be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent. Judgment against the defendant guilty of the forcible entry, or forcible or unlawful detainer may be entered in the discretion of the court either for the amount of the damages and rent found due, or for three times the amount so found.

[Execution.] When the proceeding is for an unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant, or any subtenant, or any mortgagee of the term, or any other party interested in its continuance, may pay into court, for the landlord, the amount found due as rent, with interest thereon, and the amount of the damages found by the jury or the court for the unlawful detainer, and the costs of the proceedings, and thereupon the judgment shall be satisfied and the tenant be restored to his estate;

[Satisfaction of judgment.] But if payment as here provided be not made within the five days, the judgment may be enforced for its full amount, and for

the possession of the premises. In all other cases the judgment may be enforced immediately.

History: Enacted March 11, 1872; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 349; February 23, 1907, Stats. and Amdts. 1907, p. 55, Kerr's Stats. and Amdts. 1906-7, p. 480. In effect from and after passage.

VERDICT AND JUDGMENT—WHAT SHALL DECLARE.

1. Breach of covenant in lease—Failure to pay rent—Recovery of interest without prayer.
2. Construction of section.
3. Damages are not awarded unless plaintiff recovers possession.
4. Same—For waste and injury.
5. Same—For whole tract, allowable, when.
6. Same—Must be natural and proximate consequence of action.
7. Same—Plaintiff not bound to claim.
8. Same—Propriety of designating as "rents," etc.
9. Same—To adjoining property, not allowed.
10. Same—What damages only are allowed—Assignment.
11. Same—Same—Value of rents trebled can not be awarded as damages, when.
12. Improvements as set-off.
13. Judgment—Amount of.
14. Same—Immediate enforcement of—Exception.
15. Same—Jurisdiction to enter judgment.
16. Same—Of restitution—Time to make tender of rent due—Appeal does not extend.
17. Same—Same—Stay on appeal.
18. Same—Protection of tenant in his possession—Judgment against first landlord.
19. Same—What allegation will sustain.
20. Same—What must appear to warrant.
21. Same—Writ of restitution.
22. Judgment in justices' court—Amount recoverable.
23. Same—For possession—Damages—Rental value.
24. Same—For rental—Treble damages.
25. Lease for a fixed term—Growing crops—Subtenant not entitled to.
- 26, 27. Rents and profits—Judgment for rent—Up to time of trial.
28. Same—Footing of rents—Limit of recovery.
29. Same—Liability of employees, who remain, for rent.
30. Same—Recovery of by tenant in common.
31. Same—Recovery of, though value is not stated in complaint.

32, 33. Reversal of judgment—Restoration to possession.

34, 35. Treble damages—After notice to quit.

36. Same—Are authorized, when.

37. Same—Not authorized for rent, when.

38. Same—Not allowable against tenant after judgment for restitution.

39. Same—Though prayer does not refer to statute.

40. Verdict insufficient to support judgment.

1. Breach of covenant in lease—Failure to pay rent—Recovery of interest without prayer.—Under the provisions of the above section, upon forfeiture of a lease for a failure to pay rent, interest upon the rent due should be allowed and entered as an incident to the main judgment, regardless of the fact that the plaintiff did not, in his prayer to his complaint, particularly ask that an allowance of interest be made. —*Chambers v. Security Commercial & Sav. Bank*, 46 Cal. App. 32, 188 Pac. 818.

2. Construction of section.—This section is highly penal in its character, and landlord seeking to avail himself of its harsh terms must bring himself strictly within its provisions. —*Iburg v. Fitch*, 57 Cal. 189, 192.

3. Damages—Are not awarded unless plaintiff recovers possession.—Damages for forcible entry are not awarded unless plaintiff recovers possession of premises in controversy. —*Brawley v. Risdon Iron Works*, 38 Cal. 676, 678.

4. Same—For waste and injury.—In an action for forcible entry and detainer, damages may be assessed for both waste and injury as well as for value, rents, and profits; but if no waste or injury be committed, loss of use and occupation of premises may be only damage sustained by complainant, and that value, when ascertained, is proper measure of damages in such case. These damages are to be ascertained or assessed by jury or by court without jury, according to truth of case; and when this is done, it is made duty of court to treble them. —*Tewksbury v. O'Connell*, 25 Cal. 262, 265.

5. Same—For whole tract, allowable, when.—In action of forcible detainer to recover tract of land, where court finds that plaintiff has retained and still does retain possession and occupancy of all of said land, and this finding is not assailed, defendant can not object to recovery of damages for whole tract. —*Giddings v. The '76 Land & Water Co.*, 83 Cal. 96, 99, 23 Pac. 196.

6. Same—Must be natural and proximate consequence of action.—Damages recoverable in forcible entry and detainer must be natural and proximate consequence of act complained of, and proof of damages must be confined to principal transaction complained of, and to its attendant circumstances and natural results. An averment of damages resulting to plaintiffs from injury to "credit and circumstances," and such as that sustained by them by reason of "great bodily and mental pain and anguish," will not sustain judgment awarding to them damages occasioned by forcible entry and detainer.—*Anderson v. Taylor*, 56 Cal. 131, 132, 38 Am. Rep. 52.

7. Same—Plaintiff not bound to claim.—It is not incumbent upon plaintiff in forcible entry and detainer to claim damages for waste and injury under this section, or for rents and profits. The main object of statute is to prevent individuals from obtaining possession of real property by threats or fear, and to restore by summary proceedings to injured party the possession when thus obtained; and claim indemnifying complainant for injuries suffered from loss of rent and profits and for waste committed is not for his benefit alone, but to punish offending party. These damages are not necessary appendage to verdict.—*Hicks v. Herring*, 17 Cal. 566, 568.

8. Same—Propriety of designating as "rents," etc.—In an action for unlawful detainer it is of no consequence that amount to be recovered is described in decree as "rents, damages." It is not improper to designate amount for which judgment is rendered as "rents"; neither is there any impropriety in designating as "damages" amount of money recovered in judgment.—*Keyes v. Moy Jin Mun*, 136 Cal. 129, 131, 68 Pac. 476.

9. Same—To adjoining property, not allowed.—In an action of forcible entry and detainer, damages can not be allowed for injury to landlord's property which immediately adjoins demised premises, because it relates to property respecting which there was no subsisting relation of landlord and tenant between parties.—*Kower v. Gluck*, 33 Cal. 401, 407.

10. Same—What damages only are allowed—Assignment.—If lessee, not being forbidden by his lease to assign, makes an assignment thereof, and delivers possession of premises to assignee, he is not liable for damages in action for unlawful detainer. The only damages in such action are damages caused by unlawful detainer. For such damages as may have been suffered by plaintiff by reason of any breach of covenants of lease by tenant while he was lawfully in possession of premises, plaintiff must resort to an ordinary action and can not take advantage of such summary proceeding, designed solely to enable him to subsequently recover possession of demised premises, and put an end to lease.

—*Ben Lomond Wine Co. v. Sladky*, 141 Cal. 619, 622, 75 Pac. 332.

11. Same—Same—Value of rents trebled can not be awarded as damages when action is for unlawful detainer.—*Buhman v. Nickels & Brown Bros.*, 1 Cal. App. 266, 82 Pac. 85, 87.

12. Improvements as set-off.—In actions for the recovery of real property the value of permanent improvements, made by a person holding in good faith and under a color of title adversely to the plaintiff, may be allowed only as a set-off to such damages as may be claimed for the withholding of the property sued for.—*Kinard v. Kaelin*, 22 Cal. App. 383, 134 Pac. 370.

13. Judgment—Amount of.—The plaintiff in an unlawful detainer action is entitled to a judgment not only for the rent that was due when the action was commenced, but also for the rent that has accrued up to judgment.—*Olcovich v. Deremberg*, 27 Cal. App. 194, 149 Pac. 375.

14. Same—Immediate enforcement of—Exception.—It is where proceeding is in unlawful detainer after default in payment of rent only that defendant within five days after judgment may pay into court for landlord amount found due as rent with interest thereon and costs, and, so satisfying judgment, be restored to his estate. In all other cases judgment may be enforced immediately, provided that, in case of hardship, court may relieve against forfeiture, etc. Where judgment is for treble rent, costs of suit, for recovery of demised premises, and for forfeiture of unexpired term of leasehold, court has no power under this section to satisfy judgment upon payment of rent, interest, and costs, and to restore defendant to his leasehold estate.—*Bateman v. Superior Court*, 139 Cal. 140-143, 72 Pac. 922.

15. Same—Jurisdiction to enter judgment is acquired by service of process in actions of forcible and unlawful detainer. the same as in ordinary actions, and the defendant may in such actions as in ordinary actions at the discretion of the court be relieved from a default and permitted to answer after the expiration of the time given by statute for that purpose, as no express provision is made for any special rule upon the subject in such actions.—*Lunnun v. Morris*, 7 Cal. App. 710, 712, 95 Pac. 907.

16. Same—Of restitution—Time to make tender of rent due—Appeal does not extend.—Under the provisions of the above section, tender of the amount of rent found to be due should be made within five days after entry of judgment in an action in unlawful detainer, where retention of possession is desired; and the time for making such tender is not extended by the taking of an appeal from such judgment, notwithstanding the judgment is modified on appeal by striking therefrom the amount found to be due the plaintiff for taxes.

which plaintiff sued for in a separate count, no order of reversal being made as to the remainder of the judgment.—*Chase v. Peters*, 43 Cal. App. 226, 184 Pac. 869.

17. Same—Same—Stay on appeal.—No stay of proceedings from such judgment in an action of unlawful detainer unless the trial judge so directs.—*Sarthou v. Reese*, 151 Cal. 97, 90 Pac. 187.

As to stay on appeal, see, ante, § 1161, note pars. 5, 6.

18. Same—Protection of tenant in his possession—Judgment against first landlord.—If tenant has been evicted on final process in action of ejectment by party claiming title adverse to his lessors, his tenancy ceases, and he is at liberty to take lease from successful plaintiff in ejectment, and under such lease he holds adversely and not in subordination to title of his original lessors; provided original lessors had notice of pendency of ejectment suit in time to have interposed defense before judgment. It is duty of landlord to protect his tenant in possession of leased premises; if he fails to do so and tenant is evicted after notice by tenant of threatened invasion by an adverse title, so far as tenant is concerned, such failure is equivalent to an active, unsuccessful defense by his lessor, and tenancy is terminated; and, in such case, judgment and eviction would be all sufficient to protect tenant in his possession under such adverse title, in an action of forcible entry and detainer by his first landlord.—*Steinback v. Krone*, 36 Cal. 303, 309.

19. Same—What allegation will sustain.—In action of forcible detainer sufficient allegation in complaint of refusal to surrender possession within five days after demand will sustain judgment for plaintiff for restitution of premises, for treble damages, and for costs.—*Rimmer v. Blasingame*, 94 Cal. 139, 141, 29 Pac. 857.

20. Same—What must appear to warrant.—To warrant the judgment provided for in above section it must appear from the complaint that the defendants withhold the premises from the plaintiff for the real gist of the action is the detention of the premises from the one entitled thereto, and this whether the detainer be forcible as defined by section 1160, ante, or unlawful within the meaning of section 1161, ante, or the retention of possession without force and violence by one who has by force and violence entered upon the possession of another.—*Bell v. Haun*, 9 Cal. App. 41, 44, 97 Pac. 1126.

21. Same—Writ of restitution obtained by defendant in an action of forcible entry and detainer does not determine right of property or right of possession. It simply decides restoration to immediate possession which has been taken away by an illegal and unwarranted ouster tending to produce breach of peace.—*Mitchell v. Haygood*, 6 Cal. 148.

22. Judgment in justices' court—Amount recoverable.—A plaintiff in an action of forcible entry and detainer brought in justices' court must not claim more than two hundred dollars damages in all, nor can he recover any greater sum; and rental value of property involved in such action must not exceed sum of twenty-five dollars a month, as matter of fact to be determined by evidence.—*Ballerino v. Bigelow*, 90 Cal. 500, 501, 503, 27 Pac. 372.

23. Same—For possession—Damages—Rental value.—A justices' court is not concluded in action of forcible entry and unlawful detainer by allegation of complaint in determining question of jurisdiction to try case and to render judgment therein. If complaint states that property is worth not to exceed twenty-five dollars a month, and proof shows that rental value is one thousand dollars a month or more, justice would have no power to render judgment for possession of property. The damages claimed and proved are all that plaintiff can recover. Rental value is not confined to what is alleged, but extends to what is proved; and no recovery can be had where proof shows that court has no jurisdiction to render judgment for possession of premises.—*Ballerino v. Bigelow*, 90 Cal. 500, 502, 27 Pac. 372.

24. Same—For rental—Treble damages.—Under a proper complaint, justices' court is authorized to determine from evidence amount of rental due at time of trial, where no damages are found other than those for rental, and damages may be trebled.—*Nolan v. Hentig*, 138 Cal. 281, 283, 71 Pac. 440.

25. Lease for fixed term—Growing crops—Subtenant not entitled to.—In the case of a lease of lands for a fixed term upon a rental payable at fixed dates, and breach of the covenant to pay rent on proceedings in unlawful detainer to recover possession of the premises a subtenant is not entitled to claim the growing crops or emblements after such termination of the leasehold estate, where neither he nor the original tenant certified the judgment for the payment of rent within five days as required by the provisions of the above section, nor obtained relief from the forfeiture under the provisions of section 1179, post.—*Agoure v. Plummer*, 175 Cal. 543, 166 Pac. 311, approving doctrine in *Arnold v. Krigbaum*, 169 Cal. 143, Ann. Cas. 1916D, 370, 146 Pac. 423.

26. Rents and profits—Judgment for rent—Up to time of trial.—In an action for unlawful detainer, judgment may be given for rent already due, as well as rent accruing after commencement of action up to time of trial.—*Keyes v. Moy Jin Mun*, 136 Cal. 129, 130, 131, 68 Pac. 476.

27. There is no error in rendering judgment in an action of forcible entry and detainer for amount of rent due at time of trial.—*Mason v. Wolff*, 40 Cal. 246, 250.

28. Same—Footing of rents—Limit of recovery.—Rents are put upon same footing with other damages, and their amount during period of detention is to be ascertained by estimating their monthly value. Recovery is limited to rents accruing after possession of tenant has become unlawful, and rents prior to that time are not recoverable. Rents to be recovered are such as accrue during detention.—Howard v. Valentine, 20 Cal. 282, 287.

29. Same—Liability of employees, who remain, for rent.—If employees of collection agency, which has rented premises, remain in possession after notice that if they remain rent will be twenty-five dollars per month, and they are personally notified and choose to remain, they are liable for rent whether they are doing business under title of collection agency or not.—Nolan v. Hentig, 138 Cal. 281, 285, 71 Pac. 440.

30. Same—Recovery of by tenant in common.—Even as against trespasser, tenant in common can not recover all rents and profits in action of unlawful detainer.—Lee Chuck v. Quan Wo Chong & Co., 91 Cal. 593, 599, 28 Pac. 45.

31. Same—Recovery of, though value is not stated in complaint.—Value of rents and profits may be recovered in action of forcible entry and detainer, though such value is not stated in complaint.—Holmes v. Horber, 21 Cal. 55, 56.

32. Reversal of judgment—Restoration to possession.—In forcible entry and detainer, where plaintiff recovers judgment and is placed in possession of premises by writ of restitution, trial court, upon reversal of judgment on appeal, should restore defendant to his possession so far as it can be done without interfering with acquired rights of third persons thereto.—Polack v. Shafer, 46 Cal. 270, 276.

33. If judgment in forcible entry is rendered against defendant, but such judgment is afterwards reversed, such defendant, if he has not lost possession of property under or through judgment, has no right to be restored to possession as against third parties.—Bowers v. Cherokee Bob, 46 Cal. 279, 285, distinguished in Bank of California v. Taaffe, 76 Cal. 626, 628, 629, 18 Pac. 781.

34. Treble damages—After notice to quit.—After notice to quit has been served on original lessee, subsequent tenants with knowledge of such notice previously served are liable to landlord for double or treble damages as prescribed by statute.—Schilling v. Holmes, 23 Cal. 227, 232.

35. Compare: Buhman v. Nickels & Brown Bros., 1 Cal. App. 266, 82 Pac. 85, 87.

36. Same—Are authorized, when.—Where mere employees remain in possession of premises and refuse to pay and refuse to quit possession after statutory notice, they are guilty of unlawful detainer. They bring themselves within provisions of statute, and are liable in treble damages.—Nolan v. Hentig, 138 Cal. 281, 285, 71 Pac. 440.

37. Same—Not authorized for rent, when.—In an action of unlawful detainer, where record fails to show that any evidence on question of rental value was offered by either party, and action was commenced three days after alleged expiration of defendant's term, judgment trebling rent for premises is not authorized.—Lee Chuck v. Quan Wo Chong & Co., 91 Cal. 593, 599, 28 Pac. 45.

38. Same—Not allowable against tenant after judgment for restitution.—If court, in action of unlawful detainer, renders judgment against tenant of premises for restitution, it can not afterwards render further judgment against tenant for treble damages.—Iburg v. Fitch, 57 Cal. 189, 191, 192.

39. Same—Though prayer does not refer to statute.—In forcible entry and detainer, damages may be trebled, though prayer of plaintiff's complaint does not refer to statute, which allows damages to be trebled, particularly in justices' courts.—Watson v. Whitney, 23 Cal. 375, 378.

That damages in actions of forcible entry and detainer may be trebled, see, ante, § 735 and note.

That tenant willfully holding over must pay landlord treble rent, see Kerr's Cyc. Civ. Code, 2d ed., § 3345 and note.

40. Verdict insufficient to support judgment.—Illustration of verdict in unlawful detainer not sufficiently definite to support judgment.—Diggs v. Porteus, 5 Cal. Unrep. 753, 33 Pac. 447, 449.

§ 1175. VERIFICATION OF COMPLAINT AND ANSWER. [Repealed.]

History: Enacted March 11, 1872; repeal by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 188, held unconstitutional, see history, § 5 ante; repeal approved March 16, 1907, Stats. and Amdts. 1907, p. 323, Kerr's Stats. and Amdts. 1906-7, p. 480. Section 446 ante, as amended, provides when answer shall be verified; section 1166 ante, as amended, provides for verification of complaint in forcible entry and detainer.

1. Complaint is properly verified, when.—Complaint in action of unlawful detainer is properly verified under this section and section 446, ante, if made by an agent of plaintiff, where he states that facts are within his knowledge and that facts stated

in complaint are true, except as to matters therein stated on information and belief, and that as to those matters he believes them to be true.—Newman v. Bird, 60 Cal. 372, 375.

§ 1176. EFFECT OF AN APPEAL UPON THE JUDGMENT. An appeal taken by the defendant shall not stay proceedings upon the judgment unless the judge or justice before whom the same was rendered so directs.

History: Enacted March 11, 1872; amendment approved March 9, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 9.

STAY ON APPEAL.

1. Judgment of restitution—Appeal—Liability for rent determined.
2. Stay of proceedings—Appeal as.
- 3-5. Same—Not matter of right.
6. Same—Same—Discretion of trial judge—Review.
- 7, 8. Same—Same—Same—Appellate tribunal can not substitute its discretion.
9. Same—Practice—Loss of control by trial court.
10. Same—Sufficiency of sureties.
11. Same—Supreme court has no power to grant—Upon filing of satisfactory undertaking.
12. Same—Same—Where trial judge has not directed stay.
- 13, 14. Same—Supreme court will deny stay, when—Undertaking.
15. Same—Two bonds—Liability by relation.

1. Judgment of restitution—Appeal—Liability for rent determined.—Under the provisions of the above section in a case in which an action for forcible detainer was instituted and judgment had in favor of the plaintiff for the restitution of the premises and for rent accrued up to the date of the judgment and appeal therefrom with affirmance of the judgment, the rental for the period elapsing from the date of the judgment to the date of affirmance is not involved in the judgment recovered by the landlord and he can maintain another action for the recovery of such rental, on which action the measure of the liability of the lessee will be the rent reserved in the lease as for the period covered.—*Ramish v. Workman*, 33 Cal. App. 19, 164 Pac. 26.

2. Stay of proceedings—Appeal as.—In an action of forcible entry or unlawful detainer appeal taken by defendant does not stay proceedings, unless judge before whom case is tried so directs.—*Lee Chuck v. Quan Wo Chong Co.*, 81 Cal. 222, 227, 15 Am. St. Rep. 50, 22 Pac. 594.

3. Same—Not matter of right.—In an action of forcible entry and unlawful detainer, stay of proceedings pending an appeal is not matter of right.—*Gross v. Kelleher*, 73 Cal. 639, 641, 15 Pac. 362.

4. A stay of proceedings pending an appeal in an action for unlawful detainer is not a matter of right, but one in the determination of which the court exercises large discretionary powers. Hence the ruling thereon will not be disturbed on appeal unless an abuse of discretion is made to

appear.—*Plummer v. Agoure*, 20 Cal. App. 319, 128 Pac. 1014, 1016.

5. By virtue of above section the power to stay proceedings upon a judgment in unlawful detainer is vested in the trial judge, and, in the absence of abuse of such discretion an appellate court has no power to order a supersedeas.—*Plummer v. Agoure*, 20 Cal. App. 319, 128 Pac. 1014, 1016.

6. Same—Same—Discretion of trial judge—Review.—While, in an action for unlawful detainer, the action of the trial judge in refusing to direct a stay of proceedings is subject to review on appeal, and such order will be reversed for an abuse of discretion in making the ruling, it can not be reviewed upon an application for a writ of supersedeas.—*Plummer v. Agoure*, 20 Cal. App. 319, 128 Pac. 1014, 1016.

7. Same—Same—Same—Appellate tribunal can not substitute its discretion.—In an action between a landlord and tenant in which the tenant appeals from a judgment in the landlord's favor assessing the landlord damages and finding that the tenant had violated the covenants of his lease, and for that reason restored the landlord to the possession of the property, evicting the tenant therefrom, and directing a cancellation of the lease; thereafter the tenant filed notice of appeal from the judgment of the trial court and made application to the trial judge to fix the amount of the bond on appeal, pursuant to section 945, ante, and for an order directing a stay of execution upon filing of such bond, pursuant to the provisions of the above section, and on the hearing of the application testimony having been offered to the effect that the lessee, since the trial of the action, had, by unfarmerlike methods, failed to properly irrigate and properly direct the irrigation water over the land seeded to alfalfa and caused great injury to the land seeded to alfalfa and to the crops growing thereon, the application was denied, whereupon the defendant lessee made application for a writ of mandate upon the hearing of which the court of appeals declared that it could not substitute its discretion for the discretion vested by law in the judge of the lower court to pass on the merits of the application for a stay.—*Candelas v. Superior Court*, — Cal. App. —, 193 Pac. 957.

8. In order for a petitioner to succeed in his effort to invoke the writ of mandamus against a trial judge, he must show from the record that there were no facts or circumstances to sustain the action of the trial judge in refusing the application for a stay, and that for such reason the order refusing to grant the stay was made with-

out jurisdiction, or was made without the semblance of a cause for the action of the court and that the discretion of the court under the facts can be legally exercised in but one way.—*Candelas v. Superior Court*, — Cal. App. —, 193 Pac. 957, following the doctrine in *Raisch v. Board of Education*, 81 Cal. 542, 546, 22 Pac. 890; *Newlands v. Superior Court*, 171 Cal. 741, 744, 154 Pac. 829.

9. **Same—Practice—Loss of control by trial court.**—Where judge in an action of unlawful detainer directs that proceedings be stayed, and an undertaking is executed in pursuance of such direction, and in amount fixed by him, proceedings are stayed precisely as in other cases; and judge of court who directed such stay has no further control of matter, where bond has been given. To allow him to give necessary direction, and then, after defendant had complied with his order, and an appeal and stay-bond had been perfected, to permit him, without any statutory authority, to change his mind and withdraw his direction or discharge such order, would lead to great uncertainty and inconvenience, and in some cases perhaps to wrong and injustice.—*Lee Chuck v. Quan Wo Chong Co.*, 81 Cal. 222, 227, 15 Am. St. Rep. 50, 22 Pac. 594.

10. **Same—Sufficiency of sureties.**—Whenever an appeal is perfected as provided by law, proceedings shall be stayed without reference to sufficiency or insufficiency of sureties, and it is only necessary that bond be given at proper time and in due form. If sureties are insufficient pecuniarily, opposite party has his remedy under section 948, ante.—*Lee Chuck v. Quan Wo Chong Co.*, 81 Cal. 222, 228, 15 Am. St. Rep. 50, 22 Pac. 594.

11. **Same—Supreme court has no power to grant—Upon filing of satisfactory un-**

dertaking.—Where court below, in an action for unlawful detainer, made an order for stay of proceedings upon filing of undertaking, but afterwards set aside such order, and appeal was perfected, supreme court has no power, under above section, to grant stay of proceedings upon filing of satisfactory undertaking.—*Gross v. Kelleher*, 73 Cal. 639, 640, 641, 15 Pac. 362.

12. **Same—Same—Where trial judge has not directed stay.**—In absence of direction from trial judge directing stay of proceedings, supreme court has no power to order supersedeas in an action of unlawful detainer.—*Bateman v. Superior Court*, 139 Cal. 140, 141, 143, 144, 72 Pac. 922.

13. **Same—Supreme court will deny stay, when—Undertaking.**—Power of accepting an undertaking and directing stay of proceedings under above section is vested exclusively in court that tried case, and where application for stay has been made in that court and denied, motion in supreme court for leave to file undertaking on appeal and to stay proceedings will also be denied.—*McDonald v. Hanlon*, 71 Cal. 535, 536, 12 Pac. 515.

14. In action of unlawful detainer, where an order for stay falls with expiration of time specified in which to file undertaking, supreme court will not issue writ of supersedeas, no matter upon what ground judge of trial court refuses to direct stay.—*Cluness v. Bower*, 135 Cal. 660, 661, 662, 67 Pac. 1048.

15. **Same—Two bonds—Liability by relation.**—Fact that two stay-bonds are given is immaterial, though one of them is insufficient. If same or other sureties justify within time allowed by law, stay continues, and liability of new sureties relates back to time of first stay.—*Lee Chuck v. Quan Wo Chong Co.*, 81 Cal. 222, 229, 15 Am. St. Rep. 50, 22 Pac. 594.

§ 1177. RULES OF PRACTICE. Except as otherwise provided in this chapter the provisions of part two of this code are applicable to and constitute the rules of practice in the proceedings mentioned in this chapter.

History: Enacted March 11, 1872.

RULES OF PRACTICE—FINDINGS, ETC.

1. Findings—Are required.
2. Same—How to be construed.
3. Same—Immaterial question.
4. Same—Refusal to find in different forms—Effect of.
5. Instructions—What words should be embodied in.

1. **Findings—Are required.**—Under above section, and sections 633, 634, and 1174, ante, findings are required in action of unlawful detainer.—*Lee Chuck v. Quan Wo Chong & Co.*, 91 Cal. 593, 598, 28 Pac. 45.

2. **Same—How to be construed.**—Where complaint charges both forcible entry and

forcible detainer, finding that plaintiff was owner and in possession of property should be construed to import that he was in actual and peaceable possession thereof at time he was forcibly removed therefrom, and certainly that he was entitled to possession at time of forcible detainer.—*Adams v. Helbing*, 107 Cal. 298, 302, 40 Pac. 422.

3. **Same—Immaterial question.**—If finding is sufficient to support judgment for forcible detainer it is not material whether it is sufficient to support judgment for forcible entry.—*Adams v. Helbing*, 107 Cal. 298, 302, 40 Pac. 422.

4. **Same—Refusal to find in different forms—Effect of.**—In an action of forcible entry and unlawful detainer, where there

is no omission to find upon any material facts set up by defendants, and facts found, together with admissions contained in answer, sustain cause of action alleged in favor of plaintiff, defendant has no just ground of complaint because court does not find facts in as many different forms as plaintiff, out of abundant caution, thought it best to employ in statement of his cause of action.—*Porter v. Murray*, 2 Cal. Unrep. 687, 12 Pac. 425, 426.

5. Instructions—What words should be embodied in.—In forcible entry and detainer against several persons, where defendant, though present, claims that he took no part in expulsion, or by directing others, court, in its instructions to find for plaintiff, if he was in possession and was ousted, should embody words "by defendant" after word "ousted," to show that ouster was by defendant.—*Ross v. Roadhouse*, 36 Cal. 580, 584.

§ 1178. APPEALS, HOW TAKEN, ETC. Provisions of part two of this code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this chapter, apply to the proceedings mentioned in this chapter.

History: Enacted March 11, 1872.

APPEALS—HOW TAKEN AND EFFECT OF.

1. Appeals in unlawful detainer—Affidavits of publication not in judgment-roll.
2. Appeal from justices' court to superior court—Does not enlarge jurisdiction.
3. Same—Same—By framing complaint in peculiar way.
4. Same—Effect of not objecting to jurisdiction.
5. Immaterial variance will be disregarded.
6. Judgment will not be reversed, when.
7. What will not be considered for first time, on appeal.
8. Same—Objection that issues, both legal and equitable, were tried together.

As to findings, see, ante, § 1177 and note pars. 1-4.

As to new trials, see, ante, §§ 656-663 and notes.

As to who may appeal, see, ante, § 936 and note.

1. Appeals in unlawful detainer—Affidavits of publication not in judgment-roll.—The judgment in an action by unlawful detainer can not be held void upon a direct attack by appeal merely because the affidavits upon which the order of publication of summons in the action was granted do not appear in the judgment-roll as required by section 670, ante.—*William Wilson Co. v. Trainor*, 27 Cal. App. 43, 148 Pac. 954.

2. Appeal from justices' to superior court—Does not enlarge jurisdiction.—Jurisdiction of justices' courts, in action of forcible entry and detainer, is fixed and determined by law; and an appeal from justices' court to superior court does not enlarge jurisdiction in such cases, and can not have the effect to deprive defendant of his right to have case, where rental value exceeds twenty-five dollars per month, tried originally in superior court.—*Ballerino v. Bigelow*, 90 Cal. 500, 502, 27 Pac. 372.

3. Same—Same—By framing complaint in peculiar way plaintiff can not deprive defendant of any rights secured to him by statute, and in those instances where he does so, the judgment obtained will be coram non iudice and void.—*Ballerino v. Bigelow*, 90 Cal. 500, 502, 27 Pac. 372. See *Newman v. Duane*, 33 Cal. 597, 27 Pac. 66.

4. Same—Effect of not objecting to jurisdiction.—If an action of unlawful detainer is tried in justices' court, and cause is appealed to and heard de novo in superior court without objection to its jurisdiction, judgment can not be questioned on appeal to superior court.—*Nolan v. Hentig*, 138 Cal. 281, 282, 71 Pac. 440.

5. Immaterial variance will be disregarded.—In action of forcible entry and detainer variance in description of premises which does not prejudice appellant will be disregarded on appeal.—*Paul v. Silver*, 16 Cal. 73, 75.

6. Judgment will not be reversed, when.—Judgment in forcible entry and detainer will not be reversed where most of material allegations of complaint stand confessed, because answer failed to controvert them, and only matters upon which issue was joined were decided by court in favor of plaintiff and against defendants.—*Burke v. Carruthers*, 31 Cal. 467, 469.

7. What will not be considered, for first time, on appeal.—In forcible entry and detainer failure to aver "actual" possession is mere defect in pleadings which should be taken advantage of in court below, when, if objection is good, complaint may be amended. It can not be considered for first time upon appeal.—*Minturn v. Burr*, 16 Cal. 107, 110.

See, ante, § 1166 and note.

8. Same—Objection that issues, both legal and equitable, were tried together.—It can not be objected for first time on appeal that issues in an action of unlawful detainer were all, both legal and equitable, tried together, when no objection was made by defendant in trial court.—*Diggs v. Porteus*, 5 Cal. Unrep. 753, 33 Pac. 447, 448.

§ 1179. RELIEF AGAINST FORFEITURE OF LEASE. The court may relieve a tenant against a forfeiture of a lease, and restore him to his former estate, in case of hardship, where application for such relief is made within thirty days after the forfeiture is declared by the judgment of the court, as provided in section one thousand one hundred and seventy-four.

[Application—By whom may be made.] The application may be made by a tenant or subtenant, or a mortgagee of the term, or any person interested in the continuance of the term. It must be made upon petition, setting forth the facts upon which the relief is sought, and be verified by the applicant.

Notice of the application, with a copy of the petition, must be served on the plaintiff in the judgment, who may appear and contest the application. In no case shall the application be granted except on condition that full payment of rent due, or full performance of conditions or covenants stipulated, so far as the same is practicable, be made.

History: Enacted March 24, 1874, Code Amdts. 1873-4, p. 350; amendment approved March 9, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 9; repeal by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 188, held unconstitutional, see history, § 5 ante.

RELIEF AGAINST FORFEITURE OF LEASE.

1. After judgment.
2. Discretion of trial court.

1. **After judgment.**—When party is invoking relief from judgment, which relief, if granted, would obviate any necessity of pursuing his motion for new trial, denial of his application does not preclude him from availing himself of independent proceeding to obtain same end. Equity abhors forfeiture, and it is that abhorrence which prompted above section of code, authorizing relief from forfeiture after judgment. It would hardly be just to invite tenant to apply for relief from judgment of forfeiture and through its denial preclude him

from applying to court for same relief under motion for new trial in case. There is nothing inconsistent in his application for relief, and motion for new trial, where both seek same end, namely, relief from judgment.—*Schnittger v. Rose*, 139 Cal. 656, 664, 73 Pac. 449.

2. **Discretion of trial court.**—The matter of granting or denying an application, under the provisions of the above section, to be relieved from the forfeiture of a lease because of a breach of a covenant in such lease, is one which lies largely in the discretion of the trial court, and it requires a very clear showing of an abuse of such discretion to justify a reversal by an appellate court of the order made thereon.—*Matthews v. Digges*, 45 Cal. App. 561, 188 Pac. 283.

TITLE IV.

OF THE ENFORCEMENT OF LIENS.

Chapter I. LIENS IN GENERAL, § 1180.

II. LIENS OF MECHANICS AND OTHERS UPON REAL PROPERTY, §§ 1183-1203a.

III. CERTAIN LIENS FOR SALARIES AND WAGES, §§ 1204-1207[a].

IV. CERTAIN LIENS UPON ANIMALS, § 1208.

CHAPTER I.

LIENS IN GENERAL.

§ 1180. Definition of lien.

§ 1180. DEFINITION OF LIEN. A lien is a charge imposed upon specific property, by which it is made security for the performance of an act.

History: Enacted March 11, 1872.

LIENS DEFINED—DEED OF TRUST,
ETC.

1. Deed of trust—Of homestead—Not a lien or encumbrance, when.
2. Specific property or fund only can be resorted to.
3. Statute of limitations.
4. Swamp-land assessment.

1. **Deed of trust—Of homestead—Not a lien or encumbrance** when given to secure debt, by which title is transferred to the trustee.—Weber v. McCleverty, 149 Cal. 316, 86 Pac. 706.

2. **Specific property or fund only can be resorted to.**—Lien can not be enforced for anything other than thing for which it was given. Where, therefore, advances were to be satisfied out of special fund,—that is, the "proceeds" of working the mine, and "profits" from interest therein,—if there was any lien at all held, it was only for enforcement by that mode of satisfaction.—

Frowenfeld v. Hastings, 134 Cal. 128, 132, 66 Pac. 178.

As to complaint to enforce asserted lien upon an undivided interest in mining property for advances of money alleged to have been made, etc., held insufficient, see Frowenfeld v. Hastings, 134 Cal. 128, 132, 66 Pac. 178.

3. **Statute of limitations.**—Action to enforce performance of act can only be brought within time prescribed by statute.—People v. Hulbert, 71 Cal. 72, 73, 12 Pac. 43. See State v. Yellow Jacket Silver Min. Co., 14 Nev. 220, 226; San Francisco v. Jones, 10 Sawy. C. C. 151, 20 Fed. 188.

As to lien of tax when action to enforce barred by statute of limitations, see Kerr's Cyc. Pol. Code, 2d ed., §§ 3716-3718 and notes.

4. **Swamp-land assessment.**—Fact that swamp-land assessment is charged upon property assessed and not against owner is immaterial.—People v. Hulbert, 71 Cal. 72, 73, 12 Pac. 43.

CHAPTER II.

LIENS ON MECHANICS AND OTHERS UPON REAL PROPERTY.

- § 1183. Mechanics' lien upon property on which they have bestowed labor.
- § 1183½. Building contracts, what provisions to contain. [Repealed.]
- § 1183a. Lien for power supplied by means of team, wagon, etc. [Repealed.]
- § 1184. Notice to owner of labor performed and materials furnished.
- § 1184a. Time to commence action.
- § 1184b. Pro rata distribution when moneys insufficient.
- § 1184c. Right to recover deficit.
- § 1185. What interest in the land subject to the lien.
- § 1186. Effect of liens.
- § 1187. Claim to lien to be filed in recorder's office.
- § 1188. Liens upon two or more pieces of property—Amount due from each to be designated.
- § 1189. Claim to be recorded—Fees of recorder.
- § 1190. Time of continuance of lien.
- § 1191. Lien upon lot for improving.
- § 1191a. Same—For connecting house with sewer, when.
- § 1192. Building held to have been constructed at owner's instance.
- § 1193. Contractor—Amount may recover.
- § 1194. Deficiency of proceeds on sale under decree of foreclosure.
- § 1195. Any number of lienholders may join in action.
- § 1196. Attachment, etc., against materials.
- § 1197. Lien does not impair right of personal action to recover the debt.
- § 1198. Rules of practice.
- § 1199. New trials and appeals.
- § 1200. Where contractor fails to perform contract. [Repealed.]
- § 1200a. [No such section.]
- § 1201. Written consent to waive claim.
- § 1202. What forfeits lien.
- § 1203. Mistake in statement not to invalidate lien.
- § 1203a. Mistake in statement not to invalidate lien.
- Sec. 14. [Construction to be placed on act.]

§ 1183. MECHANICS HAVE LIEN UPON PROPERTY ON WHICH THEY HAVE BESTOWED LABOR. Mechanics, material-men, contractors, sub-contractors, artisans, architects, machinists, builders, miners, teamsters and draymen, and all persons and laborers of every class performing labor upon, or bestowing skill or other necessary services, or furnishing materials to be used or consumed in or furnishing appliances, teams and power contributing to the construction, alteration, addition to or repair, either in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, wagon road or other structure, shall have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done and materials furnished and for the value of the use of such appliances, teams or power, whether at the instance of the owner, or if any other person acting by his authority or under him, as contractor or otherwise; and every contractor, sub-contractor, architect, builder or other person having charge of the construction, alteration, addition to or repair either in whole or in part of any building, or other improvement as aforesaid shall be held to be the agent of the owner for the purposes of this chapter.

[Mines.] Any person who performs labor in any mining claim or claims, or in or upon any real property worked as a mine, either in the development thereof or in working thereon by the subtractive process or furnishes materials to be used or consumed therein, has a lien upon the same and the works owned and used by the owners for milling or reducing the ores from the same, for the value of the work or labor done or materials furnished by each respectively, whether done or furnished at the instance of the owner of such mining claim or claims of real property worked as a mine, or his agent, and every contractor,

sub-contractor, superintendent or other person having charge of any mining or work or labor performed in and about such mining claim or claims or real property worked as a mine, either as lessee or under a working bond or contract thereon shall be held to be the agent of the owner for the purposes of this chapter.

[Limit of liens.] The liens in this chapter provided for shall be direct liens, and shall not in the case of any claimants, other than the contractor be limited, as to amount, by any contract price agreed upon between the contractor and the owner except as hereinafter provided; but said several liens shall not in any case exceed in amount the reasonable value of the labor done or material furnished, or both, for which the lien is claimed, nor the price agreed upon for the same between the claimant and the person by whom he was employed; nor in any case, where the claimant was employed by a contractor, or sub-contractor, shall the lien extend to any labor or materials not embraced within or covered by the original contract between the contractor and the owner, or any modification thereof made by or with the consent of such owner, and of which such contract, or modification thereof, the claimant shall have had actual notice before the performance of such labor or furnishing of such materials. The filing of such original contract, or modification thereof, in the office of the county recorder of the county where the property is situated, before the commencement of the work, shall be equivalent to the giving of such actual notice by the owner to all persons performing work or furnishing materials thereunder. In case said original contract shall, before the work is commenced, be so filed, together with a bond of the contractor with good and sufficient sureties in an amount not less than fifty per cent of the contract price named in said contract, which bond shall in addition to any conditions for the performance of the contract, be also conditioned for the payment in full of the claims of all persons performing labor upon or furnishing materials to be used in such work, and shall also by its terms be made to inure to the benefit of any and all persons who perform labor upon or furnish materials to be used in the work described in said contract so as to give such persons a right of action to recover upon said bond in any suit brought to foreclose the liens provided for in this chapter or in a separate suit brought on said bond, then the court must, where it would be equitable so to do, restrict the recovery under such liens to an aggregate amount equal to the amount found to be due from the owner to the contractor, and render judgment against the contractor and his sureties on said bond for any deficiency or difference there may remain between said amount so found to be due to the contractor and the whole amount found to be due to claimants for such labor or materials or both. No change or alteration of the work or modification of any such contract between the owner and his contractor shall release or exonerate any surety or sureties upon any bond given under this section.

[Limit to owner's liability.] It is the intent and purpose of this section to limit the owner's liability, in all cases, to the measure of the contract price where he shall have filed or caused to be filed in good faith with his original contract a valid bond with good and sufficient sureties in the amount and upon

the conditions as herein provided. It shall be lawful for the owner to protect himself against any failure of the contractor to perform his contract and make full payment for all work done and materials furnished thereunder by exacting such bond or other security as he may deem satisfactory.

History: Enacted March 11, 1872; amendment approved March 30, 1874, Code Amdts. 1873-4, p. 409; April 15, 1880, Stats. and Amdts. 1880 (C. C. P. pt.), p. 63; March 18, 1885, Stats. and Amdts. 1884-5, p. 143; March 15, 1887, Stats. and Amdts. 1886-7, p. 152; April 1, 1899, Stats. and Amdts. 1899, p. 34; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 188, held unconstitutional, see history, § 5 ante; amendment re-enacted March 15, 1903, Stats. and Amdts. 1903, p. 85; amendment approved May 1, 1911, Stats. and Amdts. 1911, p. 1313.

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- 583. Same—Improvement not exceeding one thousand dollars—Prior to amendment of 1911.

1. **Editorial note:** The mechanics'-lien law is one of the parts of the Code of Civil Procedure which has undergone such radical change at the hands of the legislature that scarcely a section is the same as it was when the first edition of this work appeared, and many of the decisions made under the provisions of the various sections as they formerly stood are not "fit" under the sections as they are at present: yet these cases have a present value, or at least may have a present value, and for that reason can not be discarded. The cases heretofore rendered by the courts of the state contain a history of the development of the doctrine of mechanics' liens in the state, together with the reasons therefor, and have a permanent value in that regard. But in the use of these cases as authorities, the provisions in existence at the time and under which the particular case was decided should be carefully consulted and industriously correlated with the respective and corresponding sections as they now stand.

2. **As to theory of mechanics'-lien law.**—The doctrine which is the underlying principle of the entire theory of the mechanics'-lien law is that the owner of real property having either by his own act or that of another, with his consent or knowledge, procured the improvement of such property and received the benefit of the labor or material of another thereby is deemed to have created an equitable lien upon the premises to secure the payment of the value of such labor and materials. He is like the owner of property who stands knowingly and silently by and sees another person sell such property to an innocent purchaser who believes the seller to be the owner and so believing parts with value for it.—*Gentle v. Britton*, 158 Cal. 328, 111 Pac. 9.

As to unconstitutionality of provision for priorities, given by former section 1194, post, see par. 93, this note.

3. **Abandonment by contractor—In general.**—When the contractor abandons the work and the owner completes it under the right reserved in the contract, the work of completion is deemed to be done under the contract: yet the contractor is entitled to receive only any surplus over and above the cost of completion.—*O'Brien v. Garibaldi*, 15 Cal. App. 523, 115 Pac. 249.

As to abandonment of work by contractor, see pars. 11-14, this note.

4. Where an order by contractor to owner to pay a sub-contracting plasterer, was conditionally accepted to be paid out of the completion payment, and the contractor abandoned the contract and the owner was compelled to complete it, the residue of the completion payment after deducting the cost of completion was distributed pro rata to lienholders, including the plasterer, and there was no further liability of owner under such conditional

order.—*O'Brien v. Molinari*, 15 Cal. App. 526, 115 Pac. 252.

5. If the contractor abandons work under such construction contract, and his surety, without objection, completes the contract in accordance with changes therein made and demands and receives payment therefor, the surety can not successfully maintain that the changes were outside the terms of the written contract, or that they were made without his consent.—*Watterson v. Owens River Canal Co.*, 25 Cal. App. 247, 143 Pac. 90.

6. In completing the work under the unrecorded contract, the surety stands in the place of his principal, the contractor, and hence is not entitled to a lien, under above section 1183 for the value of anything furnished or done, but he is limited in his recovery, as in like circumstances the contractor would be, by the contract-price named in the written agreement, after adjustment of all additions and deductions due to changes in the work as it progressed, and also after allowing of the proper credits for payments made by the owner.—*Watterson v. Owens River Canal Co.*, 25 Cal. App. 247, 143 Pac. 90.

7. **Abandonment of contract—As to rights and liabilities of parties.**—Where a contractor, under a valid building-contract with a city, after part performance thereof, abandoned the contract, leaving materials on the ground acquired for use in the building, the city, as owner of the building, becomes the owner of such material, under former section 1200, post, and is entitled to use the same in completing the building according to the contract; and the fact that the building is not subject to any lien can not affect the city's right to such materials, nor can its rights be defeated by any attempt of the contractor to transfer the same absolutely, or by way of securing his creditors.—*Quarcaroli v. City of Sonoma*, 18 Cal. App. 400, 409, 410, 411, 123 Pac. 533.

As to abandonment of contract, see pars. 465, 466, this note.

As to part performance, only, see par. 497, this note.

As to prevention of performance by owner, see par. 400, this note.

8. **Same—Application of payments.**—Where a contract, which has been duly executed and filed as provided by above section, has been abandoned before completion, and the payments made by the owner under the provisions of the contract exceed the value of the work done and materials furnished, estimated by the standard of the whole contract price, no part of the contract price is applicable to the payment of liens, but lien claimants must look to their personal claim against the contractor.—*Hoffman-Marks Co. v. Spires*, 154 Cal. 114, 97 Pac. 152; *Raphael Co. v. Grote*, 154 Cal.

138, 97 Pac. 155; *Scheerer & Co., Inc. v. Deming*, 154 Cal. 141, 97 Pac. 155.

9. In determining the value of the work done and materials furnished up to the time of abandonment, it is proper to consider not only the value of such work and materials, but also the value of the work left undone and the materials necessary to the completion of the contract left unfurnished.—*Hoffman-Marks Co. v. Spires*, 154 Cal. 117, 97 Pac. 152; *Scheerer & Co., Inc. v. Deming*, 154 Cal. 142, 97 Pac. 155.

10. **Same—Findings as to wilful abandonment of contract** by contractor indicates breach by him of his agreement and is inconsistent with bona fide attempt to perform his contract.—*Marchant v. Hayes*, 117 Cal. 669, 672, 49 Pac. 840.

As to findings on foreclosure of lien-claim generally, see pars. 258-267, this note.

11. **Abandonment of work by contractor.**—The rule of former section 1200, post, fixing the portion of the contract price applicable to the liens of other persons than the contractor where he abandons the work before completion, is not an invasion of the constitutional rights of the owner where the application of the section results in the payment by him of a total sum in excess of the contract price.—*G. Ganahl Lumber Co. v. Weinsveig*, 168 Cal. 664, 143 Pac. 1025.

As to abandonment by contractor, see pars. 3-6, this note.

12. **Damages claimed by the owner of a building for loss of rents occasioned through failure of the contractor to finish the building within the time agreed**, can not be deducted from the fund available to lienors where the contractor has abandoned his contract.—*G. Ganahl Lumber Co. v. Weinsveig*, 168 Cal. 664, 143 Pac. 1025.

13. **Same—Notice to withhold payments.**—Where one who has furnished materials to the contractor for the construction of school building serves notice on the school district, after the contractor has abandoned work on the uncompleted building and at a time when he has received all payments to which he is entitled, to withhold sufficient money to pay the claim of the materialman, the school district is not thereby in any way made liable to the materialman, under section 1184, post.—*Dorris v. Alturas School District*, 25 Cal. App. 30, 142 Pac. 795.

As to stop-notice, see post, § 1184 and note.

14. Such notice has the effect of a garnishment of any money coming to the contractor which is in the hands of the owner, and the extent of the owner's liability to the materialman is measured by the owner's liability to the contractor.—*Dorris v. Alturas School District*, 25 Cal. App. 30, 142 Pac. 795.

15. **Action for labor and material.**—In an action in assumpsit to recover a balance due

as the reasonable value of labor performed, materials furnished, and money advanced in the construction of a certain building, where the defendant interposed a general denial and also a counter-claim in which they set up a claim for damages for breach of the contract, the so-called counter-claim amounted to nothing more than a general denial and the subject of the counter-claim could have been proved under the general denial.—*Hansbrough v. Mann*, 26 Cal. App. 261, 146 Pac. 896.

16. In such a case evidence of the value of the lot and improvements, while not the best evidence, was admissible for the purpose of showing that the building should have brought in a greater revenue and would have done so but for the defective workmanship and the difficulty of securing tenants in a badly constructed and leaky building.—*Hansbrough v. Mann*, 26 Cal. App. 261, 146 Pac. 896.

17. **Same—On bond—Time of commencing.**—The amendment of 1911 (Stats. 1911, p. 1422) to the statute passed March 27, 1897, requiring the giving of a bond to secure payment of lien-claims upon public work, applies to a contract which was completed before the passage of said amendment; and where the contract was completed prior to February 26, 1912, but the claim was not filed until April 12, 1912, and a suit on the bond was begun July 18, 1912, the claim was filed and the suit begun in time, as said amendment extended the time of filing the claim from thirty days to ninety days and the time for bringing suit on the bond from ninety days to six months.—*Asbestos Mfg. & Supply Co. v. American Bonding Co.*, 25 Cal. App. 641, 145 Pac. 107.

18. In such a case, where the enlargement of the time for filing the claim and beginning the suit was made before the time had arrived in which either of said steps could be taken under the old statute, the extension of time operated merely as a modification of the remedy and did not impair the obligation of the contract.—*Asbestos Mfg. & Supply Co. v. American Bonding Co.*, 25 Cal. App. 641, 145 Pac. 107.

19. It is held in this action that the bond sued on, which seems to follow closely the language of the statute, and specifies that it was given as required by the act of the legislature, entitled "An act to secure the payment of claims of materialmen, mechanics or laborers employed by contractors upon state, municipal or other public work, approved March 27, 1897," sufficiently conforms to the requirements of the statute.—*Asbestos Mfg. & Supply Co. v. American Bonding Co.*, 25 Cal. App. 641, 145 Pac. 107.

20. **Agents of owner—As to generally.**—Person not expressly authorized by owner of mine to act in his behalf can not be held to be constructive agent of such owner under provision of statute, unless he is person having charge of mining, as provided in statute. This means that person thus

in charge of mine was doing some work upon mine itself, for purpose of extracting ores therefrom.—*Williams v. Hawley*, 144 Cal. 97, 99, 103, 77 Pac. 762.

As to mining claims and minerals and lien of laborers, etc., on, see pars. 335-356, this note.

As to person in possession not made the agent of the owner, see par. 25, this note.

21. Agent referred to in above section must be agent of owner of building, mine, or improvement.—*Reese v. Bald Mt. Consol. Gold Min. Co.*, 133 Cal. 285, 287, 65 Pac. 578.

22. **Same—Declarations and acts of alleged agent, under provisions of our mechanics'-lien law, are admitted to establish prima facie fact of agency.**—*Donohoe v. Trinity Consol. Gold & S. Min. Co.*, 113 Cal. 119, 123, 45 Pac. 259.

23. **Same—Finding that person was in possession of premises under contract with owner, and that contract authorized such person to occupy and hold possession, and to make improvements and prosecute development work, and prospect in mine, is not finding that such person was agent of owner within meaning of section, nor is it finding that he was contractor, subcontractor, or builder, nor that he was person having charge of any mine, or construction, alteration, or repair of any building or other improvement.**—*Reese v. Bald Mt. Consol. Gold Min. Co.*, 133 Cal. 285, 287, 65 Pac. 578.

As to findings generally, see pars. 259-267, this note.

24. **Same—Same—Failure to find upon issue of agency, where work is alleged to have been performed at instance of person in possession of premises, is error because finding in such case is material.**—*Reese v. Bald Mt. Consol. Gold Min. Co.*, 133 Cal. 285, 288, 65 Pac. 578. See *Soto v. Irvine*, 60 Cal. 436; *Spect v. Spect*, 88 Cal. 437, 439, 22 Am. St. Rep. 314, 13 L. R. A. 137, 26 Pac. 203; *Malone v. Bosch*, 104 Cal. 680, 681, 38 Pac. 516.

25. **Same—Person in possession not made agent of owner.**—The provisions of the above section and of section 1192, post, are not to be construed as making the person in possession of the property or the reputed owner the agent of the real owner, and for that reason unconstitutional as depriving the real owner of his property against his will, but declare that an owner or person having any interest in the property who has knowledge of an improvement being constructed on his land and who permits the improvement to be made and receives benefit of it, must pay for it.—*Allen v. Wilson*, 178 Cal. 674, 174 Pac. 661.

As to person not expressly authorized by owner of mine, see par. 20, this note.

26. **Same—Presumption raised by above section that person in charge of mine is agent of owner for purpose of employing labor may be repelled by other proof.**—

Jurgenson v. Diller, 114 Cal. 491, 492, 55 Am. St. Rep. 83, 46 Pac. 610. See *Donohoe v. Trinity Consol. Gold & S. Min. Co.*, 113 Cal. 119, 45 Pac. 259.

27. Same—Same—Overthrow of.—Owner or other person in interest might overthrow presumption arising from declarations and acts of alleged agent as to his agency, by proof of want of knowledge of employment of alleged agent, coupled with showing that he had exercised ordinary care in premises; but where no such proof is offered, and evidence supporting agency stands uncontradicted, findings of court will not be disturbed on appeal.—*Donohoe v. Trinity Consol. Gold & S. Min. Co.*, 113 Cal. 119, 124, 45 Pac. 259.

28. Alteration of building—In general.—The surfacing and waxing of the floor of a loft in a building, at the instance of the lessees, to make it suitable for dancing purposes, is an "alteration" to a part of the building, within the meaning of above section, and the contractor doing or furnishing the work is entitled to a lien therefor if the owner fails to post notice of nonliability under section 1192, post, although it does not appear that the work is of any benefit to the owner of the building.—*Hardwood Interior Co. v. Bull*, 24 Cal. App. 129, 140 Pac. 702.

29. In an action to foreclose such lien, the mere fact that the lien speaks of the work detailed therein as an "improvement" can not be regarded as creating a substantial variance between the lien and the proof.—*Hardwood Interior Co. v. Bull*, 24 Cal. App. 129, 140 Pac. 702.

30. Amendment of 1887, etc.—Construction of.—As to construction of all the amendments to the mechanics'-lien law and to the law itself, see pars. 106-110, this note.

31. Architect—Power of to change terms of contract.—An architect who has been employed to prepare plans and specifications and superintend the work and see that the contractor complies with the contract, has no implied power to change the terms of the contract entered into between the owner and contractor for the purpose of constructing a building in accordance with such plans and specifications.—*Brown v. Coffee*, 17 Cal. App. 385, 121 Pac. 309, 311.

As to effect of architect's certificate, where the contract-price is payable in instalments, see par. 71, this note.

32. Assignments by contractor—Mechanics'-lien law governs, when.—Where a building contractor assigns twenty-five per cent of the contract-price payable within a specified time after the completion of the work, the assignment is subject to the operation of the lien law.—*Lowry v. Law*, 27 Cal. App. 483, 150 Pac. 660.

33. "Bestowed" — Construction as to meaning of word as used in mechanics'-lien law, see par. 112, this note.

34. Bond of contractor—Action on by owner—Attorney's fees and loss of rentals.—In an action by an owner on the bond of a contractor the loss of rentals because of delay in completion, and attorney's fees incurred in defending suits, are proper charges as damages in favor of the owner against the contractor and against the surety on the contractor's bond.—*Bird v. American Surety Co.*, 175 Cal. 625, 166 Pac. 1009.

As to constitutionality of provision for attorney's fees in mechanics'-lien law, see pars. 96, 97, this note.

As to definition of term "contractor," see par. 162, this note.

As to bond given by contractor for construction of schoolhouse binding upon such contractor although not within letter of above section, see, post, § 1203 and note par. 11.

35. Same—Failure to file bond—Lien claimants—Right to foreclose on property.—In the case of a building-contract, where no bond has been filed, with good and sufficient sureties, in compliance with the requirements of the above section, lien claimants are entitled to a judgment to foreclose his lien upon the land of the owner, irrespective of the amount due from the owner to the contractor.—*Tyler v. J. I. Metrovich Building Co.*, — Cal. App. —, 190 Pac. 208.

36. Same—Same—Allegations essential to recovery.—In a case in which no bond has been filed by the contractor in compliance with the requirements of the above section, to entitle a lien claimant to a foreclosure upon the property of the owner, irrespective of the amount due from the owner to the contractor, it is essential to allege in the complaint that the terms of the above section have not been complied with.—*Tyler v. J. I. Metrovich Building Co.*, — Cal. App. —, 190 Pac. 208.

37. Same—Failure to file plans—Effect of.—Bond given by contractor to owner of building guaranteeing performance of contract according to conditions thereof is binding upon sureties notwithstanding that plans and specifications are not filed with county recorder.—*Blythe v. Robinson*, 104 Cal. 239, 37 Pac. 904; *McMenomy v. White*, 115 Cal. 339, 344, 47 Pac. 109.

As to drawings, plans and specifications, see pars. 175-178, 385-387, this note.

As to filing and recording contract, see par. 198, this note.

38. Same—Filed bond—Lien claimants—Extent of recovery.—In the erection of a building where a bond has been filed complying with the requirements of the above section, and it is equitable to do so, the court must restrict recovery by lien claimants from the owner of the property to the aggregate amount found due from the owner to the contractor.—*Tyler v. J. I. Metrovich Building Co.*, — Cal. App. —, 190 Pac. 208.

39. Same—In favor of owner only—Property not relieved from liability.—In a case in which a building-contractor's bond is not conditioned for payment in full of the claims of all persons performing labor or furnishing materials to be used in the work, and is not by its terms made to inure to the benefit of any and all persons who might perform labor upon or furnish materials to be used in the work described in the contract, as required by the provisions of the above section, but which, on the other hand, contains the express condition that no right of action shall accrue upon or by reason thereof to or for the use or benefit of any other person than the obligee therein named, and that the obligation of the surety is and shall be construed strictly as one of suretyship only, is not such a bond as relieves the owner from liability or his property from liens under the statute.—*Terry v. Southwestern Building Co.*, 43 Cal. App. 366, 185 Pac. 212.

40. Same—Liability of sureties—Void contract.—Party who gives bond as independent security and thereby induces another to make full payment of contract-price for construction of building is in no position to deny liability upon it; and if in order to sustain an action, it is necessary that bond should be based upon valid building-contract, it will be held that obligor is estopped to dispute truth of particular recitals contained in bond as to such contract.—*Klessig v. Allspaugh*, 91 Cal. 234, 238, 27 Pac. 662.

As to void building-contract, see pars. 557-573, this note.

41. Bond is not void although contract for performance of which it is given is void under provisions of above section.—*Klessig v. Allspaugh*, 99 Cal. 452, 454, 34 Pac. 106, disapproving doctrine in *Schallert-Ganahl Lumber Co. v. Neal*, 90 Cal. 213, 27 Pac. 192.

42. Bond given upon contract void under statute for failure to record, purpose of which was not to secure plaintiff reimbursement for any damage, is an obligation created by law and exists independently of building-contract and is not affected by any defect therein.—*Klessig v. Allspaugh*, 91 Cal. 234, 237, 27 Pac. 662.

43. Same—Not complying with requirements of above section—Owner not relieved from liability.—In a case in which the building-contractor entered into a bond in a sum but one-half of the estimated cost of the building, which bond was not conditioned for the payment in full of the claims of all persons performing labor upon or furnishing materials to be used in the building, and which bond by its terms was not made to inure to the benefit of any and all persons who might perform labor upon or furnish materials to be used in the work described in the contract, but contained a provision to the effect "that no right of action shall accrue upon or by reason hereof to or for the use or benefit

of any one other than the obligee herein named, and that the obligation of the company is and shall be construed strictly as one of suretyship only," the bond was held not to relieve the owner from liability under the above section for work done and materials furnished.—*Terry v. Southwestern Building Co.*, 43 Cal. App. 366, 185 Pac. 212.

44. Same—Recovery on—Filing of lien essential to.—Under the provisions of the mechanics'-lien law, those persons who have filed their claims of lien are entitled to recover upon the statutory bond of the contractor furnished in pursuance with the requirements of the above section.—*Robinson & Fisher Co. v. Chicago Bonding & Surety Co.*, 35 Cal. App. 650, 170 Pac. 856; *Crane Co. v. Maryland Casualty Co.*, 37 Cal. App. 87, 173 Pac. 494, following doctrine in *Hubbard v. Julian*, 35 Cal. App. 757, 170 Pac. 1093.

45. Same—Same—Previous filing of claim not required.—In the case of a building improvement in which the building contractor furnishes the bond provided for in the above section, as amended in 1911, to secure payment of claims for labor and materials to be furnished in the construction of such building, which is expressly made to inure to the benefit of all persons who perform labor upon or furnish materials to be used in the work described in the building contract, and which also provides that any and all such persons shall have and are given a right of action to recover upon the bond against the principle and surety, "or either of them," in any suit brought to foreclose mechanics' liens, which may be filed by any such persons, or any of them, upon the property mentioned in the contract, "or in a separate suit brought upon the bond," suit may be brought by laborers or materialmen upon the bond without perfecting their claims by filing a verified lien, as provided by the provisions of section 1187, post.—*General Electric Co. v. American Bonding Co.*, 180 Cal. 675, 182 Pac. 444.

46. Same—Requisite for protection of owner.—The bond provided for in the above section is required to be furnished for the express purpose of protecting laborers and materialmen. The necessity of duty, therefore devolves upon the owner to require a bond that will continue good at least until the period has expired during which laborers and materialmen can avail themselves of the benefit afforded by such bond, and this not alone for the protection of the laborers and materialmen, but also for his own protection in the matter of the limitation of the recovery which may be had against him in case of the contractor's failure to pay.—*S. R. Frazee Co. v. Arnold*, 46 Cal. App. 74, 188 Pac. 822.

47. Same—Sureties on contractor's bond—Insufficient—Judgment against owner.—Where the sureties upon a contractor's bond given pursuant to the requirements of the above section are inadequate, one of the

sureties being wholly unqualified as a surety at any time during the life of the bond and the other surety being possessed of such property owner as might reasonably be expected to be preserved inviolate against the obligations of the bond if such necessity should arise, and the contractor being insolvent at the time the bond was executed it is entirely within the discretionary power of the court, granted to it under the above section, to hold that under such circumstances it would not be equitable to restrict the recovery against the owner to the amount of the contract-price.—*S. R. Frazee Co. v. Arnold*, 46 Cal. App. 74, 188 Pac. 822.

48. Same—Same—Undisclosed side agreement between owner and contractor—Release of sureties.—In a case in which an owner and a contractor for the erection of a building makes a side contract providing for the payment of instalments of the contract-price without disclosing the existence thereof to the contractor's sureties, which side contract is not filed with the building contract and the contractor's bond, would invalidate the building contract under the provisions of the above section, and release the sureties on the ground of fraud.—*Union Oil Co. v. Pacific Surety Co.*, 182 Cal. 69, 187 Pac. 14.

49. Same—Same—Same—Agreement between contractor and third person—Sureties on bond not released.—In a case in which a contractor agrees with a third person for the advancement of certain moneys to such contractor at specified intervals during the progress of the work, in return for which the contractor is to execute his notes secured by an assignment of payments due under the building contract, such agreement does not have the effect to discharge the sureties on the contractor's bond on the ground that such contract with a third person modified the building contract providing for payments to the contractor at different stages of the work, under the provisions of section 1184, post, without disclosing to the sureties, in the absence of any showing that the agreement was made for the purpose of defrauding the sureties.—*Union Oil Co. v. Pacific Surety Co.*, 182 Cal. 69, 187 Pac. 14.

50. Same—Time of filing—Constitutional law.—The provisions of the above section requiring a bond to be secured by the owner from the contractor in the case of a contract for the erection of a building or making of other improvement, is not unconstitutional as class legislation, or for lack of uniformity of operation, or as imposing upon the owner an improper burden in addition to the rights of lien given to persons furnishing labor and materials.—*Hollenbeck-Bush Planing Mill Co. v. Amweg*, 177 Cal. 159, 170 Pac. 148, following doctrine in *City of Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604; *Roystone Co. v. Darling*, 171 Cal. 526, 154 Pac. 15; distinguishing *Shaugh-*

nessy v. American Surety Co., 138 Cal. 543, 69 Pac. 250, 71 Pac. 701, on the ground that the point was not involved in that decision.

51. The provisions of the above section requiring a bond does not violate constitutional principles prohibiting the impairment of the right to contract, or provisions forbidding deprivation of property without due process of law or class legislation.—*Hazard, Gould & Co. v. Rosenberg*, 177 Cal. 295, 170 Pac. 612.

52. Same—Same—Liability of surety.—The failure to file the contractor's bond before the work is commenced and at the time of the filing of the contractor's bond, does not invalidate the contract of the surety and relieve him from liability thereunder.—*Hollenbeck-Bush Planing Mill Co. v. Amweg*, 177 Cal. 159, 170 Pac. 148, following the doctrine in *Hammond Lumber Co. v. Willis*, 171 Cal. 565, 153 Pac. 947.

53. Same—Two contracts—Single bond covering both.—In a case in which there are two contracts by the same contractor for different parts of the work on the same building, both contracts being dated on the same day and recorded within a few days of each other, a surety company's bond given under the provisions of the above section, in the aggregate amount of the two contracts, reciting correctly the date of the contract and that on that day the owner "entered into a certain contract" for the erection of a building, which is therein described, covers both contracts, and the sureties liability on the bond is to be gathered from the language used when read in the light of the circumstances attending the transaction, and the use of the singular number, instead of the plural number, in referring to the contracts, amounts at most to a mere clerical error which could not have prejudiced or injured the surety.—*Hollenbeck-Bush Planing Mill Co. v. Amweg*, 177 Cal. 159, 170 Pac. 148, following the doctrine in *Morgan v. Thrift*, 2 Cal. 562; *Swain v. Graves*, 8 Cal. 549; *Austin v. Union Paving & Contracting Co.*, 4 Cal. App. 610, 88 Pac. 371; and approving doctrine in *Stiwell v. American Surety Co.*, 70 Ark. 512, 68 S. W. 1021.

54. Breach of contract—Action to recover damages for prevention of performance of contract can not be maintained by contractor against owner where contract between them was void for non-recording.—*Palmer v. White*, 70 Cal. 220, 221, 11 Pac. 647.

55. Same—Stop-notice—Payment after in at officer's risk.—In the case of a contract for the construction of a county bridge where a creditor of the contractor served upon the county auditor a stop-notice, pursuant to the provisions of the above section and section 1184, post, preventing the county auditor from issuing warrants to the contractor for payment, for the construction of the bridge, should the stop-notice be ultimately held good the county auditor in making payment in disregard of

such stop-notice would do so at his peril.—*Cotton-Macauley Co. v. Desheilds*, — Cal. App. —, 198 Pac. 1026.

As to stop-notice, or notice to withhold, generally, see, post, § 1184 and note.

56. Building—Description of building as dwelling-house—Will include out-house on same premises and used in connection with the dwelling.—*Lucas v. Gobbi*, 10 Cal. App. 648, 651, 103 Pac. 157.

57. Same—Destruction of by fire—After completion.—Where a completed building is destroyed by fire before any liens were filed thereon, such lien can not attach upon the land, which is a mere incident of the building, and if no lien is or could be acquired upon the building, none is acquired upon the land. No lien is acquired by the mere completion of the building, as such completion must be followed by the filing of a claim of lien upon the building before its destruction, else it has no existence.—*Kern v. San Francisco Co.*, 19 Cal. App. 157, 124 Pac. 862.

58. Same—Same—Building partially destroyed by fire.—A mechanics' lien may be had for work and materials furnished in the construction of a building partly destroyed by fire.—*Butler v. Ng Chung*, 160 Cal. 438, 117 Pac. 512.

59. Same—Same—Same—Right of contractor to proceed.—The fact that after the partial destruction of a building, in course of construction, the contractor tried to fix a time to meet the defendant owner and adjust the losses, which the owner failed to do, is not sufficient to be considered, under the contract, as rendering it impossible for the plaintiff to go on with the work. To hold such a meeting and adjustment of losses necessary to enable plaintiff to proceed with the contract would be to read into the agreement a provision which is not contained therein either in express language or by necessary implication.—*Ander-son v. Quick*, 163 Cal. 658, 126 Pac. 871.

60. Building-contract—Contractor's bond—Action on by owner.—As to generally, see par. 33, this note.

As contractor's bond generally, see pars. 34-52, this note.

As to substantial performance of building contract, see note 30 Am. St. Rep. 616.

As to the obligations of a building contract as binding the personal representative of the contractor, see note Ann. Cas. 1912A, 420.

61. Same—Drawings, plans and specifications—Failure to file with.—Where a building-contract requires the work called for to be done "conformable" to certain described drawings and specifications, such drawings and specifications, though not attached to the contract, are an essential part of it, and if the drawings and specifications be not filed, there has been no sufficient filing of the contract, and lien claimants may recover against the owner the

full amount of their unpaid claims, although in excess of the contract-price.—*Bird v. American Surety Co.*, 175 Cal. 625, 166 Pac. 1009.

As to plans and specifications generally, see par. 385-387, this note.

62. Same—Same—Necessity for filing with building-contract.—As to generally, see pars. 176-178, this note.

63. Same—Failure to file contract and bond—Surety not relieved.—In the case of a building-contractor's bond given under the provisions of the above statute, such bond will be valid and enforceable although the bond and contract were not filed; the only effect of a failure to file the contract and bond will be to prevent the limitation of the liability of the owner to lien claimants to the contract-price.—*Bird v. American Surety Co.*, 175 Cal. 625, 166 Pac. 1009.

64. Same—Improvements not exceeding one thousand dollars—Prior to amendment of 1911.—Prior to the amendment to the mechanics'-lien law of 1911 an owner of real property, in causing the construction of a building thereon or any improvement thereto at a cost of not more than one thousand dollars could provide for such improvement by a contract not filed in the recorder's office, or even by an oral contract, and could pay the consideration therefor whenever it pleased him to do so; and the provisions of the mechanics'-lien law with reference to putting in writing building-contracts, and filing them for record, and as to the mode and time of payment, and the withholding of a percentage of the contract-price, were not applicable to contracts for such improvements.—*Bailey Ornamental Iron Co. v. Goldschmidt*, 33 Cal. App. 661, 166 Pac. 363, following the doctrine in *Denison v. Burrell*, 119 Cal. 180, 151 Pac. 1; *Southern California Lumber Co. v. Jones*, 133 Cal. 242, 65 Pac. 378.

See, also, pars. 64, 583, this note.

65. Same—Limitation of owner's liability—Filing of contract and bond.—Under the provisions of the above section as amended in 1911 the provisions for the limitation of the owner's liability to the contract-price for the building or improvement are: (1) the filing of the contract with the county recorder before the commencement of the work, and (2) the filing with the contract of a contractor's bond in an amount not less than fifty per cent of the contract-price condition for the payment in full of all claims for labor done and materials furnished.—*Bird v. American Surety Co.*, 175 Cal. 625, 166 Pac. 1009.

66. Same—Same—Constitutionality of statute.—The requirement of the above section of a bond as a condition to the limitation of the owner's liability does not violate any constitutional right.—*Bird v. American Surety Co.*, 175 Cal. 625, 166 Pac. 1009, following doctrine in *Roystone Co. v. Darling*, 171 Cal. 526, 154 Pac. 15.

67. Same—Modification of—Failure to record.—As to effect on rights and liabilities of parties.—See pars. 187-191, this note.

68. Same—Same—Does not release surety—Constitutional law.—Under the provisions of the above section no modification of a building-contract between the owner and the contractor shall have the effect to release the surety on the bond required by the section to secure payment of lien claims, and the provision in this respect is not unconstitutional.—Hubbard v. Jurian, 35 Cal. App. 757, 170 Pac. 1093.

69. Same—Same—For second story on building being erected—Filing unnecessary.—Under a contract between a contractor and an owner for the construction of a one-story building, a modification of such contract requiring a second story to be added to the building while in the course of construction, is a modification of the original contract not required to be filed.—Hubbard v. Jurian, 35 Cal. App. 757, 170 Pac. 1093.

70. Same—Oral contract—For improvement costing less than one thousand dollars—Execution before amendment of 1913—Performance subsequent thereto.—In the case of a building-contract entered into by and between an owner and a contractor for an improvement upon real property, the contract-price for which was less than one thousand dollars, entered into before the amendment to the mechanics'-lien law in 1913 became effective and the work completed after amendment became effective such amendment had no application to the contract.—Bailey Ornamental Iron Co. v. Goldschmidt, 33 Cal. App. 661, 166 Pac. 363.

71. Same—Payable in instalments—Architect's certificate.—Where the contract provides for an architect's certificate as a means of showing the amount earned and due under the contract while in force, and that in case of destruction the owner shall lose the instalments paid or due, and the contractor the uncompleted work on which engaged, and no provision is made for rebuilding, it is not contemplated that in the event of destruction by earthquake and fire in April, 1906, the contractor can not recover an instalment earned and due, but unpaid, for want of an architect's certificate.—Hettinger v. Thiele, 15 Cal. App. 4, 113 Pac. 121.

As to the effect of architects' certificates and engineers' estimates on building contracts when provided for in them, see note 56 Am. St. Rep. 312.

72. Same—Statement in as to payment—Construction of.—A statement in a building-contract inserted for benefit of contractor that owner might pay whole amount when receipts were produced can not be construed as a subsequent compliance with that provision of the statute requiring the retention of twenty-five per cent, which provision is intended for the benefit of lien claimants or as even an attempt in that di-

rection.—Stimson Mill Co. v. Nolan, 5 Cal. App. 754, 758, 91 Pac. 262.

As to final twenty-five per cent, see pars. 201-207, this note.

73. Same—Substantial departure from statutory requirements—Effect of and rights and liabilities of parties under; as to generally, see pars. 239-241, this note.

As to substantial performance of building-contract, see pars. 266, 267, this note.

74. Same—Unpaid balance a fund set apart for satisfaction of lien-claimants.—See pars. 301, 302, this note.

75. Same—Void contracts.—As to what are, and rights and liabilities under, see pars. 357-373, this note.

76. Canal—Lien upon completed portion.—Lien of plaintiff and plaintiff's assignor for materials furnished and used in construction of canal may be claimed upon completed portion of such canal and it is not compulsory that lien should include incomplete portion where such incomplete portion remains of no value or utility.—Pacific Rolling Mill Co. v. Bear Valley Irr. Co., 120 Cal. 94, 101, 65 Am. St. Rep. 158, 52 Pac. 136.

As to lumber used in construction of which is "consumed," see par. 174, this note.

77. Cartage—As to allowance for.—Cartage, if allowed at all, is allowed as part of value of materials.—West Coast Lumber Co. v. Newkirk, 80 Cal. 275, 280, 22 Pac. 231.

78. Same—As to right to lien for.—Claims for cartage of material used in a building or improvement in property included in a lien-claim as part of the price of the material.—See par. 469, this note.

79. Same—Hauling slate to building and delivering it to contractor, is not performing labor upon or furnishing material to be used on building within terms of statute, and does not entitle to any lien.—Wilson v. Nugent, 125 Cal. 280, 284, 57 Pac. 1008. See Adams v. Burbank, 103 Cal. 646, 651, 37 Pac. 640.

80. Cessation of work upon building for thirty days before lien claims are filed is sufficient completion within meaning of code to entitle claimant to make such filing.—Reed v. Norton, 90 Cal. 590, 600, 26 Pac. 767, 27 Pac. 426. See Kerckhoff-Cuzner Mill & Lumber Co. v. Olmstead, 85 Cal. 84, 24 Pac. 648.

81. Claim of lien—Variance between and proof.—As to generally, when fatal and when immaterial.—See, post, § 1187, note par. 1171.

As to claim of lien, forms, requisites, and sufficiency of generally, see, post, § 1187 and note.

82. Complaint—In action to foreclose mechanics'-lien claims.—As to necessity and sufficiency of, see pars. 232-241, this note.

83. Completion of building—Finding that owner "accepted the building as finished," can not be construed as finding that such

building was in fact finished, or completed as required by act in order to permit filing of liens, and as starting point of time within which liens may be filed.—*Jones v. Kruse*, 138 Cal. 613, 616, 72 Pac. 146. See *Willamette Steam Mills Co. v. Kremer*, 94 Cal. 205, 208, 29 Pac. 633.

As to constructive notice of completion, see par. 245, this note.

As to notice of completion, see pars. 249, 389, 429, this note.

84. Same—Time of—Representation of contractor to materialman—Owner not estopped.—A contractor erecting a building for an owner is not the agent of such owner in fixing the date of the completion of the building and any representations such contractor may make regarding the completion of a building to a material man as to the date of the completion of the contract, does not estop the owner where the contractor was acting in his own interest in an effort to stave off the materialman's lien, notwithstanding that portion of the above section which provides that the contractor shall be held to be the agent of the owner for the purpose of the chapter relating to and governing mechanics' liens.—*Hammond Lumber Co. v. Yeager*, 185 Cal. 355, 197 Pac. 111, approving doctrine in *Valley Lumber Co. v. Nickerson*, 13 Idaho 682, 93 Pac. 24; *Fitz v. Howitt*, 32 Oreg. 396, 52 Pac. 192; *Whittier v. Puget Sound Loan, Trust & Banking Co.*, 4 Wash. 666, 31 Am. St. Rep. 944, 30 Pac. 1094.

85. Consolidation of actions—On foreclosure of liens.—As to generally, see pars. 243, 244, this note; also, post, § 1195 and note.

86. Constitutionality of mechanics'-lien law—Amendment of 1911.—In view of the fact that the constitution itself gives to workmen and materialmen a lien upon property for the value of the work and materials they bestow upon it and directs the legislature to provide for the efficient enforcement of such liens, it is obvious that any legislative enactment to that end which offers to the property owner a reasonable and practicable mode of improving his property through a contractor at a fixed price and without further liability should be construed as a legitimate exercise of the constitutional mandate.—*Roystone Co. v. Darling*, 171 Cal. 526, 154 Pac. 15.

87. The provision of the act requiring persons who make building contracts to file a bond while no such requirement is made of any other person who may wish to make other kinds of contracts, does not render such provision class legislation, as the right of lien conferred by the constitution upon persons performing labor or furnishing materials for a building, establishes these persons as a class.—*Roystone Co. v. Darling*, 171 Cal. 526, 154 Pac. 15.

88. The provision of the revisory act of 1911 requiring the owner to file a bond to

secure liens is not unconstitutional, and is to be distinguished from the amendment of 1893 to section 1203, post, requiring the filing of a bond, which was held to be unconstitutional, as the latter had no connection with or relation to the constitutional mechanics' lien.—*Roystone Co. v. Darling*, 171 Cal. 526, 154 Pac. 15.

89. Same—New constitution did not repeal or abrogate the then existing law, giving liens to mechanics and others upon real property, found in above section and sections 1184 to 1199, post. Such law was preserved in full force and effect by section 1 article XXII of constitution.—*Germania Building & L. Assoc. v. Wagner*, 61 Cal. 349, 353.

90. Same—Of section 1183—As to power of the legislature.—The only power of the legislature with reference to mechanics' liens is to obey the mandate of the constitution, and provide means for the enforcement of the lien which exists by force of the constitution.—*People v. Moxley*, 17 Cal. App. 469, 120 Pac. 40.

As to constitutional rights of owner, see par. 472, this note.

As to review of constitutional question raised by amici curiæ, see, ante, § 53, note par. 119.

As to the validity of mechanics'-lien laws, see notes 4 Ann. Cas. 620; Ann. Cas. 1912C. 339.

91. Same—Of section 1184—As an attempt to circumscribe the rights of private contract.—The provisions of the code regarding mechanics' liens are not violative of section 1 of article I of the constitution declaring that all men are by nature free and independent and have certain inalienable rights, among which are those of . . . acquiring, possessing and protecting property, nor of section 13 of article I declaring that "no person shall be deprived of life, liberty or property without due process of law," nor are they unconstitutional as an attempt to circumscribe the rights of private contract within the usual pursuits of business, nor as an unreasonable restriction upon the owner or his rights in regard to its use or his power to make contracts concerning the same.—*Stimson Mill Co. v. Nolan*, 5 Cal. App. 754, 759, 760, 91 Pac. 262.

92. Same—Of section 1190—Inadvertency in opinion in *Hughes Bros. v. Hoover*, 3 Cal. App. 145, 150, 84 Pac. 681. In this case the opinion used the word "perfected" in connection with a statement as to a mechanics' lien, and it is held that so far as the section assumes that such a lien may be perfected by any of the acts prescribed by the statute it must be regarded as unconstitutional. The right to a lien is given by the constitution, and above section must be construed as a statute of limitations.—*People v. Moxley*, 17 Cal. App. 469, 120 Pac. 43.

93. Same—Of section 1184—Attempted creation of priority of lien.—Unconstitutional in so far as it attempts to give priority to persons performing manual labor over those furnishing materials; but is constitutional in so far as it gives priority to these two classes over subcontractors and original contractors, and to subcontractors over contractors (Shaw, Sloss and Angellotti, J. J., dissenting).—*Miltimore v. Nofziger Bros. Lumber Co.*, 150 Cal. 790, 90 Pac. 113.

As to priority, see pars. 251, 293-295, this note.

As to pro rata distribution of funds required, without regard to their priority in filing notice of claim, see, post, § 1184b.

94. As to constitutionality of laws which provide for a preference, see *Burrows v. Brooks*, 113 Mich. 307, 71 N. W. 460; *Tuttle v. Strout*, 7 Minn. 465 (Gil. 374), 82 Am. Dec. 108; *Coleman v. Ballandi*, 22 Minn. 144; *Donaldson v. Voltz*, 19 W. Va. 156.

95. Compare: *McBride v. Reitz*, 19 Kan. 123; *Rogers v. Brackett*, 34 Minn. 279, 25 N. W. 601.

96. Same—Of section 1195—Providing for attorney's fees.—Statutory provision as to attorney's fees held unconstitutional and void.—*Builders' Supply Depot v. O'Connor*, 150 Cal. 266, 119 Am. St. Rep. 193, 88 Pac. 982; *Union Lumber Co. v. Simon*, 150 Cal. 753, 89 Pac. 1081; *Mannix v. Tryon*, 152 Cal. 41, 91 Pac. 983; *Merced Lumber Co. v. Bruschl*, 152 Cal. 372, 375, 92 Pac. 844; *Raphael Co. v. Grote*, 154 Cal. 138, 97 Pac. 155; *Burnett v. Glas*, 154 Cal. 249, 260, 97 Pac. 423; *Farnham v. California Safe Deposit & T. Co.*, 8 Cal. App. 266, 274, 96 Pac. 778; *Los Angeles Pressed Brick Co. v. Higgins*, 8 Cal. App. 514, 522, 97 Pac. 414.

As to validity of statute providing for recovery of attorney's fees, see pars. 225-227, this note; and note Ann. Cas. 1912A, 692.

97. Every provision of the law which the legislature may enact must be subordinate to and in consonance with the constitutional provisions.—*Los Angeles Pressed Brick Co. v. Higgins*, 8 Cal. App. 514, 519, 97 Pac. 414.

98. Same—Of former section 1200.—Above section is not an unconstitutional invasion of the rights of the owner.—*Scheerer & Co., Inc. v. Deming*, 154 Cal. 138, 141, 97 Pac. 155.

99. Constitutional guarantees for the protection of the person or property can be invoked only by parties whose rights are naturally affected by the alleged disregard of such guarantees and such question can not be raised by one appearing as *amici curae*.—*Scheerer & Co., Inc. v. Deming*, 154 Cal. 138, 141, 97 Pac. 155.

100. Same—Unconstitutionality of act of 1897.—Act of March 29, 1897, applies only to two classes of persons: 1st, corporations doing business in this state, and not to corporations of any other state; 2nd, to la-

borers performing labor for such corporations; and as such act discriminates in favor of one class and against another it is unconstitutional and void.—*Johnson v. Good-year Min. Co.*, 127 Cal. 4, 10, 78 Am. St. Rep. 17, 47 L. R. A. 338, 59 Pac. 304.

101. Construction of mechanics'-lien law—As to nature and interpretation of the law.—The mechanics'-lien law is remedial in its character and should be liberally construed with a view to effect its objects and promote justice.—*McClung v. Paradise Gold Min. Co.*, 164 Cal. 517, 129 Pac. 774, 776.

As to construction to be placed upon act, see legislative declaration in "Sec. 14" of act, following § 1203a, post.

102. The lien herein given is only declaratory of the right expressly guaranteed by the constitution to artisans, mechanics, laborers, and materialmen to a lien upon property on which they have bestowed labor and material in the improvement thereof or the erection of a building thereon.—*Boscut v. Waldmann*, 31 Cal. App. 245, 160 Pac. 180.

103. The filling in of a part of a tract of land of more than fifty acres belonging to a railroad company, the object being to locate and open an avenue across the land to provide a roadbed to which the line of another railroad company might some time be removed from its present location between the company's tracks and the proposed avenue, can not be reasonably held to fall within the provisions of above section giving a lien to persons performing labor upon or furnishing materials to be used in the construction, etc., of any building, railroad, way or road or other structure.—*Richmond Dredging Co. v. Atchison, Topeka & S. F. R. Co.*, 31 Cal. App. 399, 160 Pac. 862.

See, also, post, § 1191 and note.

104. The general purpose of the mechanics'-lien act is not to be obstructed or deprived of its efficiency by a subsidiary provision in the same act, which, though presumably intended to increase, and not diminish, the protection given to the class of persons described, nevertheless, if construed as mandatory and jurisdictional, and not merely directory, seriously impairs the right conferred upon that class, and deprives persons furnishing materials and labor for the construction of public works of the full measure of protection previously accorded them in the body of the act.—*United States v. United Surety Co.*, 226 Fed. 985.

105. Same—As to stare decisis.—Where the correctness of a construction placed upon a statute involving the rights of mechanics' lienholders has never been questioned, and it may be assumed that many lien claimants have relied upon that decision in framing their notices of lien, the rule laid down will not be altered in the absence of grave doubts as to its soundness.—*Pugh v. Moxley*, 164 Cal. 128, 128 Pac. 1037, 1038.

As to the law of the case, see par. 279, this note; also, ante, § 53, note Part XVI.

As to the doctrine *stare decisis* generally, see, ante, § 53, note Part XXV; also 56 American Law Review 497-513.

106. Same—Amendment of 1887.—After amendment of above section was made by legislature in 1887, owner or contractor could satisfy statute by filing either contract or memorandum setting forth matters stated in section; but if he filed contract he must file whole of it, including drawings and specifications, if they are made part thereof; while if he files memorandum, such memorandum must contain all matters which are prescribed in statute as equivalent of contract.—*Willamette Steam Mills Lumbering & Mfg. Co. v. Los Angeles College Co.*, 94 Cal. 229, 234, 29 Pac. 629.

107. Same—Amendment of 1911.—It was not the intention of the legislature in revising the mechanics'-lien law by the act of May 1, 1911, to depart from the established doctrine that the legislature could not create mechanics' liens against a real property in excess of the contract-price where there was a valid contract, but, on the contrary, it was the design to follow such doctrine and to protect lienholders by means of regulations concerning the mode of contracting and dealing with property for the purposes of erecting improvements thereon.—*Roystone Co. v. Darling*, 171 Cal. 526, 154 Pac. 15.

108. The provision of the revisory act of 1911 that it is the intent and purpose of above section to limit the owner's liability, in all cases, to the measure of the contract-price, where he shall have filed the bond required by the section, is a plain declaration of intent to make the contract-price the limit of the owner's liability where the bond has been filed, and the statement in section 14 of the act that the act is intended to make the liens therein provided for "direct and independent of any account of indebtedness between the owner and the contractor," is applicable only to the class of liens where the bond is not filed.—*Roystone Co. v. Darling*, 171 Cal. 526, 154 Pac. 15.

109. The effect of such enactment is that persons contracting for the erection of buildings or structures on their property must require the contractor to furnish such bond and must file the same with the contract in the recorder's office, or, as an alternative, he must see to it that the value of the work and materials used in the building by the contractor is paid to the persons who furnish the same; a contract not accompanied by such bond is not declared to be invalid, but it furnishes no protection to the owner against liens for labor and material on the building.—*Roystone Co. v. Darling*, 171 Cal. 526, 154 Pac. 15.

110. The revisory act of 1911 does not deprive the owner of the right to contract for the improvement of his property, but allows him to contract freely for such improvement

and upon such terms as he may deem for his best interest; all it exacts from him, as a condition of such exemption from liability, and in order to make his contract effective, is that he shall provide a reasonable security for the constitutional lien given for labor and materials furnished to the contractor.—*Roystone Co. v. Darling*, 171 Cal. 526, 154 Pac. 15.

111. Same—Amount of contract.—The above section and section 1184, post, are not limited to cases where contract-price exceeds one thousand dollars, but apply to cases where contract is less than one thousand dollars, notwithstanding contract-price is to be paid in something other than money.—*Schmid v. Busch*, 97 Cal. 184, 188, 31 Pac. 893.

112. Same—"Bestowed"—Meaning of word.—Legislature in using word "bestowed" instead of word "performed" meant "used" or "placed." This language shows that it was intended to give subcontractor lien for labor that he causes his employees to perform on building.—*Macomber v. Bigelow*, 126 Cal. 9, 14, 58 Pac. 312.

113. Same—Bond, limit of recovery on.—The terms of the bond, as prescribed in above section, authorize a recovery on the bond to the amount of the penalty thereof, and no more.—*Roystone Co. v. Darling*, 171 Cal. 526, 154 Pac. 15.

114. Same—Classes of persons affected.—Above section affects rights of three distinct classes of persons: (1) the owner; (2) the original contractor; (3) subcontractors, materialmen, artisans and laborers.—*Laidlaw v. Marye*, 133 Cal. 170, 174, 65 Pac. 391.

115. Same—Dredge—Filing contract for.—A "dredge" is not a structure within the meaning of the mechanics'-lien law requiring the filing of the contract for its construction.—*United Iron Works v. Outer Harbor Dock & Wharf Co.*, 168 Cal. 81, 141 Pac. 917.

116. Same—Liberal construction of.—In view of the provisions of section 4, ante, and of the fact that the mechanics'-lien law is remedial in character such law should be liberally construed.—*Ogram v. Welchoff*, 40 Cal. App. 298, 180 Pac. 631.

See, also, par. 155, this note.

As to legislative provision for liberal construction, see "Sec. 14" following § 1203a, post.

117. The sections of the code embracing the mechanics'-lien law, being remedial in character, are to be liberally construed.—*Ogram v. Welchoff*, 40 Cal. App. 298, 180 Pac. 631, following the doctrine in *Union Lumber Co. v. Simon*, 150 Cal. 751, 89 Pac. 1077, 1081.

118. A mechanics'-lien law should receive a liberal, not a narrow or technical, construction.—*United States v. United Surety Co.*, 226 Fed. 985.

119. Same—Materialmen and laborers are protected in their right to lien by provision

in above section requiring contract to be in writing and made matter of public record. By being placed upon record contract is open to their inspection and if they are not content with its provisions they may decline to furnish any materials for buildings or to perform any labor thereon.—*Stimson v. Braun*, 136 Cal. 122, 126, 89 Am. St. Rep. 116, 57 L. R. A. 726, 68 Pac. 481.

120. The above section is intended to preserve right of materialman, who has duly filed his lien according to statute in cases where contractor has failed, by reason of not filing his contract to preserve materialman's right thereunder; and language of statute announces law in such cases that materialman may duly file his lien and enforce it, just as if owner of building had bought or contracted for materials in beginning, instead of contractor.—*Southern Cal. Lumber Co. v. Schmitt*, 74 Cal. 625, 627, 16 Pac. 516.

121. *Same—Mines.*—The presumption that the contractor, subcontractor, superintendent or other person having the care of any mining or work or labor, etc., shall be held to be the owner for the purposes of this chapter, is a disputable one and may be rebutted and overcome.—*Street v. Hazzard*, 27 Cal. App. 263, 149 Pac. 770.

As to mining claims, millsites, etc., right of laborers to liens, see pars. 335-356, this note.

122. *Same—Of section 1183.*—The provision of above section, that a mechanic's or materialman's lien shall not in any case exceed the reasonable value of the work done and materials furnished is not applicable to one contracting directly with the owner, but has reference to subcontractors.—*Boscus v. Bohlrig*, 173 Cal. 687, 162 Pac. 100.

123. To construe the statute that both methods of giving notice of lien were intended to apply only to private owners would be to hold that the legislature has failed to carry out the commission to provide means to render effectual the right created by the constitution; that it has only partially complied with the requirement. The bond act of 1897 (Stats. 1897, p. 201) does not recognize a lien or provide for the speedy and efficient enforcement of one as a means of securing the payment of the claims of laborers employed upon public work; it is merely cumulative and does not exclude or do away with the constitutional lien. Section 1184, post, furnishes the only available method by which the laborer can obtain the benefit of his lien upon public work.—*Goldtree v. City of San Diego*, 8 Cal. App. 505, 509, 97 Pac. 216.

124. The code provisions upon the subject of mechanics' liens are intended to settle the means for their enforcement as directed by the constitution and will be construed with a view to accomplish the constitutional purpose. In so far as the acts affect the right to contract it will be limited in its

operation and the persons whom the constitution and the statute were intended to protect by giving a lien and to such contracts of these persons as relate to and affect the liens.—*Los Angeles Pressed Brick Co. v. Higgins*, 8 Cal. App. 514, 521, 97 Pac. 414.

125. In interpreting the mechanics'-lien law it is not to be considered as a general law relating to contracts and contractual relations, but a means provided whereby a laborer, mechanic or materialman may declare his intention to exercise his constitutional right and enforce his liens.—*Los Angeles Pressed Brick Co. v. Higgins*, 8 Cal. App. 514, 524, 97 Pac. 414.

126. There is nothing in the statute which would release the owner and the building from the operation of a lien to which the person supplying materials is entitled by reason of the fact that the third person has assumed the relation of guarantor of the debt. The creditor can not be presumed to have waived his lien by having this additional security.—*Barrett-Hicks Co. v. Glas*, 9 Cal. App. 491, 495, 99 Pac. 856.

127. The effect of a failure to set forth in a contract of memorandum filed in lieu thereof of matters specified in above section so far as regards the rights of one furnishing material is identically the same as though there had been no attempt to make a contract.—*D. I. Nofziger Lumber Co. v. Waters*, 10 Cal. App. 89, 92, 101 Pac. 38.

128. By complying with the provision of above section the owner may limit the amount to which his property may be subjected to the enforcement of liens for materials furnished at the instance of the contractor and failing to do so the materials are deemed to be furnished at the personal instance of the owner and the party so furnishing the same has a lien for the entire value thereof provided he complies with the provisions of section 1187, post.—*D. I. Nofziger Lumber Co. v. Waters*, 10 Cal. App. 89, 91, 101 Pac. 38.

129. *Same—Same—Materialmen not included.*—The requirement of above section that all contracts over one thousand dollars shall be recorded does not apply to contracts made with materialmen, and the failure to record the contracts of materialmen does not render them void.—*Blanck v. Commonwealth Amusement Corp.*, 19 Cal. App. 720, 724, 127 Pac. 805.

130. *Same—Of section 1184.*—Considered in the proper constitutional right, the statutory provision as to the terms, form and recording of the contract become in effect a means provided whereby the owner may place some limit upon the liability of his property to be entirely taken to satisfy the constitutional lien, and the legislature has certainly gone as far in the protection of the owner as can well be expected when it declares that twenty-five per cent of the contract-price is sufficient reservation to cover the full value of the labor done and the materials furnished, for which the constitu-

tion provides a lien.—*Nofziger Lumber Co. v. Solomon*, 13 Cal. App. 621, 625, 110 Pac. 474.

131. The mechanics'-lien law of the code is the statutory provision made by the legislature in obedience to the constitutional mandate of section 15, article XX, and prescribes the manner in which the right of lien in each particular case may be declared and rendered effective.—*Goldtree v. City of San Diego*, 8 Cal. App. 505, 509, 97 Pac. 216.

132. Same—Same—Different contracts.—Section 1184, post, can not be so extended in its application as to enable claimants to intercept the money due on one contract for the purpose of applying it as a credit on another contract.—*Clark v. Beyrle*, 160 Cal. 312, 116 Pac. 739.

133. Same—Same—Equitable garnishment.—The stop-notices provided for in section 1184, post, operate as an equitable garnishment.—*Butler v. Ng Chung*, 160 Cal. 437, 117 Pac. 512.

As to equitable garnishment, see pars. 423-428, 504, this note.

134. Same—Same—Off-sets and counter-claims.—Has reference to those not arising under the terms of the contract, and as to which materialmen and laborers could have no notice.—*Builders' Supply Depot v. O'Connor*, 150 Cal. 267, 88 Pac. 982.

135. Same—Of section 1187.—Above section as amended in 1897 is analyzed, construed and applied in *Robison v. Mitchel*, 159 Cal. 581, 114 Pac. 984.

136. The particulars required by above section to be stated in a claim of lien must be truly stated, and if they are not truly and correctly stated, the right to a lien is lost.—*Hogan v. Bigler*, 8 Cal. App. 71, 73, 96 Pac. 97.

137. If the legislature did not intend to provide that both conditions should exist, to wit, occupation and cessation from labor for thirty days before the structure or contract should be deemed complete for the purposes of the lien, it is difficult to conceive what language could have been chosen to express such intention.—*Baker v. Lake, Land, Canal & Irr. Co.*, 7 Cal. App. 482, 484, 94 Pac. 773.

138. Same—Of section 1187 with section 1191.—The introductory part of the second paragraph of section 1187, post, allows to original contractors sixty days and to other persons thirty days, after the filing of notice of completion, as the utmost limit of the time for filing claims of lien upon any "building, improvement, or structure." This can not apply to liens under section 1191, post, for the owner need not file such notice of completion of work done under that section. The only provision of section 1187, post, that fixes the time for filing claims of lien under section 1191, post, is the proviso immediately succeeding the clause prescribing the form of the claim. It can not be believed that the legislature intended to

create a lien for work upon a lot, or upon the street in front of it, which should continue without limit, or at least for the full time of the period of limitation of the cause of action against the owner, without any proviso for making it a matter of record, or for giving notice to the owner, or his successor. Yet this would be the result if the provisions of section 1187, post, requiring the filing of claims of lien and fixing the time therefor, do not apply to liens under section 1191, post. The act, as a whole, shows that its policy is to require a record notice of all liens. It would not be good public policy to allow secret liens of this character. It should not be so construed unless its language permits no other reasonable interpretation. The word "improvement" has a broad meaning. In its ordinary use it includes the work of grading an abutting street, as well as buildings, and the like, upon the lot itself. While the intent to require liens to be filed for work under section 1191, post, is not clearly stated, yet the section plainly implies that such claims must be filed for all work mentioned in the section or included in its terms. The word "improvement" in the proviso was used in the broadest sense to include any and every improvement for which a lien is given by the chapter, those under section 1191, post, as well as those under above section, and that the provisions prescribing the form of the statement and requiring that such statement be filed, apply to all such liens.—*Meyer v. City Street Improv. Co.*, 164 Cal. 645, 130 Pac. 215, 216.

139. Same—Of section 1192.—The construction that the trustee under a deed of trust given to secure an indebtedness is not required to give the notice of non-liability has been established and acted upon in this state for so long a period that it would be sustained and upheld under the rule of stare decisis and as having become a rule of property if for no other reason.—*Hollywood Lumber Co. v. Love*, 155 Cal. 270, 274, 100 Pac. 698.

140. Above section does not impose upon the trustee under a deed of trust given to secure an indebtedness the duty of giving notice of non-liability in order to prevent the subordination of the claim under the trust-deed to those claiming mechanics' liens for a building subsequently constructed upon the land.—*Hollywood Lumber Co. v. Love*, 155 Cal. 270, 274, 100 Pac. 698.

141. Above section does not give the owner two periods at which he may give the notice provided for. If he has knowledge of the intention to build, he must act on that knowledge, and at once (within three days) post the notice that all materialmen, artisans and laborers may know that he will not be responsible. If he has no knowledge of the intention upon which to act, he must move with like promptness upon obtaining knowledge of the construction.—*Western Lumber & Mill Co. v. Merchants Amusement Co.*, 13 Cal. App. 4, 11, 108 Pac. 891.

142. Same—Same—Lessee mere agent of owner in the construction of the building, the owner is not entitled to give the notice provided for in above section.—*Western Lumber & Mill Co. v. Merchants Amusement Co.*, 13 Cal. App. 4, 10, 108 Pac. 891.

143. Same — Of former section 1200—Abandonment by owner—Unused materials.—Former section 1200, post, held not to cover unused materials in a case of abandonment by owner.—*California Portland Cement Co. v. Wentworth Hotel Co.*, 16 Cal. App. 701, 118 Pac. 103.

144. Same — Same — Material furnished contractor.—Section 1200, post, has no application to materials, the title of which had not passed to the contractor at the time of the abandonment of the work, but only as against lien claimants for materials furnished for use by the contractor in the building.—*Steiger Terra Cotta & Pottery Works v. City of Sonoma*, 9 Cal. App. 698, 702, 100 Pac. 714.

145. Same—Same—Same—Replevin for.—Where contractor employs a third person to furnish all the material for and do the work necessary for a certain part of the building, and after the material for such work is delivered upon the ground, the contractor abandons the work, the owner has no claim to the material thus delivered, and after proper demand therefor, the owner thereof may maintain replevin.—*Steiger Terra Cotta & Pottery Works v. City of Sonoma*, 9 Cal. App. 698, 702, 100 Pac. 714.

146. Same—Of section 1202—Work or materials not furnished—Forfeiture of lien.—The provisions of section 1202, post, held to be penal and to require strict construction, and evidence must be clear and convincing that violation was wilful and intentional before a court will deprive a claimant of his right to a lien.—*California Portland Cement Co. v. Wentworth Hotel Co.*, 16 Cal. App. 692, 704, 118 Pac. 103.

147. This is the well-established doctrine under our mechanics'-lien law.—*Schallert-Ganahl Lumber Co. v. Neal*, 91 Cal. 362, 27 Cal. App. 743; *Pacific Mut. Life Ins. Co. v. Fisher*, 106 Cal. 224; *McGinty v. Morgan*, 122 Cal. 103, 54 Pac. 392; *Macomber v. Bigelow*, 126 Cal. 9, 58 Pac. 312.

148. Hence where the contract is for putting in an elevator, the cost of which was to be more than a thousand dollars, it was held not to be a contract for construction work within the provision requiring it to be in writing and filed, but rather a contract for the furnishing of materials.—*California Portland Cement Co. v. Wentworth Hotel Co.*, 16 Cal. App. 692, 704, 118 Pac. 103, 113.

149. The statute requiring building-con-tracts, the cost-price in which was over one thousand dollars, to be in writing, does not apply to and include materialmen, and for that reason was held not to apply to the contract to put in such elevator, which was construed as a contract to furnish ma-
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terials.—*Portland Cement Co. v. Wentworth Hotel Co.*, 16 Cal. App. 692, 704, 118 Pac. 103, 113.

150. This holding is supported by the following cases, assuming the construction of the contract, to be the correct one.—*Hinckley v. Fields Biscuit Co.*, 91 Cal. 136, 27 Pac. 594; *Roebbling's Sons Co. v. Humboldt Electric Light & Power Co.*, 112 Cal. 288, 44 Pac. 568; *Bennett v. Davis*, 113 Cal. 337, 54 Am. St. Rep. 354, 45 Pac. 684; *Bryson v. McCone*, 121 Cal. 153, 53 Pac. 637.

151. Same—Of section 1203a, not retro-active.—Section 1203a, as enacted in 1907, is not retroactive and has no bearing upon proceedings had prior to its enactment.—*Nozziger Lumber Co. v. Waters*, 10 Cal. App. 89, 91, 101 Pac. 38.

152. Same—Penal character of statute.—Provision in sections of mechanics'-lien law providing in certain cases that contract shall be wholly void is highly penal in its character, for violation of its mandate subjects owner to liability for debts which he never agreed to pay, and from which he receives no benefit. Like other statutes which create forfeiture or imposed penalty it is to be strictly construed against such liability.—*Snell v. Bradbury*, 139 Cal. 379, 382, 73 Pac. 150. See *Irvine v. McKeon*, 23 Cal. 472, 473; *Trumpler v. Bemerly*, 39 Cal. 490; *Moore v. Lent*, 81 Cal. 502, 506, 22 Pac. 875.

153. Such sections should not receive con-struction unduly favoring imposition of penalty of forfeiture. In any case statute which deals with constitutional right of owner of property to make contracts relating to its use and enjoyment, restrictions of right can go only to form of contract, and can not be extended beyond what is expressed.—*Snell v. Bradbury*, 139 Cal. 379, 382, 73 Pac. 150. See *Stimson M. Co. v. Braun*, 136 Cal. 122, 125, 89 Am. St. Rep. 116, 57 L. R. A. 726, 68 Pac. 481.

154. Same—Persons entitled to lien.—The persons entitled to a lien under the provisions of the chapter relating to mechanics' liens is confined to such persons as are named in the above section; that is, to persons who perform work upon the structure therein described at the request of the owner or to persons furnishing material to be used in such structure.—*Slayden v. O'Dea*, 182 Cal. 500, 189 Pac. 1066.

155. Same—Remedial statute.—Statute is remedial, and for purpose of carrying it into effect object for which it is enacted is to receive liberal construction, and notices which, under its provisions, are to be given, have regard to substance rather than to form.—*McGinty v. Morgan*, 122 Cal. 103, 54 Pac. 392; *Macomber v. Bigelow*, 126 Cal. 9, 16, 58 Pac. 312.

As to liberal construction to be given to mechanics'-lien law, see pars. 116-118, this note.

156. Same — Strict construction required, when.—All of Mechanics' Lien Act must be

strictly construed, because rights are given thereby in derogation of common law.—*Holmes v. Richet*, 56 Cal. 307, 310, 38 Am. Rep. 54.

But as to present rule that all statutes are liberally construed in this state, see, ante, § 4 and note pars. 116-118, 155, this note, also, "Sec. 14" following § 1203a, post.

157. Same—Technical construction can not be indulged in for purpose of visiting penalty upon owner unless there has been substantial failure to comply with law; such as, if denied, would defeat remedial purposes of statute; but if there be reasonable doubt as to construction of statute, owner should have benefit of such doubt.—*Joost v. Sullivan*, 111 Cal. 286, 296, 43 Pac. 896; *Shanklin v. Gray*, 111 Cal. 88, 95, 43 Pac. 399.

158. Same—Vessels not included in.—It was never the intention of the legislature to include a vessel under the provisions of the mechanics'-lien law (section 1183-1203a).—*United Iron Works v. Outer Harbor Dredging & Wharf Co.*, 168 Cal. 81, 141 Pac. 917.

See, ante, §§ 813 et. seq. and notes.

159. Same—"Wagon-road or other structure."—The clause in the above section "wagon-road or other structure" defining the structures and improvements upon which liens attach under the mechanics'-lien law, does not include public roads or highways, but has reference to private wagon-roads only; for this reason the provisions of section 1184, post, as to stop-notice in a case of public work, is not applicable to public work on public highways.—*Slayden v. O'Dea*, 182 Cal. 500, 189 Pac. 1066.

160. Same—Written contract.—Under above section it is necessary that whole contract shall be in writing and signed by parties thereto.—*Donnelly v. Adams*, 127 Cal. 24, 25, 59 Pac. 208.

As to contract for building or improvement costing less than one thousand dollars not required to be in writing, see par. 583, this note.

161. Same—Same—Object of statute in requiring written contracts.—The object of the statute in requiring contracts in excess of one thousand dollars to be filed with recorder is twofold: (1) as security to owner, who is thereby shielded from liability to subcontractors, laborers, and materialmen, beyond his contract; (2) to afford information to all others furnishing materials or performing service in and about contemplated improvement, upon which to predicate an opinion founded upon value of property, price to be paid, and dates of payment, as to whether contract-price is such as will afford adequate security and lien under statute sufficient to warrant them in bestowing their labor or furnishing materials for proposed improvement.—*Greig v. Rior-dan*, 99 Cal. 316, 319, 33 Pac. 913.

162. Contractor—Definition of term.—Word contractor as used in above section does not apply to one who contracts to fur-

nish material only.—*Hinckley v. Field's Biscuit Co.*, 91 Cal. 136, 139, 27 Pac. 594. See *Bryson v. McCone*, 121 Cal. 153, 156, 53 Pac. 637.

As to "original contractor," meaning of, see, post, § 1187, note par. 139.

163. Same—Right to recover.—Contractor has no right to recovery unless he can show that he has completed contract on his part, or that its completion has been in some way waived or excused.—*Marchant v. Hayes*, 117 Cal. 669, 671, 49 Pac. 840.

As to exception in favor of contractor, as to payment for work otherwise than in money, see, post, § 1184 and note par. 49.

164. Contractor's bond—As to generally, filing, sufficiency of, and liability under, see pars. 34-53, this note.

165. Contract-price—Payable in instalments.—As to generally and architect's certificate, see par. 71, this note.

166. Cook—For laborers of subcontractor.—Right to lien for wages of, see par. 516, this note.

167. Corporation—Priority of liens.—Materialman or contractor who has furnished material for or constructed building for corporation, and who has filed his notice of lien as provided in above section, can not be defeated in his right by statute giving lien in favor of laborers who perform labor for corporations, since his lien attached, giving to such laborers priority, where such statute applies only to one class of laborers to exclusion of another class of laborers.—*Johnson v. Goodyear M. Co.*, 127 Cal. 4, 11, 78 Am. St. Rep. 17, 47 L. R. A. 338, 59 Pac. 304.

As to service upon corporation of demand for stop-notice, see, post, § 1184, note par. 73.

168. Debtor's application of money.—Mode by which debtor manifests his intention to apply moneys paid to him for extinction of any particular obligation is immaterial, provided that at time debtor intended to make particular application of moneys, and creditor well knew that debtor so intended.—*Hanson v. Cordano*, 96 Cal. 441, 443, 31 Pac. 457.

169. Deductions owner may make from payments to contractor,—as to, see *Hampton v. Christensen*, 148 Cal. 729, 84 Pac. 200.

170. Deposit by owner—Of balance due upon building-contract, and the application and distribution of same.—See pars. 247-249, this note.

171. Where an owner of property delivered her check to a bank in which she was a depositor, which check was afterward certified by the bank, with instructions to pay it to a certain building company with which she had made a contract to construct a building upon her property, upon the production of satisfactory releases of liens and notices to withhold, executed by various parties who performed labor upon and furnished material for the construction of the

building, and about three years after the deposit of the check, the construction company served notice upon the bank that it no longer had any interest in the check, whereupon the bank applied the amount of money represented by the check upon an indebtedness of the depositor to it under its banker's lien, under the circumstances, no trust in the funds was created in favor of the lien-claimants, and the bank was justified in applying the amount of the check upon the indebtedness of its depositor.—*Wade v. City and County Bank*, 25 Cal. App. 675, 145 Pac. 145.

172. In such a case the transaction neither creates a trust in favor of the lien-claimants, or an equitable assignment; nor is there anything that could in any manner be construed as creating an estoppel in their favor, where the record does not show that they knew anything of it. The entire transaction was simply a means adopted by the owner of the building of setting aside money with which to pay her contractor.—*Wade v. City and County Bank*, 25 Cal. App. 675, 145 Pac. 145.

173. **Direct employment of laborer.**—Statute does not require that laborer must have been hired originally to do particular work for which lien is given, and that he must under that hiring have performed such work; it says he shall have lien if he performs work, whether employed directly for such purpose or for some other purpose.—*Ah Louis v. Harwood*, 140 Cal. 500, 503, 74 Pac. 41.

174. **Drains—Lumber used in construction of—Part thereof.**—In a case in which the court finds that all the lumber furnished by a materialman to a subcontractor was actually used in the digging or dredging of a ditch or canal and that the portion not already destroyed became a permanent part of such ditch or canal and finding also the value of the lumber thus used, including in such finding as to value the lumber which had been used as "skids," and which was destroyed by the action of the dredge the portion of the lumber used as "skids" was properly included under the provisions of the above section as amended in 1911 because such lumber, although destroyed by the dredger, became, in legal contemplation, a permanent part of the ditch.—*L. W. Blinn Lumber Co. v. Pioneer Drainage District*, — Cal. App. —, 195 Pac. 750, following the doctrine in *Olson-Mahoney Lumber Co. v. Dunne Invest. Co.*, 30 Cal. App. 332, 159 Pac. 178; *Consolidated Lumber Co. v. Bosworth, Inc.*, 40 Cal. App. 80, 180 Pac. 60.

As to lien upon completed portion of, see par. 76, this note.

As to lumber used in concrete "forms" being materials "used and consumed" in the improvement of "structure," see par. 471, this note.

175. **Drawings, plans and specifications.**—As to necessity of signing specifications.—Failure to sign and failure to file specifica-

tions, where the contracts provided that the work should be done according to specifications, held to invalidate the same.—*Coghlan v. Quartararo*, 15 Cal. App. 662, 666, 115 Pac. 664.

As to plans and specifications, see pars. 386, 387, this note.

176. **Same—Filing of plans, drawings and specifications with contract.**—Where the contract specifically refers to such plans, drawings, specifications, etc., whether referred to as being annexed, or as being on file in the architect's office, or elsewhere, they constitute an essential part of the contract, and must be filed with the contract, and a failure to comply with this requirement renders the contract void, and labor done and materials furnished thereunder, by all persons except the contractor, are deemed to have been done or furnished at the special instance and request of the owner.—*Burnett v. Glas*, 154 Cal. 255, 97 Pac. 423.

177. Where the contract does not contain the plans, drawings and specifications constituting an essential part thereof they must be filed with it, although they are not attached to or by reference made a part of it, but are provided to be kept at the office of the architect or in some other place, and a failure to comply with this requirement renders the contract wholly void and labor done and materials furnished by all persons except the contractor are deemed to have been done and furnished at the personal instance of the owner and they have a lien for the value thereof.—*Burnett v. Glas*, 154 Cal. 249, 255, 97 Pac. 423.

178. It is not necessary that the plans and specifications attached to and made a part of the building-contract be signed by the parties if they are sufficiently identified as to show they are the plans and specifications referred to.—*Hartwell v. Ganahl Lumber Co.*, 8 Cal. App. 733, 734, 97 Pac. 901.

179. **Dredge—Filing of contract for—Not a "structure."**—A "dredge" is not a structure within the meaning of the mechanics' lien law requiring the filing of the contract for its construction.—*United Iron Works v. Outer Harbor Dock & Wharf Co.*, 168 Cal. 81, 141 Pac. 917.

180. **Electrical apparatus—Contract for setting up electrical apparatus and machinery necessary in construction of electric-light works is contract for material and nothing more.**—*Roebeling's Sons Co. v. Humboldt E. L. & P. Co.*, 112 Cal. 288, 290, 44 Pac. 568. See *Hinckley v. Fields B. & C. Co.*, 91 Cal. 136, 27 Pac. 594.

181. **Engineering expert—Right to lien.**—An engineering expert employed for a single and specified purpose in the construction of a building or the making of an improvement, even though he may not be classed as an architect, comes plainly within the provisions of the above section as one bestowing skill to be used in the construction of the building or making the improvement, and is entitled to a lien for the furnishing

of engineering designs to the architects.—*Hornlein v. Bohlrig*, 37 Cal. App. 646, 174 Pac. 697.

182. Equitable estate—Is equally bound with legal title to satisfy liens of mechanics or materialmen growing out of contracts made in construction of building.—*Hinckley v. Field Biscuit & Cracker Co.*, 91 Cal. 136, 139, 27 Pac. 594.

183. Equitable garnishment—Notice to withhold.—As to generally, see pars. 430, 431, 504, this note.

As to notice to withhold, see, also, post, § 1184, note pars. 72-94.

184. Evidence—Admissibility and sufficiency of.—As to generally, see pars. 184, 253-258, this note.

185. Same—Void contract as.—Contract void under statute for failure to file in recorder's office is nevertheless admissible in evidence to determine character of building to be erected, and thereby to furnish test by which it may be known when building was completed.—*Barker v. Doherty*, 97 Cal. 10, 12, 31 Pac. 1117.

As to void contract generally, see pars. 557-573, this note.

186. Extra work—Recovery for.—No right of action accrues to contractor for extra work done by him until same is valued, or some good and sufficient excuse for failure to value same in accordance with agreement is shown. In cases where no valuation is made and no reason is shown for failure to make such valuation, contractor is not entitled to recover anything.—*Holmes v. Richet*, 56 Cal. 307, 315, 38 Am. Rep. 54.

187. Failure to file and record contract—In general.—The clause in above section providing that the failure to file a building-contract should render it "wholly void" is penal in its nature. It is to be construed in connection with the rest of the section in which it is void as well as with regard to the section of the constitution creating the mechanics' lien for the enforcement of which the lien law was provided. It is an arbitrary provision and is not to be extended to any contract not falling strictly within its letter.—*Los Angeles Pressed Brick Co. v. Higgins*, 8 Cal. App. 514, 518, 97 Pac. 414.

As to provision not applying to contracts by materialmen with original contractor or subcontractor, see par. 129, this note.

As to recordation of contract, see pars. 198, 360-367, this note.

188. Failure to file contract renders same void for the purpose of an action between the parties, and of subjecting the owner to liens filed against the building, yet it does not establish the relationship of master and servant between the owner and contractor so as to render the owner liable for negligence of the contractor.—*Smith v. Dryden*, 15 Cal. App. 570, 115 Pac. 455.

189. Failure to file and record the contract can not be excused on the ground that the contract did not specify the contract-

price and the materials.—*Peterson v. Freiermuth*, 17 Cal. App. 613, 121 Pac. 299.

190. Same—Liability of surety.—The fact that a construction contract is invalid as between the parties because not recorded as required by above section, does not release the surety on the bond of the contractor from liability.—*Watterson v. Owens River Canal Co.*, 25 Cal. App. 247, 143 Pac. 90.

191. A change made in such contract without the consent of the surety releases him; but this rule would not apply to a change effected by corporate officers without authority, or to a change orally agreed upon but not actually executed.—*Watterson v. Owens River Canal Co.*, 25 Cal. App. 247, 143 Pac. 90.

192. Farm development—"Structure"—Construction of section.—Under the provisions of the above section conferring a right to mechanics' lien on specified improvements or "other structure," farm development consisting of ditches, drains, embankments, and roads, so correlated as to form one harmonious entity designed to convey water to and distribute it over the land, and constituting a permanent improvement thereto, increasing its value, is a "structure" within the meaning of the statute.—*Mendoza v. Central Forest Co.*, 37 Cal. App. 289, 174 Pac. 359.

193. Filing and recording bond.—Under the mechanics'-lien law as amended in 1911, where the owner fails to file the bond and contract in the recorder's office, lien-claimants are entitled to a lien against the property for the full amount of the value of the materials furnished and used in the building or the labor done thereon, less any credits justly to be made in favor of the owner or contractor.—*Hammond Lumber Co. v. Willis*, 171 Cal. 566, 153 Pac. 947.

194. The bond which above section provides for the security of the payment of claims for labor and materials is a valid common-law obligation, though not filed.—*Hammond Lumber Co. v. Willis*, 171 Cal. 566, 153 Pac. 947.

195. If the bond refers specifically to a contract which covers only a house, it will not cover labor or materials furnished in the construction of a garage on the same lot.—*Hammond Lumber Co. v. Willis*, 171 Cal. 566, 153 Pac. 947.

196. That some of the materials are furnished to a subcontractor rather than to the original contractor does not affect such bond.—*Hammond Lumber Co. v. Willis*, 171 Cal. 566, 153 Pac. 947.

197. It is the duty of the owner to exact the bond from the contractor and file the same in the office of the county recorder if he would restrict his liability to laborers and materialmen or subcontractors for their claims to the contract-price. If the owner fails to require the bond to be executed and filed, and none is filed, there is then imposed upon him the penalty of paying all

the liens to the extent of the value of the work done and materials furnished.—*Boscut v. Waldmann*, 31 Cal. App. 245, 160 Pac. 180.

198. Filing and recording contract.—Where the contract has not been executed and filed as provided herein neither party may maintain an action based on the contract against the other. The sole remedy of the contractor is an action for the reasonable value of the labor and materials furnished, which can not exceed the price fixed in the contract. He must show a substantial compliance with the terms of the invalid contract.—*Mannix v. Radke Co.*, 166 Cal. 333, 136 Pac. 52.

199. Filing claim of lien—Premature filing.—Claim of lien filed before completion of building is premature and gives no right of recovery.—*Davis v. McDonough*, 109 Cal. 547, 550, 42 Pac. 450; *Roylance v. San Luis Hotel Co.*, 74 Cal. 273, 20 Pac. 573.

As to filing claim of lien, time of, sufficiency, etc., see, post, § 1187 and note.

200. Same—Time and manner of—Contractor must comply with statute as to time and manner of filing in order to avail himself of its benefits.—*Morris v. Wilson*, 97 Cal. 644, 646, 32 Pac. 801.

201. Final twenty-five per cent—Abandoned contract.—When a contract duly executed and filed according to the provisions of the preceding section, has been abandoned by the contractor before completion, the amount of the contract applicable to the liens of other persons than the contractor is determined by former section 1200, post, and the final twenty-five per cent payment formerly provided by section 1184, post, can not be resorted to.—*Hoffman-Marks Co. v. Spires*, 154 Cal. 115, 97 Pac. 152; *Raphael Co. v. Grote*, 154 Cal. 138, 97 Pac. 155.

As to final twenty-five per cent of the contract-price, see par. 478, this note.

202. Same—Failure to reserve twenty-five per cent of contract-price.—A provision in the contract reserving twenty per cent of the contract-price for thirty-five days after completion of the building is not in compliance with the provisions of section 1184, post, as to the reservation of twenty-five per cent, and the contract is void, and the property is subjected, under the statute, to liens for labor and materials in like manner as though no contract had been made or filed, or the materials and labor had been furnished at the instance and request of the owner.—*Burnett v. Glas*, 154 Cal. 256, 97 Pac. 432.

203. Omission to provide for retention of twenty-five per cent of contract-price as provided in section 1184, post, renders contract void and entitles all laborers and materialmen to lien for full amount of their claims.—*Stimson Mill Co. v. Nolan*, 5 Cal. App. 754, 758, 91 Pac. 262.

204. Same—Same—Provision for retaining twenty-five per cent.—Contract provid-

ing for the retention for thirty-five days after completion of twenty per cent instead of twenty-five per cent of the contract-price is void, as is any contract where there is a subsequent departure from the provisions of above section as to the times of payment, and renders the property subject to liens in favor of those doing labor or furnishing materials to the same extent as if there had been no contract and the labor or material was furnished directly to the owner.—*Burnett v. Glas*, 154 Cal. 249, 255, 97 Pac. 423.

205. Where there is a substantial departure in the contract from the provisions as to the times of payment and the reservation of at least twenty-five per cent of the contract-price, for at least thirty-five days after completion of the building, the property is subject to liens in favor of those doing labor or furnishing materials to the same extent that it would have been had there been no contract and the labor and materials had been furnished at the personal instance and request of the owners, and therefore the retention of five hundred dollars instead of six hundred twenty-five dollars (the twenty-five per cent) is not a sufficient compliance with the provisions of above section.—*Nofziger Lumber Co. v. Solomon*, 13 Cal. App. 621, 625, 110 Pac. 474.

206. It is not sufficient that the owner did in fact retain twenty-five per cent of the contract-price. It is provided that by the terms of the contract twenty-five per cent of the whole contract-price shall be made payable, etc., and an unrevealed intention to retain or the actual retention of twenty-five per cent is not a compliance with the statute, and evidence of such actual retention of the full amount without a provision therefor in the contract is immaterial.—*Nofziger Lumber Co. v. Solomon*, 13 Cal. App. 621, 626, 110 Pac. 474.

207. The earlier decisions holding a substantial compliance with above section with regard to the retaining of twenty-five per cent of the purchase-price, etc., were made when there was no constitutional provision upon the subject or without regard to the constitutional provision. In the constitution of 1849 there was no special provision for a mechanics' lien law and the law was therefore entirely the creature of the statute. The constitution of 1879 continued the existing mechanics' lien law in force and it was accepted as the means provided by the legislature in response to the constitutional mandate that "the legislature shall provide by law for the speedy and efficient enforcement of such liens" no new procedure having been provided. The phraseology of the law which implied that the lien was of legislative creation was not devised to meet the change caused by the adoption of section 15 of article XX of the constitution of 1879, and was grammatically at least out of harmony with the view that a right of lien is due to the provisions of the constitution. The recognition of the constitutional origin of the right and the true relation of the

statute is much clearer in the later cases.—*Nofziger Lumber Co. v. Solomon*, 13 Cal. App. 621, 623, 110 Pac. 474.

208. Fixtures—Lien claimed upon property of third person.—Laborers and materialmen claiming lien upon mine for labor and materials can not acquire any interest by sale upon foreclosure of mechanics' lien in property not belonging to owner at time lien attached, and where machinery is affixed to such mining claim, right being reserved to remove such machinery, no lien upon this personal property by virtue of statute is given where lien is claimed upon property of owner of mine.—*Jordan v. Myres*, 126 Cal. 565, 570, 58 Pac. 1061. See *Williams v. Mountaineer Gold Min. Co.*, 102 Cal. 134, 34 Pac. 702, 63 Pac. 388; *Hamilton v. Delhi Min. Co.*, 118 Cal. 148, 50 Pac. 378.

200. Same—Intention with which article of personal property attached to realty, whether for temporary or permanent improvement, determines whether it thereby becomes permanent fixture with reference to laws subjecting same to claim of lien, as has way and manner with which such property is attached to realty.—*Jordan v. Myres*, 126 Cal. 565, 570, 58 Pac. 1061.

210. Same—Question of fact.—Whether materials furnished by materialmen are affixed to building so as to become part thereof, is question of fact to be determined upon evidence.—*Blanchi v. Hughes*, 124 Cal. 24, 29, 56 Pac. 610.

211. Foreclosure of lien—As to nature of action.—An action to foreclose a mechanics' lien is a suit in equity and no right of trial by jury exists, either upon the whole case, or upon any special issue.—*Coghlan v. Quarataro*, 15 Cal. App. 666, 115 Pac. 664.

212. While for various purposes the proceeding to foreclose a mechanics' lien in this state has been said to be a suit in equity and may be termed a statutory proceeding of an equitable nature, equity itself raises no lien on behalf of the mechanic or the materialman. The debt created by furnishing labor or materials for a building and the lien given therefor are two distinct matters. The former may be enforced as any other debt, while the lien exists only by statute and must be enforced by the special proceeding provided for that purpose.—*Los Angeles Pressed Brick Co. v. Higgins*, 8 Cal. App. 514, 520, 97 Pac. 414.

213. In an action to foreclose the mechanics' lien as against the owner of a stable, where it is shown that such owner was present on the premises and saw all of the work going on for its improvement, who neither pleaded nor proved that any notice of non-responsibility was posted, as permitted in above section, both the stable and the land on which it is are subject to foreclosure both as against the owner and the tenant.—*Acme Lumber Co. v. Wessling*, 19 Cal. App. 406, 410, 126 Pac. 167.

214. In this action to foreclose certain mechanics' liens upon the real property of

the defendant, it is held that the contention of plaintiffs that the original contract between the parties was abrogated by an executed parol agreement, providing for the erection of a different building, the cost of which, it was claimed, exceeded the sum of one thousand dollars and that, no memorandum of the latter contract being recorded or ever filed, judgment should have been directed to foreclose the liens upon the property for their full amount; and the further contention that the findings are contrary to the evidence, and inconsistent with, and repugnant to, each other, can not be sustained.—*Eureka Mill & Lumber Co. v. Andres*, 25 Cal. App. 613, 144 Pac. 970.

215. Same—Same—Action brought to foreclose lien and the lien fails, a contractor may recover a personal judgment against the owner and the laborer or materialman may recover a personal judgment against the contractor or subcontractor to whom the labor or material was furnished. In both instances if there be a contract the recovery depends upon the terms of the contract and it is only in the absence of an express contract that the right rests upon a quantum meruit, quantum valebant, or implied contract. The right to recover the judgment in either case is in no way dependent either upon the constitutional provision or the mechanics' lien law.—*Los Angeles Pressed Brick Co. v. Higgins*, 8 Cal. App. 514, 524, 97 Pac. 414.

216. Same—Amount of recovery—Interest.—If the action is based upon a quantum meruit, the claimant is limited in his recovery to the reasonable value of the work done or materials furnished; and as reasonable value requires determination, no interest can be charged until judgment is rendered.—*Hardwood Interior Co. v. Bull*, 24 Cal. App. 129, 140 Pac. 702.

As to interest recoverable, see pars. 268-270, this note.

217. If the complaint contains an allegation that the agreed price is a reasonable one, but the action is based upon a contract in which the terms are fixed and definite, judgment should be given for the full amount prayed for, with interest from the date of lien, notwithstanding proof of double pay for night work. It can not be said that the extra charge for night work is of itself evidence that the charge is unreasonable.—*Hardwood Interior Co. v. Bull*, 24 Cal. App. 129, 140 Pac. 702.

218. Same—Answer—As to generally.—Where the plaintiff in an action to enforce a mechanics' lien alleges that the electrical supplies were contracted for at an agreed price, which it was also alleged was a reasonable value of the same, and the answer of the defendant with reference to this particular item was in the form of a negative pregnant, this was not a denial of the allegation in the complaint. There was, in effect, an admission that the electrical supplies furnished for and used in the building were of the value stated in the complaint,

and therefore the answer of the defendant raised no issue upon the subject of value.—*Blanck v. Commonwealth Amusement Corp.*, 19 Cal. App. 720, 127 Pac. 805, 807.

219. Same—Appeal—In general.—In an action to foreclose a mechanics' lien for extra labor and material used in the construction of a building, in which the original complaint alleged that no prices for the items of extra work and materials had been agreed upon, but that after the completion of the building the defendant agreed to pay the balance due on account thereof, the denial of a continuance of the trial, after the plaintiff had been permitted to amend his complaint by alleging an agreement of the defendant, after the completion of the extra work, to pay a specified sum therefor, was without prejudice to the defendant, where it appears, from the record, that all that the defendant's counsel expected to show to meet the changed form of the issue was that the defendant at the time he signed the agreement to pay the specified amount was in such a condition of ill health as not to know what he was doing.—*Smith v. Murphy*, 168 Cal. 328, 143 Pac. 594.

220. In such an action, antecedent conversations between the parties to the building-contract concerning matters embodied in the specifications, are entirely irrelevant, saving in case of doubt over the construction of the specifications, to show what the parties actually intended.—*Smith v. Murphy*, 168 Cal. 328, 143 Pac. 594.

221. Where, in consolidated actions for the foreclosure of mechanics' liens, an appeal is taken by some of the claimants from that part of the judgment in favor of the owner and against them, another part of the judgment, distributing to other lien-claimants the fund deposited in court by the owner, from which no appeal is taken, becomes final, and upon a second trial the court properly limits the claims of the appellants to their claims against the owner to the difference between the total amount found applicable to liens, and the amount awarded by the first judgment to other lien-claimants.—*G. Ganahl Lumber Co. v. Wein-sveig*, 168 Cal. 664, 143 Pac. 1025.

222. Same—Same—By mortgagee.—Where property is sold upon proceedings for the foreclosure of a mechanics' lien, at the request of the lienor, two days after the taking of an appeal by the holder of a mortgage on the property from the judgment declaring the superiority of the lien over that of the mortgage, the mortgagee is not estopped from prosecuting his appeal by bidding in the property at its reasonable value.—*Sunset Lumber Co. v. Bachelder*, 167 Cal. 512, 140 Pac. 35.

223. Same—Same—Equity suit.—Action to foreclose mechanics' liens is suit in equity, and therefore, appeal should be taken directly to the supreme court.—*Stock-ton Lumber Co. v. Schuler*, 7 Cal. App. 257, 94 Pac. 399.

224. Same—Attachment levied—Does not cut off right to lien.—The right to enforce a mechanics' lien is not lost by the lienor levying an attachment upon other property and thereby obtaining additional security.—*Martin v. Becker*, 169 Cal. 301, Ann. Cas. 1916D, 171, 146 Pac. 665.

225. Same—Attorney's fees—Allowance of.—Allowance of attorney's fees in action to foreclose lien is erroneous.—*Stimson Mill Co. v. Nolan*, 5 Cal. App. 754, 759, 91 Pac. 262.

226. Provision for allowance for attorney's fees on foreclosure of mechanics' lien is void.—*Los Angeles Pressed Brick Co. v. Los Angeles Pac. Boulevard & Devel. Co.*, 7 Cal. App. 460, 464, 94 Pac. 775.

As to constitutionality of statute granting right to recover attorney's fees, see pars. 96 and 97, this note.

227. In the absence of a demurrer and after trial without the point being raised, it is too late to object if such objection could in any event have been made that the complaint where the contract was in excess of one thousand dollars and not recorded, contains no allegation that there was anything due on the contract.—*Western Lumber & Mill Co. v. Merchants Amusement Co.*, 13 Cal. App. 4, 10, 108 Pac. 891.

228. Same—Bar of action.—An action under section 1184, post, to enforce a notice of the claim for materials furnished to the contractor for the erection of a school-house, given to the school district as owner under this section, is barred by a judgment rendered in a former action brought after the service of such notice by the same plaintiff against the school district, members of its board of trustees, and the contractor, to recover damages for breach of contract between the contractor and the school district. The plaintiff in such action, in order to hold the school district, should have pleaded and relied upon the notice given under section 1184, post.—*Suisun Lumber Co. v. Fairfield School Dist.*, 19 Cal. App. 587, 589, 591, 592, 595, 597, 127 Pac. 349.

As to limitation of action, see par. 280, this note; also, post, §§ 1184a and 1190 and notes.

229. Same—Change of basis of action by amendment.—Where the original complaint was founded upon above section an amendment thereto based upon section 1192, post, does not change the cause of action as originally drawn.—*Grenfell Lumber Co. v. Peck*, 29 Cal. App. 347, 155 Pac. 1012.

230. Same—Character of claimant—Burden of proof.—In an action to foreclose a mechanics' lien, under the provisions of the above section, a person who has furnished and laid a certain quantity of roofing for an agreed price, in order to be entitled to the benefit of the provisions of said section, and to be placed in a position more advantageous than that occupied by a material-man, must adduce proof showing that his status was that of a contractor rather than

that of a materialman.—*Ferger v. Gearhart*, 44 Cal. App. 245, 186 Pac. 376.

231. Same—Same—Same—Test of character of claimant.—The test of the character of the contract is the relative value of the material and the labor supplied; as the value of the labor is small in comparison with that of the material the claimant is a materialman.—*Ferger v. Gearhart*, 44 Cal. App. 245, 186 Pac. 376, following the doctrine in *Pugh v. Moxley*, 164 Cal. 374, 128 Pac. 1037.

232. Same—Complaint—Abandonment of contract by contractor—Allegations.—Complaint on lien where contractor has abandoned contract must show that there is something due the contractor or that the value of the work done and materials furnished at the time of the abandonment exceeded the sum then due the contractor.—*McCue v. Jackman*, 7 Cal. App. 703, 704, 95 Pac. 673.

See, also, par. 464, this note.

As to inconsistent averments in consolidated actions, see par. 243, this note.

233. Same—Same—Allegations as to completion uncertain—Effect of stipulation.—In an action to foreclose a claim of lien although an allegation in the complaint stating that the building was completed on or about a day mentioned, renders the pleading open to demurrer for uncertainty, yet where at the trial it was stipulated by all the parties that the building was in effect completed on the day named, the defendant can not be said to have been prejudiced in any substantial right by the overruling of his demurrer to the complaint, nor by the form of the finding in which the court found the completion of the building was on or about the date named.—*Klumm v. Henry Cowell Lime & Cement Co.*, 38 Cal. App. 239, 175 Pac. 908.

234. Same—Same—Allegation as to posting notice—Necessity.—In the action to foreclose the lien as against the owner of the stable, who was present on the premises and saw all of the work going on for its improvement, but who neither pleaded nor proved that any notice of nonresponsibility was posted as permitted in section 1185, post, both the stable and the land on which it is situated are subject to foreclosure both as against the owner and the tenant.—*Acme Lumber Co. v. Wessling*, 19 Cal. App. 406, 126 Pac. 167.

235. Same—Same—Averment of value.—An averment of an agreed price both in the claim of lien and in the complaint is a sufficient prima facie averment of value in the absence of a special demurrer for uncertainty.—*Coghlan v. Quartararo*, 15 Cal. App. 667, 115 Pac. 664.

As to allegation of amount in case of unrecorded contract, see par. 241, this note.

236. Same—Same—Failure to allege contract-price—Presumption.—Where a mechanics' lien was sought to be foreclosed upon a building constructed at a time when

under above section, as it then stood, no contract of one thousand dollars or less need be recorded, and the complaint to enforce the lien failed to state the contract-price, which does not appear in the record, it must be presumed, under the rule for the construction of pleadings, that the contract was for one thousand dollars or under, and was valid.—*National Lumber Co. v. Wickliffe*, 19 Cal. App. 234, 125 Pac. 357.

237. Same—Same—Sufficiency of.—Where the complaint to foreclose a lien and to enforce a notice to withhold payment alleges that the goods were sold to the contractor, and that a notice was served upon the owner to withhold payment for the contractor, and that the contract was unwritten and was not recorded, but not only fails to state the contract-price, but fails to allege that any sum was in the hands of the owner and due to the contractor when the lien was filed or such notice to withhold was given, and there is neither allegation nor proof showing the invalidity of the contract, there can be no judgment for the plaintiff; and where there is evidence supporting findings for the defendant, the court properly rendered judgment for defendant for costs.—*National Lumber Co. v. Wickliffe*, 19 Cal. App. 234, 125 Pac. 357.

238. Where the complaint to foreclose a lien upon the land on which the building stood describes the whole of the land by twelve exterior dimensions, and does not allege that the building occupied the entire parcel, or show what portion thereof was covered or occupied by the building, the complaint states no cause of action.—*Kern v. San Francisco Co.*, 19 Cal. App. 157, 124 Pac. 862.

239. In an action to enforce a mechanics' lien, a complaint which proceeded on the theory that the contract, not being properly recorded, was void, and sought to recover the reasonable value of the services rendered, stating in another part of the complaint that there was sufficient money in the hands of the defendant owner to pay all claims against the building, was not open to general demurrer on the ground that by this method of pleading the plaintiff could recover whether the contract be void or valid. If the complaint contained two causes of action, not separately stated, or if it was uncertain in any respect, it was amenable to a special demurrer, but such defects in the pleading afford no ground of general demurrer.—*Anderson v. Blean*, 19 Cal. App. 581, 126 Pac. 859.

240. Same—Same—Same—Action for services.—Where, in an action by a building contractor to recover the reasonable value of his services, there was no specific allegation in the complaint by the contractor that the material furnished by him was actually used in the construction of the building or that said building had been completed, this is immaterial in view of the fact that no lien was allowed the contractor. His complaint is manifestly sufficient on a

quantum meruit, and authorized a personal judgment in his favor for the reasonable value of his services.—*Tubbs v. Deillo*, 19 Cal. App. 612, 127 Pac. 514.

241. Same—Same—Unrecorded contract—Allegation of amount.—Where the contract is unrecorded it is not essential to the plaintiff's cause of action that the exact amount of the contract be alleged.—*Christenson Lumber Co. v. Buckley*, 17 Cal. App. 43, 118 Pac. 466.

As to averment of amount, see par. 235, this note.

242. Same—Completion of building—Certain fixtures not necessary to completion—Time for filing lien.—In an action to foreclose a lien for materials furnished to an owner of land, who was himself a "speculative housebuilder," engaged in constructing houses for sale, where it appeared in evidence that it was not the intent of the owner to install electric heating and lighting fixtures as part of the completed house, and that it was his custom never to install such fixtures until the house was sold, leaving them to be selected by the purchaser of the house, such fixtures could not be deemed necessary to the completion of the house, and a notice of lien filed more than ninety days after the completion of everything except such fixtures, though filed within ninety days after their installation, was too late.—*Hogan Lumber Co. v. Boyle*, 177 Cal. 477, 170 Pac. 1106.

243. Same—Consolidation of actions—Action of owner against surety.—In the case of an action for the foreclosure of mechanics' lien claims such actions may be consolidated with an action by the owner on the bond, although, as to the owner and the surety, their pleadings may go upon the theory that the contract was duly filed, the surety can not contend on appeal that the case was tried upon that theory where some of the complaints of the lien-claimants contain no allegation of the making or filing of a contract between the owner and the original contractor, and amended complaints of some of the other lien-claimants expressly allege the failure to file and record the plans and specifications.—*Bird v. American Surety Co.*, 175 Cal. 625, 166 Pac. 1009.

244. Same—Same—Inconsistent averments.—The findings are conclusive upon all, and where one lien-claimant averred the validity of the contract, and the others alleged that it was void, a finding that it was void operated in favor of all, including the lienor who averred its validity.—*Coghlan v. Quartararo*, 15 Cal. App. 667, 115 Pac. 664.

245. Same—Constructive notice.—A lis pendens is not required in a suit for the foreclosure of a mechanics' lien filed within ninety days, as required by section 1190, post, and a purchaser of the land during the pendency of such a suit must be held to have had constructive notice of the pendency of the action.—*Sax v. Clark*, 180 Cal.

287, 180 Pac. 821, approving doctrine in *Tulloh v. Boyce*, 37 Cal. App. 761, 174 Pac. 680, 177 Pac. 847, distinguishing *Metropolis Trust & Sav. Bank v. Barnett*, 165 Cal. 449, 132 Pac. 833.

246. Same—Cross-complaint—As to generally.—In an action on a building-contract, there seems to be no good reason why a mechanics' lien may not be foreclosed through the agency of a complaint in intervention, provided such lien is filed within the prescribed time.—*Tubbs v. Deillo*, 19 Cal. App. 612, 127 Pac. 514.

As to right to file cross-complaints in proceeding to foreclose mechanics' lien claims, see note 9 Ann. Cas. 228.

247. Same—Deposit by owner of balance due on contract.—In an action to foreclose hereunder, upon a valid contract, the owner may deposit in court the balance due the contractor, in order to save his property from sale.—*Stockton Lumber Co. v. Schuler*, 155 Cal. 412, 101 Pac. 307.

See, also, pars. 170-172, this note.

248. Same—Same—Application of fund deposited in court by owner to save property from sale.—Where the owner deposits the balance due the contractor upon a valid contract, in court, to save his property from sale under foreclosure of liens, such fund takes the place of the property, and is to be distributed among the parties entitled thereto according to their respective priorities and equities.—*Stockton Lumber Co. v. Schuler*, 155 Cal. 412, 101 Pac. 307.

249. Same—Same—Distribution of fund deposited in court by owner.—Upon such distribution, no lien-claimant who fails to establish his right to a lien is entitled to share therein; but a judgment which accords him the right of participation after payment in full of all valid liens, will not be reversed at his instance, where neither owner nor contractor raises any objection to such disposition of the fund.—*Stockton Lumber Co. v. Schuler*, 155 Cal. 414, 101 Pac. 307.

250. Same—Enforcement of order by contempt proceedings.—Such order for payment may be enforced by proceedings in contempt.—*Frey v. Superior Court*, 22 Cal. App. 421, 134 Pac. 733.

251. Same—Equality of claimants.—Mechanics, materialmen, artisans and laborers of every class entitled to a lien upon the property upon which they have bestowed labor or furnished material are all in the same class. Their equality is established by the constitution and can not be impaired or destroyed by the legislature. One has no preference over the other.—*Stimson Mill Co. v. Nolan*, 5 Cal. App. 754, 759, 91 Pac. 262.

As to priorities, see pars. 93-95, 293-295, this note.

252. Same—Same—Materialmen who have furnished supplies to subcontractor may give notice to the owner of the amount of their demands, and the fact that the con-

tractor has paid the subcontractor in full will not prevent the enforcement of the claims of materialmen who have furnished material to the subcontractor.—*Los Angeles Pressed Brick Co. v. Los Angeles Pac. Boulevard & Devel. Co.*, 7 Cal. App. 460, 462, 94 Pac. 775.

253. Same—Evidence—As to generally.—Value of work done and materials furnished prior to abandonment is part of case in chief in action to foreclose mechanics' liens and it is not erroneous to reject such evidence when offered in rebuttal.—*Scheerer v. Deming*, 154 Cal. 138, 143, 97 Pac. 155.

As to the competency of an expert to testify as to whether the construction work has been properly done, see note Ann. Cas. 1912D, 903.

As to the effect of statement of defendant as to performance of obligations, see par. 261, this note.

As to "trivial imperfection," being a question of fact, see pars. 266, 267, this note.

254. Same—Same—Circumstantial evidence.—In an action for the foreclosure of a mechanics' lien claimed on account of materials used in the construction of the building or improvement, if there is sufficient evidence as to the circumstances and negotiation of the contract and delivery of the material to give rise to a legal inference that the parties arrived at an understanding that the material was sold to be used in the erection and construction of certain buildings, then under the provisions of sections 1832, 1859, and 1960, post, the court can so find, and base its findings thereon without a word of direct testimony as to such agreement and understanding.—*Consolidated Lumber Co. v. Bosworth*, 40 Cal. App. 80, 180 Pac. 60, following doctrine in *Savings & Loan Soc. v. Burnett*, 106 Cal. 514, 39 Pac. 922.

255. Same—Same—Hearsay evidence.—In an action to foreclose a mechanics' claim of lien hearsay evidence as to the names of the persons composing a partnership is properly excluded.—*Hazard, Gould & Co. v. Rosenberg*, 177 Cal. 295, 170 Pac. 612.

256. Same—Same—Sufficiency of evidence.—Where objection is raised to the admission in evidence of certain claims of lien on the ground that the amount claimed as against each of two buildings was not separately stated, but from the facts of the case no such separate statement was required, such defect, even if it had been, would merely have affected the priority of the liens, and would have been no ground for refusing to admit them in evidence.—*Fugh v. Moxley*, 164 Cal. 374, 128 Pac. 1037, 1039.

257. It is held that the finding of the trial court that a portion of the front of the building was not destroyed is not supported by the evidence, which shows a total destruction of the building by the fire of April 18, 1906, and wholly fails to support

the finding.—*Kern v. San Francisco Co.*, 19 Cal. App. 157, 124 Pac. 862.

258. Same—Same—Variance.—Where the terms of the contract are admitted by the pleadings, a claim of variance between the pleadings and proof, based upon the theory that the evidence shows a sale for an agreed price, is not tenable.—*National Lumber Co. v. Ripple*, 166 Cal. 506, 137 Pac. 236.

259. Same—Findings—As to cost of work—Necessity for.—In an action to foreclose mechanics' lien by subcontractors after abandonment of the work by the principal contractor, there is no occasion to make a specific finding of the reasonable cost of completing the work after cessation of labor by the contractor; the ultimate fact is the value of the work done and material furnished at the time of cessation, to be estimated as required by section 1200, post.—*Marshall v. Vallejo Commercial Bank*, 163 Cal. 469, 126 Pac. 146.

As to action to foreclose mechanics' lien where contractor has abandoned the work before completion, as to findings by court, see pars. 465, 466, this note.

260. Same—Same—Contract for lumber—Price in accordance with claim of lien.—In the foreclosure of a mechanics' lien a finding of the court that the contract for lumber was for the reasonable market value and not a fixed price may be warranted by the evidence.—*Consolidated Lumber Co. v. Bosworth*, 40 Cal. App. 80, 180 Pac. 60.

261. Same—Same—Effect of statement of defendant as to performance of obligations.—The trial court is not bound by a statement of the defendant that he had performed his obligations in full prior to receiving notice to withhold money due under the contract, which was but a conclusion of the witness, and in direct conflict with his further testimony as to payment made by him after notice received.—*Christenson Lumber Co. v. Buckley*, 17 Cal. App. 44, 118 Pac. 466.

262. Same—Same—In language of complaint.—In this action for the foreclosure of liens for materials furnished in the construction of certain buildings, the findings in the language of the complaint that the materials were sold at the current market prices and that such prices were reasonable value thereof are sufficiently sustained by the evidence.—*National Lumber Co. v. Ripple*, 166 Cal. 506, 137 Pac. 236.

263. The findings that the materials furnished were actually used in the buildings are also supported by the evidence.—*National Lumber Co. v. Ripple*, 166 Cal. 506, 137 Pac. 236.

264. Same—Same—Objection to on appeal.—In an action for the foreclosure of a mechanics' lien, the plaintiff can not contend on appeal from an adverse judgment that the findings are defective, in that they did not show that the contract between the owner and the contractor complied with all

the requirements of above section, as such section read at the time of the making of the contract, where the complaint alleged the making of a valid contract, and such allegation was not denied in the answer.—*Pacific Portland Cement Co. v. Hopkins*, *Webster-Mace Construction Co.*, 53 Cal. Dec. 100, 162 Pac. 1016.

265. Same—Same—"On or about"—Sufficiently definite.—In an action to foreclose a mechanics' lien a finding that the notice of claim of lien was filed "on or about" a stated time is indefinite, is not reversible error under article VI, section 4½ of the constitution, where there was, in fact, a leeway of several days in which notice might have been filed, and the evidence showed that notice was filed in time.—*Consolidated Lumber Co. v. Bosworth*, 40 Cal. App. 80, 180 Pac. 60.

266. Same—Same—"Trivial imperfection."—Findings as to "trivial imperfection" held sustained by the facts.—*Schindler v. Green*, 149 Cal. 754, 87 Pac. 626.

267. "Trivial imperfection" held to be a question of fact in each instance, and that no fixed and inflexible rule can be laid down.—*Schindler v. Green*, 149 Cal. 754, 87 Pac. 626.

268. Same—Interest—In general.—The provisions of the above section do not prohibit the allowance of interest in mechanics'-lien causes, and in an action for the foreclosure of a mechanics'-lien interest is allowable from the date of completion of the contract or improvement.—*Klumm v. Henry Cowell Lime & Cement Co.*, 38 Cal. App. 239, 175 Pac. 908, following the doctrine in *Hubbard v. Jurian*, 35 Cal. App. 757, 170 Pac. 1093.

See, also, par. 432, this note.

As to interest, see, also, par. 216, this note.

As to interest not recoverable prior to decision, see pars. 311, 312, this note.

269. Same—Same—Allowable from date of completion.—In an action for the foreclosure of a mechanics'-lien, interest is allowable from the date of the completion of the building or improvement.—*Klumm v. Henry Cowell Lime & Cement Co.*, 38 Cal. App. 239, 175 Pac. 908.

270. Same—Same—Time from when allowed.—Interest on lien-claims for labor and material furnished under contracts fixing no time for payment, should be allowed from the time of the commencement of the actions to foreclose the liens.—*Hubbard v. Jurian*, 35 Cal. App. 757, 170 Pac. 1093.

271. Same—Judgment—Personal judgment, jurisdiction to render.—When the court has acquired jurisdiction of the action, it has jurisdiction to render a personal judgment for the amount claimed, although the right to the lien may be denied, and the amount claimed may be less than three hundred dollars.—*Mannix v. Tryon*, 152 Cal. 34, 91 Pac. 983, following doctrine in *Becker v. Superior Court*, 151 Cal. 313, 90 Pac. 689.

as overruling *Miller v. Carlisle*, 127 Cal. 327, 59 Pac. 785. See *Fresno Planing Mill v. Manning*, 20 Cal. App. 766, 130 Pac. 186, 197.

272. Same—Same—Same—Subcontractors.—Entitled to enforce claims against the land only, and a personal judgment against the owner is erroneous.—*Builders' Supply Depot v. O'Connor*, 150 Cal. 267, 88 Pac. 982.

273. Same—Same—Same—What not a.—Where by the terms of the judgment, it directs that the defendant's interest in the property be sold to satisfy the established liens against it, in the manner prescribed by law, and that, "in case the proceeds of such sale do not suffice so that each of said plaintiffs receive the full amount for which he has judgment hereunder, then a judgment for deficiency shall be docketed in favor of each of said plaintiffs and against the defendant," the judgment for foreclosure and sale is not a personal judgment against the owner, in violation of the provision of section 1194, post.—*Blanck v. Commonwealth Amusement Corp.*, 19 Cal. App. 720, 727, 127 Pac. 805.

274. Same—Same—Single judgment may be properly entered in action under above section, although distinct causes of action are set forth.—*Nordstrom v. Corona City Water Co.*, 155 Cal. 206, 209, 100 Pac. 242.

275. Same—Same—Sufficiency of judgment.—A judgment in an action to enforce a mechanics' lien, the sum and substance of which is, after declaring that judgment in certain specified sums be entered in favor of some of the plaintiffs and against the defendant, that the several liens sued upon be foreclosed against the interest of the defendant in the property involved, and the judgment further directs that the defendant's interests in the property be sold by the sheriff in a manner prescribed by law, and that, "in case the proceeds of such sale do not suffice to pay each of said plaintiffs the full amount of which he has judgment hereunder, then a judgment for any deficiency shall be docketed in favor of each of said plaintiffs and against defendant," will not be considered as violative of the provisions of section 1194, post. It will thus be seen that by the very terms of the judgment, no judgment except for a deficiency could be docketed against the defendant, and the judgment itself could not have been enforced as a purely personal judgment against the defendant except in the contingency that a deficiency might be shown by the return of the sheriff.—*Blanck v. Commonwealth Amusement Corp.*, 19 Cal. App. 720, 127 Pac. 805, 808.

276. Same—Jurisdiction of superior court.—The superior court, in an action brought in good faith to foreclose an asserted mechanics' lien, has jurisdiction, upon finding against the claim of lien, to render a personal judgment against a defendant personally liable for the amount for which the lien was claimed, although such amount is less than three hundred dollars.—*Ransome-*

Crummey Co. v. Martenstein, 167 Cal. 406, 139 Pac. 1060.

277. The action to enforce a mechanic's lien is equitable and jurisdiction to foreclose the lien does not depend upon the amount of money secured by the lien; nor when than amount is less than three hundred dollars does the court lose jurisdiction by reason of any fatal defect which destroys the lien and prevents its foreclosure. It becomes the duty and the right of the court to retain the action and render a personal judgment in the proper amount even if that amount is less than three hundred dollars.—*Robnett v. Brown*, 167 Cal. 735, 141 Pac. 368.

278. *Same—Jury trial.*—The fact that legal issues may be involved in the action does not entitle the defendant to demand a jury trial thereof.—*Coghlan v. Quartararo*, 15 Cal. App. 666, 115 Pac. 664.

279. *Same—Law of case—Common-law bond.*—Where upon former appeal, bond given under former section 1203, post, was held good as voluntarily given and a common-law bond, such decision becomes the law of the case and the question may not be considered in a subsequent trial.—*People's Lumber Co. v. Gillard*, 5 Cal. App. 435, 438, 90 Pac. 556.

As to *stare decisis*, see par. 105, this note; also, ante, § 53, note Part XVI.

280. *Same—Limitation of action.*—An action begun on June 5th, to foreclose a lien filed on March 7th of the same year, is within the period of ninety days' limitation of section 1190, post.—*Pacific Sash & Door Co. v. Bumiller*, 162 Cal. 664, 667, 124 Pac. 230.

As to *bar of action*, see par. 228, this note; also, post, §§ 1184a and 1190 and notes.

281. *Same—Lien-claimant's judgment—Neither for more nor for less than claim.*—The mechanics'-lien law does not enable a lien-claimant to recover judgment for any more or any less than the amount which he expressly agrees to take. It has nothing to do with the amount of the judgment which he is entitled to recover, but makes effective the judgment by a lien upon the property upon which he has bestowed his labor or material.—*Los Angeles Pressed Brick Co. v. Higgins*, 8 Cal. App. 514, 525, 97 Pac. 414.

As to *equality before the law of claimants*, see pars. 93-95, 251, 293-295, this note.

As to *judgment in action to foreclose mechanics' lien*, see pars. 271-275, this note.

282. Lien-claimant whose lien has been declared invalid may in an action brought to foreclose the lien obtain a personal judgment against the contractor to whom he furnished materials or at whose instance he rendered services. For this reason the contractor may and should be made a defendant in the action. The owner, however, is rendered liable to the materialman, laborer or subcontractor only by reason of the lien and neither of these persons is entitled to a

personal judgment against him. He is under no obligation to pay said claimants for material or labor furnished by them to the contractor.—*Los Angeles Pressed Brick Co. v. Higgins*, 8 Cal. App. 514, 521, 97 Pac. 414.

283. *Same—Order of payment under insufficient claim of lien.*—In a proceeding to enforce mechanics' liens, one who has not filed a claim of lien, or who has filed an insufficient claim, but who has served notice on the owner that he has furnished materials, stating the amount thereof and directing that the amount of his claim be withheld by the owner, is entitled, if a party to the proceedings in foreclosure, to have an order of court directing the payment to him by the owner of such sum, under the notice provided by section 1184, post, as it may appear to the court he is entitled.—*Frey v. Superior Court*, 22 Cal. App. 421, 134 Pac. 733.

284. The action to foreclose a mechanics' lien is an equitable one, and the power to direct the payment of money, after notice provided for in such action, is the exercise of an equitable power, and a court of equity has power to make appropriate orders and decrees as to the rights of all persons before it properly.—*Frey v. Superior Court*, 22 Cal. App. 421, 134 Pac. 733.

285. *Same—Parties to action—As to generally.*—Under the provisions of section 1197, post, any person to whom a debt is due for materials furnished for the erection of a building may, in addition to an action to foreclose a lien against the building and its owner, maintain a personal action to recover such debt against the person liable therefor; and under the established and approved practice in this state the person contracting for such materials may be made a party defendant with the owner of the building in an action to foreclose a mechanics' lien. In such an action a personal judgment may be rendered against the contractor, even though foreclosure of the lien be denied as against the owner of the building. If a personal judgment is desired, against the contractor, it is proper to make him a party defendant, and such practice is commended as tending to avoid a multiplicity of suits.—*Fresno Planing Mill Co. v. Manning*, 20 Cal. App. 766, 130 Pac. 196, 197.

As to *owner as party in action to foreclose miner's lien*, see par. 350, this note.

286. *Same—Same—Contractor not necessary party.*—A contractor for the erection of a building or the making of an improvement is not a necessary party to a suit to foreclose a mechanics' lien thereon.—*Hazard, Gould & Co. v. Rosenberg*, 177 Cal. 295, 170 Pac. 612.

287. *Same—Same—Misnomer.*—In the foreclosure of a mechanics' lien a mistake in naming a contractor in a claim of lien is immaterial unless the misnomer misleads the owner to his prejudice.—*Hazard, Gould*

& Co. v. Rosenberg, 177 Cal. 295, 170 Pac. 612.

288. Same—Pleading and issues.—Where, in an action for the foreclosure of a lien for labor performed and materials furnished in the construction and repair of a canal, the complaint alleges nonpayment, and the answer denies the existence of the contract under which the plaintiff charges the liability of the defendant, no formal denial of the allegation of nonpayment is necessary, and a finding of part payment is within the issues.—*Watterson v. Owens River Canal Co.*, 167 Cal. 370, 139 Pac. 804.

See, also, pars. 388-394.

As to answer, see par. 218, this note.

As to complaint, see pars. 242-244, this note.

As to cross-complaint, see par. 246, this note.

289. It is not necessary that a traverse should be expressed in negative terms, as it is sufficient if the matters set forth in the answer are contrary to what is charged in the complaint.—*Watterson v. Owens River Canal Co.*, 167 Cal. 370, 139 Pac. 804.

290. Same—Prevention of further performance by owner.—Where the owner has prevented further performance of a building-contract by his refusal to pay instalments due, the contractor may sue to recover the reasonable value of his work independent of the contract-price.—*Tubbs v. Dellillo*, 19 Cal. App. 612, 127 Pac. 516.

291. Same—Same—Rights of contractor after breach by owner.—Where a building-contract provided that the owner should pay for the work in five instalments, and that if the owner failed to pay any instalment within five days after it was due, the contractor could treat such refusal to pay as a prevention by the owner of further completion, the owner's refusal to pay the fifth instalment placed him in default and entitled the contractor to recover the balance due for the work performed.—*Tubbs v. Dellillo*, 19 Cal. App. 612, 127 Pac. 514.

292. Same—Same—Waiver of breach.—Where, under a building-contract, the owner refused to pay an instalment when due, thereby preventing further completion by the contractor, the fact that the contractor continued to work for a few days longer than he was required would be considered rather as a favor to the owner than a waiver of the refusal to pay.—*Tubbs v. Dellillo*, 19 Cal. App. 612, 127 Pac. 514.

293. Same—Priority.—In cases where there is no valid contract between the owner and the contractor the priority of the lien is to be determined by the time the work was done or the materials furnished, but in case where some of the liens attached prior to the lien of a mortgage and some after the lien of the mortgage had attached, and all are entitled under the statute to a judgment for the sale of the entire building with so much land as is

necessary for its convenient use, that the proceedings may be pursued so far as applicable to the payment of their respective liens. The course of a court of equity in adjudging a sale of the property and application of the proceeds first to the payment of the prior mechanics' lien, then to the mortgage, and then to the inferior mechanics' liens will be upheld, although the mortgage was not due at the time.—*Burnett v. Glas*, 154 Cal. 249, 258, 97 Pac. 423.

As to priority of mechanics'-lien claims, see, post, § 1186 and note.

As to pro rata distribution where money insufficient, see, post, § 1184b.

As to provisions for priority being unconstitutional, see pars. 93-95, 251, this note.

294. Same—Same—Mechanics' liens are prior to deed of trust where the work for which they are claimed was done, or the materials for which they are claimed were furnished prior to the execution or recording of the deed of trust.—*Farnham v. California Safe Deposit & Trust Co.*, 8 Cal. App. 266, 270, 96 Pac. 778.

See, also, post, § 1186 and note.

295. Same—Same—Payment of mortgage-lien.—Where some liens are superior and some inferior to a mortgage-lien upon the same property, the court may decree the sale of the property, and the application of the proceeds to the payment, first, of the prior mechanics' liens, second, of the mortgage, and finally, of the inferior mechanics' liens, somewhat in the manner provided in the case of instalment mortgages by section 728, ante.—*Burnett v. Glas*, 154 Cal. 259, 97 Pac. 432.

296. Same—Prohibition against enforcement.—And in prohibition against the enforcement of the order by contempt proceedings, it will be presumed that the court had before it evidence of facts warranting the making of the order and had jurisdiction to make it.—*Frey v. Superior Court*, 22 Cal. App. 421, 134 Pac. 733.

296a. Prohibition, in such case, is in the nature of a collateral attack.—*Frey v. Superior Court*, 22 Cal. App. 421, 134 Pac. 733.

297. Same—Resort to bond—Not exclusive remedy.—The right of lien-claimants for labor performed and material furnished to resort to the bond given by the contractor under the requirements of the above section is not their exclusive remedy; that having right to serve stop-notices under the provisions of section 1184, post, and to share in the money withheld from the contractor by the owner under the provisions of that section.—*Sweeney v. Board of Trustees*, 33 Cal. App. 331, 165 Pac. 42.

298. Same—Several contracts for buildings on same property—Variance.—In the foreclosure of a claim of mechanics' lien under the mechanics'-lien law as amended in 1911 where the liability of the owner is not limited owing to the failure to file a contractor's bond, and the evidence shows

three contracts for buildings, or parts of buildings, on the same property as part of a single enterprise, it can make no difference to the owner whether the liens chargeable against the property arise under one or other of the contracts, and an allegation in the complaint of one contract does not constitute a fatal variance when the proof shows another contract.—*Consolidated Lumber Co. v. Bosworth*, 40 Cal. App. 80, 180 Pac. 60, following doctrine in *Booth v. Pendola*, 88 Cal. 36, 23 Pac. 200, 25 Pac. 1101; *Kritzer v. Tracy Engineering Co.*, 16 Cal. App. 287, 116 Pac. 700; *Acme Lumber Co. v. Wessling*, 19 Cal. App. 406, 126 Pac. 167.

299. Same—Stop-notice—Apportionment of funds—Priority of liens.—The apportionment of funds coming to a contractor on the foreclosure of mechanics' lien claims under the provisions of the above section, is entirely separate and distinct from the remedy under the provisions of section 1184, post, under which section persons serving stop-notices acquire priority of claims over other claimants not serving stop-notices.—*Southern California Electric Co. v. McDonald*, 178 Cal. 386, sub nom. *Southern California Electric Co. v. Grant*, 173 Pac. 760.

As to stop-notices, see, post, § 1184 and note.

300. Same—Time of commencement of action—Notice of lis pendens.—Under the provisions of section 1190, post, where an action to foreclose a mechanics' lien is within ninety days, the lien of the claim continues during the pendency of the action, and the filing of a notice of lis pendens is not essential to the continuance of the lien.—*Tulloh v. Boyce* (Cal. Sup.), 37 Cal. App. 763, 177 Pac. 847.

301. Same—Unpaid balance of the contract-price—A fund set apart for the satisfaction of lien-claimants and a charge upon the land to secure the payment of this balance to them is created for their benefit. No unsecured creditors of the contractor such as the materialman or mechanic failing to establish a lien has any claim whatever against the owner or his property, nor can he have as against holders of valid liens any claim upon the fund set apart by law for lienors.—*Stockton Lumber Co. v. Schuler*, 155 Cal. 411, 413, 101 Pac. 307.

302. It has been held that a general creditor is not entitled to a judgment providing that the remainder of the fund due from the owner to the contractor after the payment of the valid liens if any there be, shall be distributed to him to the extent of his lien; also that such general creditor can not be deemed to be included in an offer of the owner to pay to the persons claiming to be lienholders in proportion to their respective claims the amount admitted to be due from him to the contractor whenever the respective amount due each lienholder is determined.—*Los An-*

geles Pressed Brick Co. v. Higgins, 8 Cal. App. 514, 521, 97 Pac. 414.

303. Same—Variance—Failure to deny allegations—Estoppel.—In a case in which an action is brought to foreclose a mechanics' lien given under the provisions of the above and following sections, where the defendant fails to answer and thus to put in issue all the material allegations of the complaint, and particularly those which set forth the contents of the liens, the defendant-owner will be estopped to raise the question of variance between the claim of lien and the proof.—*Krenwinkel v. Henne*, 42 Cal. App. 580, 183 Pac. 957.

As to variance generally, see, post, § 1187 and note.

304. Form of action—Assumpsit.—Where statute declares that contract shall be wholly void for failure to record, it means that it is wholly void as to subcontractors, materialmen, artisans, and laborers, who thereupon become entitled to liens for full value of their material and service, and are deemed to have furnished them to owner at his special request. Law never meant to reward contractor for his disobedience by conferring upon him for its violation greater rights than would have been his had he obeyed it. Therefore, as between contractor and owner, contract must remain as measure and test of contractor's right to recover.—*Laidlaw v. Marye*, 133 Cal. 170, 176, 65 Pac. 391, overruling *Rebman v. San Gabriel Valley Land & Water Co.*, 95 Cal. 390, 395, 30 Pac. 564.

305. Original contractor may maintain his suit in implied assumpsit, and finding that alleged contract,—only contract relied upon by owner,—never had been recorded and was therefore wholly void, is equivalent to finding that there was no written contract; this conclusion is not affected by facts that writing corresponding in form to alleged contract had been signed and delivered by parties, and that labor may have been done and materials furnished in accordance with terms of that paper.—*Rebman v. San Gabriel Valley Land & Water Co.*, 95 Cal. 390, 395, 30 Pac. 564, overruled in *Laidlaw v. Marye*, 133 Cal. 170, 176, 65 Pac. 391, holding that as between owner and contractor, contract must remain not basis of his recovery but measure and test of his right to recover,—that contractor must still show substantial compliance with its terms to warrant any recovery at all—and measure to recover even under implied assumpsit must be limited as to him by contract-price.

306. Same—Proceedings in rem.—Action to enforce mechanics' lien is of nature of proceeding in rem; no personal judgment can be recovered against an estate, payable in due course of administration; and such lien is not a "claim" within meaning of subdivision 3 of section 1880, post.—*Booth v. Pendola*, 88 Cal. 36, 43, 23 Pac. 200, 25 Pac. 1101.

307. Same—Statutory.—Action to enforce liens under mechanics'-lien law, though statutory, is in its essential features equitable.—*Dunlop v. Kennedy*, 4 Cal. Unrep. 196, 34 Pac. 92, 95.

308. Garnishment — Right to garnish moneys of contractor in hands of owner is limited by terms of the section to "persons named in above section, and is cumulative or additional remedy given for purpose of enforcing in another mode, right for which by above section lien is authorized upon property upon which labor has been performed or for which materials were furnished."—*Blanchi v. Hughes*, 124 Cal. 24, 28, 56 Pac. 610.

As to right to garnish moneys of contractor in hands of owner, and limitation thereof, see, post, § 1184 and note par. 37.

309. Grading—Lien for grading city streets is not included under "improvement" within meaning of above section. Lien is given to contractor for such work under section 1191, post.—*Warren v. Hopkins*, 110 Cal. 506, 510, 42 Pac. 986.

As to grading and other improvements of land done independently of and not as necessary part of the contract, see, post, § 1191 and note.

As to homestead, liable to forced sale for mechanics', contractors', and others' liens, see *Kerr's Cyc. Civ. Code*, 2d ed., §§ 1240, 1241 and notes.

310. "Improvement"—Definition of term.—Where "improvement" is used as equivalent to object upon which labor has been performed it is not to be construed as equivalent to labor itself.—*Davis v. McDonough*, 109 Cal. 547, 551, 42 Pac. 450.

311. Interest—Can not be recovered prior to decision of case where action is brought on quantum meruit for reasonable value of services and materials, etc.—*Macomber v. Bigelow*, 123 Cal. 532, 535, 56 Pac. 449. See *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164, 18 Pac. 100; *Swinnerton v. Argonaut Co.*, 112 Cal. 375, 44 Pac. 719.

As to interest, see pars. 268-270, this note.

312. Interest on claim is not authorized prior to rendition of judgment.—*Macomber v. Bigelow*, 126 Cal. 9, 15, 58 Pac. 312. See *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164, 18 Pac. 100; *Easterbrook v. Farquharson*, 110 Cal. 311, 42 Pac. 811; *Swinnerton v. Argonaut Co.*, 112 Cal. 375, 44 Pac. 719.

313. Interest in property subject to lien.—Under the provisions of the above section and of section 1192, post, the interest of the owner, or other person having or claiming any interest in the land upon which a building is erected or an improvement made, no matter what that interest may be, whether legal or equitable, is subject to mechanics' liens.—*Allen v. Wilson*, 178 Cal. 674, 174 Pac. 661.

314. Judgment—On foreclosure of mechanics'-lien claim.—As to generally, see pars. 271-275, this note.

315. Jurisdiction of court—Amount involved as affecting.—Sum of money involved is not substantive ground on which jurisdiction of superior court rests in any degree; jurisdiction must be supported, if at all, where amount is less than three hundred dollars, upon demand and claim of lien, on mere incident of debts claimed by plaintiffs respectively in consolidated action, viz., lien and equitable remedy of foreclosure, and in such case if lien fails, court can administer no equitable relief whatever, and it must logically follow that residue of action—dispute concerning money less than three hundred dollars in amount—can no longer engage attention of court.—*Miller v. Carlisle*, 127 Cal. 327, 331, 59 Pac. 785.

316. Distinguished from Dashiell v. Slingerland, 60 Cal. 653, in which so-called ad damnum clause of complaint, when stated in good faith, becomes test of jurisdiction, and if amount equals or exceeds three hundred dollars, superior court obtains jurisdiction and may render judgment for such lesser sum as evidence may justify.

317. Jury trial—On foreclosure of mechanics' liens.—Defendant may not demand, notwithstanding fact legal issue may be involved.—*Coghlan v. Quartararo*, 15 Cal. App. 666, 115 Pac. 664.

318. Laborers' lien—In general.—Laborer who performs labor upon and in construction of building is entitled to enforce his lien, where such lien has been duly filed under above section.—*Patent Brick Co. v. Moore*, 75 Cal. 205, 212, 16 Pac. 890.

As to right of laborer to lien for labor performed upon building or improvement, see pars. 451-516, this note.

319. Same—Materialmen not included.—Laborers' liens do not include liens of materialmen any more than they do those of architects or contractors or subcontractors.—*Richards v. Shear*, 70 Cal. 187, 189, 11 Pac. 607.

As to right of materialman to lien for materials furnished for building or improvement and entering into or consumed therein, see pars. 174, 294, 295, this note.

As to liquidated damages and penalty for failure of non-completion, see *Kerr's Cyc. Civ. Code*, 2d ed., § 1671 and note.

320. Law of the case—On foreclosure of mechanics' lien.—As to generally, see par. 279, this note.

321. Lien—Of laborers, materialmen, etc.—As to right to, see pars. 451-516, this note.

322. Same—Variance in claim of and evidence.—When fatal and when immaterial.—See, post, § 1187, note pars. 168-176.

323. Mantels, tiles, grates, and appurtenances thereto are material, and furnishers thereof are not original contractors

within meaning of section.—*Bennett v. Davis*, 113 Cal. 337, 340, 54 Am. St. Rep. 345, 45 Pac. 684.

324. Materialmen—As to equal claimants on foreclosure of mechanics' liens.—See par. 251, this note.

325. Materials must be furnished to be used, and must actually be used, in construction of building or other structure against which lien is sought to be enforced, to entitle materialmen to such lien under above section.—*Stimson Mill Co. v. Los Angeles Traction Co.*, 141 Cal. 30, 32, 74 Pac. 357. See *Houghton v. Blake*, 5 Cal. 240; *Patent Brick Co. v. Moore*, 75 Cal. 211, 212, 16 Pac. 890; *Silvester v. Coe Quicksilver Min. Co.*, 80 Cal. 513, 22 Pac. 217; *Bewick v. Muir*, 83 Cal. 373, 23 Pac. 390; *Roebbling's Sons Co. v. Bear Valley Irr. Co.*, 99 Cal. 488, 34 Pac. 80; *Hamilton v. Delhi Min. Co.*, 118 Cal. 148, 153, 154, 50 Pac. 378.

326. Same—Failure of court to find that materials furnished by lien-claimants were furnished to be used, and that they were used in building, is fatal objection to judgment, as such finding is necessary.—*Wilson v. Nugent*, 125 Cal. 280, 284, 57 Pac. 1008.

327. Same—Findings that materials were furnished should also state that such materials had been used in work done, for, if not used, there can be no lien by materialman against owner.—*Bewick v. Muir*, 83 Cal. 368, 373, 23 Pac. 389. See *Silvester v. Coe Quicksilver Min. Co.*, 80 Cal. 510, 22 Pac. 217.

As to findings generally, see pars. 259-267, this note.

328. Same—Material must be furnished expressly for particular building on which lien is asserted.—*Weatherly v. Van Wyck*, 128 Cal. 329, 330, 60 Pac. 846; *Bottomly v. Rector of Grace Church*, 2 Cal. 90; *Houghton v. Blake*, 5 Cal. 240; *Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54; *Cohn v. Wright*, 89 Cal. 86, 26 Pac. 643; *Roebbling's Sons Co. v. Bear Valley Irr. Co.*, 99 Cal. 488, 490, 34 Pac. 80.

329. Materialman will have no lien upon building for value of materials unless such materials are actually used therein.—*Bennett v. Beadle*, 142 Cal. 239, 242, 75 Pac. 843.

As to materialman, as such, not original contractor, see, post, § 1187 and note par. 139.

330. Materials used "in the structure"—Means that they must be used as materials of which it is constructed, not merely in process of construction.—*Stimson Mill Co. v. Los Angeles Traction Co.*, 141 Cal. 30, 32, 74 Pac. 357. See *Gordon H. Co. v. San Francisco S. R. Co.*, 86 Cal. 620, 25 Pac. 125; *Hamilton v. Delhi Min. Co.*, 118 Cal. 148, 153, 50 Pac. 378.

As to lumber used and "consumed" in building drains or canals as being part of structure, see par. 174, this note.

331. Memorandum—Signature.—The statute does not require memorandum to be

signed nor is it necessary that signatures to plans, specifications, and drawings should be copied into memorandum to make it sufficient, where it appears by recital in copy of articles of agreement, which constituted part of memorandum filed, that drawings and specifications had been signed by parties.—*Blinn Lumber Co. v. Walker*, 129 Cal. 62, 66, 61 Pac. 664. See *Joost v. Sullivan*, 111 Cal. 286, 294, 43 Pac. 896.

As to written contract, see pars. 582-583, this note.

332. Memorandum is not required to be signed or subscribed by parties; and memorandum is sufficient where it sets forth names of parties and states they are all parties to contract.—*Joost v. Sullivan*, 111 Cal. 286, 294, 43 Pac. 896.

333. Same—Insufficiency of.—As to memorandum insufficient for not containing proper statement of general character of work to be done.—*Butterworth v. Levy*, 104 Cal. 506, 508, 38 Pac. 897. See *Williamette Steam Mill Lumber & Mfg. Co. v. Los Angeles College Co.*, 94 Cal. 229, 235, 29 Pac. 629; *Greig v. Riordan*, 99 Cal. 316, 320, 33 Pac. 913.

334. Same—Verbatim copy of contract is memorandum.—*Blinn Lumber Co. v. Walker*, 129 Cal. 62, 65, 61 Pac. 664.

As to memorandum of contract held sufficient compliance with statute, see *Blinn Lumber Co. v. Walker*, 129 Cal. 62, 64, 61 Pac. 664.

335. Mining claims—As to what are.—Where several claims or locations are owned and operated as one mine, as against parties so uniting them; they may, for purposes of lien law, be regarded and treated as single claim and declared on as such.—*Hamilton v. Delhi Min. Co.*, 118 Cal. 148, 151, 50 Pac. 378. See *Malone v. Big Flat Gold Min. Co.*, 76 Cal. 578, 583, 18 Pac. 772.

336. "Mining claim" is name given to that portion of public mineral lands which miner for mining purposes takes up and holds in accordance with mining law.—*Morse v. De Ardo*, 107 Cal. 622, 623, 40 Pac. 1018, quoting from *Mt. Diablo Mill & Min. Co. v. Callison*, 5 Sawy. C. C. 439, 17 Fed. Cas. 918; *Helm v. Chapman*, 66 Cal. 291, 5 Pac. 352; *Williams v. Santa Clara M. Assoc.*, 66 Cal. 193, 5 Pac. 85; *Bewick v. Muir*, 83 Cal. 373, 23 Pac. 890.

337. Same—Iron pipes, joints, machinery, etc., held for purpose of lien, to be part of mine, whether attached to it or not.—*Malone v. Big Flat Gold Min. Co.*, 76 Cal. 578, 583, 18 Pac. 772.

As to fixtures to mine see *Kerr's Cyc. Civ. Code*, 2d ed., § 661 and note.

338. Same—Inclusion of land held under Spanish grant, adjacent to mining land, does not vitiate notice of lien, if such land constituted any part of mine.—*Bewick v. Muir*, 83 Cal. 368, 372, 23 Pac. 389. See *Malone v. Big Flat Gold Min. Co.*, 76 Cal. 578, 583, 18 Pac. 772.

339. Same—"Is a structure."—Mine is structure within meaning of statute.—*Helm v. Chapman*, 66 Cal. 291, 5 Pac. 352; *Williams v. Mountaineer Gold Min. Co.*, 102 Cal. 134, 142, 34 Pac. 702, 36 Pac. 388. See *Helm v. Chapman*, 66 Cal. 291, 5 Pac. 352; *Silvester v. Coe Quartz Min. Co.*, 80 Cal. 510, 22 Pac. 217.

340. Same—Labor upon mine.—Above section is sufficiently broad to entitle to liens for work and labor done in "breaking down and tearing away from face of drifts and mine, quartz and substance of mines."—*Chapplus v. Blankman*, 128 Cal. 362, 366, 60 Pac. 925.

341. Above section can not be held applicable to claim by miner for labor in mine.—*Reese v. Bald Mt. Consol. Gold Min. Co.*, 133 Cal. 285, 289, 65 Pac. 578.

342. Same—Same—Character of labor.—Statute implies that labor to be performed on any mining claim for which lien is given, is labor performed in course of actual work of mining in development of mining claim, and that such labor does not include services of watchman in caring for mine while it is lying idle.—*Williams v. Hawley*, 144 Cal. 97, 103, 77 Pac. 762.

343. Same—Land held under agricultural patent is not "mining claim" within meaning of above section and lien thereon is not given for labor in sinking shaft upon such land.—*Morse v. De Ardo*, 107 Cal. 622, 626, 40 Pac. 1018. See *Williams v. Santa Clara Min. Assoc.*, 66 Cal. 193, 5 Pac. 85.

344. Same—Mill erected upon mining claim is part of mine itself.—*Williams v. Mountaineer Gold Min. Co.*, 102 Cal. 134, 143, 34 Pac. 702, 36 Pac. 388. See *Roebling's Sons Co. v. Humboldt Elec. Light & Power Co.*, 112 Cal. 288, 44 Pac. 568.

345. Same—Mining and millsite.—In general.—Where a mine and millsite, though designated separately in the proceedings to foreclose a mechanics' lien thereon, constitute but a single plant, the requirement as to separate designation of amount has no application.—*Kritzer v. Tracy Eng. Co.*, 16 Cal. App. 292, 116 Pac. 700.

As to lien for labor on mining claims, see, ante, § 586 and note.

As to mines, minerals and mining, see, ante, § 586 and note.

346. Same—Same—Mining work.—Held not to apply to any work about a mine which does not constitute for any purpose an improvement to the mine or the land, apart from work of obtaining ore from the rock excavated or mined.—*Higgins v. Carlotta Min. Co.*, 148 Cal. 704, 84 Pac. 758.

347. Mining claim is not subject to lien for any and every work that may be done upon or about it, but only work done in the development thereof or in working thereon by the subtractive process.—*Danaldson v. Orchard Crude Oil Co.*, 6 Cal. App. 641, 645, 92 Pac. 1046.

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348. Same—Same—Same—Watchman taking care of mining claim while the same is shut down and no operations are being had thereon is not entitled to lien, but must look to personal liabilities of the owners.—*Danaldson v. Orchard Crude Oil Co.*, 6 Cal. App. 641, 645, 92 Pac. 1046.

349. Same—Same—Miner's liens, foreclosure of.—The interest of an owner defendant in a suit to foreclose miners' liens, in whose favor judgment was rendered, is unaffected by the judgments rendered against his codefendants.—*Robinson v. Muir*, 151 Cal. 122, 90 Pac. 521.

As to parties to foreclosure of lien, see par. 285-287, this note.

350. Same—Same—Same—Owner not party.—The interest of an owner in a mining claim, who is not made a party to a suit to foreclose a miner's lien thereon, is not affected by a judgment in such suit or a sale thereunder.—*Robinson v. Muir*, 151 Cal. 122, 90 Pac. 521.

351. Same—Same—Same—Sale under judgment.—Neither the lien-claimants, nor the purchasers at the execution sale for their benefit, are bona fide purchasers for value as against the grantee of a prior unrecorded deed, where the suit was brought with full knowledge of such deed, the grantee being made defendant therein, and judgment having been in his favor.—*Robinson v. Muir*, 151 Cal. 122, 90 Pac. 521.

352. Same—Mining machinery and tools furnished for mine but not set up or used in its development do not subject it to lien for work in developing mine.—*Hamilton v. Delhi Min. Co.*, 118 Cal. 148, 153, 50 Pac. 378.

353. Same—Oil-wells included.—Word "well" inserted in statute by amendment of 1899 (Stats. 1899, p. 33) and in section 1185, post, at same time, evidently intended to include oil-wells (dictum).—*Parke & Lumber Co. v. Inter Nos Oil & Devel. Co.*, 147 Cal. 490, 493, 82 Pac. 51.

354. Same—Same—Laborer on oil-wells.—Under the second clause or subdivision persons who perform labor in any mining claim are given a lien for the value of the labor done, and the section provides that the superintendent shall be considered the agent of the owner; this is the only statute on the subject applicable to oil-wells.—*McCreary v. Toronto Midway Oil Co., Ltd.*, 38 Cal. App. 17, 175 Pac. 87.

355. Lien of laborers on eighty-acre tract being developed for oil; right extends to whole tract.—*Berents v. Belmont Oil Co.*, 148 Cal. 577, 113 Am. St. Rep. 308, 84 Pac. 47.

356. Compare: *Berents v. Kern King Oil & Devel. Co.*, 7 Cal. Unrep. 214, 84 Pac. 45.

357. Modification of contract—Failure to record.—Renders contract absolutely void as between the parties, and no recovery can be had thereon by either party, though the original contract was recorded.—*Condon v. Donohue*, 160 Cal. 752, 118 Pac. 113.

358. Moving building.—Removing building from one point to another is performing labor upon building within the meaning of above section and contractors are entitled to lien therefor.—*Palmer v. Lavigne*, 104 Cal. 30, 32, 37 Pac. 775.

359. Municipalities — Public improvements by—Equitable garnishment.—As to generally, see pars. 441, 504, this note.

360. Necessity for writing and recordation.—A contract for the sale of materials to be used in the construction of a building is not an original contract within the meaning of above section, and hence does not need to be reduced to writing or filed for record.—*Pugh v. Moxley*, 164 Cal. 374, 128 Pac. 1035, 1038.

361. Same—Employment by owner of, carpenter as foreman of the building work at a certain wage per day which might and actually did amount to more than one thousand dollars for all the services does not constitute such a contract in excess of one thousand dollars as is required to be in writing, etc.—*Farnham v. California Safe Deposit & T. Co.*, 8 Cal. App. 266, 268, 271, 96 Pac. 778.

As to effects of failure of owner to make and file valid contract, see par. 421, this note.

362. Same—Failure to record contract.—Effect of the failure of the contractor or owner to record the contract is to render the contract void as a limitation of the liability of the owner. The obligation of the owner to pay the laborer and materialman is no longer limited by the contract-price if he fail to record and the penalty as to him is the exercise by lien-claimants of a right of lien co-extensive with the value of the property.—*Los Angeles Pressed Brick Co. v. Higgins*, 8 Cal. App. 514, 525, 97 Pac. 414.

See par. 63, this note.

As to failure to file contract for record, see pars. 63, 64, this note.

As to failure to record modified contract, see pars. 67, 357, this note.

363. Failure to record the contract does not affect the contractual rights of the parties in any manner. It only affects the fund from which their demands may be paid after a judgment is obtained and a right of lien established.—*Los Angeles Pressed Brick Co. v. Higgins*, 8 Cal. App. 514, 525, 97 Pac. 414.

364. Same—Same—Materialman's contract.—The provisions of above section, that all contracts over one thousand dollars shall be recorded, does not apply to the contracts of materialmen, and it is well-settled that the failure to record the contracts of materialmen does not render them void.—*Blanck v. Commonwealth Amusement Corp.*, 19 Cal. App. 720, 127 Pac. 805. See *Hinckley v. Fields Biscuit Co.*, 91 Cal. 136, 27 Pac. 594; *Roebeling Co. v. Humboldt County*, 112 Cal. 288, 44 Pac. 568; *Bennett v. Davis*, 113

Cal. 337, 54 Am. St. Rep. 351, 45 Pac. 684; *Bryson v. McCone*, 121 Cal. 153, 58 Pac. 637.

365. Same—Oral contract not recorded—Notice of nonliability.—Where the contract was oral, and was not signed or filed in the recorder's office, and the complaint in an action on such contract showed these facts, such complaint states no cause of action, notwithstanding an averment that the owners, after knowledge of the contract, failed to post the notice required by section 1192, post.—*Peterson v. Freiermuth*, 17 Cal. App. 613, 121 Pac. 299.

366. Same—Two contracts necessary, when.—Where a contract was made for the construction of a shed, and a subsequent contract was made for the remodeling of a stable, so that the two buildings were to be joined together, such contracts can not be joined together as one individual contract, but must be regarded as separate and distinct agreements, within the meaning of above section, requiring that a building-contract must be expressed in writing and recorded when the amount to be paid thereunder exceeds the sum of one thousand dollars, and when so regarded it is not necessary to the validity of these agreements that they should have been expressed in writing and recorded.—*Acme Lumber Co. v. Wessling*, 19 Cal. App. 406, 126 Pac. 167.

367. Same—Unrecorded contract is not, under above section, void as between the parties to it.—*Lacy Mfg. Co. v. Los Angeles Gas & El. Co.*, 12 Cal. App. 37, 42, 106 Pac. 413.

As to void contracts, see pars. 75, 357-373, this note.

As to unrecorded contract being void, see par. 75, this note.

Same—Allegation of amount of not essential in action on, see par. 241, this note.

368. Notice of lien.—Fact that notice does not state at what time during course of claimants employment title passed from one owner to another does not affect validity of notice. Notice is sufficient if name of person alone is given who was owner when lien was filed.—*Ah Louis v. Harwood*, 140 Cal. 500, 504, 74 Pac. 41.

As to notice of claim of lien, form and sufficiency of, see, post, § 1187 and note.

369. Same—Stating name of reputed owner.—If claimant in good faith states name of reputed owner he shall not lose his lien if he shall afterward ascertain that some other person was owner.—*Corbett v. Chambers*, 109 Cal. 178, 184, 41 Pac. 873; *Ah Louis v. Harwood*, 140 Cal. 500, 504, 74 Pac. 41.

370. Notice to withhold payment from contractor—Failure to give.—Persons claiming liens for labor performed and materials furnished in the construction of a building who have not served notice upon the owner to withhold any sums due the contractor, can not compel the owner to pay them, in addition to the final payment of twenty-

five per cent, the amounts of prior payments actually earned by the contractor on or before completion, but advanced by the owner before the date when such payments were due under the contract.—*Pacific Sash & Door Co. v. Elderton*, 167 Cal. 563, 140 Pac. 247.

As to stop-notice or notice to withhold generally, see, post, § 1184 and note.

371. The only fund available to the lien-claimant who has served no notice to withhold is the thirty-five-day payment of twenty-five per cent, and he is not affected by and can not take advantage of the fact that other payments have been prematurely made.—*Pacific Sash & Door Co. v. Elderton*, 167 Cal. 563, 140 Pac. 247.

372. Oral contracts—Effect of.—As to generally, see par. 360-367, this note.

As to necessity that building-contract shall be in writing and recorded, see pars. 360-367, this note.

373. Original contractors—Who are—Employers and employees.—Where employees of contractors are entitled to liens which take precedence over liens of their employers, such contractors in order to distinguish their status are original contractors within meaning of above section, making their liens subsequent to liens of their employees.—*La Grill v. Mallard*, 90 Cal. 373, 376, 27 Pac. 294.

374. Papering and decorating house with paper decorations is as much subject-matter of lien as painting or putting on hard finish of plaster.—*La Grill v. Mallard*, 90 Cal. 373, 376, 27 Pac. 294.

375. Parties—To action to foreclose mechanics' lien.—As to generally, see pars. 285-287, this note.

376. Same—Contractors—Joinder of as codefendants.—In action by materialmen to foreclose lien for material furnished in erection of building, where prior to completion of contract original contractors abandoned work, in action so brought to recover value of materials furnished, held that contractors, while they were proper parties to action, were not necessary parties, and if defendant desired to have them joined as codefendants he should have made application in trial court for such order.—*Yancy v. Morton*, 94 Cal. 558, 560, 29 Pac. 1111. See *Russ Lumber Co. v. Garrettson*, 87 Cal. 596, 25 Pac. 747; *Green v. Clifford*, 94 Cal. 49, 53, 29 Pac. 331.

377. Same—Practice in actions for foreclosure of materialman's lien in making owner and contractor parties defendant, and uniting personal action against contractor for money, with action to establish lien for foreclosure against owner, is commendable practice, in that it prevents multiplicity of suits, and thus saves labor and expense.—*Giant Powder Co. v. San Diego Flume Co.*, 78 Cal. 193, 198, 20 Pac. 419.

378. Payment in instalments—Architect's certificate.—As to generally, see par. 71, this note.

379. Personal action—Lien under mechanics'-lien act is but collateral security for debt; and claimant has also convenient remedy by personal action.—*Germania Building & L. Assoc. v. Wagner*, 61 Cal. 349, 355.

380. Personal liability of owner—As to generally.—Contract made by statutory owner can not render real owner personally liable; only remedy against him for labor and materials furnished at instance of contractor only is foreclosure of liens, but for labor and materials furnished at his instance he is personally liable and may be made party defendant in actions to foreclose liens, and in such case personal judgment may be entered against him.—*McMenomy v. White*, 115 Cal. 339, 343, 47 Pac. 109. See *Southern California Lumber Co. v. Schmitt*, 74 Cal. 625, 16 Pac. 516; *Giant Powder Co. v. San Diego Flume Co.*, 78 Cal. 193, 20 Pac. 419; *Kellogg v. Howes*, 81 Cal. 170, 180, 6 L. R. A. 588, 22 Pac. 509; *Davies Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641, 647, 22 Pac. 860; *Wood v. Oakland T. Co.*, 107 Cal. 502, 40 Pac. 806; *McClain v. Hutton*, 131 Cal. 132, 144, 61 Pac. 273, 63 Pac. 182, 622.

381. Owner is not made personally liable to materialman, where subcontractor was personally liable, and personal judgment was rendered against contractor in court below, but property of owner is made liable for material he actually received and retained in his building, independent of personal liability.—*Davies Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641, 647, 22 Pac. 860.

382. No personal liability is incurred by owner as to contract between employees and subcontractor for labor, but improvements are made subject to lien therefor in favor of employees performing labor on such improvements.—*Macomber v. Bigelow*, 126 Cal. 9, 14, 58 Pac. 312.

383. Persons and property subject to lien.—While it may be true that the theory upon which the mechanics'-lien law is based is that the owner receives the benefit which he is estopped to deny, yet our statute does not seem to contemplate, as an essential prerequisite to the existence of a lien under it, that the owner must be benefited by the labor bestowed or the materials furnished.—*Hardwood Interior Co. v. Bull*, 24 Cal. App. 129, 140 Pac. 702.

384. The above section provides that certain designated persons shall have a lien "for the value" of the labor done and materials furnished; and this phrase, in the absence of fraud, means the "agreed value" in cases based upon contract.—*Hardwood Interior Co. v. Bull*, 24 Cal. App. 129, 140 Pac. 702.

385. Plans and drawings—Sun-print copy.—Plans and drawings are as much part of contract as paper containing agreements or covenants of parties with original signatures, or original specifications with particular signatures, and it is just as necessary to file such plans and drawings in the recorder's office as to file either of others; and since section makes no provision for filing copy of contract or of any part thereof, and it is established law that where plans and specifications are part of contract they must be filed, there is no warrant for holding that filing of copy thereof satisfies requirement of filing, and this is true also of sun-print copy of plans and drawings, bearing photographic representation of documents and signatures thereof.—*San Francisco Lumber Co. v. O'Neill*, 120 Cal. 455, 456, 52 Pac. 728. See *Greig v. Rioridan*, 99 Cal. 316, 323, 33 Pac. 913.

See pars. 386, 387, this note.

386. Plans and specifications—A most important part of building contract, as without them nature and extent of work and materials to be furnished can not be ascertained. They should therefore be made part of written contract, and signed by parties in such way that no resort to oral evidence will be necessary to show intention of parties that they should be part of such contract.—*Donnelly v. Adams*, 127 Cal. 24, 25, 59 Pac. 208.

See par. 385, this note.

As to drawings, plans and specifications generally, see pars. 175-178, this note.

387. Same—Necessity for signing and filing with building-contract.—As to generally, see pars. 61, 62, this note.

388. Pleadings—Amendment to complaint as to plans and specifications, saying that provision of contract requiring plans and specifications to be signed by parties was by verbal consent of both parties waived, can not do away with provision that oral evidence is not admissible to contradict or vary terms of written contract nor can void contract be made valid by such oral waiver of any part of it.—*Donnelly v. Adams*, 127 Cal. 24, 25, 59 Pac. 208. See *Wornden v. Hammond*, 37 Cal. 61; *Willamette Steam Mill Lumber & Mfg. Co. v. Los Angeles C. Co.*, 94 Cal. 229, 233, 29 Pac. 629; *Donnelly v. Adams*, 115 Cal. 129, 132, 46 Pac. 916; *West Coast Lumber Co. v. Knapp*, 122 Cal. 79, 83, 54 Pac. 533.

As to answer, see par. 218, this note.

As to complaint, see pars. 232-241, this note.

As to pleadings and issues, see pars. 288, 289, this note.

389. Same—Completion of building.—Allegation in complaint as to completion of building applies to all its parts, and includes excavation necessary to its construction as contemplated by contract.—*Macomber v. Bigelow*, 126 Cal. 9, 12, 58 Pac. 312.

390. Same—Labor in mine—Necessary allegations.—In action brought to recover amount claimed as wages, and to have said amount declared to be lien upon mine described in complaint, it is essential, under provisions of above section, for plaintiffs to allege and prove that labor was performed at instance of owner, or at instance of agent of owner, within definition thereof as to who shall be held to be such agent.—*Reese v. Bald Mt. Consol. Gold Min. Co.*, 133 Cal. 285, 287, 65 Pac. 578.

391. Same—Ownership—Sufficient averment as to.—Complaint sufficiently sets forth ownership or reputed ownership of defendants in property sought to be foreclosed, wherein lien attached to complaint, after stating manner and time of payment, averred as to last payment that it was to be paid out of wages of "John Lavigne, her reputed husband, who was and still is reputed owner of Lavigne ranch."—*Palmer v. Lavigne*, 104 Cal. 30, 32, 37 Pac. 775.

392. Same—Uncertainty in complaint.—Where allegations of complaint are inconsistent with exhibit attached, demurrer for ambiguity and uncertainty is well taken, and, therefore, where complaint shows that contract was made and entered into with defendants, and lien attached to complaint shows that contract was made with one of defendants with full knowledge and consent of other, held that such complaint was ambiguous and uncertain, and demurrer upon that ground should be sustained.—*Palmer v. Lavigne*, 104 Cal. 30, 33, 37 Pac. 775.

393. Same—Value of materials.—Allegation of agreed price for materials is sufficient showing, prima facie, of their value and is equivalent to allegation of value in absence of demurrer for uncertainty in this particular.—*Bringham v. Knox*, 127 Cal. 40, 44, 59 Pac. 198. See *Himmelman v. Spanagel*, 39 Cal. 401; *Tehama County v. Bryan*, 68 Cal. 57, 8 Pac. 673; *Grant v. Sheerin*, 84 Cal. 197, 200, 23 Pac. 1094; *Russ Lumber & Mill Co. v. Garrettson*, 87 Cal. 589, 595, 25 Pac. 747; *Amestoy v. Electric R. T. Co.*, 95 Cal. 311, 314, 30 Pac. 550; *Mullally v. Townsend*, 119 Cal. 47, 52, 50 Pac. 1066.

394. Same—Verification.—Complaint in action of character is not required to be verified.—*Parke & L. Co. v. Inter Nos Oil & Devel. Co.*, 147 Cal. 490, 494, 82 Pac. 51.

395. Power supplied—Lien for—Constitutionality and interpretation of statute.—Former section 1183a, post, enacted in 1909 (Stats. 1909, p. 1003), giving a lien to persons supplying power by means of teams, wagons, vehicles, implements, or appliances, used in the construction, alteration, addition to, or repair of any of the improvements or works mentioned in above section, and providing the same procedure for enforcing the lien, and the same right to give notice to withhold payments, as is given to persons furnishing materials, is not unconstitutional because such lien is not one of those specified in section 15 of

article XX of the constitution.—Mendenhall v. Gray, 167 Cal. 233, 139 Pac. 67.

396. That section of the constitution, declaring that "mechanics, materialmen, artisans and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the legislature shall provide, by law, for the speedy and efficient enforcements of such liens," neither expressly nor impliedly prohibits the legislature from granting liens to other classes of persons.—Mendenhall v. Gray, 167 Cal. 233, 139 Pac. 67.

397. A claim of lien for power actually supplied, covering only the period during which it was furnished and used by the contractor, can not be construed as claiming damages for the failure of the contractor to use the power during the entire period for which he agreed to take it, merely because it contains a statement that the power was not retained for the full contract period, and that this was due to no fault of the claimant.—Mendenhall v. Gray, 167 Cal. 233, 139 Pac. 67.

398. An agreement to furnish mules, together with equipment, for a compensation measured by the number of mules employed, the equipment and appliances not to be separately paid for, is not uncertain as to the amount and mode of payment.—Mendenhall v. Gray, 167 Cal. 233, 139 Pac. 67.

399. **Premature payment by owner—Effect of and rights of parties, as to generally, see pars. 500, 501, this note.**

400. **Prevention of performance by owner—Rights and liabilities of parties.—As to generally, see par. 54, this note.**

401. **Priorities.—In mechanics' lien claims there are no priorities under present law.—See par. 293, this note.**

402. **Proceedings to perfect lien.—Claim of lien.—**The validity of a claim can not be affected by a mistake in attempting to carry out the requirements of the law with regard to stating the name of the owner or reputed owner.—Lucas v. Gobbi, 10 Cal. App. 648, 651, 103 Pac. 157.

As to what claim of lien must contain, see, post, § 1187 and note.

403. **Same—Same—Excessive claim.—**It is well settled that in the absence of fraud, the claim will not be defeated because the claimant has included too much in his notice.—Lucas v. Gobbi, 10 Cal. App. 648, 651, 103 Pac. 157.

As to errors and mistakes in claim of lien, see pars. 415-420, this note; also, post, §§ 1203 and 1203a and notes.

404. **Excess in the claim of a mechanic's lien would not invalidate it under the original section above, unless it was found to be "wilful and intentional," and under section 1203, post, as enacted in 1907, or section 1203, post, as enacted in 1911, it is provided that "no mistakes or errors in the statement**

of demand for the amount of credits or offsets, shall invalidate the lien, unless the court finds that such mistake or error was made with intent to defraud." While the court expresses its conviction that the plaintiff did not wilfully attempt to assert a lien that he did not believe he was entitled to, and no fraud was shown or is inferable from the facts, the lien can not be defeated merely because it turns out in the trial that the claim was filed for too much.—Henley v. Pacific Fruit Cooling & Vaporizing Co., 19 Cal. App. 728, 734, 127 Pac. 800.

405. **Same—Same—Filed prematurely can not be enforced.—**Baker v. Lake Land Canal & Irr. Co., 7 Cal. App. 482, 484, 94 Pac. 773.

406. If it appear from the complaint that the claim of lien was filed prematurely, a general demurrer must be sustained, as the only claim of the plaintiff in an action to foreclose the lien is based upon the theory of a compliance by him with the provisions of the statute in reference to the lien.—Baker v. Lake Land Canal & Irr. Co., 7 Cal. App. 482, 484, 94 Pac. 773.

407. **Same—Same—Materialman.—**The fact that the owner neglects to avail himself of the means afforded by above section for limiting the amount of liens which may be enforced against his property can not relieve the materialman from complying with the provisions of above section thereby made a condition without regard to the validity of the contract for enforcing a lien of material furnished.—Nofziger Lumber Co. v. Waters, 10 Cal. App. 89, 91, 101 Pac. 38.

As to recordation of contract by materialman, see par. 360, this note.

408. **Same—Same—Right to mechanics' lien is purely creature of statute and in order to sustain an action to foreclose such lien it is essential that the complaint show a substantial compliance with the requirements of the statute.—**Davis v. Treacy, 8 Cal. App. 395, 396, 97 Pac. 78.

As to right to mechanics' lien, see pars. 451-516, this note.

409. **Same—Same—Signing and verifying.—**Claim of mechanics' lien sufficiently signed and verified to entitle it to be filed with the recorder, when so filed, becomes public record and entitled to be received in evidence under the rules governing the admission of private writings which may become public records by recording.—Nofziger Lumber Co. v. Solomon, 13 Cal. App. 621, 626, 110 Pac. 474.

410. The purpose of the verification is not to prove the lien when it is sought to enforce it in the court. The statement while with the recorder which is required to be verified is but a notice by the claimant that he intends to avail himself of a right to a lien in the particular case. The verification is required as an evidence of good faith and a prima facie support to his claim for the purpose of giving such no-

tice only. The introduction of the claim in evidence is not to prove its contents but to establish that notice has been given as required by law. It is entitled to admission when it is shown that it complies with the statutory requirements.—*Nofziger Lumber Co. v. Solomon*, 13 Cal. App. 621, 626, 110 Pac. 474.

411. Claim of lien with signature and verification sufficient to entitle it to be filed with the recorder, by such filing becomes a public record and is therefore entitled to be received in evidence under the rule governing the admission of private writings which may become public records by recording under the statute.—*Nofziger Lumber Co. v. Solomon*, 13 Cal. App. 621, 626, 110 Pac. 474.

412. No proof of the genuineness of the signatures to the claim or verification of a lien is a necessary preliminary to the admission in evidence of a lien properly verified and filed.—*Nofziger Lumber Co. v. Solomon*, 13 Cal. App. 621, 627, 110 Pac. 474.

413. Same—Same—"Owner or reputed owner."—The statute requires the statement of "the name of the owner or reputed owner if known." If the names are not known, the claim is sufficient if it is silent on the subject. The claimant may not know the owner, and if he is ignorant of his name, he is not required to state it.—*Lucas v. Gobbi*, 10 Cal. App. 648, 651, 103 Pac. 157.

414. Same—Effect of filing lien is to transfer from contractor to lien-claimant the right to receive the money remaining due under the contract, so far as necessary to satisfy the lien.—*Butler v. Ng Chung*, 160 Cal. 439, 117 Pac. 512.

415. Same—Effect of errors in claim of lien.—The unintentional inclusion in a mechanics' lien of materials not actually used in the building will not render the lien void, as section 1203a, post, provided that no mistake or error in the statement of a claim of lien will invalidate it unless the court finds that such mistake was made with the intent to defraud.—*Blanck v. Commonwealth Amusement Corp.*, 19 Cal. App. 720, 127 Pac. 805.

As to excessive claim of lien, see pars. 403, 404, this note.

416. No fraud having been shown and none being clearly inferable from the facts, a mechanics' lien can not be defeated merely because it turns out on the trial that the claim as filed was for too much.—*Henley v. Pacific Fruit Cooling & Vaporizing Co.*, 19 Cal. App. 728, 127 Pac. 800, 802.

417. Since fraud is never to be presumed, and, before a party can be deprived of his right upon a claim of fraud, the facts must be clearly made out, a mistake in filing a mechanics' lien for an amount greater than due will not invalidate the lien in the absence of any showing of intent to defraud.—*Henley v. Pacific Fruit Cooling & Vaporizing Co.*, 19 Cal. App. 728, 127 Pac. 802.

418. Under the provisions of section 1203a, post, as it existed when the liens were filed, and this case was decided, no mistake or error in the statement of a claim of lien will invalidate it, unless the court finds that such mistake or error was made with intent to defraud; and where there were mistakes or errors in certain claims of lien for materials, by including materials not actually used in the building, but the court found, on sufficient evidence, that such mistakes and errors were unintentional and free from fraud, the liens were valid.—*Blanck v. Commonwealth Amusement Corp.*, 19 Cal. App. 720, 724, 127 Pac. 805.

419. Same—Same—Inadvertence in failing to allow credit.—A claim of lien in which the claimant fails to give credit for a payment made to him, as the result of inadvertence, and with no intent to defraud, is not invalidated therefor.—*Stockton Lumber Co. v. Schuler*, 155 Cal. 414, 101 Pac. 307.

420. Failure of claimant to offset credit against the contract-price held not to justify the court in depriving it of its lien, where such failure did not appear to have been the result of a wilful intent to assert what the claimant knew to be false.—*California Portland Cement Co. v. Wentworth Hotel Co.*, 16 Cal. App. 704, 118 Pac. 103.

421. Same—Failure of owner to make and record valid contract of memorandum as required by above section does not estop him from controverting the validity of a lien claimed upon the ground that the claimant neglected to comply with the requirements of section 1187, post.—*Nofziger Bros Lumber Co. v. Waters*, 10 Cal. App. 89, 92, 101 Pac. 38.

422. Same—Itemized account—When unnecessary.—Where the claimant of a mechanics' lien on two buildings erected on one lot can show that his contract with the owner called for the performance of work for a lump sum, or for a sum to be fixed in accordance with the amount of work done and materials furnished, he will not be required to comply with section 1188, post, by which it is necessary to designate the amount due on each building.—*Pugh v. Moxley*, 164 Cal. 374, 128 Pac. 1037, 1038.

423. Same—Notice of claim—In general.—The notice of lien must contain a description of the property to be charged sufficient for identification and where the notice contains no description of the building and its general location, but only by lot and block number, which numbers are incorrect, the claim of lien is void and of no effect.—*Nofziger Lumber Co. v. Waters*, 10 Cal. App. 89, 91, 101 Pac. 38.

424. Two methods are provided for giving notice of claim of mechanics' lien, one, by recording against the property, and the other by notice to the holder of the fund which has been earned by the claimant's labor. The former for reasons of public policy can not be enforced against public

building or improvement, but no such objection exists as to the latter.—*Goldtree v. City of San Diego*, 8 Cal. App. 505, 509, 97 Pac. 216.

425. Section 1190, post, is as follows: "No lien provided for in this chapter binds any building, mining claim, improvement, or structure for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same; or, if a credit be given, then ninety days after the expiration of such credit; but no lien continues in force for longer time than two years from the time the work is completed, by any agreement to give credit." Hence the claim of lien of the defendant for street improvement should have been filed at least within ninety days after the completion of the work, and the action should have been begun to enforce it within ninety days after the filing of such lien.—*Meyer v. City St. Improvement Co.*, 164 Cal. 645, 130 Pac. 215, 217.

426. **Same—Same—Statement of conditions and terms of contract.**—The object of such statement is to "inform the owner as to the extent and nature of the lienor's claim, to facilitate investigation as to its merits," and the test of the sufficiency of the notice is whether it departs so far from such terms and conditions as to be misleading.—*Barrett-Hicks Co. v. Glas*, 14 Cal. App. 299, 111 Pac. 760.

As to statement of conditions of contract, see par. 436, this note.

427. The requirement of section 1187, post, as it existed when the claim of the mechanics' lien in this case was filed, that the claim of lien shall contain "a statement of the terms, time given and conditions of his contract," it is not meant that the fact that the work was performed under several contracts is a circumstance which must be stated as a "condition" of the contract. The "conditions" of the contract which the statute contemplates and requires to be stated are those provisions which enter into and form a part of a contract and make it a binding contract.—*Acme Lumber Co. v. Wessling*, 19 Cal. App. 406, 412, 126 Pac. 167.

428. **Same—Same—Sufficiency of notice.**—A notice sufficient as to the owner can not be void as to third persons without knowledge of the extrinsic facts.—*Union Lumber Co. v. Simon*, 150 Cal. 755, 89 Pac. 1077.

As to sufficiency of description of land to be charged, see pars. 437, 438, this note.

429. **Same—Notice of completion—Municipal corporations.**—The provision of section 1187, post, added by way of amendment in 1897, requiring the filing of notices of completion, does not apply to improvements under section 1191, post, and hence notice of completion is not required of a street improvement made at the request of the owner.—*Meyer v. City St. Improvement Co.*, 164 Cal. 645, 130 Pac. 215, 216.

430. **Same—Notice to owner to withhold payments—Equitable garnishment.**—Notice to the owner of a building or other improvement to withhold from the contractor, out of moneys due or first to become due, sufficient to answer claims for labor and material, amounts to an equitable garnishment of the funds, and the right to recover the money so garnished does not depend upon the establishment of liens.—*Diamond Match Co. v. Silberstein*, 165 Cal. 278, 131 Pac. 874.

As to equitable garnishment, see pars. 133, 504, this note.

As to the sufficiency of the notice to owner, see note 20 Ann. Cas. 1162.

As to the sufficiency of service upon the owner of the notice of lien, see note 16 Ann. Cas. 355.

431. Where the materialman serves notice upon the school district, under section 1184, post, such notice operates as an equitable garnishment, or as an assignment pro tanto of the money due from the school district to the general contractor, and such materialman is subrogated pro tanto to such rights as the general contractor had to any money held by the owner as part of the contract-price.—*Suisun Lumber Co. v. Fairfield School Dist.*, 163 Cal. 726, 127 Pac. 349.

432. **Same—Same—Interest allowed on claims.**—Persons who have furnished labor and material and have served notice on the owner to withhold from the contractor sufficient to pay their claims, are entitled to interest on their claims.—*Diamond Match Co. v. Silberstein*, 165 Cal. 278, 131 Pac. 874.

As to interest in general, see pars. 268-270, 311, 312, this note.

433. **Same—Same—Subsequent payments by owner.**—Payments made by the owner to the contractor, after notice to withhold, although in accordance with the contract, do not relieve the owner from liability.—*Diamond Match Co. v. Silberstein*, 165 Cal. 278, 131 Pac. 874.

434. **Same—Recordation by materialman.**—The requirement of above section that all contracts over one thousand dollars shall be recorded does not apply to the contracts of materialmen; and it is well settled that the failure to record the contracts of materialmen does not render them void.—*Blanck v. Commonwealth Amusement Corp.*, 19 Cal. App. 720, 127 Pac. 805, 807, citing *Hinckley v. Field's Biscuit Co.*, 91 Cal. 136, 27 Pac. 594; *Roebbing Co. v. Humboldt County*, 112 Cal. 288, 44 Pac. 568; *Bennett v. Davis*, 113 Cal. 337, 54 Am. St. Rep. 354, 45 Pac. 684; *Bryson v. McCone*, 121 Cal. 153, 53 Pac. 637.

435. **Same—Statutory requisites.**—The creation of a mechanics' lien is statutory, and in order to constitute a valid lien, it is necessary only to do the things which the statute directs to be done.—*Acme Lumber*

Co. v. Wessling, 19 Cal. App. 406, 126 Pac. 167.

436. Same—Same—Conditions of contract—Claim of lien.—Section 1187, post, as it existed prior to the amendment of 1911, provides that the claim of a lien shall contain a statement of the demand, the name of the owner or reputed owner, the name of the person by whom the claimant was employed, a statement of the terms and conditions of the contract, and file a description of the property to be charged with the lien. The requirement of above section that claim of lien shall state "conditions" of the contract does not mean that the fact that the work was performed under several contracts is a circumstance which must be treated as a "condition" of the contract; the "condition" of a contract which is contemplated requires to be stated those provisions which enter into and form a part of the contract and are essential to make it a binding agreement.—*Acme Lumber Co. v. Wessling*, 19 Cal. App. 406, 126 Pac. 167.

437. Same—Sufficiency of description of land to be charged.—Description need only be "sufficient for identification," and evidence is admissible for the purpose of identifying the lands as described (*Henshaw, J., dis.*)—*Union Lumber Co. v. Simon*, 150 Cal. 755, 89 Pac. 1077.

438. The statute is held remedial, and is to be liberally construed with a view to promote justice and effect its objects, and a description of the property by metes and bounds, ambiguous in itself, is aided by a further statement in the notice that a particular person is the owner of the land and building, and that the lien is for materials furnished a specified contractor while constructing the building (*Henshaw, J., dissents as to sufficiency of notice.*)—*Union Lumber Co. v. Simon*, 150 Cal. 755, 89 Pac. 1077.

439. Same—"Trivial imperfections."—As to generally, see pars. 221 and 222, this note.

440. Same—Use and occupation as completion.—Use and occupation here intended is not such as would be created by the owners assuming to proceed with the work of constructing an unfinished building after abandonment by the contractor.—*C. Ganahl Lumber Co. v. Weinsveig*, 16 Cal. App. 690, 117 Pac. 954.

441. Public improvements by municipalities—Equitable garnishment.—As to generally, see pars. 430, 431, this note.

442. Public schoolhouse.—Public buildings such as schoolhouses are not included in word "property" used in constitution, or in phrase "any building" used in code, and therefore it must necessarily follow that mechanics and materialmen are not, by these provisions given right to lien upon such buildings.—*Mayrhofer v. Board of Education*, 89 Cal. 110, 112, 23 Am. St. Rep. 451, 26 Pac. 646.

443. Railroads—Lien for materials.—Statute allows materialmen and others liens for materials or labor furnished for use in construction of railroad and requires that lien must in general be claimed and enforced against entire road.—*Cox v. Western Pac. R. Co.*, 44 Cal. 18, 28. See *Bringham v. Knox*, 127 Cal. 40, 43, 59 Pac. 198.

444. Same—Same—Sufficiency of.—Where plaintiff in his claim of lien for materials used in construction of railroad stated his claim—not upon part or section of railroad—but "of that certain railway known as and called the Sierra Valley and Mohawk railway," held that although he names present terminus, carrying implication that railroad was projected beyond such point and might be extended, statement of claim was held to be sufficient for identification of road as an entirety, exclusive of extension then incomplete.—*Bringham v. Knox*, 127 Cal. 40, 43, 59 Pac. 198.

445. Recording and filing—Effect of failure—Subcontractors, materialmen, artisans, and laborers are entitled under law to value of their material or labor and are not affected by remissness of parties to contract failing to record it or by contract being thereby rendered void.—*Laidlaw v. Marye*, 133 Cal. 170, 174, 65 Pac. 391.

446. Recording of contract so far as regards person furnishing labor or materials is immaterial.—*Giant Powder Co. v. San Diego Flume Co.*, 78 Cal. 193, 197, 20 Pac. 419.

447. Contractor, by omission to file contract, is deprived of any lien for his labor and materials, but he does not by such omission acquire any greater right to recovery for his labor and materials than he would if he had brought an action therefor, irrespective of his rights to lien.—*Marchant v. Hayes*, 117 Cal. 669, 671, 49 Pac. 840.

448. Same—Failure to file plans and specifications renders contract void.—*Kuhlman v. Burns*, 117 Cal. 469, 472, 49 Pac. 585. See *Yancy v. Morton*, 94 Cal. 558, 560, 29 Pac. 1111; *Barker v. Doherty*, 97 Cal. 10, 31 Pac. 1117; *Greig v. Riordan*, 99 Cal. 316, 33 Pac. 913; *Dunlop v. Kennedy*, 102 Cal. 443, 36 Pac. 765; *Pierce v. Birkholm*, 115 Cal. 657, 661, 47 Pac. 681.

449. Same—Necessity for.—As to generally, see pars. 360-367, this note.

450. Refusal of supreme court to grant rehearing—Must not be understood as approval of opinion of district court to the effect that a finding as to the reasonable value of the work done on the building was unnecessary to support the judgment in favor of the original contractor against the owner, and that he could recover on an unrecorded contract.—*Los Angeles Pressed Brick Co. v. Higgins*, 8 Cal. App. 514, 526, 97 Pac. 414.

451. Right to lien—As to generally.—Such lien is a constitutional right, and attaches to the structure as the material is

furnished or the work done, and the statutory procedure here provided has reference solely to the remedy. The lien created by the constitution can not be subordinated to or made dependent upon a legislative act. It exists with all its force at all times between the furnishing of the material or the doing of the work and the expiration of the time within which liens may be filed.—*People v. Moxley*, 17 Cal. App. 469, 120 Pac. 43.

As to the nature of improvement for which a mechanics' lien may exist, see note Ann. Cas. 1912B, 5.

As to the right of an architect to a mechanics' lien, see note Ann. Cas. 1913A, 275.

As to the right of a materialman to a mechanics' lien, see note 79 Am. Dec. 268.

As to who is a "laborer," "workman" or "servant" within the meaning of statutes relating to mechanics' liens, see note 32 Am. Rep. 264.

452. Where a valid contract has been filed, mechanics'-lien claimants are merely substituted to the original contractors, and their right to enforce their liens against the owners depends on whether or not the original contractor has a money demand against the owner or not.—*Butler v. Ng Chung*, 160 Cal. 438, 117 Pac. 512.

453. In the construction of a theater building, the different firms furnishing and installing respectively an electric sign which consisted of a swinging bracket set into the front of the building, telephone instruments and telephone equipment used for intercommunication between the various portions of the building, a gas furnace and gas connections installed in the building for heating purposes, and "belaying pins" which were "turned pieces of hardwood," were entitled to mechanics' liens for the material furnished.—*Blanck v. Commonwealth Amusement C. rp.*, 19 Cal. App. 720, 127 Pac. 805, 807.

454. Same—As to property subject to lien.—The constitution not declaring that laborers of every class shall have a lien upon the property upon which they have bestowed labor for the value of the labor done, makes no exception as to public or municipal property, and it is only because of other constitutional provisions, or by reason of public policy, the laborer can be deprived of the right so created by the people. Without constitutional authority the right to the lien can not be taken away by the legislature either by legislation or lack of legislation.—*Goldtree v. City of San Diego*, 8 Cal. App. 505, 508, 97 Pac. 216.

As to buildings and other property subject to mechanics' liens, see note 78 Am. Dec. 694.

As to the extension of the lien to the land upon the destruction of the improvement for which the lien is given, see note Ann. Cas. 1913A, 943.

455. By allowing a mechanics' lien as provided in above section for labor performed upon public works none of the grounds of the policy against the enforcement of a lien against public property are violated. The performance of the public duties of the municipality will in no way be interfered with. Its only interest in the matter is that of a stakeholder. Only the fund, not the property, is subject to the lien.—*Goldtree v. City of San Diego*, 8 Cal. App. 509, 511, 97 Pac. 216.

456. It is only as the terms "statute" and "statutory law" are intended to include the constitution as well as the enactments of the legislature that they can be said to create the right to a mechanics' lien.—*Goldtree v. City of San Diego*, 8 Cal. App. 505, 509, 97 Pac. 216.

457. Same—Same—Homestead.—Liability of to mechanics' lien has recently been passed upon by the supreme court of Utah, and the result arrived at is that under the constitutional provision authorizing the legislature to provide for a homestead exempt from execution the legislature has no power to render a homestead subject to a mechanics' lien, and that where the mechanics'-lien law provides for a lien on such property it is in this respect unconstitutional and void.—*Volker-Scowcraft Lumber Co. v. Vance*, 32 Utah 74, 125 Am. St. Rep. 828, 88 Pac. 896.

As to exemption of homestead from liens and forced sale to satisfy same, see generally, notes 70 Am. Dec. 692; 71 Am. Dec. 387, 711; 84 Am. Dec. 382; 87 Am. Dec. 273; 6 Am. St. Rep. 54; 79 Am. St. Rep. 902; 6 L. R. A. 814.

458. This decision is undoubtedly correct, as it is certainly in accord with the authorities. The homestead is not subject to mechanics' lien unless specially made so in the constitution.—See *Jossman v. Rice*, 121 Mich. 270, 80 Am. St. Rep. 493, 80 N. W. 25; *Tuttle v. Strout*, 7 Minn. 465 (Gil. 374), 82 Am. Dec. 108; *Cogel v. Mickow*, 11 Minn. 475 (Gil. 354); *Coleman v. Ballandi*, 22 Minn. 147; *Fallihee v. Wittmayer*, 9 S. D. 479, 70 N. W. 642; *Cummings v. Bloodworth*, 87 N. C. 83; *Sampson v. Williamson*, 6 Tex. 102, 55 Am. Dec. 763; *Black v. Rockmore*, 50 Tex. 88; *Summerville v. King*, 98 Tex. 332, 84 S. W. 643; *Donaldson v. Voltz*, 19 W. Va. 156; *Moran v. Clark*, 30 W. Va. 358, 8 Am. St. Rep. 66, 4 S. E. 303; *Lanahan v. Sears*, 102 U. S. 318, 26 L. ed. 180.

459. Legislature can not discriminate in exempting homestead from lien for debts.—*Burrows v. Brooks*, 113 Mich. 307, 71 N. W. 460 (exception as to personal labor invalid); *Tuttle v. Strout*, 7 Minn. 465 (Gil. 374), 82 Am. Dec. 108; *Coleman v. Ballandi*, 22 Minn. 144 (discriminating giving materialman a lien unconstitutional); *Donaldson v. Voltz*, 19 W. Va. 156 (holding law excepting debts due for rent unconstitutional).

460. Same—Same—Public property not subject to mechanics' lien.—As to generally, see par. 318, this note.

461. Same—Action to foreclose lien where contractor has abandoned the work before completion, it is not necessary for the court to find the cost of completing the building, although this may be properly considered in evidence in determining the ultimate fact of the value of the work done and materials furnished at the time of the abandonment.—*Scheerer & Co. Inc. v. Deming*, 154 Cal. 138, 141, 97 Pac. 155.

As to action to foreclose a mechanics' lien claim, see pars. 211-303, this note.

As to allegations in action to enforce lien under abandoned contract, see par. 232, this note.

462. Same—Same—No lien can be enforced against property in excess of sum which is the value of work already done and materials furnished estimated by the standard of the whole contract-price in case of the abandonment of a valid contract.—*Duffy Lumber Co. v. Stanton*, 9 Cal. App. 38, 98 Pac. 38.

463. Above section furnishes the rule for determining extent to which property is liable for liens in case where there is an abandonment of work under a valid contract.—*Duffy Lumber Co. v. Stanton*, 9 Cal. App. 38, 39, 98 Pac. 38.

464. Same—Amount of lien—How estimated.—In estimating the value of the work done and materials furnished up to the time of abandonment it is proper to consider not only the value of the work done but also the value of that left undone.—*Hoffman-Marks Co. v. Spires*, 154 Cal. 111, 117, 97 Pac. 152.

465. Same—Same—Abandonment of valid contract, amount applicable to liens of persons other than the contractor must be determined under the rule prescribed by above section. If the payments made by the owner under the contract amounted to more than the value of the work and labor done and materials furnished at the time of abandonment there is nothing for the lien-claimants and they must look to the personal responsibility of the contractor.—*Hoffman-Marks Co. v. Spires*, 154 Cal. 111, 114, 97 Pac. 152.

466. Where valid contract has been abandoned by contractor the amount due lien-claimants other than the contractor may be estimated as provided in above section and if the payments made by the owner prior to the abandonment equal or exceed the value of the work and materials furnished at that time there is nothing for the claimants.—*Scheerer & Co., Inc. v. Deming*, 154 Cal. 138, 141, 97 Pac. 155.

467. Same—Amount subject to claims of lienors where contract is abandoned, see notes to section 1200, post.—*Hoffman-Marks Co. v. Spires*, 154 Cal. 115, 97 Pac. 152.

468. Same—Same—Where there is a deficiency in the amount necessary to pay all the liens so that the subcontractor and his employees and materialmen can not be paid in full, the claims of the employees and materialmen must be settled first and the loss fall upon the subcontractor.—*Los Angeles Pressed Brick Co. v. Los Angeles Pac. Boulevard & Devel. Co.*, 7 Cal. App. 460, 463, 94 Pac. 775.

469. Same—Cartage.—Claims for cartage of material to be used in a building or improvement are properly included in a lien-claim as part of the price of materials furnished.—*Consolidated Lumber Co. v. Bosworth*, 40 Cal. App. 80, 180 Pac. 60, following the doctrine in *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231; *Woods, Curtis & Co. v. El Dorado Lumber Co.*, 153 Cal. 232, 126 Am. St. Rep. 80, 15 Ann. Cas. 382, 16 L. R. A. (N. S.) 585, 94 Pac. 877.

470. Same—Claim of lien by surety on contractor's bond.—A partnership has a right to a lien for materials furnished by it, notwithstanding a member thereof, in his individual capacity, is a surety on the bond of the contractor, and had therein guaranteed the delivery of the building free of liens.—*Burnett v. Glas*, 154 Cal. 256, 97 Pac. 432.

471. Same—Concrete "forms"—Material used for.—Where the nature of concrete work contracted for is such as to require the use of "forms" to hold it in place while it hardens into a self-sustaining permanent structure and the materials from which the forms are made are consumed in the process, such materials come within the definition of "materials to be used or consumed," in the construction of a building or improvement as contained in the above section.—*Consolidated Lumber Co. v. Bosworth*, 40 Cal. App. 80, 180 Pac. 60, following the doctrine in *Olson-Mahoney Lumber Co. v. Dunne Invest. Co.*, 30 Cal. App. 332, 334, 159 Pac. 178.

472. Same—Constitutional right of owner.—The owner's liability under a valid contract is limited, under the general constitutional principle underlying the mechanics' lien law, to the price he has agreed to pay, and where the contractor fails to perform his undertaking, and the owner is burdened with the cost of completing the work, it is but fair and just that he should be made liable only for the proportion of the contract-price representing the value of the work already done, and that he should be relieved of the obligation of paying the contractor, or those claiming under him, so much of the contract-price as corresponds to the portion of the work left undone.—*Hoffman-Marks Co. v. Spires*, 154 Cal. 116, 97 Pac. 152; *Scheerer & Co. Inc. v. Deming*, 154 Cal. 141, 97 Pac. 155.

473. Same—Effect of valid contract.—Where the contract is valid, the only right possessed by laborers or materialmen is to cause the contract-price to be applied to

the payment of their demands. The lien, in the case of a valid contract, extends to the contract-price, and such contract is the limit of the liability which may be imposed upon the owner or his property.—*National Lumber Co. v. Wickliffe*, 19 Cal. App. 234, 125 Pac. 357.

474. Same—Engineering expert employed for a single express purpose. In the construction of a building or the making of an improvement has a right to a lien for the engineering designs furnished to an architect.—See par. 181, this note.

475. Same—Extent of lien.—In case of a valid contract the lien extends to the contract-price, and such contract-price is the limit of the liability which may be imposed upon the owner or his property.—*Stockton Lumber Co. v. Schuler*, 155 Cal. 411, 412, 101 Pac. 307.

476. Up to the limit of the owner's liability, the claimants, by filing their liens, acquire a right to share in any money owing from the owners to the original contractors on account of the contract, and their right to this extent, is secured by a lien on the property.—*Butler v. Ng Chung*, 160 Cal. 438, 117 Pac. 512.

477. Same—Farm development, consisting of ditches, drains, embankments, and roads so correlated as to form one harmonious whole, is a "structure" under the provisions of the mechanics' lien law.—See par. 192, this note.

478. Same—Final twenty-five per cent of contract-price.—The twenty-five per cent of the contract-price required to be retained by former section 1184, post, can not be reached by lien-claimants where at the time of the abandonment the payments already made equal or exceed the value of the work done and materials furnished.—*Hoffman-Marks Co. v. Spires*, 154 Cal. 115, 97 Pac. 152.

As to final twenty-five per cent of contract-price, see pars. 201-207, this note.

479. Same—"Forms" for concrete.—Material used for, right to lien for price of.—See par. 467, this note.

480. Same—Furnishing labor and material to subcontractor—Limit of liability of original contractor.—In a case in which the claims of persons are for materials furnished and labor bestowed upon an improvement to a subcontractor, they are limited, as far as the original contractor is concerned, to the amount owing by the latter to the subcontractor on his subcontract.—*Southern California Electric Co. v. McDonald*, 178 Cal. 386, sub nom. *Southern California Electric Co. v. Grant*, 173 Pac. 760.

481. Same—Gardener—Planting of seed.—Held that while one would perhaps not be entitled, under section 1191, post, to a lien as a gardener for labor employed in the general care of trees and crops, the planting of seeds, trees, shrubs, flowers, etc., and starting the same well to growing, would be an improvement within the meaning of

the language employed.—*California Portland Cement Co. v. Wentworth Hotel Co.*, 16 Cal. App. 706, 118 Pac. 103.

As to lien for actual manual labor, see par. 491, this note.

482. Same—Improvement at instance of owner.—The facts that an employee of the agent of the real owner, having entire charge of the selling of the tract of land of which the lot in question formed a part, informed such agent that the building had been commenced and subsequently that the work had been stopped, are sufficient to put the real owner upon inquiry as to the construction of the building and to charge him with knowledge thereof, under section 1192, post.—*National Lumber Co. v. Whalley*, 162 Cal. 224, 226, 121 Pac. 729.

483. Same—Improvement by lessee.—There is nothing in above section or section 1185, post, which imposes any personal liability upon the lessor for improvements made by the lessee; and when the lessor gives the notice herein required his property is not affected by any lien in virtue of the labor done and materials furnished thereon under contract with the lessee, but the leasehold itself does not thereby escape such a lien, provided, of course, the contract has been reduced to writing and filed as provided.—*Peterson v. Freiermuth*, 17 Cal. App. 620, 121 Pac. 299.

484. Same—Same—Notice of lessor-owner.—The effect of the notice required by above section is such that the failure on the part of the lessor to post the same is merely to entitle the contractor to a lien upon the fee, and not to impose any personal liability upon the lessor.—*Peterson v. Freiermuth*, 17 Cal. App. 620, 121 Pac. 299. See *Phelps v. Maxwell's Creek Gold Min. Co.*, 49 Cal. 336; *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231; *Russ Lumber Co. v. Newkirk*, 87 Cal. 596, 25 Pac. 747; *Buell v. Brown*, 131 Cal. 158, 161, 63 Pac. 167; *Hubbard v. Lee*, 6 Cal. App. 602, 92 Pac. 744.

See, also, *James on Mechanics' Liens*, § 121.

485. Same—Same—Same—Constructive notice.—The owner of land is chargeable with constructive notice of the erection thereon of a building by his lessee, where the lease requires the lessee to erect the building with all reasonable dispatch and vests the ownership thereof in the lessor upon the termination of the lease.—*Harmon Lumber Co. v. Brown*, 165 Cal. 193, 131 Pac. 368.

486. Same—Same—Same—Building partly on other land.—The owner of land upon which a building is constructed by a lessee is chargeable with constructive notice of the erection, although the building is partly on adjoining land owned by others.—*Harmon Lumber Co. v. Brown*, 165 Cal. 193, 131 Pac. 368.

487. Same—Same—Owner's liability for improvements ordered by lessee.—Where they did not authorize the improvement, which was contracted for with the lessee

alone, and were not connected in any way with the contract, and no privity existed, express or implied, between them and the lessee as to such improvement, they are not liable.—*Peterson v. Freiermuth*, 17 Cal. App. 620, 121 Pac. 299.

488. The owner can exempt his interest from liability for alterations, after knowledge that the work of alteration has begun, only by posting the notice of nonliability, as provided in above section.—*Pacific Sash & Door Co. v. Bumiller*, 162 Cal. 664, 667, 124 Pac. 230.

489. Same—Interest in the land—Deed of trust does not create an interest in the land within the meaning of above section so as to impose the duty upon the trustee of giving the notice of nonliability required, in order to prevent the subordination of his claim to the liens claimed for labor and materials.—*Hollywood Lumber Co. v. Love*, 155 Cal. 271, 100 Pac. 698, following with approval *Williams v. Santa Clara Min. Assoc.*, 66 Cal. 200, 5 Pac. 85.

490. Same—Lessor of teams, etc.—One who lets horses and harness to a contractor engaged in railroad construction, at a stipulated price per month, the contractor having full control of the same during the hiring, and employing and paying the drivers, can not be held to have bestowed labor upon such railroad so as to entitle him to a lien for the hire of such horses and harness.—*Wood, Curtis & Co. v. El Dorado Lumber Co.*, 153 Cal. 230, 232, 126 Am. St. Rep. 80, 15 Ann. Cas. 382, 16 L. R. A. (N. S.) 585, 94 Pac. 877.

491. Same—Lien for actual manual labor.—A subcontractor who agrees to furnish certain materials and put the same in place, and performs his contract, is entitled to a lien for such labor and materials, even though he did not in person perform actual manual labor in the matter, but it was done by his employee.—*Barrett-Hicks Co. v. Glas*, 14 Cal. App. 302, 111 Pac. 760.

As to lien of gardener for planting seed, see par. 481, this note.

As to wages of cook for laborers of a subcontractor, see par. 574, this note.

492. Same—Materialman and contractor.—The test as to whether one is a contractor or a materialman is the relative value of the material and labor supplied. If the value of the labor is small in comparison with that of the material, the claimant is a materialman. Hence, one who supplies fixtures and other material worth nine hundred fifty dollars at a cost of labor of one hundred twenty-eight dollars is a materialman.—*Pugh v. Moxley*, 164 Cal. 374, 128 Pac. 1035, 1038.

493. The owner is chargeable with the duty of paying for materials furnished a subcontractor on his building, where he has notice of the materialman's lien, and has funds in his possession due the contractor; notwithstanding payment therefor to the subcontractor has been made by the con-

tractor. The latter must bear the loss.—*In re Snell*, 16 Cal. App. 254, sub nom. *Snell v. Clark Construction Co.*, 116 Pac. 699, following doctrine in *Los Angeles Pressed Brick Co. v. Los Angeles Boulevard & Devel. Co.*, 7 Cal. App. 460, 94 Pac. 775.

494. Same—Materialman's right to lien.—To entitle a materialman to a lien under above section the materials must be furnished to be used and must be strictly used, in the construction of the building or other structure against which the lien is sought to be enforced; this means that the materials must be used not merely in the process of construction, but "in the structure," that is, must be used as the materials of which it is constructed.—*Olson-Mahoney Lumber Co. v. Dunne Invest. Co.*, 30 Cal. App. 332, 159 Pac. 178.

495. Same—Materialman taking mortgage—Effect on right.—A materialman does not lose his right to a mechanics' lien by taking a mortgage upon the real property of the contractor for the value of the material sold to him, either by virtue of section 726, ante, or by the application of any rule of decision holding that the taking of either security destroys the right to such lien.—*Martin v. Becker*, 169 Cal. 301, Ann. Cas. 1916D, 171, 146 Pac. 665.

496. Same—Necessity for written and recorded building-contract.—To validity of contract.—As to generally, see pars. 360-367, this note.

497. Same—Part performance only.—Where the plaintiff, a contractor, had not performed to a point entitling him to receive more than the first payment (which he had in fact received), he could claim nothing additional without showing that the defendant owner had wrongfully prevented further performance.—*Anderson v. Quick*, 163 Cal. 658, 126 Pac. 871, 872.

As to abandonment of contract, see pars. 86-90 and 465, 466, this note.

As to prevention of performance by owner and rights of parties, see pars. 290-292, this note.

498. Same—Persons entitled.—The lien provided for by the provisions of the above section being given to all persons who furnish labor or material contributing to the erection of a building, and not to individuals as followers of a particular trade or calling, notwithstanding the enumeration of the various classes of persons in the above section, it follows that persons, who were laborers upon the improvement, claiming liens, need not designate the particular class of laborers to which they belong and in which the services were rendered.—*Ogram v. Welchoff*, 40 Cal. App. 298, 180 Pac. 631.

499. Same—Same—Furnisher of steam shovel.—In the work of making an improvement consisting of the construction of a roadway upon private property, a person who furnishes the contractor with a steam shovel for use in the work is entitled to a

lien for any unpaid rental for the use of the shovel, under the provisions of the above section.—City of Los Angeles v. Kautz, 39 Cal. App. 702, 179 Pac. 716.

500. Same—Premature payments.—In general.—Under the provisions of section 1184, post, providing that payments made prior to the time when due shall not be valid for the purpose of defeating any lien in favor of any person except the contractor, but as to such lien such payments shall be deemed as if not paid, the owner can not take advantage of such premature payments, merely because of the fact that they were made pursuant to certificates of the architect.—Marshall v. Vallejo Commercial Bank, 163 Cal. 469, 126 Pac. 146.

501. Section 1184, post, provides that payments made prior to the time when same is due under the terms of the contract shall not be valid for the purpose of defeating any lien in favor of any person except the contractor, but as to such lien such payment shall be deemed as if not paid, and section 1200, post, provided, before its repeal, for the apportionment of the contract-price applicable to the liens of others than the contractor. It follows, therefore, that in an action brought by subcontractors to foreclose their lien, the owner is not entitled to the benefit of any payments made prior to the time they were due under the contract, and this fact is not affected because, under an agreement between the owner and the contractor, these payments were made directly to subcontractors, materialmen, and laborers, and where some of these premature payments have been made to the plaintiff himself, he may retain the amount and claim the benefit of the statute for ascertaining the balance due him.—Marshall v. Vallejo Commercial Bank, 163 Cal. 469, 126 Pac. 146.

502. Same—Same—Surety on bond not released.—The surety on a building contractor's bond given in pursuance of the requirements of the above section to secure the performance of the building-contract, is not released by the premature payment of installment of the contract-price by the owner to the contractor, in view of the provision of the above section that no modification of the contract between the owner and the contractor shall relieve the surety.—Hubbard v. Jurian, 35 Cal. App. 757, 170 Pac. 1093.

503. Same—Same—To subcontractor.—The contractor is liable to a materialman for materials furnished his subcontractor, notwithstanding he has already paid the latter therefor. He may protect himself by means of a written contract under the terms of which he may require a showing of payment of all claims by his subcontractor before settlement can be required.—In re Snell, 16 Cal. App. 254, sub nom. Snell v. Clark Const. Co., 116 Pac. 699, following doctrine in Los Angeles Pressed Brick Co. v. Los Angeles Boulevard & Devel. Co., 7 Cal. App. 460, 94 Pac. 775.

504. Same—Public improvements of municipalities.—Equitable garnishment.—No mechanics' lien attaches. The sole remedy is the equitable garnishment provided by above section, whereby the money due or to become due may be intercepted.—Clark v. Beyrle, 160 Cal. 312, 116 Pac. 739.

As to notice to owner to withhold payment constituting an equitable garnishment, see pars. 430, 431, this note.

505. Same—Recovery on contractor's bond.—Failure to file claim.—Release of surety.—In an action, by laborers or materialmen to foreclose claimed liens a recovery can be had upon the bond of the contractor by those laborers and materialmen only who have perfected their claims by filing verified liens within the time specified by the statute.—Hubbard v. Jurian, 35 Cal. App. 757, 170 Pac. 1093.

506. Same—Statutory provision essential.—Constitutional provision not self-executing.—The declaration in article XX, section 15 of the constitution providing that mechanics, materialmen, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished material, for the value of such labor done and material furnished, is inoperative until supplemented by legislative action, and until such legislative action the right to lien contemplated by the constitution does not exist.—Bailey Ornamental Iron Co. v. Goldschmidt, 33 Cal. App. 661, 166 Pac. 363, approving the doctrine in Andrews & Johnson Co. v. Atwood, 167 Ill. 249, 47 N. E. 387; Kendall v. Fader, 199 Ill. 294, 65 N. E. 318; Bass v. Williams, 73 Mich. 208, 41 N. W. 229.

507. Same—Subcontractor.—In general.—Under the provisions of former section 1200, post, providing for the apportionment of the contract-price applicable to liens of other persons other than the contractor, in a case where the contractor has abandoned the work, in a suit to foreclose subcontractors' liens, the owner of the property is not entitled to deduct the amount of damages which he has sustained by reason of the failure on the part of the contractor to complete the building within the stipulated time.—Marshall v. Vallejo Commercial Bank, 163 Cal. 469, 126 Pac. 146.

As to premature payment to subcontractor, see par. 503, this note.

508. One who has contracted to do all the brick and steel work on a building is a subcontractor and not a materialman, and his lien must be restricted to and governed by the rights of a subcontractor and not those of a materialman.—Bird v. American Surety Co., 175 Cal. 625, 166 Pac. 1009.

509. Although a contractor or his surety are not entitled to a lien under an unrecorded contract, subcontractors are entitled to liens for labor performed and materials furnished.—Watterson v. Owens River Canal Co., 25 Cal. App. 247, 143 Pac. 90.

510. Same — Same—Apportionment.—Under the provisions of former section 1200, post, as it existed prior to the amendment of 1911, the portion of the contract-price applicable to the liens of other persons than the contractor is to be fixed by taking such proportions of the actual value of the work done and material furnished at the time of abandonment as the total contract-price bears to the actual, total reasonable cost of the complete improvements; the last-mentioned figure being reached by adding to the actual value of the work done and material furnished at the time of the abandonment the reasonable cost of completing the building.—*Marshall v. Vallejo Commercial Bank*, 163 Cal. 469, 126 Pac. 146.

511. Same—Superintendent of oil-mining company.—Not entitled to lien not being within the class of persons enumerated in the above section and within the provisions of section 1187, post.—See, post, 1187 and note.

512. Same—Surety upon building contractor's bond guaranteeing the delivery of the building free from liens can not enforce a lien for materials furnished by him. This does not apply to materials furnished by a partnership one member of which, as an individual, became a surety upon such bond.—*Burnett v. Glas*, 154 Cal. 249, 256, 97 Pac. 423.

As to two contracts in writing required when, see par. 366, this note.

513. Same—Ten-day period within which privilege of objecting formally may be exercised not curtailed by intervening holiday.—*Gentle v. Britton*, 158 Cal. 331, 111 Pac. 9.

514. Same—Traveling expenses.—A claim for lien for work and labor according to contract, properly included traveling expenses expressly provided for in the contract.—*Kritzer v. Tracy Eng. Co.*, 16 Cal. App. 290, 116 Pac. 700.

515. Same—Variance in claim of lien.—When fatal and when immaterial.—See, post, § 1187, note pars. 168-176.

516. Same—Wages of cook for laborers of a subcontractor, not included in phrase "all claims and liens of any kind whatsoever connected with said work," and can not be recovered hereunder directly from the contractor.—*Clark v. Beyrle*, 160 Cal. 315, 116 Pac. 739.

517. Service of notice—As to generally.—Under mechanics'-lien law prior to amendment adopted March 13, 1885, service of notice did not affect rights of parties, nor impose upon owner duty of retaining portion of contract-price to satisfy any lien which subcontractor might subsequently file.—*McCants v. Bush*, 70 Cal. 125, 126, 11 Pac. 601.

518. Set-off—Right of by owner.—Owner is never under any obligation to pay contractor's debts to laborers or materialmen. His only obligation is to pay for labor performed and materials furnished. Against this obligation owner is entitled to set off

contractor's obligation to indemnify owner for all that he has been compelled to pay to relieve his property from liens thereon for contractor's debts including attorney's fees and costs of suits to enforce such liens.—*Covell v. Washburn*, 91 Cal. 560, 563, 27 Pac. 859.

See par. 168, this note.

519. Shipping—Lien upon vessel.—Constructing section 813, ante, strictly in pari materia with mechanics'-lien law statute does not give lien or materials furnished to contractors for construction of vessel only when materials are furnished "to the vessel" in this state.—*Bennett v. Beadle*, 142 Cal. 239, 242, 75 Pac. 843. See *Phoenix Iron Co. v. The Hopatcong, etc.*, 127 N. Y. 206, 211, 27 N. E. 841.

520. Lien can only arise upon furnishings, material, etc., actually furnished to and used in vessel. There can be no lien upon vessel wholly constructed out of this state for material furnished by resident of state to builders in other place, nor will lien for such attach upon vessel coming into this state.—*Bennett v. Beadle*, 142 Cal. 239, 242, 75 Pac. 843.

As to lien upon vessels in general, see, ante, § 813 and note.

521. Sidewalks—Construction of in cities.—Above section does not relate to contracts for building sidewalks in cities. Section 1191, post, is one that governs such contracts.—*Kreuzberger v. Wingfield*, 96 Cal. 251, 257, 31 Pac. 109.

522. State is not bound by general words in statute.—*Mayrhofer v. Board of Education*, 89 Cal. 110, 112, 23 Am. St. Rep. 451, 26 Pac. 646.

523. General statutes creating new remedies for individuals have never been held to authorize suits against state upon principles embodied in constitution.—*Mayrhofer v. Board of Education*, 89 Cal. 110, 113, 23 Am. St. Rep. 451, 26 Pac. 646.

524. Statement as to payments—In building-contract.—As to construction and effect of.—See par. 72, this note.

525. Steam plant—Put up on foundation prepared by owner is structure within meaning of above section.—*Hinckley v. Field's Biscuit Co.*, 91 Cal. 136, 140, 27 Pac. 594. See *Bryson v. McCone*, 121 Cal. 153, 156, 53 Pac. 637.

526. Steam shovel—Lien for rental of—Municipal improvement.—A person who has rented to a contractor engaged upon a municipal improvement in excavating earth and rock for the purposes of making a roadway in a park is not entitled to a claim of lien for the unpaid rental thereof; if the improvement, however, had been upon private property he would have been entitled to a lien.—*City of Los Angeles v. Kautz*, 39 Cal. App. 702, 179 Pac. 716.

527. Street work—Lien of mechanic for street work must be filed within sixty days after completion of work, and defect of lien

is not obviated by certificate of deputy superintendent of streets to effect that work had been done to his satisfaction.—Beatty v. Mills, 113 Cal. 312, 313, 45 Pac. 468.

As to street work, lien upon lot therefor, etc., see, post, § 1191 and note.

528. "Structure"—Definition of term.—Word "structure" comprehends all properties specifically enumerated, and is broad enough to include any similar thing constructed should enumeration prove incomplete.—Williams v. Mountaineer Gold Min. Co., 102 Cal. 134, 139, 34 Pac. 702, 36 Pac. 388.

529. Same—Drains, ditches, embankments, and roads in farm improvements, where correlated so as to form one harmonious whole, constitute a "structure," under the mechanics'-lien law.—See par. 192, this note.

530. Same—Mine is a "structure" within meaning of statute.—Silvester v. Coe Quartz Min. Co., 80 Cal. 510, 512, 22 Pac. 217.

See, also, par. 339, this note.

As to steam plant put upon a foundation prepared by owner being a "structure," see par. 525, this note.

531. Subcontractor—Bond of—Default of subcontractor—Premature payment by contractor—Effect of.—Where a bond is given by a subcontractor under the provisions of the above section saving the contractor harmless the sureties on the bond of such subcontractor will not be released from the entire obligation by reason of premature payments made by the contractor on the subcontractor's default but the effect will be to leave the contractor without a cause of action on the bond to recover the amount of the premature payments.—Siegel v. Hechler, 181 Cal. 187, 183 Pac. 664.

As to subcontractor's right to lien, see pars. 507-510, this note.

532. Same—Contract of.—Contract of mere subcontractor as materialman is not required to be in writing or recorded under above section.—Reed v. Norton, 90 Cal. 590, 599, 26 Pac. 767, 27 Pac. 426.

533. Same—Labor of employees of.—Subcontractor has lien for work of employees done on building and this, too, where original contract is void.—Macomber v. Bigelow, 126 Cal. 9, 14, 58 Pac. 312.

534. Same—Liability of.—The liability of subcontractor does not extend to the provisions of the main contract; and where the main contract provides for the erection of a building, and its delivery to the owner by the contractor properly and entirely finished, and "in an undamaged state," a subcontractor for the plastering and hard finish, who performs his contract according to its terms, making use of the materials specified therein, and compounding them and applying them to the walls in the manner specified, all in a skillful and workmanlike manner, is not liable to the owner for certain discolorations in the plastering

which appeared after the completion of the work.—Mannix v. Tryon, 152 Cal. 31, 39, 91 Pac. 983.

535. Same—May have judgment against contractor.—Subcontractor may have personal action against original contractor, but in action against owner of property his relief is confined to lien upon property and to foreclosure and sale as provided by statute.—Gnekow v. Confer, 5 Cal. Unrep. 654, 48 Pac. 331.

536. Same—Premature payments to.—As to effect of, see par. 503, this note.

537. Same—Relation to owner.—Statute does not create contractual relation between owner and subcontractor, upon which personal action will lie. It merely furnishes subcontractor, even though contract be void, with remedy of lien against property of the owner.—Gnekow v. Confer, 5 Cal. Unrep. 654, 48 Pac. 331.

538. Same—Same—No personal judgment.—Subcontractor is not entitled to personal judgment against owner where he has furnished materials and performed labor on building for original contractors, and where he occupied no contractual relation with owner unless created under above section by failure of parties to record building-contract before work was commenced.—Gnekow v. Confer, 5 Cal. Unrep. 654, 48 Pac. 331.

539. Substantial departure of building-contract from statutory requisites—As to effect of.—While the effect of such departure is to give all persons who furnish labor or materials a lien upon the lot therefor, as though such labor had been done or materials furnished "at the personal instance and request of the person who contracted with the contractor," the liability of the person who so contracted is not such as will support a personal judgment for any deficiency that may arise after the proceeds of the sale of the property under the lien have been applied to the satisfaction thereof.—Merced Lumber Co. v. Bruschi, 152 Cal. 375, 92 Pac. 844.

540. To like effect, see Southern Cal. Lumber Co. v. Schmitt, 74 Cal. 628, 16 Pac. 516; Giant Powder Co. v. San Diego Flume Co., 78 Cal. 200, 20 Pac. 419; Kellogg v. Howes, 81 Cal. 180, 22 Pac. 509; Madera Flume & Trading Co. v. Kendall, 120 Cal. 182, 184, 65 Am. St. Rep. 177, 52 Pac. 304.

541. Same—Provisions for premature paying of the twenty-five per cent.—A provision for payment of the final twenty-five per cent of the contract-price at and before the completion thereof is held to be a substantial departure from the statutory requirement for the retention of such portion thirty-five days after final completion, the effect of which is to give all who furnish labor or materials, except the contractor, a lien therefor as though such labor and materials had been furnished direct to the owner; and a person otherwise entitled to such lien does not forfeit his right thereto

by the acceptance of the balance of the contract-price, paid to him and others entitled to liens, pro rata.—*Merced Lumber Co. v. Bruschi*, 152 Cal. 374, 92 Pac. 844.

542. Superintendent of oil-mining company.—Not entitled to lien for unpaid wages, not coming within the provisions of above section and section 1187, post.—See, post, § 1187 and note.

543. Swings and seats.—Used in connection with dancing halls are not buildings or structures within intent and meaning of above section and section 1192, post, for which lien may be filed and owner of land who may acquiesce in their construction be made liable.—*Lothian v. Wood*, 55 Cal. 159, 113.

544. Taking additional security by lienor.—Effect of.—The lien of a mechanic, worldwide notice of which is given by recordation, is one of the highest possible dignity, since it is not secured by legislative enactment but by the constitution of the state, and grave reasons must be shown in every case to justify a holding that such lien is lost or destroyed; the mere circumstance that the mechanic or materialman has taken additional security for his debt should not be held so to operate, nor should any conclusion that such additional security was meant to be a substituted security for the right to the lien be found except in the clearest case.—*Martin v. Becker*, 169 Cal. 301, Ann. Cas. 1916D, 171, 146 Pac. 665.

545. Temporary structure.—In general.—Where temporary structure was used in construction of bridge, put in merely for purpose of supporting structure until steel necessary for its permanent support could be obtained, held that neither contractors nor furnishers of materials in such temporary structure became entitled to lien upon permanent structure for labor or materials in such temporary structure.—*Stimson Mill Co. v. Los Angeles Traction Co.*, 141 Cal. 30, 32, 74 Pac. 357.

546. Same.—Use of.—Held under circumstance of case not to furnish any evidence of acceptance of bridge as completed.—*Stimson Mill Co. v. Los Angeles Traction Co.*, 141 Cal. 30, 32, 74 Pac. 357.

As to placing structure on land temporarily and without knowledge or consent of owner of land, not entitling laborer to lien upon such land, see, post, § 1185 and note; see, also, *Fresno L. & S. Bank v. Husted*, 5 Cal. Unrep. 715, 49 Pac. 195, 196.

547. Traveling expenses.—Provided for in contract.—Right to lien for.—See par. 514, this note.

548. "Trivial imperfections."—A question of fact pure and simple.—See pars. 266, 267, this note.

549. "Value."—Definition of term.—Word "value" in above section is to be construed so as to mean "agreed value" in cases where there is an agreed value.—*Jewell v. McKay*, 82 Cal. 144, 150, 23 Pac. 139.

550. Words "for value" of labor done and materials furnished are not used in contradistinction from "price" or "agreed value."—*Jewell v. McKay*, 82 Cal. 144, 150, 23 Pac. 139.

551. Same.—Statement of value of service or materials furnished.—Claims stating that labor was to be performed "at usual rates," is equivalent to saying that such labor was to be performed "for what it was reasonably worth."—*McClain v. Hutton*, 131 Cal. 132, 137, 61 Pac. 273, 63 Pac. 182, 622. See *Reed v. Norton*, 90 Cal. 590, 596, 597, 26 Pac. 767, 27 Pac. 426.

552. "Value" of work done.—Is what.—The "value" of work done is extent for which property is subject to lien.—*Macomber v. Bigelow*, 126 Cal. 9, 15, 58 Pac. 312.

553. Variance.—In general.—Material variance in contract set forth in claim of lien and that proven is shown where notice of lien states that contract is for reasonable value or worth of goods, and where evidence shows that goods were bought at fixed price and that there was no agreement in regard to contract-price.—*Wilson v. Hind*, 113 Cal. 357, 45 Pac. 695.

As to variance between claim and notice of lien, see *Palmer v. Lavigne*, 104 Cal. 30, 34, 37 Pac. 775.

554. Variance is fatal to liens where notice of liens in stating terms, time given, and conditions of contract set forth that claimant was to receive reasonable market value of materials furnished, and uncontradicted evidence was that materials were furnished at fixed price.—*Wilson v. Nugent*, 125 Cal. 280, 283, 57 Pac. 208. See *Wagner v. Hansen*, 103 Cal. 104, 37 Pac. 195.

As to when variance fatal, see, post, § 1187 and note.

555. Distinguished from Santa Monica Co. v. Hege, 119 Cal. 376, 377, 51 Pac. 555, where it is held that different rule applies as to variance between pleading and proof, and variance between notice of lien and proof, and that where in case proof shows that contract set forth in notice of lien is untrue it is fatal to lien.

556. Verification of claim.—It is only required that verification should state that claim is true without setting out particulars which law requires to be contained in body of claim.—*Reed v. Norton*, 90 Cal. 590, 602, 26 Pac. 767, 27 Pac. 426. See *Arata v. Tellurium Gold & S. Min. Co.*, 65 Cal. 340, 342, 4 Pac. 195.

557. Void building-contracts.—An unrecorded contract is void for the purpose of an action thereon, but it is nevertheless effective as showing "the understanding of the parties" as to the work that is to be performed, and the relations between the parties and the amount upon indebtedness assumed that may be recovered.—*Smith v. Dryden*, 15 Cal. App. 570, 115 Pac. 455.

558. A contract for plastering a four-story hotel, at so much per square yard, which it appears would necessarily aggregate in excess of one thousand dollars, is void unless recorded as required by above section, and the materials furnished the contractor must be deemed furnished "at the personal instance of the owner," and the lien therefor may be foreclosed against the owner.—*Smith v. Bradbury*, 148 Cal. 42, 82 Pac. 367.

559. Contract void by reason of not being recorded is void only as to those who furnish materials, labor, etc., and not as between the owner and the contractor, between whom it still furnishes the measure of compensation.—*Los Angeles Pressed Brick Co. v. Higgins*, 8 Cal. App. 514, 519, 97 Pac. 414 (see supreme court on denial rehearing).

560. Contract void, it is sufficient to allege that the material was furnished through the contractor as the agent of the owner.—*Lucas v. Gobbi*, 10 Cal. App. 648, 650, 103 Pac. 157.

561. Where the contract is void there is no necessity for the plaintiff to set it out in his complaint and then allege its invalidity, but he may allege the material was furnished to the owner and introduce the contract in evidence for the purpose of showing it to be void.—*Lucas v. Rea*, 10 Cal. App. 641, 644, 101 Pac. 537.

562. The statute does not make the owner responsible personally for materials furnished to the contractor in cases where the contract is void because not recorded. The provision that the materials furnished "shall be deemed to have been done and furnished at the personal instance of the owner" means that in such case the material shall be deemed to have been furnished at the special instance and request of the owner for the purpose of giving the materialmen a lien upon the building or structure upon and in which such materials were used. It imposes a penalty upon the owner of the lot upon which the building is erected by making the building and lot subject to a lien for the value and the materials. The clause "shall be deemed to have been done and furnished at the personal instance of the owner" is followed in each instance by the words "and they shall have a lien for the value thereof." The meaning of the statute should not be extended beyond its express terms for the purpose of compelling the owner to pay a debt which he did not contract or agree to pay and that was in fact incurred by another party.—*Hubbard v. Lee*, 6 Cal. App. 602, 605, 92 Pac. 744.

563. Since the statute expressly requires that all contracts for labor to be performed or materials to be furnished, where the same exceeds the sum of one thousand dollars shall be wholly void unless the same be in writing, and, before the commencement of the work, be filed in the recorder's office, C. C. P.—164

a complaint showing non-compliance with this requirement precludes recovery.—*Peterson v. Freiermuth*, 17 Cal. App. 613, 121 Pac. 299.

564. Same—Contractor is agent of owner.—Where contract is wholly void because plans and specifications are not recorded in recorder's office, contractor must be held to be agent of owner, and while acting as such he can not contract to pay one price for articles purchased and then compel owner to pay him larger price for same articles.—*Kuhlman v. Burns*, 117 Cal. 469, 472, 49 Pac. 585.

565. Same—For failure to sign and file specifications.—In such case the lien is for the full amount of the materials and labor furnished without regard to the contract, or the balance remaining unpaid in owner's hands.—*Coghlan v. Quartararo*, 15 Cal. App. 667, 115 Pac. 664.

566. Same—Parties affected.—Statute only declares contract void as between parties to it.—*Giant Powder Co. v. San Diego Flume Co.*, 78 Cal. 193, 196, 20 Pac. 419.

567. Notwithstanding declaration of above section that contract in certain events is wholly void, and no recovery can be had thereon by either party thereto, it is provided that other persons than parties to contract furnishing materials and performing labor may have lien therefor. It is also provided in section 1197, post, that, notwithstanding other provisions of chapter, any person to whom debt may be due for work or materials may in personal actions recover debt.—*Palmer v. White*, 70 Cal. 220, 221, 11 Pac. 647.

568. Inability to maintain action on void contract is confined to parties.—*Giant Powder Co. v. San Diego Flume Co.*, 78 Cal. 193, 196, 20 Pac. 419.

569. Contract void as between contractor and owner is not void necessarily between such contractor or owner and materialman.—*Giant Powder Co. v. San Diego Flume Co.*, 78 Cal. 193, 197, 20 Pac. 419.

570. Same—Rights of contractor.—Contractor can not take lien under contract which is wholly void under above section, nor has such contractor right to recover in such case upon quantum meruit for services or upon quantum valebant for goods, wares, and merchandise sold and delivered.—*Spinney v. Griffith*, 98 Cal. 149, 153, 32 Pac. 974.

571. Mechanics' lien only exists by virtue of compliance with statute which creates it. Where contract is void, contractor may claim no implied right to lien which, had written contract been properly filed, he might have recovered under it. Law gives him right in such cases to recover personal judgment for money as on implied contract.—*Morris v. Wilson*, 97 Cal. 644, 646, 32 Pac. 801.

572. Same—Strict construction of statute.—Provision of above section making

wholly void as between parties thereto written contract for construction of building for price exceeding one thousand dollars unless same is filed with county recorder before commencement of work thereunder, is arbitrary, and is not to be extended to contract not falling strictly within its letter.—*Klessig v. Allspaugh*, 99 Cal. 452, 454, 34 Pac. 106.

573. Same—"Wholly void"—Has same meaning as "void."—When an instrument is void, it is void from one end to other, and in all its parts.—*Giant Powder Co. v. San Diego Flume Co.*, 78 Cal. 193, 196, 20 Pac. 419.

As to owners' or contractors' waiver by contract or otherwise, not to affect or impair claims and liens of other persons, etc., see, post, § 1201 and note.

574. Wages of cook—For laborers of subcontractor.—Right to lien for, see par. 516, this note.

575. "Wagon-road or other structure"—Refers to what—Public highway not included.—The term "wagon-road or other structure" in the above section, defining the structures improvements to which mechanics' liens attach, refers to private wagon-roads only, and does not include public roads or highways.—*Slayden v. O'Dea*, 182 Cal. 500, 189 Pac. 1066.

576. Watchman at mine—As to right to lien.—Whether watchman engaged as watchman at mine "performs labor upon" the mining claim so as to be entitled to a lien upon the claim depends on conclusions of law deduced from facts found by court, or upon sufficiency of facts stated in complaint to constitute a cause of action; neither of which points can be considered upon an appeal from an order denying a new trial. The only questions which can be considered are those arising upon the specifications as to the insufficiency of the evidence and errors of law contained in the bill of exceptions.—*Williams v. Hawley*, 144 Cal. 97, 99, 77 Pac. 762.

577. Same—Idle mine.—"It is clear that the statute implies that the labor to be performed upon any mining claim, and for which a lien is given, is the labor performed in the course of the actual work of mining or development in the mining claim, and that it does not include the services of a watchman engaged in caring for a mine while it is lying idle" (dictum).—*Williams v. Hawley*, 144 Cal. 97, 103, 77 Pac. 762.

578. Same—Watchman, bookkeeper, cook, etc., not entitled to lien, under our statute and similar statutes, is thought to be the true doctrine. "While liens are allowed for many kinds of labor the authorities term 'incidental,' such incidental labor must be directly done for, and connected with, or actually incorporated into the building or improvement. It will not do to extend the protection given to services indirectly and remotely associated with the

construction work. The cook who prepares food for the employees, the blacksmith who shoes the horses or repairs the implements in use, and all similar contributors to the enterprise, are not among the favored workmen. See *McCormick v. Los Angeles City Water Co.*, 40 Cal. 185. The keeping of defendant's books and disbursement of its funds were matters of great importance, but we can not declare such services within purview of the statute."—*Rara Avis Gold & S. Min. Co.*, 9 Colo. 385, 12 Pac. 433.

579. Compare: *Winslow v. Urquhart*, 39 Wis. 260, quoted with approval in *Stewart-Chute Lumber Co. v. Missouri Pac. R. Co.*, 28 Neb. 39, 44 N. W. 47 (Maxwell, J., dissenting).

580. Work done by owner—Time for filing claim.—Under the provisions of the above section, as it existed prior to the amendment of 1919, where the construction, alteration, or repair of a building was undertaken by the owner, under the superintendence of one of his employees, a person who furnished labor, or materials, or both, was not entitled to a lien on the property, where a claim of lien was not filed within thirty days after the claimant had ceased to furnish such labor or materials, or labor and materials.—*Ferger v. Gearhart*, 44 Cal. App. 245, 186 Pac. 376.

581. Same—Same—Constitutional provision.—The constitutional provisions touching the subject of the liens of laborers, materialmen, and others, upon property upon which they have bestowed labor or furnished materials (art. XX, § 15, const. 1879, 1 Henning's General Laws, 3d ed. p. cii) are not paramount to the statute which prescribes a time within which a claim of lien must be filed to be effective; the section of the constitution referred to is not self-executing and is inoperative except as supplemented by legislation.—*Ferger v. Gearhart*, 44 Cal. App. 245, 186 Pac. 376, following doctrine in *Spinney v. Griffith*, 98 Cal. 149, 32 Pac. 974; *Morse v. De Ardo*, 107 Cal. 622, 40 Pac. 1018, distinguishing and limiting *Milwaukee v. Nofzinger Bros. Lumber Co.*, 150 Cal. 790, 90 Pac. 114.

582. Written contract—For building or improvement—Necessity for.—As to generally, see pars. 160, 360-367, this note.

583. Same—Improvement not exceeding one thousand dollars—Prior to amendment of 1911.—At all time prior to the amendment to the above and succeeding sections of the code by the legislature in 1911, the law permitted an owner of real property, in causing the construction of any improvement thereon at a cost of not more than one thousand dollars, to provide for such improvement by a contract not filed in the recorder's office, or even by an oral contract, and to pay the consideration therefor whenever it pleased him to do so; and the provisions of the code with reference to putting in writing building-contracts, and

filing them for record, and as to the mode and time of payment and the withholding of a percentage of the contract-price, were

not applicable to such an improvement.—*Bailey Ornamental Iron Co. v. Goldschmidt*, 33 Cal. App. 661, 166 Pac. 363.

§ 1183½. BUILDING CONTRACTS, WHAT PROVISIONS MUST CONTAIN. [Repealed.]

History: Enacted March 28, 1901, Stats. and Amdts. 1900-1, p. 817; repeal approved February 12, 1903, Stats. and Amdts. 1903, p. 21.

1. **Construction.**—Statute was intended for protection of subcontractors, materialmen, artisans, and laborers, and to preserve to them right of liens. They are not parties to contract between owner and contractor, and may be justly entitled under

law to value of materials and labor, even though original parties failed to make contract as directed by statute.—*Sullivan v. California R. Co.*, 142 Cal. 201, 203; 75 Pac. 767. See *Laidlaw v. Marye*, 133 Cal. 170, 176, 65 Pac. 391.

§ 1183a. LIEN FOR POWER SUPPLIED BY MEANS OF TEAM, WAGON, ETC. [Repealed.]

History: Enactment approved April 19, 1909, Stats. and Amdts. 1909, p. 1003; repeal approved May 1, 1911, Stats. and Amdts. 1911, p. 1319.

As to lien for power supplied, constitutionality and interpretation of the statute, see, ante, § 1182, note pars. 395-398.

§ 1184. NOTICE TO OWNER OF LABOR PERFORMED AND MATERIALS FURNISHED. Any of the persons mentioned in the preceding section, except the contractor, and all persons, firms and corporations, excluding the contractor, performing work or furnishing materials, or both, upon any public improvement, including highways, streets, wagon roads, viaducts or sewers, may at any time, prior to the expiration of the period within which claims of lien must be filed for record, as prescribed by the provisions of section one thousand one hundred eighty-seven of this code, give to the owner a notice that they have performed labor or furnished materials, or both, to the contractor or other person acting by the authority of the owner, or that they have agreed to do so, stating in general terms the kind of labor and materials and the name of the person to or for whom the same was done or furnished, or both, and the amount in value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished, or both, and any of said persons who shall on the written demand of the owner refuse to give such notice shall thereby deprive himself of the right to claim a lien under this chapter. Such notice must be verified by the claimant, or by some person acting in his behalf, and may be given by delivering the same to said owner personally, or by leaving it at his residence or place of business with some person in charge, or by delivering it to his architect, if any; provided, however, that in all cases in which said work is being done under a contract with the state, or with any public board, commission, or officer thereof, or with any political subdivision thereof, such notice must be filed, within said time, in the office of the controller, auditor or other public disbursing officer whose duty it is to make payments under the provisions of such contract or with the commissioner, managers, trustees, officers, board of supervisors, board of trustees, common council or other body by whom the contract for the improvement was awarded. No such notice shall be invalid by reason of any defect in form, provided it is

sufficient to inform the owner of the substantial matters herein provided for. Upon such notice being given it shall be lawful for the owner to withhold, and in the case of property which, for reasons of public policy or otherwise, is not subject to liens in this chapter provided for, the owner or person who contracted with the contractor, shall withhold from his contractor sufficient money, and bonds, where bonds are to be issued in lieu of money, by the political subdivision which contracted for said work, due or that may become due to such contractor to answer such claim and any lien that may be filed therefor, including the reasonable cost of any litigation thereunder.

"Owner" defined. The word "owner" as used in this section, includes the state or any public board, commission or officer thereof, or any political subdivision thereof, whether the said work be done by or under the direction of said state, public board, commission or officer thereof, or any political subdivision thereof.

History: Enacted March 11, 1872; amendment approved March 18, 1885, Stats. and Amdts. 1884-5, p. 144; March 15, 1887, Stats. and Amdts. 1886-7, p. 153; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 189, held unconstitutional, see history, § 5 ante; amendment approved May 1, 1911, Stats. and Amdts. 1911, p. 1315; May 10, 1919, Stats. and Amdts. 1919, p. 452; May 16, 1921, Stats. and Amdts. 1921, p. 144. In effect July 29, 1921.

MECHANICS' LIENS—STOP-NOTICE, ETC.

- 1, 2. Abandonment of contract — Rights of materialmen.
3. Amount—Limitation of.
- 4, 5. Assignment—Right to lien not subject of.
6. Assignment made by contractor.
7. Same—Effect of breach of contract.
8. Bond given upon building-contract—Effect of section.
- 9, 10. Same—Extent of obligation.
11. Building-contract void — Silence as to time of final payment.
12. Constitutionality—In general.
13. Same—Unconstitutional provision.
14. Construction of section—As to generally.
- 15-17. Same — As to proceedings authorized.
18. Same — Contract to furnish materials.
19. Same—Contractor only referred to.
- 20, 21. Same—Effect given by above section.
22. Same—Intercepting contract-price—Not dependent on lien.
- 23, 24. Same — Penalty — Statute must be construed against exaction of.
25. Same—Reasonable construction for protection of owner as well as materialman.
26. Same — Stop-notices — Persons entitled to give.
27. Same—Public roads and streets—Stop-notice not applicable to.
28. Same—Use of phrase "any such contract."
29. Costs and attorney's fees — Are properly allowed.
30. Default of subcontractor—Immediate payment of bills by contractor — Surety not released.
31. Description of property — Contract is not void by reason of its not containing.
32. Duty to withhold money.
33. Filing—Plans and specifications.
34. Foreclosure proceedings — Lien denied—Personal judgment.
35. Same — Amount claimed less than three hundred dollars—Stop-notice disregarded.
36. Same—Writ of review — When not remedy.
37. Garnishment—Remedy by.
38. History of section.
39. Injunction—Will not issue to prevent payment of order.
40. Lien — Distinguished from recorded lien.
41. Mistake in name—Validity of claim is not affected by.
42. Municipal corporation — Complete plan—Vrooman Act—Section inapplicable.
43. Notice—To withhold payment.
44. Ownership—Statement of.
45. Parties — Contractor as defendant with owner.
46. Same—Complaint against owner.
47. Payments—Amount not specified.
48. Same—Bills to be paid by owner.

49. Same — Contract not payable in money.
50. Same—Contract-price less than one thousand dollars.
51. Same — Same — Payment of instalments is subject to change.
- 52, 53. Same — Same — Last payment — Amount not specified.
54. Same—Same—Mistake in amount.
55. Same—Same—Remedy of mechanics, laborers, and materialmen.
56. Same—Same — Stating that certain percentage of costs will be paid.
57. Same—Same—Statement of time.
58. Same—Object of provision that contract-price be paid in instalments.
59. Same — Same — Intermediate payments included.
60. Same—Premature payment—Effect of.
- 61, 62. Personal judgment against owner.
63. Penalty — Every reasonable intentment will be indulged in to avoid.
64. Pleading—Sufficiency of complaint.
65. Public building itself is in no way affected.
66. Road district improvement act—Claims of laborers — Claim of laborers and materialmen — Stop-notices served on county.
67. Same — Lien of laborers and materialmen — Above provisions not applicable.
68. Same — Materialman's lien — Stop-notice—Effect of.
- 69, 70. School district—Liability of.
71. Statement of items.
72. Stop-notice — Assignment by contractor of instalment to become due—Priority under notice.
73. Same—Demand by owner for service of—Service of demand—Party a corporation.
74. Same—Same—Validity of provision.
75. Same—Effect of code amendment.
76. Same—Effect of notice.
77. Same—Enforcement of lien—Remedies.
78. Same — Equitable lien, garnishment or assignment.
79. Same — Failure of materialman to serve—Loss of lien.
80. Same—Limitation of recovery.
81. Same — Money not due — Construction of section.
82. Same—Municipal improvement.
83. Same—Necessity of notice.
84. Same—Payment to contractor after —Effect of code amendment.
85. Same—Purpose of.
86. Same—Public building — Withholding payment from contractor to meet claims for labor, etc.
- 87, 88. Same—Recording not necessary.
89. Same — School property — Right of trustees.
90. Same — Service before instalment due—Priority of claims.
91. Same—Subcontractors in absence of notice.
92. Same — Sufficiency of — Acceptance of order of contractor.
93. Same—Time of.
94. Same—Violation of duty to withhold payments—Release of sureties.
95. Street improvement act of 1911—Rights of laborers and materialmen.
96. Substantial compliance with statute.
97. Sufficiency of notice to withhold—Acceptance by owner.
98. Trustees of state asylum — Moneys in hands of.
99. Unknown owner.
100. Verification.
- 101, 102. Void contract—Amount due immaterial.
103. Same — Effect — Subcontractors, laborers, and materialmen shall have lien.

See, ante, § 1183 and note.

1. Abandonment of contract—Rights of materialmen.—Where contract for less than one thousand dollars is abandoned by contractor prior to completion of work, amount available for lien of materialman is only excess of contract-price remaining in owner's hands after payment of cost of completion.—*Denison v. Burrell*, 119 Cal. 180, 183, 51 Pac. 1. See *Wiggins v. Bridge*, 70 Cal. 437, 11 Pac. 754; *Gibson v. Wheeler*, 110 Cal. 243, 42 Pac. 810.

2. Distinguished from *Dunlop v. Kennedy*, 102 Cal. 443, 36 Pac. 765; *Golden Gate Lumber Co. v. Sahrbacher*, 105 Cal. 114, 38 Pac. 635, where contract-price exceeded one thousand dollars.

3. Amount—Limitation of.—Laborers or materialmen have no right to lien for any amount which owner does not owe contractor under valid contract, as there is no privity of contract between owner and laborers or materialmen under contract entered into with contractor.—*Brill v. De Turk*, 130 Cal. 241, 244, 62 Pac. 462. See *San Diego Lumber Co. v. Wooldredge*, 90 Cal. 574, 579, 27 Pac. 431; *West Coast Lumber Co. v. Knapp*, 122 Cal. 79, 54 Pac. 533.

4. Assignment—Right to lien not subject of.—Right to create mechanics' or laborers' lien, under mechanics'-lien law, is personal right, and non-assignable.—*Mills v. La Verne Lumber Co.*, 97 Cal. 254, 255, 33 Am. St. Rep. 168, 32 Pac. 169; *McCrea v. Johnson*,

104 Cal. 224, 225, 37 Pac. 902; Duncan v. Hawn, 104 Cal. 10, 37 Pac. 626.

5. Assignment of demand can not carry with it right to give notice for purpose of creation of lien upon fund in hands of owner, owing to contractor, and creating legal liability in favor of laborer and against owner.—McCrea v. Johnson, 104 Cal. 224, 226, 37 Pac. 902.

6. Assignment made by contractor of amount to become afterward due to him in course of performance of contract, given before arrival of time of payment, can not defeat right of materialman to give notice specified in above section and obtain benefit thereof.—First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 61, 40 Pac. 45.

7. Same—Effect of breach of contract.—Contractor's subsequent breach of contract by failing to complete building and additional expenses caused to school district thereby do not create any equity against assignee of order for completed portion paid by instalment, or entitle school district to injunction restraining such payment.—Long Beach School Dist. v. Lutge, 129 Cal. 409, 414, 62 Pac. 36.

8. Bond given upon building-contract.—Effect of section.—Results following failure of owner to comply with above section are not material upon matters pertaining to bond given by contractor upon building-contract.—Ganahl v. Weir, 130 Cal. 237, 239, 62 Pac. 512.

9. Same—Extent of obligation.—Obligation of bond does not extend to releasing of building from invalid liens.—Brill v. De Turk, 130 Cal. 241, 244, 62 Pac. 462. See San Diego Lumber Co. v. Wooldredge, 90 Cal. 579, 27 Pac. 434; West Coast Lumber Co. v. Knapp, 122 Cal. 79, 54 Pac. 533.

10. Claims which can not be legally enforced against building can not be said to have accrued against it.—Brill v. De Turk, 130 Cal. 241, 245, 62 Pac. 462. See San Diego Lumber Co. v. Wooldredge, 90 Cal. 574, 579, 27 Pac. 431; West Coast Lumber Co. v. Knapp, 122 Cal. 79, 54 Pac. 533.

11. Building-contract void—Silence as to time of final payment.—Prior to the amendments to the mechanics'-lien law in 1911, a building-contract which merely provided when seventy-five per cent of the contract-price is payable and which made no provision as to the payment of the remaining twenty-five per cent thirty-five days after the completion of the building, was void under the provisions of the above section, and persons furnishing labor and material were entitled to liens for the full amount thereof.—Sweet v. Fresno Hotel Co., 174 Cal. 789, 164 Pac. 788.

12. Constitutionality—In general.—The requirements of above section are not illegal as interfering with the right of contract. The effect of the notice is to serve as an "equitable garnishment." It is a form of "equitable subrogation regulated by stat-

ute." It is an equitable assignment of the amounts due or to become due to the contractor under the contract and entitles the persons serving the notice to receive so much of said amounts as would satisfy their claims.—Diamond Match Co. v. Silberstein, 165 Cal. 282, 131 Pac. 874.

13. Same—Unconstitutional provision.—Statute declaring invalid any contract by owner of real property for construction of building thereon, unless it is provided therein that contract-price shall be payable only in money, is unconstitutional in that it is an infringement upon right of owner in possession and enjoyment of his property, an invasion of right to contract with others respecting use of which he may subject his property or manner in which he may enjoy it.—Stimson M. Co. v. Braun, 136 Cal. 122, 125, 89 Am. St. Rep. 116, 57 L. R. A. 726, 68 Pac. 481.

14. Construction of section—As to generally, see, ante, § 1183, note pars. 122-128.

15. Same—As to proceedings authorized.—The proceeding authorized by this section is substantially an equitable garnishment by the claimant of the fund due the contractor by the owner, and secures to one giving notice a claim paramount to that of the contractor, his assignor, or attachments made after notice.—Miles v. Ryan, 172 Cal. 205, 157 Pac. 5.

16. Above section gives laborers and materialmen a right to give their notices any time after they contract to furnish the labor or material, and they may thus anticipate any subsequent attachment or execution. Where they wait until the maturity of the payment to the contractor before giving their notice it must be given before any assignment is made, or attachment or other claim has accrued against the contractor, or their claims will be postponed to attaching creditors whose attachments are prior in time.—Miles v. Ryan, 172 Cal. 205, 157 Pac. 5.

17. The claims of laborers and materialmen who give notice after a garnishment has been made under section 710, ante, is subordinate to the latter.—Miles v. Ryan, 172 Cal. 205, 157 Pac. 5.

18. Same—Contract to furnish materials, such as machinery and apparatus, is not building-contract within meaning of above section.—Roebbling's Sons Co. v. Humboldt Elec. Light & Power Co., 112 Cal. 288, 291, 44 Pac. 568. See Donahue v. Cromartie, 21 Cal. 80; Sparks v. Butte Consol. Gold Min. Co., 55 Cal. 389, 392; Hinkley v. Field's Biscuit & Cracker Co., 91 Cal. 136, 140, 27 Pac. 594.

19. Same—Contractor only referred to.—above section only refers to contract of contractor.—Hinkley v. Field's Biscuit & Cracker Co., 91 Cal. 136, 140, 27 Pac. 594.

20. Same—Effect given by above section does not depend upon lien provided in sec-

tion 1183, ante.—*Weldon v. Superior Court*, 138 Cal. 427, 430, 71 Pac. 502.

21. Above section does not declare contract void in case it fails to conform substantially to its provisions, but only imposes penalty on owner by making him personally liable, and his improved property subject to liens for labor done and materials furnished.—*Stimson Mill Co. v. Riley*, 5 Cal. Unrep. 218, 42 Pac. 1072, 1073.

22. Same—Intercepting contract-price—Not dependent on lien.—Remedy provided by above section for intercepting contract-price in hands of owner is not dependent upon proceedings to enforce lien against property.—*First Nat. Bank v. Perris Irr. Dist.*, 107 Cal. 55, 65, 40 Pac. 45. See *Bates v. Santa Barbara County*, 90 Cal. 543, 547, 27 Pac. 438.

23. Same—Penalty—Statute must be construed against exaction of penalty, if in reason it can be.—*West Coast Lumber Co. v. Knapp*, 122 Cal. 79, 81, 54 Pac. 533.

24. Every reasonable intendment will be indulged in to avoid penalty under statute.—*San Diego Lumber Co. v. Wooldredge*, 90 Cal. 574, 579, 27 Pac. 431.

25. Same—Reasonable construction for protection of owner as well as materialman must be given statute.—*Dunlop v. Kennedy*, 4 Cal. Unrep. 196, 34 Pac. 92, 94.

26. Same—Stop-notices—Persons entitled to give.—Persons entitled to give stop-notices in accordance with the provisions of the above section are such persons as are described in section 1183, ante, that is, persons who perform work on the structure therein described at the request of the owner, or who furnish material entering into such structure.—*Slayden v. O'Dea*, 182 Cal. 500, 189 Pac. 1066.

As to stop-notices generally, see pars. 72-94, this note.

27. Same—Public roads and streets—Stop-notice not applicable to.—The provisions of the above section relative to equitable attachment by stop-notices served upon owner by lien-claimants have no application in the case of public work on public highways for the reason that highways do not belong to the county but to the people of the state of California.—*Slayden v. O'Dea*, 182 Cal. 500, 189 Pac. 1066, applying the doctrine in *People v. Holladay*, 93 Cal. 241, 27 Am. St. Rep. 186, 29 Pac. 54; *People v. County of Marin*, 103 Cal. 223, 26 L. R. A. 659, 37 Pac. 203.

28. Same—Use of phrase "any such contract" in clause of above section immediately following provisions of section 1183, ante, in reference to amount of payment of contract, indicates that legislature intended to refer to contracts spoken of in section 1183, ante, namely, contracts in which "amount agreed to be paid thereunder exceeds one thousand

dollars."—*Sidlinger v. Kerkow*, 82 Cal. 42, 44, 22 Pac. 932.

29. Costs and attorney's fees—Are properly allowed and made payable out of property ordered to be sold where claimed in complaint in action where defendant defaulted.—*De Camp Lumber Co. v. Tolhurst*, 99 Cal. 631, 635, 34 Pac. 438.

As to deductions by owner, see, ante, § 1183 and note par. 169.

30. Default of subcontractor—Immediate payment of bills by contractor—Surety not released.—In a case in which a subcontract provided that the subcontractor should save the contractor free and harmless from any and all liability which might accrue against or upon the latter as the result of the default of the former in the performance of his subcontract, and by the bond executed by a surety it became bound to the effect that the subcontractor should perform all the covenants and agreements on his part in the subcontract, upon breach by the subcontractor, the immediate payment by the contractor of bills for work done and materials furnished to the subcontractor, which were lienable under the provisions of the above section, was not a premature payment and did not release the surety company from its obligations on the bond of the subcontractor.—*Siegel v. Hechler*, 181 Cal. 187, 183 Pac. 664.

31. Description of property—Contract is not void by reason of its not containing description of property upon which building is to be erected, as statute does not require it.—*Yancy v. Morton*, 94 Cal. 558, 561, 29 Pac. 1111. See *San Diego Lumber Co. v. Wooldredge*, 90 Cal. 574, 579, 27 Pac. 431.

32. Duty to withhold money.—It is the clear duty of the owner under service of such notice to withhold from the moneys due, or from the first moneys that may become due, a sum sufficient to protect him against the demand of the notice. Unless he does this he becomes justly liable under later notices which may be served upon him. No materialman is charged with knowledge that another materialman has served the owner with such notice to withhold, still less with knowledge that the owner contemplates withholding the funds out of the last payments that may become due the contractor. The materialman reading the contract and learning from its terms that moneys are to become due serves his notice, and is entitled to rely upon the fact that sufficient of these later payments will be withheld to meet his claim. Of course, if all these payments have in fact been absorbed under the demands of the earlier notices, the owner is entitled to show that fact. But he can do this only under the construction here set forth—namely, that from the time of the service of each notice upon him he has withheld out of the moneys due, or first to become due, funds to meet

the previous demands.—*Diamond Match Co. v. Silberstein*, 165 Cal. 282, 131 Pac. 874.

As to liability on payment to contractor after service of stop-notice, see, ante, § 1183 and note para. 399-431.

As to violation of duty to withhold payment releasing sureties on bond, see par. 94, this note.

33. Filing—Plans and specifications held not required to be filed in recorder's office to render memorandum of contract valid, where such contract was made after amendment of 1887, as in that amendment it is not specified that any plans or specifications shall be filed, nor is it necessary to proper memorandum that they should be.—*Reed v. Norton*, 90 Cal. 590, 600, 26 Pac. 767, 27 Pac. 428.

34. Foreclosure proceedings—Lien denied—Personal judgment—In a case in which a materialman seeks equitable relief in the foreclosure of a lien in an amount less than three hundred dollars, and the relief sought is denied, the appellate court may render personal judgment for the amount found to be due.—*L. W. Blinn Lumber Co. v. Pioneer Drainage District*, — Cal. App. —, 195 Pac. 750, following the doctrine in *Mannix v. Tryon*, 152 Cal. 31, 91 Pac. 983.

35. Same—Amount claimed less than three hundred dollars—Stop-notices disregarded—In an action in which it is sought to establish and foreclose a materialman's lien for lumber furnished and used upon the construction of a ditch or canal, the amount claimed being less than three hundred dollars in which stop-notices had been filed under the above section and the directors of the ditch or canal had full knowledge of such stop-notices and deliberately and intentionally ignored the same the stop-notices served constituted an "equitable garnishment" of a form of "equitable subrogation regulated by statutes," even though the trial court found that the lien was not filed in good faith, and the right to recover the money so garnished by the stop-notices being accumulative remedy, does not depend upon the establishment of a valid materialman's lien.—*L. W. Blinn Lumber Co. v. Pioneer Drainage District*, — Cal. App. —, 195 Pac. 750.

36. Same—Writ of review—When not remedy—Action to foreclose lien against premises is unquestionably an equitable suit, and proceeding to reach fund in hands of owner is also equitable, but as supreme court has appellate jurisdiction in all cases in equity, except such as arise in justices' courts, writ of review is not the remedy for correcting erroneous judgment in such action.—*Weldon v. Superior Court*, 138 Cal. 427, 429, 71 Pac. 502.

37. Garnishment—Remedy by garnishment or equitable assignment under above section is entirely disconnected from and additional to remedy by lien upon building

—*Bates v. Santa Barbara County*, 90 Cal. 543, 547, 27 Pac. 438.

38. History of section—As to change made in mechanics' lien law, first enacted in 1867 (Stats. 1867-8, p. 589), and effect of changes in above section, see *Santa Cruz Rock Pavement Co. v. Lyons*, 133 Cal. 114, 117, 65 Pac. 329.

As to word "improvement," construction of, see, ante, § 1183 and note par. 310.

39. Injunction—Will not issue to prevent payment of order to assignee of contractor where it is conclusively established by stipulation that sureties upon building-contract are peculiarly able to respond to its full amount—*Long Beach School Dist. v. Lutge*, 129 Cal. 409, 415, 62 Pac. 36.

40. Lien—Distinguished from recorded lien—Giving of statutory notice does not establish lien on fund in owner's hands in sense that recorded lien is established on buildings and land under section 1183, ante, but it does not follow that no sort of equitable lien may not be enforced against fund referred to in above section.—*Weldon v. Superior Court*, 138 Cal. 427, 430, 71 Pac. 502.

41. Mistake in name—Validity of claim is not affected by mistake in attempting to carry out requirements of law as to name of owner—*McClain v. Hutton*, 131 Cal. 132, 138, 61 Pac. 273, 63 Pac. 182, 622.

42. Municipal corporation—Complete plan—Vrooman Act—Section inapplicable—Under the provisions of the Vrooman Act (II Henning's General Laws, 3d ed., p. 3065) providing for a comprehensive, self-sufficient, and exclusive plan for the improvement of streets, etc., which covers not only the doing of the work and the protection of laborers, materialmen, the city, and the property-owner, but likewise provides a complete and comprehensive scheme for the payment of the contractor, which provision is irreconcilable with any process for withholding the funds, as provided for in the above section, and which provision for withholding is limited to persons mentioned in section 1183, ante, none of whom are persons performing labor or furnishing materials for work of the character of that dealt with by the Vrooman Act, the above section will be inapplicable.—*Los Angeles Rock & Gravel Co. v. Coast Construction Co.*, 185 Cal. 586, 197 Pac. 941, following the doctrine in *Kreuzberger v. Wingfield*, 96 Cal. 251, 257, 31 Pac. 109; *Warren v. Hopkins*, 110 Cal. 506, 42 Pac. 986.

43. Notice—To withhold payment—As to generally, see para. 72-94, this note.

As to sufficiency of generally, see par. 92, this note.

As to time when to be served, see par. 93, this note.

44. Ownership—Statement of—Statement in claim of lien as to ownership of lot of land, which is described, is sufficient as against objection that owner of building

erected upon land is not named.—*Russ Lumber & Mill Co. v. Garrettson*, 87 Cal. 589, 595, 25 Pac. 747.

45. Parties—Contractor as defendant with owner.—When contractor is personally liable for debt incurred for materials, above section authorizes his being made defendant along with owner, and determination in such action of amount for which he is liable to each lienholder, and, in case of deficiency, docketing of judgment against him for such deficiency as he may be personally liable for.—*Giant Powder Co. v. San Diego Flume Co.*, 78 Cal. 193, 200, 20 Pac. 419.

46. Same—Complaint against owner of building may be filed under above section upon claim of lien setting up contracts with alleged original contractor.—*Coss v. MacDonough*, 111 Cal. 662, 667, 44 Pac. 325. See *Davies Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641, 646, 22 Pac. 860; *Yancy v. Morton*, 94 Cal. 558, 29 Pac. 1111.

47. Payments—Amount not specified.—Requirements of above section may be met without stating either amount of each payment or instalment, or total amount of them all.—*Snell v. Bradbury*, 139 Cal. 379, 382, 73 Pac. 150.

48. Same—Bills to be paid by owner.—Main purpose of statute is to secure to laborers and materialmen and subcontractors their just compensation. Safeguard intended by statute is accomplished in contract providing for payment of bills for materials and labor when indorsed by contractor "provided that such bills for material and labor do not exceed seventy-five per cent of value of material and labor employed in erection of said building up to date of said bills, four hundred and ninety-five dollars (upward of twenty-five per cent of contract-price) to be paid thirty-five days after building is finished and accepted."—*Brill v. De Turk*, 130 Cal. 241, 242, 62 Pac. 462. See *Reed v. Norton*, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426; *Yancy v. Morton*, 94 Cal. 558, 29 Pac. 1111.

49. Same—Contract not payable in money.—Contractor to do painting under contract not payable in money is original contractor within meaning of above section, and as term is used in sections 1187, 1194, post, and is, therefore, within exception expressed in above section.—*Baird v. Peall*, 92 Cal. 235, 237, 28 Pac. 285. See *La Grill v. Mallard*, 90 Cal. 373, 27 Pac. 294.

50. Same—Contract-price less than one thousand dollars.—Provisions of above section relating to mode and time of payment, and withholding of percentage of contract-price, are not applicable where contract-price is less than one thousand dollars. In such case it is permissible for owner to contract for payment of whole amount to contractor before commencement of work or before building is completed.—*Denison v. Burrell*, 119 Cal. 180, 182, 51 Pac. 1; *Southern Cal. Lumber Co. v. Jones*, 133 Cal. 242, 243, 65 Pac. 378. See *Sidlinger v. Ker-*

low, 82 Cal. 42, 45, 22 Pac. 932; *Kerckhoff-Cuzner Mill & Lumber Co. v. Cummings*, 86 Cal. 22, 24, 25, 24 Pac. 814.

51. Same—Same—Payment of instalments is subject to change in cases where contract-price is less than one thousand dollars, by agreement of owner and contractor both as to time and amount, as in case of private contracts relating to other matters.—*Southern Cal. Lumber Co. v. Jones*, 133 Cal. 242, 244, 65 Pac. 378.

52. Same—Same—Last payment—Amount not specified.—Contract fails to conform with requirements of above section where instead of providing that at least twenty-five per cent of whole contract-price shall be payable at least thirty days after final completion of contract, its provision is, "last and final payment to be made thirty-five days after completion of the work according to contract," without specifying amount of that payment.—*Willamette Steam Mill Lumber & Mfg. Co. v. Los Angeles College Co.*, 94 Cal. 229, 235, 29 Pac. 629.

53. Failure to observe requirement of above section as to stating amount to be paid thirty-five days after final completion of contract is followed by failure to receive benefits provided by statute.—*Willamette Steam Mill Lumber & Mfg. Co. v. Los Angeles College Co.*, 94 Cal. 229, 235, 29 Pac. 629.

54. Same—Same—Mistake in amount.—Courts of equity are always reluctant to enforce penalties, and every reasonable indulgence is indulged to avoid them. Hence where it is apparent that mistake was made in calculating amount of twenty-five per cent of contract-price and designating it as last payment, by which mistake amount of instalment was given as five hundred and thirty dollars instead of five hundred and forty-five dollars held that contract was thereby not rendered insufficient as failing to meet requirements of statute, and that maxim "de minimis non curat lex" (the law does not notice trifling matters) should be applied.—*Stimson Mill Co. v. Riley*, 5 Cal. Unrep. 218, 42 Pac. 1072, 1074.

55. Same—Same—Remedy of mechanics, laborers, and materialmen where contractor is paid in full upon contract less than one thousand dollars, and before notice prescribed in above section is given, is against contractor personally.—*Kerckhoff-Cuzner Mill & Lumber Co. v. Cummings*, 86 Cal. 22, 26, 24 Pac. 814.

As to above and preceding section not limited to cases where contract exceeds one thousand dollars, and applicable where contract-price is to be paid in something other than money, see, ante, § 1183 and note.

56. Same—Same—Stating that certain percentage of cost will be paid thirty-five days after final completion of contract, is not equivalent to setting forth amount to be paid at any particular date.—*Willam-*

ette Steam Mill Lumber & Mfg. Co. v. Los Angeles College Co., 94 Cal. 229, 235, 29 Pac. 629.

57. Same—Same—Statement of time.—Contract providing that last payment "shall be made within thirty-six days after this contract is fulfilled" does not violate statute, as, under this provision, debt can not be said to be due until creditor can demand and insist upon payment.—*West Coast Lumber Co. v. Knapp*, 122 Cal. 79, 82, 54 Pac. 533. See *Reed v. Norton*, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426; *Yancy v. Morton*, 94 Cal. 558, 29 Pac. 1111.

58. Same—Object of provision that contract-price be paid in instalments at specified times, is to protect materialmen, and any specification which accomplishes this purpose is sufficient.—*Dunlop v. Kennedy*, 4 Cal. Unrep. 196, 34 Pac. 92, 94.

59. Same—Same—Intermediate payments included.—Provisions that no lien shall be defeated or diminished by payment made prior to time before it becomes due "under terms and conditions of contract" applies as forcibly to any intermediate payment provided in contract as to final payment fixed by statute (*Shaw, J., and Beatty, C. J., in conc. op.*).—*Valley Lumber Co. v. Struck*, 146 Cal. 266, 272, 30 Pac. 405.

60. Same—Premature payment—Effect of.—Provision of law as to premature payments is not made dependent upon giving, or failure to give, notice (*Beatty, C. J., dis.*).—*Sweeney v. Meyer*, 124 Cal. 512, 514, 57 Pac. 479.

As to contract sufficiently specific as to time and amount to comply substantially with statute, see *Reed v. Norton*, 90 Cal. 590, 600, 26 Pac. 767, 27 Pac. 426.

61. Personal judgment against owner.—Personal judgment against owner is not necessary to support lien.—*Russ Lumber & Mill Co. v. Garrettson*, 87 Cal. 589, 596, 25 Pac. 747.

62. Affirmed on authority of *Bates v. Santa Barbara Co.*, 90 Cal. 543, 27 Pac. 438; *Russ Lumber & Mill Co. v. Roggenkamp*, 4 Cal. Unrep. 462, 35 Pac. 643.

63. Penalty—Every reasonable intentment will be indulged in to avoid penalty under statute.—*Brill v. De Turk*, 130 Cal. 241, 243, 62 Pac. 462. See *San Diego Lumber Co. v. Wooldredge*, 90 Cal. 574, 579, 27 Pac. 431; *West Coast Lumber Co. v. Knapp*, 122 Cal. 79, 54 Pac. 533.

64. Pleading—Sufficiency of complaint.—Complaint is insufficient which fails to allege that at time of filing notice of lien or bringing action there was anything owing from owner to contractor, and where no attempt is made in complaint to allege any fact, such as premature payment by owner to contractor, or like, that under above section might be claimed to give materialman lien against property of owner for value of his materials.—*Nason v. John*, 1 Cal. App. 538, 540, 82 Pac. 566. See *Benton v. Conley*,

49 Cal. 185; *Wells v. Cahn*, 51 Cal. 423; *Dingley v. Greene*, 54 Cal. 333; *Rosenkranz v. Waner*, 62 Cal. 151; *Whittier v. Hollister*, 64 Cal. 283, 30 Pac. 846; *Turner v. Strenzel*, 70 Cal. 28, 11 Pac. 389; *Harmon v. San Francisco R. Co.*, 86 Cal. 617, 25 Pac. 124; *California Lumber Co. v. Jones*, 133 Cal. 242, 65 Pac. 378.

65. Public building itself is in no way affected by remedy under above section. Where contractor fails to perform his contract, notice given by subcontractor or materialman operates only as equitable garnishment and as an assignment pro tanto of all moneys due from owner to contractor.—*Bates v. Santa Barbara County*, 90 Cal. 543, 547, 27 Pac. 438.

66. Road district improvement act—Claims of laborers and materialmen—Stop-notices served on county.—The provisions of the above section do not apply to contracts for the improvement of streets and highways and for that reason a stop-notice, given pursuant to the above section, under a contract for the improvement of a road district, does not have the effect of sequestering the funds in the hands of the person who is charged with their disbursement on behalf of the county, as would occur in the case of a contract between private parties for the construction of a public building.—*Hunt v. Empire Securities Co.*, — Cal. App. —, 194 Pac. 744, following the doctrine in *Slayden v. O'Dea*, 182 Cal. 500, 189 Pac. 1066.

67. Same—Lien of laborers and materialmen—Above provisions not applicable.—The remedy provided for laborers and materialmen under the terms of the above section, is not available to them in a case where their claim arises out of the performing of labor or furnishing of materials or appliances to a contractor having a contract for road work under the provisions of the Road District Improvement Act of 1907.—*Hunt v. Continental Nat. Bank*, 45 Cal. App. 578, 188 Pac. 300.

68. Same—Materialman's lien—Stop-notice—Effect of.—In a case in which A entered into a contract with the county for the construction of a certain highway improvement for which A was to receive a designated amount in bonds and A completed the work, which was accepted by the board of supervisors, and the bonds were issued and the proper fund created for their payment and all the bonds were delivered to A with the exception of bonds for the amount of four thousand dollars which remained in the hands of the county treasurer and B by agreement with A furnished teams, tools, and other appliances required in the construction of the said improvement, and before A had completed the contract and it had been accepted by the board of supervisors, and while said four thousand dollars in bonds remained in the possession of the county treasurer, B served a notice in proper form upon said county and the treasurer thereof of his

claim and demanded that a sufficient amount of said four thousand dollars in bonds be withheld from the contractor to satisfy his said claim; the service of this notice amounting to an equitable garnishment of the said four thousand dollars in bonds remaining due to the contractor from the county but in the possession of the county treasurer, under the provisions of the above section.—*Stansbury v. Frazer*, — Cal. App. —, 189 Pac. 495, following the doctrine in *Miles v. Ryan*, 172 Cal. 205, 157 Pac. 5; *Goldtree v. City of San Diego*, 8 Cal. App. 509, 97 Pac. 216; *Olson-Mahoney Lumber Co. v. Dunne Invest. Co.*, 30 Cal. App. 332, 159 Pac. 178; *Associated Oil Co. v. Commary-Peter-son Co.*, 32 Cal. App. 582, 163 Pac. 702.

As to stop-notices generally, see pars. 72-94, this note.

69. School district—Liability of.—Presentation of claims of materialmen can create no liability against school district.—*Long Beach S. Dist. v. Lutge*, 129 Cal. 409, 413, 62 Pac. 36. See *Newport Wharf & Lumber Co. v. Drew*, 125 Cal. 585, 589, 58 Pac. 187.

70. School district is not subject to garnishment of funds by notice under this section.—*Skelly v. Westminster School Dist.*, 103 Cal. 652, 655, 37 Pac. 643; *Board of Education v. Blake*, 4 Cal. Unrep. 891, 38 Pac. 536, 537. See *Bates v. Santa Barbara County*, 90 Cal. 543, 27 Pac. 438.

As to right of set-off by owner, see, ante, § 1183 and note par. 518.

71. Statement of items.—It is unnecessary to state specifically in claim of liens kind of materials furnished or price of several items. Claim is sufficient under special contract to pay for material furnished where it would be sufficient as statement in complaint upon *indebitatus assumpsit*, or debt.—*McClain v. Hutton*, 131 Cal. 132, 136, 61 Pac. 273, 63 Pac. 182, 622. See *Brennan v. Swasey*, 16 Cal. 141, 76 Am. Dec. 507; *Sheldon v. Meeks*, 17 Cal. 129; *Davis v. Livingston*, 29 Cal. 283, 287; *Tredinnick v. Red Cloud Consol. Min. Co.*, 72 Cal. 78, 84, 13 Pac. 152; *Jewell v. McKay*, 82 Cal. 144, 150, 23 Pac. 139.

72. Stop-notice—Assignment by contractor of instalment to become due—Priority under notice.—In the case of an assignment by a subcontractor under a contract for the erection of a building for a school district of his claim for work and labor, made prior to the date upon which an instalment payable to the original contractor became due, does not prevent another claimant, under the provisions of the above section, from intercepting the money by a stop-notice given prior to the maturity and date of payment of such instalment, and the right of such latter claimant is superior under his stop-notice to that of the assignee of the subcontractor.—*Southern California Electric Co. v. McDonald*, 178 Cal. 386, sub nom. *Southern California Electric Co. v. Grant*, 173 Pac. 760.

73. Same—Demand by owner for service of—Service of demand—Party a corporation.—In a case in which the materialman supplying a subcontractor is a corporation, service of a demand for the stop-notice made upon the credit manager of the corporation is sufficient, since it constitutes a demand upon an agent of a corporation who is in charge of a particular branch of its business, on a matter relating to such branch and in the ordinary course thereof.—*N. O. Nelson Mfg. Co. v. Rush*, 178 Cal. 569, 174 Pac. 327.

74. Same—Same—Validity of provision.—The provision of the above section to the effect that any person who shall, on the written demand of the owner, refuse to give the stop-notice therein prescribed, shall thereby deprive himself of the right to claim a lien, is not unconstitutional, as operating to deprive persons furnishing materials or bestowing labor upon a building of a lien given them by section 15 of article XX of the constitution, it being nothing more than a reasonable and just regulation of the exercise of the constitutional right to a lien, which the legislature has the right to make in the exercise of its police powers.—*N. O. Nelson Mfg. Co. v. Rush*, 178 Cal. 569, 174 Pac. 327.

75. Same—Effect of code amendment.—The provisions of the above section, as amended in 1911, do not, save at the option of the owner, secure unto persons giving the requisite notice an equitable garnishment upon the moneys due or to become due the contractor.—*Hornlein v. Bohlrig*, 37 Cal. App. 646, 174 Pac. 697, following the doctrine in *Hubbard v. Jurian*, 35 Cal. App. 757, 170 Pac. 1093.

76. Same—Effect of notice can not be prevented by contractor as to any payments that may mature after it is given, but its effect upon payments that have matured before notice is given, but which have not been made, is to be determined by rights of contractor with reference to such payments. If he is still entitled to demand them from owner, such payments are intercepted by notice, but if he has already assigned them to third party notice will be inoperative to prevent payment to such party.—*Newport Wharf & Lumber Co. v. Drew*, 125 Cal. 585, 589, 58 Pac. 187. See *Bates v. Santa Barbara Co.*, 90 Cal. 543, 27 Pac. 438; *First Nat. Bank v. Perris Irr. Dist.*, 107 Cal. 55, 40 Pac. 45.

77. Same—Enforcement of lien—Remedies.—The remedy by stop-notice, under the provisions of the above section, is entirely distinct from, and disconnected with, the remedy by perfecting and enforcing a lien upon property under section 1183, ante; decision relating to the apportionment of proceeds in foreclosure suits do not apply to the application of funds intercepted by a stop-notice.—*Southern California Electric Co. v. McDonald*, 178 Cal. 386, sub nom. *Southern California Electric Co. v. Grant*, 173 Pac. 760.

78. Same—Equitable lien, garnishment, or assignment.—Whether notice under above section results in establishing equitable garnishment or assignment, or confers an equitable lien, or is in form of equitable subrogation regulated by statute, right to control and direct funds remaining in hands of owner is as distinct and independent as right to file and enforce lien. It is remedy entirely disconnected from and additional to remedy of lien upon building, and should be regarded with favor by court.—*Weldon v. Superior Court*, 138 Cal. 427, 430, 71 Pac. 502. See *Bates v. Santa Barbara County*, 90 Cal. 543, 27 Pac. 438; *First Nat. Bank v. Perris Irr. Dist.*, 107 Cal. 55, 65, 40 Pac. 45; *Blanchi v. Hughes*, 124 Cal. 24, 27, 56 Pac. 610.

79. Same—Failure of materialman to serve—Loss of lien.—In a case in which a materialman for a subcontractor, after having been served by the owner of the building, which was under construction, with a demand that he should give the owner the stop-notice provided for in the above section, and who fails to give such stop-notice, is deprived of the right to claim any lien for any part of the materials furnished to such subcontractor.—*N. O. Nelson Mfg. Co. v. Rush*, 178 Cal. 569, 174 Pac. 327.

80. Same—Limitation of recovery.—Remedy provided by above section for garnishing moneys of contractor in hands of owner being limited to cases in which property may be subject to lien, owner is not required, upon receiving notice prescribed by above section, to withhold from contractor any moneys in his hands except for materials furnished, or labor performed upon property.—*Blanchi v. Hughes*, 124 Cal. 24, 28, 56 Pac. 610; *Kruse v. Wilson*, 3 Cal. App. 91, 84 Pac. 442.

81. Same—Money not due—Construction of section.—The provisions of the above section make a stop-notice effective as to any money subsequently falling due under the contract, without any provision that the money be due at the time of the giving of the notice, or that the notice shall be effective only as to money falling due next after the use in the building of materials furnished on account of which the notice is given.—*Fuller v. Towne*, 184 Cal. 89, 193 Pac. 88, approving doctrine in *Diamond Match Co. v. Silberstein*, 165 Cal. 282, 131 Pac. 874.

82. Same—Municipal improvement.—Under the provisions of the above section enabling any of the persons mentioned in section 1183, ante, to give "withhold-notice," this privilege is restricted to such of the persons named in such section as for "performed labor or furnished materials" and does not include a person who rented to a contractor a steam shovel to be used in the performance of public work who, if the work had been on private property, would have had a lien under the provisions of

section 1183, ante.—*City of Los Angeles v. Kautz*, 39 Cal. App. 702, 179 Pac. 716.

83. Same—Necessity of notice.—As to, see *Kruse v. Wilson*, 3 Cal. App. 91, 84 Pac. 442.

84. Same—Payment to contractor after—Effect of code amendment.—Under the amendment of 1911 to the above section, providing that it shall be unlawful for the owner to withhold from the contractor sufficient money due, or that may become due to the contractor to answer the claim of any lien for labor or materials furnished to the contractor, is not mandatory upon the owner to withhold payment after notice, and the doctrine of "premature payments" as formerly applied in mechanics'-lien cases has no application in such a case.—*Hubbard v. Jurian*, 85 Cal. App. 757, 170 Pac. 1093.

85. Same—Purpose of.—Personal notice provided in this section is for purpose indicated by statute, to compel owner to withhold payments due contractor for better security of materialmen, etc. Such notice is not necessary where there is no contract, and no payments to stop.—*Davies Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641, 644, 22 Pac. 860.

86. Same—Public building—Withholding payment from contractor to meet claims for labor, etc.—Mechanic or materialman may give owner of public building, upon which he has performed labor or for which he has furnished material, written notice of his claim, and owner must withhold fund from contractor for work which he agreed to do but which laborer has actually performed, and this right to claim is not dependent upon legality of contract between owner and contractor, nor is it dependent upon right to lien by contractor.—*Bates v. Santa Barbara County*, 90 Cal. 543, 547, 27 Pac. 438.

87. Same—Recording not necessary.—Notice to owner which may be given under above section, as amended in 1885, stating claims and "amount in value as near as may be," etc., is not notice of lien, which is to be recorded. Such notice to owner is extra precaution on claimant's part, and it is optional with him whether to give it or not.—*Jewell v. McKay*, 82 Cal. 144, 149, 23 Pac. 139.

88. Under provisions of above section and section 1183, ante, whether contract is recorded or not, if proper notice is given, and if sufficient money is then due upon contract, or afterwards becomes due from owner to contractor to pay claim for materials furnished, it is duty of owner to withhold same from contractors, and materialman is entitled to have his claim for lien therefor enforced.—*Russ Lumber & Mill Co. v. Garrettson*, 87 Cal. 589, 594, 25 Pac. 747.

89. Same—School property—Right of trustees.—Under the provisions of the above section as amended in 1911, provid-

ing that upon the giving of a notice to withhold, the owner of property not subject to mechanics' liens shall withhold from the contractor sufficient money to cover the claim embraced in the notice, a school district is justified in refusing to issue its warrant for the balance due the contractor on the construction of a school building, where prior to the demand for the issuance of the warrant, the district has been served with withhold-notices by laborers and materialmen who performed labor and furnished material for the building.—*Sweeney v. Board of Trustees*, 33 Cal. App. 331, 165 Pac. 42.

90. Same—Service before instalment due—Priority of claims.—A person furnishing material or bestowing work to a subcontractor on a building-contract for the erection of a school building for a school district, who serves a stop-notice for the amount of his claim prior to the date on which an instalment is due to the contractor, under the original contract, is entitled under the provisions of the above section, to a preference in payment for the amount of his claim to a claimant furnishing other labor and material to the subcontractor serving a stop-notice as the maturity of the instalment.—*Southern California Electric Co. v. McDonald*, 178 Cal. 386, sub nom. *Southern California Electric Co. v. Grant*, 173 Pac. 760.

91. Same—Subcontractors, in absence of notice, must rely upon personal responsibility of contractor, and twenty-five per cent of whole contract-price required to be retained for thirty-five days after completion of work.—*Dunlop v. Kennedy*, 4 Cal. Unrep. 196, 34 Pac. 92, 94.

92. Same—Sufficiency of—Acceptance of order of contractor.—An order on the owner given by a contractor to a subcontractor, and by the latter presented to the owner for acceptance, is sufficient notice to the owner to entitle such owner to withhold the amount from the contractor as provided for in the above section.—*Suhr v. Metcalfe*, 33 Cal. App. 59, 164 Pac. 407.

As to sufficiency of stop-notice, see, also, par. 97, this note.

93. Same—Time of.—Notice may be effectually given so long as money is owed to contractor himself, although time when it should have been paid is passed.—*First Nat. Bank v. Perris Irr. Dist.*, 107 Cal. 55, 61, 40 Pac. 45. See *Board of Education v. Blake*, 4 Cal. Unrep. 891, 38 Pac. 536.

94. Same—Violation of duty to withhold payments—Release of sureties.—The sureties on the bond of a building contractor are discharged from liability by the owner's failure to comply with his duty, under the provisions of the above section, to protect the sureties by withholding payment of unpaid instalments, where stop-notices or notices to withhold are served upon him as provided in the above section.—*Silberstein v. Kitrick*, 35 Cal. App. 91, 169 Pac. 250.

following the doctrine in *Keissig v. Allspaugh*, 91 Cal. App. 231, 13 L. R. A. 418, 27 Pac. 655.

As to duty of owner to withhold payment on receipt of, see par. 32, this note.

95. Street improvement act of 1911—Rights of laborers and materialmen.—Under the provisions of the street improvement act of 1911, persons performing labor and furnishing materials in the performance of the work, have no rights against the moneys or bonds due under the contract on the completion of the work, but are limited to a personal recovery against the contractor and to a recovery upon his bond for payment of their claims, and therefore there is no subrogation of their rights of liens upon such moneys or bonds.—*Adamson v. Paonessa*, 180 Cal. 157, 179 Pac. 880.

96. Substantial compliance with statute is sufficient in statement of claim of lien.—*Russ Lumber & Mill Co. v. Garrettson*, 87 Cal. 589, 594, 25 Pac. 747.

97. Sufficiency of notice to withhold—Acceptance by owner.—An order on the owner, given by the contractor to a subcontractor, presented to and accepted by the owner, is a sufficient notice to withhold within the requirements of the above section.—*Suhr v. Metcalfe*, 33 Cal. App. 59, 164 Pac. 407.

See, also, par. 92, this note.

98. Trustees of state asylum—Moneys in hands of.—Effect of notice under above section given to trustees of state asylum for insane and inebriates, for labor and materials furnished, is to intercept in hands of such trustees any moneys to which contractor is entitled, and to operate as garnishment of moneys in favor of laborers and materialmen where contractor fails to meet such payment and amounts are due to him upon building-contract.—*Newport Wharf & Lumber Co. v. Drew*, 125 Cal. 585, 589, 58 Pac. 187.

99. Unknown order.—Statute requires statement of name of owner or reputed owner, if known. If name is not known claim is sufficient if it is silent on subject.—*West Coast Lumber Co. v. Newkirk*, '80, Cal. 275, 277, 22 Pac. 231; *Corbett v. Chambers*, 109 Cal. 178, 183, 41 Pac. 873; *McClain v. Hutton*, 131 Cal. 132, 138, 61 Pac. 273, 63 Pac. 182, 622.

100. Verification.—Signature and certificate of magistrate fixes matter of verification as to person sworn, and verification is sufficient where signed by affiant and magistrate, even though name of affiant is not inserted in blank at beginning of verification.—*San Diego Lumber Co. v. Wooldredge*, 90 Cal. 574, 579, 27 Pac. 431.

101. Void contract—Amount due immaterial.—Materialmen and laborers may recover without regard to amount due upon contract where such contract is void for material non-conformity with statute.—*San Diego Lumber Co. v. Wooldredge*, 90 Cal. 574, 578, 27 Pac. 431.

102. Lienors may recover, although contract is not rendered void, irrespective of amount due to contractor, as upon contract which shall be deemed to have been made at personal instance and request of person contracting with contractor, and for value of labor or materials.—San Diego Lumber Co. v. Wooldredge, 90 Cal. 574, 579, 27 Pac. 431.

103. Same — Effect — Subcontractors, laborers, and materialmen shall have lien where contract is wholly void, precisely as if no contract had ever been made between owner and contractor, as in such cases material is deemed furnished and work done at special instance and request of owner.—Kellogg v. Howes, 81 Cal. 170, 177, 6 L. R. A. 588, 22 Pac. 509.

§ 1184a. TIME OF COMMENCING ACTION. No action to enforce the payment of any such claim shall be commenced against the owner, nor against the state or any public board, commission, or officer thereof, nor against any political subdivision of the state or the disbursing officer thereof whose duty it is to make payments under provisions of such contract, prior to the expiration of the period within which claims of lien must be filed for record, as prescribed by section one thousand one hundred eighty-seven of this code, nor shall any such suit be commenced later than ninety days following the expiration of such period. Any number of persons who have given such notices may join in the same action and when separate actions are commenced the court first acquiring jurisdiction may consolidate them. Upon the demand of the owner the court shall require all claimants to the moneys withheld by the owner in response to such notices to be impleaded in said action, to the end that the respective rights of all parties may be adjudicated and settled therein.

History: Enactment approved May 10, 1919, Stats. and Amdts. 1919, p. 453. In effect July 22, 1919.

§ 1184b. PRO RATA DISTRIBUTION WHEN MONEYS INSUFFICIENT. In the event the moneys so withheld by the owner shall be insufficient to pay in full the valid demands of all the persons by whom such notices were given, the same shall be distributed among such persons in the same ratio that their respective claims bear to the aggregate of such valid demands. Such pro rata distribution of said moneys shall be made among the persons entitled to share therein, without regard to the order of priority in which their respective notices may have been given or their respective actions, if any, commenced.

History: Enactment approved May 10, 1919, Stats. and Amdts. 1919, p. 453. In effect July 22, 1919.

§ 1184c. RIGHT TO RECOVER DEFICIT. Nothing contained in the three preceding sections shall be construed to impair in any manner the right of any person by whom such notice has been given to recover from the contractor and the surety or sureties upon his bond any deficit that may remain unpaid after such pro rata distribution, in an action commenced under the provisions of an act entitled "An act to secure the payment of the claims of materialmen, mechanics, or laborers, employed by contractors upon state, municipal, or other public work," approved March 27, 1897, and the acts amendatory thereof and supplemental thereto;

[False claims.] provided, that any person who shall wilfully give a false notice of his claim to the owner or who shall wilfully include in his claim work or materials not performed upon or furnished for the property described

in such notice shall forfeit all right to participate in the distribution of such moneys.

History: Enactment approved May 10, 1919, Stats. and Amdts. 1919, p. 454. In effect July 22, 1919.

§ 1185. WHAT INTEREST IN THE LAND SUBJECT TO THE LIEN. The land upon which any building, improvement, well or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien, if at the commencement of the work, or of the furnishing of the material for the same, the land belonged to the person who caused said building, improvement, well or structure to be constructed, altered or repaired, but if such person owned less than fee simple estate in such land, then only his interest therein is subject to such lien, except as provided in section eleven hundred and ninety-two of this code.

History: Enacted March 11, 1872; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 351; February 23, 1899, Stats. and Amdts. 1899, p. 24; May 1, 1911, Stats. and Amdts. 1911, p. 1316.

MECHANICS' LIEN — INTEREST IN LAND SUBJECT TO LIEN.

1. Agency—Evidence of.
2. Amount of land to be made subject of lien.
3. Same—Construction of section.
- 4, 5. Same—Findings.
6. Same—Pleading.
7. Conflict of sections.
8. Construction of section—Intention of legislature.
9. Same—Land subject to lien.
10. Same—Theory of law.
- 11-13. Destruction of building by fire.
14. Homestead.
15. Hotel—What included.
- 16, 17. Interest subject to lien.
18. Same — False representation as to ownership of land.
19. Materials must be used in building.
20. Mine is a structure.
21. Oil-well.
22. Ownership—Allegations in complaint.
23. Temporary building.
24. Watchman of mine.

See, ante, § 1183 and note.

1. **Agency—Evidence of.**—General reputation in vicinity that person acted as agent of owner and that he was generally supposed to be such agent, is not competent evidence of agency, but where such incompetent evidence is admitted without objection, question of its incompetency can not be considered under specification that evidence was insufficient to prove fact.—*Williams v. Hawley*, 144 Cal. 97, 99, 103, 77 Pac. 762. See *McCloud v. O'Neal*, 16 Cal. 392, 393; *Pierce v. Jackson*, 21 Cal. 636, 641; *Tebbs v. Weatherwax*, 23 Cal. 58, 60; Jan-

son v. Brooks, 29 Cal. 214; *Wright v. Roseberry*, 81 Cal. 87, 91, 22 Pac. 336.

2. **Amount of land to be made subject of lien** is an issuable fact, and can be determined by court only when such issue is presented by pleadings.—*Willamette Steam Mills Co. v. Kremer*, 94 Cal. 205, 211, 29 Pac. 633. See *Green v. Chandler*, 54 Cal. 626, 627.

3. **Same—Construction of section.**—Expression "the land upon which any building . . . is constructed, together with convenient space about same, or so much as may be required for convenient use and occupation thereof," should be construed to mean such space or area of land as is necessary to enjoyment of building for purpose in view in its construction.—*Tunis v. Lakeport Agricultural Park Assoc.*, 98 Cal. 285, 286, 33 Pac. 63.

4. **Same—Findings.**—Failure of court to define exact amount or extent of land necessary for building does not invalidate decree, and does not render findings and judgment indefinite and uncertain as to what property is to be sold by sheriff in execution of lien.—*Sidlinger v. Kerkow*, 82 Cal. 42, 45, 22 Pac. 932. See *Tibbets v. Moore*, 23 Cal. 208, 213.

As to findings generally, see, ante, § 1183, note pars. 259-267.

5. Finding that whole of parcel of land with appurtenances was required for convenient use and occupation of mill, etc., held outside of any issues made in case, and unsustained by evidence, and, therefore, not sufficient to support judgment.—*Green v. Chandler*, 54 Cal. 626, 627. See *Morenhaut v. Barron*, 42 Cal. 591, 605; *DeVoe v. DeVoe*, 51 Cal. 543.

6. **Same—Pleading.**—Land upon which building is constructed is necessarily subject to lien to extent of owner's interests

therein, but if plaintiff would claim that more than that is required for convenient use and occupation of building, and ask for sale of same in satisfaction of his lien, he must make appropriate averments therefor.—*Willamette Steam Mills Co. v. Kremer*, 94 Cal. 205, 211, 29 Pac. 633.

7. Conflict of sections.—Provisions of above section and section 1183, ante, and section 1192, post, can be reconciled consistently by fair construction of words used under each section. Such provisions mean: If the person who caused building to be constructed owned, when work was commenced, or materials for same furnished, less than fee-simple estate in land to be charged with lien, then only his interest in land is subject to such lien; provided, however, that if building was constructed with knowledge of owner of fee, or person having or claiming any interest therein, such building shall be held to have been constructed at instance of such owner or person having or claiming any interest therein, and interest owned or claimed shall be subject to any lien filed in accordance with provisions of this chapter, unless such owner or person shall within three days after he shall obtain knowledge of construction, give notice above referred to.—*West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 278, 22 Pac. 231.

As to construction of section generally, see, ante, § 1183, note pars. 122-153.

As to construction of section as to amount of land included, see par. 3, this note.

8. Construction of section.—Intention of legislature was to make lien on building principal thing, and lien upon land upon which it is situated incident of completion of building.—*Humboldt Lumber Mill Co. v. Crisp*, 146 Cal. 686, 688, 106 Am. St. Rep. 75, 2 Ann. Cas. 811, 81 Pac. 30.

As to construction of section generally, see, ante, § 1183, note pars. 122-153.

9. Same.—Land subject to lien.—The lien upon the land is an incident to the lien upon the building as provided in section 1183, ante. The lien herein is limited to the interest of the person who caused the building to be constructed, but by section 1192, post, the interest of other persons who with the knowledge of the construction fall to disclaim is also subjected to the lien.—*Hammond Lumber Co. v. Brown*, 165 Cal. 193, 131 Pac. 368.

10. Same.—Theory of law.—Mechanics'-lien law proceeds upon theory that laborer and materialman have equitable right to follow their labor and material into building of which they have become component parts, and have lien on building because it contains in it such labor and material, and that it is not just that owner shall succeed to that labor and material without seeing to it that compensation is rendered therefor to persons furnishing the same.—*Humboldt Lumber Mill Co. v. Crisp*, 146 Cal. 686,

688, 106 Am. St. Rep. 75, 2 Ann. Cas. 811, 81 Pac. 30.

11. Destruction of building by fire.—Under peculiar language of mechanics'-lien law, lien has nothing to which it can attach if filed after destruction of building.—*Humboldt Lumber Mill Co. v. Crisp*, 146 Cal. 686, 106 Am. St. Rep. 75, 2 Ann. Cas. 811, 81 Pac. 30.

12. If building is destroyed by fire it is impossible for court to determine that any land within meaning of section "may be required for its convenient use"; and in view of findings as to destruction of building before it was delivered to owner, and before any lien was filed and without fault of owner, court can not enter judgment decreeing lien upon land.—*Humboldt Lumber Mill Co. v. Crisp*, 146 Cal. 686, 687, 106 Am. St. Rep. 75, 2 Ann. Cas. 811, 81 Pac. 30.

13. When building is destroyed before completion there can be no lien against land on which it was being erected; reason for binding land ceases with destruction of building.—*Humboldt Lumber Mill Co. v. Crisp*, 147 Cal. 686, 689, 106 Am. St. Rep. 75, 2 Ann. Cas. 811, 81 Pac. 30. See *Mo. Holzhour v. Meer*, 59 Mo. 434; *Shine's Executrix v. Helmburger*, 60 Mo. App. 174. *N. J. Coddington v. Beebe*, 31 N. J. L. (2 Vr.) 477. *Pa. Presbyterian Church v. Stettler*, 26 Pa. St. 246; *Wigton & Brooks' Appeal*, 28 Pa. St. 161, 163. *Wis. Goodman v. Baerlocher*, 38 Wis. 287, 43 Am. St. Rep. 893, 60 N. W. 415.

14. Homestead.—Sale of homestead under lien for materials furnished does not come within any of exceptions enumerated in section 1240 Civil Code.—*Walsh v. McMenomy*, 74 Cal. 356, 361, 16 Pac. 17.

As to homestead exempt from execution or forced sale except for debt secured by mechanics', laborers', vendors' liens, etc., see *Kerr's Cyc. Civ. Code*, 2d ed., §§ 1240, 1241 and notes.

15. Hotel.—What included.—Race track with its training stables, grand stand, corals, and other improvements, although they may be necessary to create business for hotel, club house and saloon, for which building in question was constructed, it can not be said that they are necessary to convenient use and occupation of building for hotel purposes.—*Tunis v. Lakeport Agricultural Park Assoc.*, 98 Cal. 285, 287, 33 Pac. 63.

As to word "improvement," construction of, see, ante, § 1183 and note par. 310.

16. Interest subject to lien.—Any interest of owner in lands is subject to liens under provisions of above section.—*Parke & Lacy Co. v. Inter Nos Oil & Devel. Co.*, 147 Cal. 490, 495, 82 Pac. 51.

17. Interest of owner of fee as well as estate of owner of leasehold interest therein is subject to lien.—*West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 279, 22 Pac. 231.

18. Same—False representation as to ownership of land by person contracting with materialman, latter will have lien on buildings for the price of materials furnished and entering into the construction of the building.—*Linck v. Melkeljohn*, 2 Cal. App. 506, 84 Pac. 309.

As to provisions of above and succeeding section applicable to all property to which liens may attach, see, post, § 1186 and note.

19. Materials must be used in building.—Materials must not only have been used in construction of building, but they must have been by express terms of contract furnished for particular building on which lien is claimed; and, to entitle materialman to enforce such lien at law, these terms of contract must be alleged and proved.—*Holmes v. Richet*, 56 Cal. 307, 310, 38 Am. Rep. 54.

20. Mine is a structure within meaning of above section.—*Elm v. Chapman*, 66 Cal. 291, 292, 5 Pac. 352.

21. Oil-well.—Assumption that "well" is oil-well can not be surmised by corporate name of party where there is no allegation compelling such conclusion.—*Parke & Lacy Co. v. Inter Nos Oil & Devel. Co.*, 147 Cal. 490, 492, 82 Pac. 51.

As to word "well" inserted in statute by amendment in 1899 including oil-well, see, ante, § 1183 and note par. 353.

22. Ownership—Allegations in complaint, viz., that the defendant was owner of the well and its appurtenances, and that it was "the owner and holder of an interest in land," held sufficient to sustain judgment subjecting such well and its appurtenances and interest of owner in land to liens, where judgment was adjudged only upon such interest.—*Parke & Lacy Co. v. Inter Nos Oil & Devel. Co.*, 147 Cal. 490, 495, 82 Pac. 51.

23. Temporary building.—Laborer is not entitled to lien against owner of tract of land upon whose land building constructed elsewhere was temporarily placed without knowledge or consent of such owner.—*Fresno Loan and Sav. Bank v. Husted*, 5 Cal. Unrep. 715, 49 Pac. 195, 196.

24. Watchman of mine.—Statute implies that labor performed upon any mining claim, and for which lien is given, is labor performed in course of actual work of mining or development of mining claim, and this does not include services of watchman engaged in caring for mine while it is lying idle.—*Williams v. Hawley*, 144 Cal. 97, 99, 102, 103, 77 Pac. 762.

§ 1186. EFFECT OF LIENS. The liens provided for in this chapter are preferred to any lien, mortgage, or other encumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished; also, to any lien, mortgage, or other encumbrance of which the lien-holder had no notice, and which was unrecorded at the time the building, improvement or structure was commenced, work done, or the materials were commenced to be furnished.

History: Enacted March 11, 1872.

MECHANICS' LIENS—EFFECT OF LIENS, PRIORITY.

1. Construction of section—Application of section.
2. Lease—Improvements at expense of lessee.
3. Materialman's lien—Superior to subsequent deed of trust.
4. Mortgage—Advances after construction commenced—Notice material being furnished—Inferior to mechanics' lien.
5. Same—Effect of Civil Code on priority of lien.
6. Same—How rights of priority fixed.
- 7, 8. Same—Subsequent—Mechanics' lien superior to.
- 9, 10. Same—When lien superior.
11. Same—When superior to lien.
12. Owner as mortgagee—Sufficiency of notice.
13. Owner of land—Protection from statutory lien, how.
- 14, 15. Test of priority of liens.

See, ante, § 1183 and note.

1. Construction of section—Application of section.—Provisions of above and preceding section relate to liens generally and apply to all property to which liens can attach.—*Walsh v. McMenomy*, 74 Cal. 356, 361, 16 Pac. 17.

2. Lease—Improvements at expense of lessee.—Land is not protected from lien where agreement is had with lessee or conditional purchaser, that improvements must be at his cost, and that lessor or seller will not be liable for labor or materials.—*Ah Louis v. Harwood*, 140 Cal. 500, 504, 74 Pac. 41.

3. Materialman's lien—Superior to subsequent deed of trust.—In view of the provisions of the above section in a case in which the construction of a building, for which lien-claimants furnished materials, was begun in September and the lien-claim-

ants entered into their contract for furnishing such materials in October of the same year and furnished material between that date and the date of completion in January of the following year, the liens of the claimants attached on or about September 15, and were superior to a trust-deed executed October 21, of the same year.—*Sax v. Clark*, 180 Cal. 287, 180 Pac. 821.

4. Mortgage—Advances after construction commenced—Notice material being furnished—Inferior to mechanics' lien.—In a case in which a mortgagee and his assignee after making the original payment stipulated as made in the mortgage makes additional optional payments after such mortgagee or his assignee has actual notice that material has been furnished by mechanics' lien claimants, and had actual notice that their right to lien had attached by reason thereof the mortgage is to be regarded as a fresh mortgage as to each and every one of the optional payments thereafter made and as such subject to the liens of such of the materialmen as had commenced furnishing material prior to the time when the advancement or advancements were made, under the provisions of the above section.—*W. P. Fuller & Co. v. McClure*, — Cal. App. —, 191 Pac. 1027, approving the doctrine in *Allen Co. v. Emerton*, 108 Me. 221, 79 Atl. 905; *Finlayson v. Crooks*, 47 Minn. 74, 49 N. W. 398, 645.

5. Same—Effect of Civil Code on priority of lien.—Priority of lien of mortgage is not given under section 2898, Civil Code, in disregard of provisions of above section.—*Avery v. Clark*, 87 Cal. 619, 627, 22 Am. St. Rep. 272, 25 Pac. 919.

6. How rights of priority fixed.—Rights of mortgagee and encumbrancers with reference to those to whom provisions of code concede liens are fixed and determined by above section.—*Williams v. Santa Clara Min. Assoc.* 66 Cal. 193, 200, 5 Pac. 85.

7. Same—Subsequent mechanics' liens are superior to subsequently dated trust deeds.—*Sax v. Clark*, 180 Cal. 287, 180 Pac. 821.

8. In a case in which A purchased a lot, title to which prior to the date of purchase had vested in B, in anticipation of the purchase and while negotiations therefor were pending, A entered into a contract with C whereby A undertook and agreed to erect a dwelling-house upon the lot for C, and in pursuance of such contract A entered upon the lot and commenced the work of constructing the house, and four days later the property was conveyed to A at which time a mortgage thereon which A had theretofore signed and acknowledged, was, by the party in whose hands it had been placed, with other papers in escrow, delivered and thereafter filed for record; thereafter A having failed to pay the contractor he filed his lien under the provisions of the mechanics'-lien law of which

above section is a part, and the court held that the lien of the mortgage executed by A did not attach to the lot until a date subsequent to that upon which the contractor commenced the work of constructing the house and for that reason the contractor's lien was superior to the mortgage-lien, under the provisions of the above section.—*Hardy v. Fry*, — Cal. App. —, 196 Pac. 92.

9. Same—When lien superior.—Mechanics' lien for materials commenced to be furnished prior to date of mortgage takes priority over such mortgage.—*Avery v. Clark*, 87 Cal. 619, 627, 22 Am. St. Rep. 272, 25 Pac. 919.

10. Liens are properly preferred and given priority over mortgage where such mortgage attached subsequent to time when building was commenced.—*Germania Building & L. Assoc. v. Wagner*, 61 Cal. 349, 354.

11. Same—When superior to lien.—Lien of mortgage is superior to mechanics' lien unless mechanics at time they performed labor or commenced to furnish materials had no notice of existence of the unrecorded mortgage; but where it does not appear from findings that materialman did not have such notice, court erred in adjudging their lien prior to that of mortgage.—*Root v. Bryant*, 57 Cal. 48, 49.

12. Owner as mortgagee—Sufficiency of notice.—New or separate notice of lien is not required in order to bring in as defendant original owner who has mortgage interest in property, for purpose of having priority of liens determined.—*Ah Louis v. Hardwood*, 140 Cal. 500, 505, 74 Pac. 41.

13. Owner of land—Protection from statutory lien, how.—The owner of land can not protect it from statutory lien except by giving statutory or some other notice equivalent thereto.—*Ah Louis v. Harwood*, 140 Cal. 500, 506, 74 Pac. 41.

14. Test of priority of liens.—Under provision of above section cases must be divided into two categories, distinguished by existence or nonexistence of valid contract. In former case priority of lien is to be determined by date of commencement of building; in latter case by time work was done, or materials commenced to be furnished.—*McClain v. Hutton*, 131 Cal. 132, 144, 61 Pac. 273, 63 Pac. 182, 622. See *Davies-Henderson Lumber Co. v. Gottschalk*, 81 Cal. 642, 23 Pac. 860; *Avery v. Clark*, 87 Cal. 619, 22 Am. St. Rep. 272, 25 Pac. 919; *Pacific Mut. Life Ins. Co. v. Fisher*, 106 Cal. 224, 236, 39 Pac. 758.

15. Liens have precedence in order of their record or notice, in absence of any statutory provisions regulating such precedence.—*Williams v. Santa Clara Min. Assoc.*, 66 Cal. 193, 199, 5 Pac. 85.

As to holder of vendor's lien or lien of mortgage, not required to give notice of nonresponsibility for improvements, see post, § 1192 and note par. 44.

§ 1187. CLAIM OF LIEN FILED IN RECORDER'S OFFICE. Every original contractor, claiming the benefit of this chapter, within sixty days after the completion of his contract, and every person save the original contractor claiming the benefit of this chapter, at any time after he has ceased to perform labor or furnish material, or both, for any work of improvement mentioned in this chapter, and until thirty days after the completion of such work of improvement, may file for record with the county recorder of the county or city and county in which such property or some part thereof is situated a claim of lien containing a statement of his demand after deducting all just credits and offsets, the name of the owner or reputed owner, if known, a general statement of the kind of work done or materials furnished by him, or both, the name of the person by whom he was employed or to whom he furnished the materials, and a description of the property sought to be charged with the lien sufficient for identification; which claim of lien must be verified by oath of claimant or some other person. Any trivial imperfection in the said work, or in the completion of any contract by any lien claimant, or in the construction of any building, improvement or structure, or of the alteration, addition to, or repair thereof, shall not be deemed such a lack of completion as to prevent the filing of any lien; and in all cases, any of the following shall be deemed equivalent to a completion for all the purposes of this chapter: the occupation or use of a building, improvement or structure, by the owner, or his representative, accompanied by cessation from labor thereon; or the acceptance by the owner, or said agent, of said building, improvement or structure; or cessation from labor for thirty days upon any contract or upon any building, improvement or structure, or the alteration, addition to, or repair thereof; the filing of the notice hereinafter provided for.

[Owner may file record of completion with recorder.] The owner shall within ten days after the completion of any contract or improvement provided for in this chapter, or within ten days after there has been a cessation from labor thereon for a period of thirty days, file for record in the office of the county recorder of the county where the property is situated, a notice setting forth the date when the same was completed, or on which cessation from labor occurred, together with his name and the nature of his title, and a description of the property sufficient for identification, which notice shall be verified by himself or some other person on his behalf. The fee for recording the same shall be one dollar. In case such notice be not so filed, then all persons claiming the benefit of this chapter shall have ninety days after the completion of said improvement within which to file their claims of lien.

History: Enacted March 11, 1872; amendment approved March 30, 1874, Code Amdts. 1873-4, p. 410; March 15, 1887, Stats. and Amdts. 1886-7, p. 154; March 27, 1897, Stats. and Amdts. 1897, p. 202; May 1, 1911, Stats. and Amdts. 1911, p. 1316; May 3, 1919, Stats. and Amdts. 1919, p. 190. In effect July 22, 1919.

MECHANICS' LIEN—CLAIM OF LIEN.

1. Amendment of section—Not retro-active.
2. Answer—Denial on information and belief.
3. Assignment of right.

4. Authority of agent.
- 4a. Same—Pleading and proof.
- 5-8. Cessation of work—Time for filing lien.
9. Change of owners.
10. Claim of lien and sufficiency of—Agency, statement of.

11. Same—Alternative statement as to owner.
12. Same—Amount of contract and amount paid.
13. Same—Completion of work, date of.
- 14, 15. Same—Description of property.
16. Same—Error of date in notice of lien is immaterial when.
17. Same—Finding as to.
18. Same—Form and contents of.
19. Same—Gross sum.
20. Same—Indefinite description of materials.
21. Same—Items of account.
22. Same—Legal presumptions.
23. Same—Materialman—Price of lumber furnished.
24. Same—Name given instrument.
- 25-27. Same—Name of owner.
28. Same—Precise words of statute are not required.
29. Same—Section prescribes contents.
30. Same—Statement of price—Reasonable value.
31. Same—Sufficiency of form of—In general.
32. Same—Same—Person to whom materials furnished.
33. Same—Sufficiency of statement—Designation of claimant—Construction of section.
- 34, 35. Same—Substantial compliance.
- 36-38. Same—"Terms," etc.
- 39, 40. Same—"Time given."
- 41, 42. Same—Time of filing—Cessation of work for more than thirty days—In general.
43. Same—Same—Same—Equivalent to completion.
44. Same—Same—Same—Improvement made by owner himself—Estoppel not applicable.
45. Same—Same—Claim of subcontractor—Completion of work—Extending time by subterfuge.
46. Same—Same—Completion by owner—Time not extended.
47. Same—Same—Completion of contract.
48. Same—Same—Construction of section.
- 49, 50. Same—Same—Constructive completion of building or improvement.
51. Same—Same—Foreclosure of lien—Defense.
52. Same—Same—Materialman or laborer.
53. Same—Same—No notice of completion.
- 54, 55. Same—Same—Notice of completion not filed.
56. Same—Same—Original contractor.
57. Same—Same—Premature filing.
58. Same—Same—Release of contractor.
59. Same—Same—Substantial completion.
60. Same—Same—Time of completion—Delivery of hinges after completion.
61. Same—Same—Void contract.
62. Same—Same—When begins to run—Notice of completion.
- 63, 64. Same—Truth of statement.
65. Complaint in foreclosure of lien—Must state essential facts to recovery.
- 66-69. Completion of building—Cessation from labor.
70. Same—Same—Constructive completion.
71. Same—Effect of failure of owner to file and record notice.
72. Same—Essential to lien.
- 73-76. Same—Occupation of building—Acceptance—Possession, etc.
77. Same—Same—Presumption arising from.
78. Same—Omission of owner.
79. Same—Operation of above section can not be restricted.
80. Same—Purpose of owner to complete only in part.
- 81, 82. Same—Question of fact.
- 83, 84. Same—Substantial omission.
85. Same—Sufficiency of.
86. Same—"Trivial imperfections" or "omissions"—As to generally.
87. Same—Same—Defects not preventing recovery for substantial performance.
88. Same—Same—Substantial performance—Time for filing lien not delayed.
89. Same—Uncertainty as to time of completion.
- 90-92. Construction of section—In general.
- 93-95. Same—As to cessation from labor.
- 96, 97. Same—Amendment to section.
- 98, 99. Same—Filing notice of completion.
100. Same—Failure to file notice of occupancy.
101. Same—Notice of claim—Time of filing.
102. Same—Same—Validity of.
103. Same—Purpose of section.
104. Same—Statute remedial.
105. Credit—Giving of for longer period than prescribed by statute.
106. "Demand"—Definition of term.
107. Distinction exists—Between original contractor and materialmen or subcontractors.
108. Duration of lien—Recorded liens bind building only ninety days.

109. Elevator as part of structure.
 110. Failure to comply with law—Liability of owner.
 111. Failure to file within time—Want of valid lien.
 112. Filing lien—As to whether prerequisite to suit on contractor's bond.
 - 113, 114. Foreclosure of liens—Completion of contract—Finding—Evidence.
 115. Frivolous objections to claim and verification.
 116. Interest—May be allowed upon claims of lienors.
 117. Judgment—Certainty.
 118. Same—On demurrer.
 119. Legal relations—Between owner, contractor, and subcontractor.
 120. Marshaling of liens.
 121. Materialmen—As such, are not original contractors.
 122. Same—Furnishing materials directly to owner.
 123. Same—Must file lien within time prescribed.
 124. Measure of damage—In case of valid contract that fixes liability.
 125. "Mining claim" and "mining location"—Are identical.
 126. Same—Mining claim may stand in place of word "structure."
 127. Same—Work on mine—Provision as to completion.
 128. Mine superintendent—Claim of salary.
 129. Nature of lien.
 130. Nonsuit—Should be granted, when.
 131. Notice of completion—Delayed filing of claim—Defense—Estoppel—Pleading and proof.
 132. Same—Error in date—Want of injury.
 133. Same—Failure to file—Pleading and proof.
 134. Same—Same—Time for original contractor to file claim.
 135. Same—Filing by owner—Releases contractor and sureties.
 136. Same—Same—Reservation as to latent defects—Effect of.
 137. Notice of lien—Complaint to foreclose—Variance fatal.
 138. Same—Terms of payment—Variance—Fatal, when.
 139. "Original contractor"—Meaning of term.
 140. Ownership—There is no limitation upon term "owner."
 141. Same—Reputed owner—Lienholder who in good faith files lien.
 142. Same—The same person may be both owner and reputed owner.
 143. Preliminary work—Claim of lien for—When to be filed.
 - 144, 145. Personal judgment—May be entered in favor of lien-claimant.
 146. Same—Materialman held not entitled to.
 - 147, 148. Pleading—Answer—Denial on information and belief.
 - 149, 150. Same—Complaint in action to enforce lien.
 - 151-153. Premature filing of claim—No lien raised.
 154. Property affected—Lien must cover entire structure.
 155. Railroad—In more than one county—Recording lien.
 156. Reformation of claim of lien—Not permissible.
 157. Schoolhouse, building—Contractor's bond—Lien of laborers and materialmen—Filing claims of lien—Sufficiency.
 158. Service of notice.
 159. Subcontractor.
 160. Sufficiency of claim of lien—Allegations and requisites.
 161. Time of filing claim of lien—Commences to run, when, and sufficiency of filing.
 - 162-164. "Trivial imperfections"—Meaning of term.
 - 165, 166. Same—Question of fact.
 167. Same—Same—Alterations made after construction of house.
 168. Variance between contract and claim of lien—As to generally.
 169. Same—Claim of lien must contain a true statement.
 170. Same—Same—Agreement as to price.
 171. Same—Same—Between notice of lien and proof.
 172. Same—Complaint upon quantum meruit.
 - 173-175. Same—Immateriality of.
 176. Same—Notice—Requirement of proof.
 177. Verbal contract.
 178. Verification of claim.
 179. Same—By attorney.
 180. Void contract—In general.
 181. Same—Materialman has lien.
- See, ante, § 1183 and note.
1. Amendment of section—Not retroactive.—Amendment to section passed March 15, 1887, held not to have retroactive effect.—Kerckhoff-Cuzner Mill & Lumber Co. v. Olmstead, 85 Cal. 80, 84, 24 Pac. 648.
 2. Answer—Denial on information and belief.—As to generally, see par. 2, this note; also, ante, § 1183, note par. 218.

3. **Assignment of right.**—Laborer or materialman can not assign his mere right to assert and create lien by complying with provisions of above section and thereby clothe his assignee with power to create lien for himself. Right to create lie nis personal right and can not be assigned.—*Mills v. La Verne Lumber Co.*, 97 Cal. 254, 257, 33 Am. St. Rep. 168, 32 Pac. 169. See *Patent Brick Co. v. Moore*, 75 Cal. 205, 16 Pac. 890; *Rollin v. Cross*, 45 N. Y. 766, 771; *Dexter v. Sparkman*, 2 Wash. 165, 168, 25 Pac. 1070; *Caldwell v. Lawrence*, 10 Wis. 331.

4. **Authority of agent.**—Whether person in possession of property or person by whom laborer was employed had authority to bind owner as agent is matter for allegation and proof at trial.—*Castagnetto v. Coppertown Min. & Smelt. Co.*, 146 Cal. 329, 332, 80 Pac. 74.

4a. **Same—Pleading and proof.**—Authority of person to whom materialman furnished material to bind owner so as to entitle materialman to lien is matter of pleading and proof at trial.—*Davies-Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641, 646, 22 Pac. 860.

5. **Cessation of work—Time for filing lien.**—A finding in an action for the foreclosure of a mechanics'-lien that there was no cessation of labor upon the building for the period of thirty consecutive days between certain designated dates is unsupported, where the undisputed evidence shows that there was no work done upon the building for a period of almost four months within such designated dates, although a little work was done in fixing up the yard and in putting up some fences during the latter period.—*Sunset Lumber Co. v. Bachelder*, 167 Cal. 512, 140 Pac. 35.

As to constructive completion by cessation from labor for thirty days, see pars. 66-69, this note.

6. It is the cessation of work upon the building for which the material was furnished, together with its occupation or use by the owner, that sets the time running for the constructive completion of such building, under above section, as that section read in 1909.—*Sunset Lumber Co. v. Bachelder*, 167 Cal. Cal. 512, 140 Pac. 35.

7. A claim of lien for materials furnished in the construction of a building filed more than one hundred and twenty days after cessation of labor upon the building, is not paramount to a subsequently executed mortgage.—*Sunset Lumber Co. v. Bachelder*, 167 Cal. 512, 140 Pac. 35.

8. Under above section, a cessation from labor for thirty days is deemed a completion of the building, and in case the owner does not file the notice of such cessation, as required by above section, materialmen and laborers do not have an unlimited time in which to file their claims of lien, but must file them at all events within ninety days after the expiration of such thirty-day period, or within one hundred and

twenty days after the actual cessation from labor.—*Sunset Lumber Co. v. Bachelder*, 167 Cal. 512, 140 Pac. 35.

9. **Change of owners.**—Where owner who contracted for improvement has in meantime parted with all interest in property, whether before or after filing notice, claimant can not enforce his lien in action against him alone, but must make as defendant party who was owner at time of bringing suit.—*Corbett v. Chambers*, 109 Cal. 178, 184, 41 Pac. 873.

10. **Claim of lien and sufficiency of—Agency, statement of.**—Contract made by agent should, perhaps, as matter of strict pleading, be alleged to have been made by principal, but no such recognition of maxim "that which is done by another, he himself does" is requisite to validity of notice under mechanics'-lien law.—*McIntyre v. Trautner*, 63 Cal. 429, 431.

11. **Same—Alternative statement as to owner.**—Claimant does not fail in perfecting his lien if he states name of owner or reputed owner in alternative, as he is not required to ascertain at his peril name of true owner. It is sufficient if he gives name of reputed owner, and sufficiency of notice is not impaired by same person being designated as "owner or reputed owner."—*Corbett v. Chambers*, 109 Cal. 178, 184, 41 Pac. 873.

12. **Same—Amount of contract and amount paid.**—Claim of lien substantially complies with statute where, although it does not set forth that contract-price was to be paid in instalments as work progressed, it did, however, state correct amount of contract-price and amount that had been paid thereon.—*McGinty v. Morgan*, 122 Cal. 103, 105, 54 Pac. 392.

13. **Same—Completion of work, date of.**—Statement is not required to give date of completion of work, nor to state that filing of notice is within thirty days after completion of work.—*Slight v. Patton*, 96 Cal. 384, 387, 31 Pac. 248. See *Harmon v. Ashmead*, 68 Cal. 321, 9 Pac. 183; *Jewell v. McKay*, 82 Cal. 144, 146, 23 Pac. 139.

As to completion of work generally, see pars. 65-104, this note.

14. **Same—Description of property.**—One of most important requirements of statute governing creation of liens is that notice shall contain description of property to be charged sufficient for identification. If there be mistake as to some incident of description, the mistaken circumstance, like false call in deed, will be rejected.—*Fernandez v. Burleson*, 110 Cal. 164, 167, 52 Am. St. Rep. 75, 42 Pac. 566. See *Willamette Steam Mills Co. v. Kremer*, 94 Cal. 205, 209, 29 Pac. 633.

15. Description is not required to be either full or precise, and courts are reluctant to set aside mechanics' claim merely for loose description, as acts generally contemplate that claimants should prepare their own papers.—*Willamette Steam Mills Co. v.*

Kremer, 94 Cal. 205, 209, 29 Pac. 633. See *Hotaling v. Cronise*, 2 Cal. 60; *Tredinnick v. Red Cloud C. M. Co.*, 72 Cal. 78, 13 Pac. 152. *Kam. Seaton v. Hixon*, 35 Kan. 663, 12 Pac. 22. *Mass. Cleverly v. Moseley*, 148 Mass. 280, 19 N. E. 394. *Minn. Northwestern C. & C. P. Co. v. Norwegians, etc.*, *Seminary*, 43 Minn. 449, 45 N. W. 868. *Pa. Kennedy v. House*, 41 Pa. St. 39, 80 Am. Dec. 594; *McClintock v. Rush*, 63 Pa. St. 203, 205.

16. **Same—Error of date in notice of lien is immaterial when it does not affect substantial rights of parties.**—*Boscow v. Patton*, 136 Cal. 90, 91, 68 Pac. 490.

17. **Same—Finding as to.**—Finding is erroneous and not supported by evidence in which court determines that notice of lien was filed "in due form, as required by law," where proof showed that materials were furnished at agreed contract-price, and evidence disproved contract set out in notice, in which respect notice was fatally defective, and no lien attached that could be enforced, and where it appeared that certain portion of materials were furnished under special contract as to price, and that balance was furnished on basis of quantum meruit.—*Reed v. Norton*, 90 Cal. 590, 594, 26 Pac. 767, 27 Pac. 426.

18. **Same—Form and contents of.**—The provisions of the above section only require a statement in a claim of a lien as to when the work was to be done, and when the price was payable, if that were agreed upon, and the insertion of the name of the owner or reputed owner only when it is known to the claimant.—*Allen v. Wilson*, 178 Cal. 674, 174 Pac. 661, following doctrine in *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 277, 22 Pac. 231; *Corbett v. Chambers*, 109 Cal. 178, 185, 41 Pac. 873; *McClain v. Hut-ton*, 131 Cal. 132, 137, 61 Pac. 273, 63 Pac. 182, 622.

As to variance between claim of lien and contract, see par. 178, this note.

19. **Same—Gross sum.**—Claim for gross sum of balance claimed for all material furnished for work without any designation of amount claimed on account of material furnished at request of either or any one of several persons at whose request it was furnished, is not substantial compliance with statute in filing materialman's claim of lien.—*Gordon Hardware Co. v. San Francisco & S. R. Co.*, 3 Cal. Unrep. 140, 22 Pac. 406.

20. **Same—Indefinite description of materials.**—Description of materials is too indefinite and uncertain to sustain claim where statement is that materials consisted of "nails, spikes, iron, steel, picks, shovels, and other like material," especially where it is conceded that claim can only be maintained for material which is actually used in work contracted to be done, and such material so used could not certainly include tools of trade.—"picks, shovels, and other like material."—*Gordon Hardware Co.*

v. San Francisco & S. R. Co., 3 Cal. Unrep. 140, 22 Pac. 406.

21. **Same—Items of account.**—Statements in notice of lien are not required to be made with greater fullness or formality than is necessary in pleading. General statement is, therefore, sufficient in notice of lien where, in case of contract, details of amounts, etc., are involved.—*Jewell v. McKay*, 82 Cal. 144, 151, 23 Pac. 139.

22. **Same—Legal presumptions.**—Notice is not required to state matters implied by law.—*Jewell v. McKay*, 82 Cal. 144, 152, 23 Pac. 139.

23. **Same—Materialman—Price of lumber furnished.**—A claim of lien by a materialman in which the price is set out as the lumber market value and the record on foreclosure shows that a specific sum of money, distinguishable from and independent of the market price of the lumber, was agreed upon between the parties as the consideration of the sale, this will establish a fatal variance between the lien-claim and the proof.—*Consolidated Lumber Co. v. Bosworth*, 40 Cal. App. 80, 180 Pac. 60, approving and following the doctrine in *Reed v. Norton*, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426; *Wagner v. Hansen*, 103 Cal. 104, 37 Pac. 195; *Wilson v. Nugent*, 125 Cal. 280, 57 Pac. 1008; *Buell & Co. v. Brown*, 131 Cal. 158, 63 Pac. 167; *Robinet v. Brown*, 167 Cal. 735, 141 Pac. 368.

24. **Same—Name given instrument.**—Lien is sufficient which sets out matters and things essential to be stated under above section; and it is of little consequence whether claimant styles it claim of lien or claim of benefit under lien law.—*Madary v. Smartt*, 1 Cal. App. 498, 500, sub nom. *Valley L. Co. v. Wright*, 3 Cal. App. 288, 84 Pac. 58.

25. **Same—Name of owner.**—Statement in claim held insufficient for failing to comply with law in reference to name of owner and reputed owner.—*Hooper v. Flood*, 54 Cal. 218, 223.

26. Notice is not required to state name of owner who originally entered into contract under which work was done.—*Corbett v. Chambers*, 109 Cal. 178, 181, 41 Pac. 873.

27. Plaintiff is required to state names of owner or reputed owner, if known. If names are not known, claim filed is sufficient if it is silent on this subject.—*West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 277, 22 Pac. 231.

28. **Same—Precise words of statute are not required to be used by claimant in his claim of lien.** Where other and substantially equivalent expressions are resorted to, it will be deemed sufficient compliance with requirements of law.—*Ascha v. Fitch*, 5 Cal. Unrep. 481, 46 Pac. 298.

29. **Same—Section prescribes contents.**—Contents of notice to be recorded are prescribed by above section, and not by section

1183, ante.—*Jewell v. McKay*, 82 Cal. 144, 150, 23 Pac. 139.

30. Same.—Statement of price.—Reasonable value.—Under the provisions of the above section, as amended in 1911, a claim of lien is not required, as it was required before such amendment, to state "the terms, time given and conditions of his contract" but only to state "the price, if any, agreed upon for the same, and when payable"; consequently in the absence of any particular agreement the law fixes the compensation at the reasonable value thereof, and when the lien-claimants state in their claims that the price agreed upon was a certain definite amount and that this was the reasonable value of such service of materials, they are stating the facts correctly.—*Krenwinkel v. Henne*, 42 Cal. App. 580, 183 Pac. 957.

31. Same.—Sufficiency of form of.—In general.—A claim of lien which conforms to the requirements of the above section, and which contains nothing that is contradictory or destructive of the essential particulars enumerated in the above section, is sufficient.—*Sweet v. Fresno Hotel Co.*, 174 Cal. 789, 164 Pac. 788.

32. Same.—Same.—Person to whom materials furnished.—A claim of lien filed under the provisions of the above section, which gives the name of a contractor who entered into the contract with the claimant to furnish the materials, and states that the materials were furnished and used, although it does not expressly state to whom the material was furnished, is sufficient.—*Jarvis v. Frey*, 175 Cal. 687, 166 Pac. 997, following the rule in *Russ Lumber & Mill Co. v. Garrettson*, 87 Cal. 589, 25 Pac. 747.

33. Same.—Sufficiency of statement.—Designation of claimant.—Construction of section.—In a case in which an artisan claiming a lien upon a building or improvement, was employed as such artisan at daily wages to work at his trade under the direction of his employer and no specific work is agreed to be done, the requirements of the above section respecting that the "work agreed to be done" shall be stated in the claim of lien, has no application; in such claim of lien it is not necessary for the claimant to designate what class of artisans he belongs to for the reason that the provisions of section 1183, ante, gives a right to lien to all classes of artisans and laborers, and not to those of any particular trade or calling.—*Ogram v. Welchoff*, 40 Cal. App. 298, 180 Pac. 631.

34. Same.—Substantial compliance.—While courts always require substantial compliance with statute in regard to statement in notice of lien and proceedings thereunder, yet they will not give statute such narrow or technical construction as to fritter away or impede and destroy the right of lien-claimant.—*Castagnetto v. Coppertown S. & M. Co.*, 146 Cal. 329, 333, 80 Pac. 74. See *Hagman v. Williams*, 88 Cal. 146, 151, 25 Pac. 1111; *Russ L. & M. Co. v. Garrettson*,

87 Cal. 589, 595, 25 Pac. 747; *Ascha v. Fitch*, 5 Cal. Unrep. 481, 46 Pac. 298; *McGinty v. Morgan*, 122 Cal. 103, 105, 54 Pac. 392; *Macomber v. Bigelow*, 126 Cal. 9, 16, 58 Pac. 312.

35. Substantial statement of facts required by statute is sufficient.—*Castagnetto v. Coppertown Min. & Smelt. Co.*, 146 Cal. 329, 332, 80 Pac. 74.

36. Same.—"Terms," etc.—By section requiring notice of lien to state terms, time given, and conditions of contract, this means terms, time, and conditions expressly agreed upon. If no terms, time, or conditions were agreed upon, notice need state none.—*Reed v. Norton*, 90 Cal. 590, 597, 26 Pac. 767, 27 Pac. 426. See *Jewell v. McKay*, 82 Cal. 144, 23 Pac. 139.

37. Statement that "labor was performed by the day at the agreed price of two dollars and seventy-five cents per day between first day of August and 20th day of September, 1901, and that amount is justly due," is sufficient statement as to claim of laborer.—*Castagnetto v. Coppertown Min. & Smelt. Co.*, 146 Cal. 329, 332, 80 Pac. 74.

38. Word "cash" used in statement does not sufficiently show terms and conditions of contract.—*Hooper v. Flood*, 54 Cal. 218, 221.

39. Same.—"Time given."—When no distant time is agreed on, but time of payment is left to rule fixed by law on such state of facts, in contemplation of law no time is given, and requirement that claim shall state "time given" does not then apply.—*Hills v. Ohlig*, 63 Cal. 104.

40. Words "time given" mean not date nor time when contract was made, but "time of payment for work and labor performed and materials furnished as agreed on and expressed in contract."—*Hills v. Ohlig*, 63 Cal. 104; *California Powder Works v. Blue Tent Consol. Hydraulic Gold Mines*, 3 Cal. Unrep. 145, 22 Pac. 391, 392.

41. Same.—Time of filing.—Cessation of work for more than thirty days.—In general.—A claim of lien by a contractor which is not filed until more than nine months after the constructive completion of the contract, and having been a complete cessation and abandonment of the work by the contractor, is not filed within time under the requirements of the above section.—*Pence v. Martin*, 43 Cal. App. 626, 185 Pac. 503, approving the doctrine in *Kerckhoff-Cuzner Mill & Lumber Co. v. Olmstead*, 85 Cal. 80, 24 Pac. 648; *Johnson v. La Grave*, 102 Cal. 324, 36 Pac. 651; *Buell v. Brown*, 131 Cal. 159, 63 Pac. 167; *Robinson v. Mitchell*, 159 Cal. 581, 114 Pac. 984.

As to cessation of work generally, see pars. 66-69, this note.

42. In those cases in which there has been a cessation from labor, the time allowed for filing mechanics' liens is ninety days after the expiration of thirty days from the date of such cessation, or, in other words, one hundred and twenty days after

the actual cessation from labor.—Hubbard v. Jurian, 35 Cal. App. 757, 170 Pac. 1093.

43. Same—Same—Same—Equivalent to completion.—In a case in which there has been a temporary cessation of labor upon a building for more than thirty days, and such cessation occurred on August 20, the ninety days' time allowed a materialman to file a lien commenced to run on September the 19, following, under the provisions of the above section.—Hogan Lumber Co. v. Boyle, 177 Cal. 477, 170 Pac. 1106.

44. Same—Same—Same—Improvement made by owner himself—Estoppel not applicable.—In those cases in which the improvements are not made under contract, but are made by the owner himself, either actually or constructively, the provisions of the above section relating to the filing of notice of completion do not apply, and the estoppel raised by the latter portion of the above section, where there is a default on the part of the owner to file notice of completion, can not be invoked by a laborer or a materialman.—Irwin v. Silva, 40 Cal. App. 135, 180 Pac. 361.

45. Same—Same—Claim of subcontractor—Completion of work—Extending time by subterfuge.—Under the provisions of the above section every lien-claimant, save the original contractor, must file his claim of lien within thirty days after he has ceased to labor or to furnish materials, or both, or at his option, within thirty days after the completion of the original contract; under these provisions a subcontractor whose contract for the construction of two chimneys and a porch consisted in the main of furnishing and setting brick could not, when he had completed the entire work, leave two trivial items undone for more than thirty days thereafter, so that he could "come back after thirty days and thus by a mere subterfuge prolong indefinitely the statutory time for filing his claim, and his testimony to the effect that he had pursued that course, and that that was his practice, warranted the reversal of a judgment in his favor on the ground that a finding that he had filed his claim within thirty days after ceasing to labor or furnish materials, was unsupported by the evidence.—Klann v. Hoffman, 176 Cal. 763, 169 Pac. 678.

46. Same—Same—Completion by owner—Time not extended.—In the case in which there has been a cessation of labor by the contractor or he has abandoned the building, the subsequent completion of the building by the owner, does not operate as an extension of time for filing liens.—Hubbard v. Jurian, 35 Cal. App. 757, 170 Pac. 1093.

47. Same—Same—Completion of contract.—The above section specifies several events, among others the filing by the owner of a notice of cessation from work, any one of which may be equivalent to completion of a building-contract, and thus a starting point for the filing of mechanics' lien or materialman's claim of lien.—Schwarz &

Gottlieb Inc. v. Marcuse, 175 Cal. 401, 165 Pac. 1015.

48. Same—Same—Construction of section.—Under the provisions of the above section, where work is done under contract between the owner of the property upon which an improvement is made and the contractor, persons furnishing either labor or material may, at their option, file their claims of lien, either within thirty days after ceasing to labor or to furnish materials, or within thirty days after the completion of the original contract between the owner and the contractor; but where the work is not done under such a contract laborers and materialmen must file their claims of liens within thirty days after they have ceased to labor or to furnish materials.—Irwin v. Silva, 40 Cal. App. 135, 180 Pac. 361.

49. Same—Same—Constructive completion of building or improvement.—Under the provisions of the above section, as amended in 1911, either of the three following circumstances shall constitute constructive completion of a building, for the purpose of setting the time running in which to file a mechanics' lien to wit: (1) occupation of the building; (2) acceptance of the building by the owner; and (3) cessation from labor for thirty days.—Emigh-Winchell Hardware Co. v. Plyman, 37 Cal. App. 533, 176 Pac. 722, 38 Cal. App. 508, 176 Pac. 722.

50. The rule as to the one hundred- and twenty-day period after cessation from labor within which claims may be filed by laborers, materialmen, and others, has no application where there has been an actual completion under the terms of the building-contract.—Mott v. Wright, 43 Cal. App. 21, 184 Pac. 517, distinguishing the doctrine in Buell v. Brown, 131 Cal. 158, 63 Pac. 167; Farnham v. California Safe Deposit & Trust Co., 8 Cal. App. 266, 96 Pac. 788.

51. Same—Same—Foreclosure of lien—Defense.—In an action to foreclose a mechanics' lien the owner is not estopped from setting up as a defense the plaintiff's failure to file notice of claim of lien within the statutory period, where there is no showing that the owner had, by act or representation, wilfully and fraudulently led the claimant to forego his right of lien.—Pence v. Martin, 43 Cal. App. 626, 185 Pac. 503.

52. Same—Same—Materialman or laborer.—Time within which materialman or laborer must file his claim of lien begins to run whenever there has been cessation from labor for thirty days upon unfinished building.—Kerckhoff-Cuzner Mill & Lumber Co. v. Olmstead, 85 Cal. 80, 84, 24 Pac. 648.

53. Same—Same—No notice of completion.—The limit of time fixed by statute for the filing of mechanics' lien where no notice of completion or cessation from labor has been filed, is ninety days after the actual completion of the building.—Hubbard v. Jurian, 35 Cal. App. 757, 170 Pac. 1093.

54. Same—Same—Notice of completion not filed.—Under the provisions of the last

clause of the above section where a notice of completion is not filed by the owner, such owner will be estopped in any foreclosure proceeding from maintaining any defense therein based on the ground that the lien was not filed in time; but this provision refers to the completion of the contract under which material was furnished or labor done, and if such notice is not filed by the owner, he waives the thirty-day limitation provided for in the above section; but the ninety-day limitation in such concluding portion of the section applies to all cases, and all claims of lien must be filed before the expiration of ninety days after the completion of the building, regardless of the filing of the notice of completion by the owner.—*Emigh-Winchell Hardware Co. v. Plyman*, 37 Cal. App. 533, 176 Pac. 722.

55. Under the provisions of the above section where no notice of completion was filed by the owner, lien-claimants have ninety days after actual completion within which to file their claims.—*Klimm v. Henry Cowell Lime & Cement Co.*, 38 Cal. App. 239, 175 Pac. 908.

56. Same—Same—Original contractor may file claim of lien "within sixty days after completion of his contract," irrespective of when building is completed.—*Pacific Mut. Life Ins. Co. v. Fisher*, 106 Cal. 224, 232, 39 Pac. 758.

As to original contractor generally, see par 139, this note.

57. Same—Same—Premature filing.—Under the provisions of the above section every person, save the original contractor, shall file his claim of lien within thirty days after he has ceased to labor. This provision necessarily implies and means that the last day on which the claimant-laborer performed labor must have passed before he can file his claim; and where an employment terminated on August 22, the first day on which he could file his claim was August 23, and where it was filed on August 22, the claim of lien is prematurely filed and confers no rights thereunder.—*McCreary v. Toronto Midway Oil Company, Ltd.*, 38 Cal. App. 17, 175 Pac. 87, following doctrine in *Davis v. McDonough*, 109 Cal. 547, 42 Pac. 450; *Santa Monica Lumber & Mill Co. v. Hege*, 119 Cal. 376, 51 Pac. 555; *Merchant v. Hayes*, 120 Cal. 137, 52 Pac. 154; *Baker v. Lake Land Canal & Irr. Co.*, 7 Cal. App. 482, 94 Pac. 773.

58. Same—Same—Release of contractor.—Lien-claim filed within thirty days after owner had released contractor, taken his work and some of his materials, and agreed to pay some of his debts, constitutes claim filed within thirty days after acceptance, use, and occupation within the meaning of above section.—*Giant Powder Co. v. San Diego Flume Co.*, 88 Cal. 20, 24, 25 Pac. 976.

59. Same—Same—Substantial completion.—All that is required under the provisions of the above section, to fix the time from which the right of lien-claimants to file

their liens begins to run, is that there be, so far as actual completion is concerned, a substantial completion; "trivial imperfections" will not be considered.—*Mott v. Wright*, 43 Cal. App. 21, 184 Pac. 517, following the doctrine in *Harlan v. Stufflebeem*, 87 Cal. 508, 25 Pac. 686; *Willamette Steam Mills Lumbering & Mfg. Co. v. Los Angeles College Co.*, 94 Cal. 229, 237, 29 Pac. 629; *Jost v. Sullivan*, 111 Cal. 286, 292, 43 Pac. 896; *Santa Monica Lumber & Mill Co. v. Hege*, 119 Cal. 376, 379, 51 Pac. 555; *Bianchi v. Hughes*, 124 Cal. 24, 27, 56 Pac. 610; *Schindler v. Green*, 149 Cal. 752, 754, 87 Pac. 626.

60. Same—Same—Time of completion.—Delivery of hinges after completion.—In determining whether a lien for materials used in the construction of a building was filed within the time required by the above section, the delivery to the building about two months after its occupation by the owner of four special hinges of small value, previously ordered by the contractor and afterwards paid for by the owner, can not be taken into consideration.—*Emigh-Winchell Hardware Co. v. Pylman*, 37 Cal. App. 533, 176 Pac. 722.

61. Same—Same—Void contract.—Where contract is void because memorandum thereof is not filed, there being therefore no original contractor within meaning of above section, claimants of lien are deemed to have furnished their labor and materials in such case at personal instance of owner, and under above section are required only to file their claims of lien within thirty days after building is completed.—*Pierce v. Birkholm*, 115 Cal. 657, 662, 47 Pac. 681.

As to void contract generally, see pars. 180, 181, this note; also, ante, § 1183, note pars. 357-373.

62. Same—Same—When begins to run.—Notice of completion.—The time for filing a claim of mechanics' lien begins to run, not from the date of the completion of the work, but from the date on which the owner files notice of completion of the contract, and it is in time if filed within thirty days thereafter.—*Consolidated Lumber Co. v. Bosworth*, 40 Cal. App. 80, 180 Pac. 60, following the doctrine in *Hughes Mfg & L. Co. v. Hathaway*, 174 Cal. 44, 161, Pac. 1159; *Pioneer Paper Co. v. Hathaway*, 39 Cal. App. 405, 179 Pac. 227.

63. Same—Truth of statement.—Statement must be true in all essential particulars, and is required to be verified by lienor.—*Wagner v. Hansen*, 103 Cal. 104, 107, 37 Pac. 195. See *Frazer v. Barlow*, 63 Cal. 71; *Malone v. Big Flat Gold Min. Co.*, 76 Cal. 578, 18 Pac. 772; *Eaton v. Malatesta*, 92 Cal. 75, 28 Pac. 54.

As to verification of claim of lien, see pars. 178, 179, this note.

64. Statements contained in notice of lien must be correct and in accordance with facts. If they are not correctly stated, right to lien is lost.—*Santa Monica Lumber*

& Mill Co. v. Hego, 119 Cal. 376, 380, 51 Pac. 555.

As to notice of claims of lien held sufficient, see *Jewell v. McKay*, 82 Cal. 144, 146 23 Pac. 139.

As to notice not required to state want of knowledge of owner of improvements being placed upon his land, see, post, § 1192 and note.

65. Complaint in foreclosure of lien—Must state essential facts to recovery.—As to generally, see, ante, § 1183, note pars. 232-241.

66. Completion of building—Cessation from labor.—Fact that owner does not resume work within thirty days after contractor ceased does not alone render him liable to materialmen who furnished material to contractor to full amount of contract-price remaining unpaid, notwithstanding owner was compelled to finish work at an expense which, added to payments made by original contractor in accordance with contract, exceeded contract-price.—*McDonald v. Hayes*, 132 Cal. 490, 494, 64 Pac. 850.

As to cessation from labor generally, see pars. 5-8, 66-69, this note.

67. Cessation from labor for thirty days upon unfinished contract is equivalent to completion thereof for all who claim lien by virtue of that contract, as fully as though building was actually completed.—*Johnson v. La Grave*, 102 Cal. 324, 326, 36 Pac. 651. See *Kerckhoff-Cuzner Mill & Lumber Co. v. Olmstead*, 85 Cal. 80, 24 Pac. 648; *Willamette Steam Mill Lumbering & Mfg. Co. v. Los Angeles College Co.*, 94 Cal. 229, 238, 29 Pac. 629.

68. Cessation of work for more than thirty days constitutes "completion" under above section and findings are not fatally contradictory because it is found in one place that "the building was completed on 2d day of August, 1889," and in another that building "was never actually completed."—*Marble Lumber Co. v. Lordsburg Hotel Co.*, 96 Cal. 332, 334, 31 Pac. 164.

69. Term "cessation of work" is used in reference to time in which notices or claims to liens should be filed.—*McDonald v. Hayes*, 132 Cal. 490, 495, 64 Pac. 850.

70. Same—Same—Constructive completion.—Under the provisions of the above section the cessation from labor by reason of the actual contract, is not the cessation of labor which itself constitutes a constructive completion of the building or contract, and the time for filing claim of lien is not governed by the rule applying where there is a constructive completion.—*Mott v. Wright*, 43 Cal. App. 21, 187 Pac. 517.

71. Same—Effect of failure of owner to file and record notice of cessation of labor can not be construed to indefinitely postpone time in which claim of lien may be filed. Section gives materialman thirty days after filing of notice of cessation of labor by owner, or in case owner does not file

such notice, then one hundred and twenty days after such cessation from labor.—*Buell v. Brown*, 131 Cal. 158, 161, 63 Pac. 167.

72. Same—Essential to lien.—Completion of building is essential to validity of liens, and it must appear that building was completed when claims were filed.—*Johnson v. La Grave*, 102 Cal. 324, 326, 36 Pac. 651; *Marchant v. Hayes*, 120 Cal. 137, 139, 52 Pac. 154; *Jones v. Kruse*, 138 Cal. 613, 617, 72 Pac. 146.

73. Same—Occupation of building—Acceptance—Possession, etc.—Acceptance and occupation of building can not be regarded as equivalent to or conclusive evidence of completion.—*Jones v. Kruse*, 138 Cal. 613, 616, 72 Pac. 146.

74. Actual possession taken of building by owner does not constitute statutory completion, as such construction would result in absurdity where lien-claimant does his work after occupation by owner takes place. By such construction time to file lien would begin to run before laborer had performed any work upon building.—*Orlandi v. Gray*, 125 Cal. 372, 374, 58 Pac. 15.

75. Provision of statute requiring that occupation, etc., shall in certain cases be deemed conclusive evidence of completion was enacted in interest of and for better protection of lien-claimant.—*Giant Powder Co. v. San Diego Flume Co.*, 88 Cal. 20, 23, 25 Pac. 976.

76. Words of statute, "occupy and use," or "accept" have reference not only to occupation, use, or acceptance of dwelling or other house, but to any kind of structure, building, or improvement in which materials of lien-claimant have been used.—*Giant Powder Co. v. San Diego Flume Co.*, 88 Cal. 20, 23, 25 Pac. 976.

77. Same—Same—Presumption arising from.—Occupation of a building raises presumption of completion of the contract and acceptance by the owner but where the lien-claimants do all their work after the occupation or use by the owner has taken place, or while the owner is occupying or using the building, this occupation or use is not such as to raise a conclusive presumption of completion under the statute so as to govern as to when the time begins to run for the claimants to file their notice of claim and lien.—*Mott v. Wright*, 43 Cal. App. 21, 184 Pac. 517, following doctrine in *Orlandi v. Gray*, 125 Cal. 372, 374, 58 Pac. 15; *Boscut v. Waldman*, 31 Cal. App. 245, 255, 160 Pac. 180.

78. Same—Omission of owner.—Owner can not deprive materialman or laborer of his lien by refusing or omitting to finish building.—*Schwartz v. Knight*, 74 Cal. 432, 434, 16 Pac. 235.

79. Same—Operation of above section can not be restricted in meaning only to make it possible for materialman or laborer to file his claim of lien before actual completion of building, and not to make it nec-

essary to do so. Words, "shall be deemed equivalent to a completion," mean shall be equal in legal effect to completion; that is, shall be treated for purpose of filing lien as an actual completion.—*Kerckhoff-Cuzner Mill & Lumber Co. v. Olmstead*, 85 Cal. 80, 84, 24 Pac. 648.

80. Same—Purpose of owner to complete only in part.—When it is made to appear that it was original purpose of owner to erect building only in part, or if owner having proceeded to erect building in part, abandoned his design to finish the same, the building should be held to be completed within meaning of above section, from time it was so built in part, or so abandoned; and purpose of owner may be inferred from his acts or omission, ultimate fact to be determined in such case being his original or subsequent purpose to leave building unfinished.—*Schwartz v. Knight*, 74 Cal. 432, 434, 16 Pac. 235.

81. Same—Question of fact.—Whether contract has been substantially performed is question of fact which must be determined by trial courts in each instance from facts and circumstances in the case, and findings of trial court upon that point are as conclusive as its findings upon any other fact.—*Harlan v. Stufflebeem*, 87 Cal. 508, 512, 25 Pac. 686.

82. Under the provisions of the mechanics'-lien law, the question as to whether a building has been completed, or is not completed, is one of fact and not a question of law.—*Hammond Lumber Co. v. Yeager*, 185 Cal. 355, 197 Pac. 111.

83. Same—Substantial omissions.—If omissions in construction are so substantial that contractor would not have right of recovery upon his contract he can not enforce lien.—*Marchant v. Hayes*, 117 Cal. 669, 671, 49 Pac. 840; *Blanchi v. Hughes*, 124 Cal. 24, 27, 56 Pac. 610.

84. Question whether omitted portion of building is trivial imperfection, or is substantial failure in its construction, is not to be determined by its relative cost to that of entire building.—*Blanchi v. Hughes*, 124 Cal. 24, 27, 56 Pac. 610.

85. Same—Sufficiency of.—Completion of contract is sufficient for purpose of filing claim of lien where contractor's connection with owner is completed, and owner accepts work done and uses and occupies so far as it is capable of being so used or occupied.—*Glant Powder Co. v. San Diego Flume Co.*, 88 Cal. 20, 25, 25 Pac. 976.

86. Same—"Trivial imperfections" or "omissions"—As to generally.—In the construction of a concrete reservoir at an agreed price of approximately six thousand dollars the omission of five items called for by the specifications of the aggregate cost of approximately sixty-three dollars, is trivial, and can not be deemed to constitute such a lack of completion as to prevent the filing of liens, under the above section.

—*Simmons v. Firth*, 33 Cal. App. 187, 164 Pac. 87.

87. Same—Same—Defects not preventing recovery for substantial performance.—Any such imperfections in the performance of the work of constructing a building which are of so trivial a character as to permit the contractor to recover for substantial performance, notwithstanding the existence of the defects, are "trivial imperfections" within the meaning of the above section.—*Hammond Lumber Co. v. Yeager*, 185 Cal. 355, 197 Pac. 111, following the doctrine in *Rischard v. Miller*, 182 Cal. 351, 188 Pac. 50; *Thomas Harvety Co. v. Jones*, 185 Cal. 285, 197 Pac. 105.

88. Same—Same—Substantial performance—Time for filing lien not delayed.—A "trivial imperfection" in the work of constructing a building, within the meaning of the above section, providing that such imperfection shall not be deemed such a lack of completion as to prevent the filing of a lien, is one of fact to be determined by the trial court under the conditions and circumstances of each case, and the finding of the trial court will not be disturbed when it can not be said that there is no substantial evidence to support it.—*Hammond Lumber Co. v. Yeager*, 185 Cal. 355, 197 Pac. 111, following the doctrine in *Harlan v. Stufflebeem*, 87 Cal. 508, 25 Pac. 686; *Williamette Steam Mills Lumbering & Mfg. Co. v. Los Angeles College Co.*, 94 Cal. 229, 29 Pac. 629; *Blanchi v. Hughes*, 124 Cal. 24, 27, 56 Pac. 611; *Schindler v. Green*, 149 Cal. 752, 755, 87 Pac. 626.

As to the right of a building contractor to recover for a substantial performance, see note 134 Am. St. Rep. 678.

89. Same—Uncertainty as to time of completion.—As to allegation in complaint relating to time of cessation of work being sufficient in absence of special demurrer thereto to admit proof, and support finding of exact date of such cessation, see *San Joaquin Lumber Co. v. Welton*, 115 Cal. 1, 3, 46 Pac. 735, 1057.

90. Construction of section—In general.—As to, see, ante, § 1183, note pars. 135-138.

91. Under the provisions of above section, all claims of liens can be filed. The liens must be after the completion of the building, regardless of whether or not a notice of cessation of labor or of completion of the building is filed as required by the section.—*National Lumber Co. v. Kennedy*, 28 Cal. App. 780, 154 Pac. 25.

92. Where a building has been completed and occupied, it will not be regarded as incomplete merely because a skylight proves defective and has to be remedied.—*National Lumber Co. v. Kennedy*, 28 Cal. App. 780, 154 Pac. 25.

93. Same—As to cessation from labor.—A cessation from labor for thirty days is deemed a completion of the building, and

the effect of the failure of the owner to file and record the notice of cessation does not indefinitely postpone the time within which the claim of liens must be filed within ninety days after the expiration of the thirty-day period.—*Sunset Lumber Co. v. Bachelder*, 167 Cal. 512, Ann. Cas. 1916B, 664, 140 Pac. 35.

94. It is the cessation of work upon the building for which the material was furnished, together with its occupation or use by the owner that sets the time running for the constructive completion of the building under above section as it read in 1909.—*Sunset Lumber Co. v. Bachelder*, 167 Cal. 512, Ann. Cas. 1916B, 664, 140 Pac. 35.

95. A notice of claim of lien for the value of labor and materials furnished under a contract for the alteration and repair of a dwelling-house filed on the fifty-ninth day following the cessation of work under the contract is filed in due time where the cessation of work was by mutual consent of the owner and contractor and was followed by an immediate acceptance of the work.—*Trimlett v. De Coursey*, 28 Cal. App. 90, 151 Pac. 390.

96. **Same—Amendment to section.**—The amendment of the code section gives the materialman or the one who bestows labor the option either to file his claim with reference to the time he ceases to furnish materials or labor, or to wait and take his chances of knowing just when the building is deemed completed—a fact always within the knowledge of the owner and original contractor, but not of the materialman and laborer.—*Yost v. Roux*, 27 Cal. App. 307, 149 Pac. 781.

97. Under above section as amended in 1911, a materialman may file his claim of lien within thirty days after he has "ceased to furnish materials," and the owner of the building can not cut off such statutory right by taking possession of the building and treating it as completed, while the materials are still being furnished.—*Yost v. Roux*, 27 Cal. App. 307, 149 Pac. 781.

98. **Same—Filing notice of completion.**—The filing of a notice of completion is declared by above section to be "equivalent to a completion for all the purposes of this chapter," and such declaration, when read in connection with this language preceding it, must be understood to mean that the filing of such notice of completion is not mandatory, but "completion of the original contract" previously mentioned as the thing which starts running the thirty-day period, and that a claim of lien by a materialman or laborer, if filed within thirty days after the filing of such notice, will be deemed to be within the time prescribed, whether within thirty days after the actual completion or not.—*Hughes Mfg. & Lumber Co. v. Hathaway*, 174 Cal. 44, 161 Pac. 1158.

99. Where no notice of completion is filed, the claimant is only required to see that his claim is filed before the expiration

of the period of ninety days after the completion of the building; that is, of the building, as a whole, as provided in the last clause of such section.—*Hughes Mfg. & Lumber Co. v. Hathaway*, 174 Cal. 44, 161 Pac. 1159.

100. **Same—Failure to file notice of occupancy.**—The owner of the building is estopped from claiming that the lien of a claimant other than the original contractor was not filed within thirty days after occupation of the building, where no notice of such occupancy was filed. The requirement of the filing of notice of completion required applies as well to the statutory completion of the building by occupation, acceptance, or cessation of labor as to the actual completion.—*Bosch v. Waldmann*, 31 Cal. App. 245, 160 Pac. 180.

101. **Same—Notice of claim—Time of filing.**—Under the provisions of above section a claim of lien for materials furnished in the construction of a building, filed within thirty days after the filing of notice of completion of the building, is in time.—*Hughes Mfg. & Lumber Co. v. Hathaway*, 174 Cal. 44, 161 Pac. 1159.

102. **Same—Same—Validity of.**—A full and literal compliance with the statute as to the statement in the notice "of the terms, time given and conditions of his contract" would require a statement that the price to be paid was the current or market rate at the time for the labor and materials. But where this was in fact what was claimed and what was understood by the parties, and would be implied as the contract in the absence of a specific agreement otherwise, an omission so to state under the circumstances will not be held to be fatal to the validity of the notice.—*Olson-Mahoney Lumber Co. v. Dunne Inv. Co.*, 30 Cal. App. 332, 159 Pac. 178.

103. **Same—Purpose of section.**—Clearly, the purpose was to give to persons interested notice of the completion of the work in order that they might in due time file their claims of lien. Filing the notice of completion is the equivalent of the failure to file; it extends the time for filing claims of lien for a period of ninety days after the actual completion of the work. The legislature deemed such a period ample time for otherwise obtaining information as to the time of completion. The provision that "all claims of lien must be filed within ninety days after the completion of any building" could serve no purpose other than to terminate the time within which the claim of lien might be filed. Such is the plain import of the language used.—*National Lumber Co. v. Kennedy*, 28 Cal. App. 780, 154 Pac. 25.

104. **Same—Statute remedial.**—Statute is remedial, adopted in obedience to constitution (article XX, § 15), and is to be liberally construed in furtherance of purposes for which it was authorized.—*Corbett v. Chambers*, 109 Cal. 178, 184, 41 Pac. 873.

105. Credit—Giving of for longer period than prescribed by statute does not affect time within which notice of lien must be filed.—*Knowles v. Baldwin*, 125 Cal. 224, 226, 57 Pac. 988.

106. "Demand"—Definition of term.—Word "demand" does not mean an itemized account.—*Jewell v. McKay*, 82 Cal. 144, 151, 23 Pac. 139. See *Brennan v. Swasey*, 16 Cal. 141, 76 Am. Dec. 507.

107. Distinction exists—Between original contractor and materialmen or subcontractors in that the former has direct lien upon real estate of owner to full extent of amount due him, based upon personal liability of owner to him, while the latter have but a lien in the nature of an attachment against money in hands of owners and due to contractor.—*Kellogg v. Howes*, 81 Cal. 170, 172, 6 L. R. A. 588, 22 Pac. 509. See *Greig v. Riordan*, 99 Cal. 316, 319, 33 Pac. 913.

108. Duration of lien—Recorded liens bind building only ninety days unless in meantime suit shall be brought to foreclose them.—*Goss v. Strelitz*, 54 Cal. 640, 643.

As to time of continuance of lien, see, post, § 1190 and note.

109. Elevator as part of structure.—When building to be erected is of large size, costing quarter of million dollars, and different contracts were let by owner for construction of various portions of it, and, among these, was contract for completion of an elevator, held that elevator was substantial and necessary part of building, and until elevator was completed and placed in position it could not be said that building was completed.—*Coss v. MacDonough*, 111 Cal. 662, 666, 44 Pac. 325.

110. Failure to comply with law—Liability of owner.—Under the provisions of the above section an owner of a building who has failed to comply with the provisions of the mechanics'-lien law, may be required to respond to a lien-claimant which, when added to the other payments made, will exceed the total contract-price of the building.—*Schultheiss Bros. Co. v. Hunziker*, 42 Cal. App. 73, 183 Pac. 347, following doctrine in *Roystone v. Darling*, 171 Cal. 526, 154 Pac. 115.

111. Failure to file within time—Want of valid lien.—Where a contractor, after entering into an agreement with the owner for the acceptance of the work contracted to be done and the elimination from the contract of certain unfinished work, did not file his notice of lien either within the time limited after the notice of completion, or in the time limited after the actual completion of the original contract with such unfinished work eliminated, no valid lien was created under the provisions of the above section.—*Pacific Mfg. Co. v. Rasmussen*, 42 Cal. App. 742, 184 Pac. 54.

112. Filing lien—As to whether prerequisite to suit on contractor's bond.—In the case of a building-contract in which the contractor executes the bond provided for in section 1183, ante, the filing of lien-claims under the provisions of the above section are not an essential prerequisite to an action on the bond of the contractor by laborers, materialmen, and other lien-claimants.—*General Electric Co. v. American Bonding Co.*, 180 Cal. 675, 182 Pac. 444, approving doctrine in *Richardson & Fisher Co. v. Chicago Bonding & Surety Co.*, 35 Cal. App. 650, 170 Pac. 856; *Hubbard v. Jurian*, 35 Cal. App. 757, 170 Pac. 1093; *Crane Co. v. Maryland Casualty Co.*, 37 Cal. App. 87, 173 Pac. 494.

113. Foreclosure of liens—Completion of contract—Finding—Evidence.—In an action to foreclose contractor's liens against leasehold interest under contract let by sublessee, proper changes in the leased premises, and who employed certain persons to perform the plumbing, electrical wiring, and painting; but there was no definite price agreed upon, nor any plan adopted for the contemplated changes, the work being laid out from day to day as it progressed, and such persons employed to do the work following the instructions given to them from time to time by such sublessees or by the superintending contractor, as to the manner of its performance testimony of the plaintiffs that all the work which the sublessee had required from them had been performed prior to his death is sufficient to sustain a finding that the contracts of the lien-claimants were completed on the date of such death.—*Perazzi v. Doe Estate Co.*, 40 Cal. App. 607, 181 Pac. 398.

114. In such an action evidence that the employees of such plaintiff-claimants were working on the premises at the time of the death of such sublessee, and that all the changes contemplated had not then been made, but were completed at a later date, is held not, under the circumstances, necessarily inconsistent with the findings that the contracts of the plaintiff-claimants were completed on the date of the death of the sublessee.—*Perazzi v. Doe Estate Co.*, 40 Cal. App. 607, 181 Pac. 398.

115. Frivolous objections to claim and verification.—Objections to verification of claim stating "that facts stated therein are true," instead of stating that claim is true, as well as objection that party was owner of "premises," instead of stating that he was owner of "building," held to be frivolous.—*Corbett v. Chambers*, 109 Cal. 178, 185, 41 Pac. 873.

As to forfeiture of lien for violating of provisions of section 1202, see post, § 1202 and note.

As to word "improvement," construction of, see, ante, § 1183 and note par. 310.

116. Interest—May be allowed upon claims of lienors from commencement of

several actions to foreclose liens.—Pacific Mut. Life Ins. Co. v. Fisher, 106 Cal. 224, 233, 39 Pac. 758. See *Md. Trustees etc. v. Heise*, 44 Md. 453, 472. *Mass. Johnson v. Boudry*, 116 Mass. 196. *Oreg. Willamette Falls T. & M. Co. v. Riley*, 1 Oreg. 183.

As to interest on lien-claims, see, ante, § 1183, note pars. 268-270, 311, 312.

117. Judgment—Certainty.—Decree is not unintelligible and incapable of being executed by sheriff because it is not stated which of defendants shall pay amount found due to plaintiffs, where there is no personal judgment against any of defendants, but judgment is that plaintiffs have valid lien upon property and that sheriff sell same and from proceeds of sale pay plaintiffs sums due them, stating such sums.—*Neihaus v. Morgan*, 5 Cal. Unrep. 391, 45 Pac. 255, 257.

118. Same—On demurrer.—Judgment on demurrer in action to foreclose laborer's lien is proper where it appears from complaint that notice of lien was not filed within either thirty or sixty days from termination of employment.—*Welthoff v. Murray*, 76 Cal. 508, 510, 18 Pac. 435.

119. Legal relations—Between owner, contractor, and subcontractor.—No privity of contract exists between owner of building and subcontractor, but subcontractor's rights are based simply upon his contract made with contractor. The contractor, and not owner of building, is subcontractor's debtor, and subcontractor has no right to claim that building has been completed until contractor under whom he claims has such right.—*Roylance v. San Luis Hotel Co.*, 74 Cal. 273, 277, 20 Pac. 573. See *Davis v. Bullard*, 32 Kan. 234, 4 Pac. 75; decided under similar statute.

120. Marshaling of liens.—Purpose of legislature is that rights of subcontractors and materialmen should be ascertained by reference to liens as filed, or shall rest upon proofs of contracts between them and original contractor, such as accord with terms and conditions set forth in claims of lien. Statute does not attempt to create privity between such subcontractors or materialmen and owner, by which latter shall become personally indebted to former; it is liens which are to be marshaled and their relative rank declared.—*Goss v. Strellitz*, 54 Cal. 640, 643.

121. Materialmen—As such, are not original contractors within meaning of above section.—*Hinckley v. Field's Biscuit & Cracker Co.*, 91 Cal. 136, 140, 27 Pac. 594.

122. Same—Furnishing materials directly to owner, is not original contractor in sense of statute, for reason that there can be no subcontractor or intervening lienor, and consequently he must file his claim of lien within thirty days after completion of building.—*Sparks v. Butte Consol. Gold Min. Co.*, 55 Cal. 389; *Schwartz v. Knight*, 74 Cal.

432, 16 Pac. 235; *Pacific Mut. Life Ins. Co. v. Fisher*, 106 Cal. 224, 233, 39 Pac. 758.

123. Same—Must file lien within time prescribed.—Under the provisions of the above section, as amended in 1911, a materialman's claim must be filed in the recorder's office within the time required, otherwise he can not enforce his rights to a lien.—*L. W. Blinn Lumber Co. v. American Cement Producers Co.*, — Cal. App. —, 197 Pac. 142, following the doctrine in *Irwin v. Silva*, 40 Cal. App. 135, 145, 180 Pac. 361; *Ferger v. Greatheart*, 44 Cal. App. 245, 186 Pac. 376.

124. Measure of damage—In case of valid contract that fixes liability of owner on completion is the contract-price, but where contractor fails to perform his contract, owner's liability is to be determined under § 1202, post.—*McDonald v. Hayes*, 132 Cal. 490, 495, 64 Pac. 850. See *Walsh v. McMenomy*, 74 Cal. 356, 359, 16 Pac. 17; *Kellogg v. Howes*, 81 Cal. 175, 177, 6 L. R. A. 538, 22 Pac. 509; *Greig v. Riordan*, 99 Cal. 316, 319, 33 Pac. 913.

125. "Mining claim" and "mining location"—Are identical and the two designations may be indiscriminately used to denote same thing.—*Castagnetto v. Copper-town Min. & Smelt. Co.*, 146 Cal. 329, 333, 80 Pac. 74. See *Smelting Co. v. Kemp*, 104 U. S. 636, 649, 26 L. ed. 875.

126. Same—Mining claim may stand in place of word "structure" as property to be charged with lien and may be described as such in notice and claim of lien under above section.—*Williams v. Mountaineer Gold Min. Co.*, 102 Cal. 134, 140, 34 Pac. 702, 36 Pac. 388.

127. Same—Work on mine—Provision as to completion.—Language of statute upon subject of completion is not strictly applicable to case where work is continuous in its nature, as upon mine, and in such case where time is not definitely fixed by statute it is only necessary that claim be filed within reasonable time.—*California Powder Works v. Blue Tent Consol. Hydraulic Gold Mines*, 3 Cal. Unrep. 145, 22 Pac. 391, 393.

As to contract not payable in money, and exception as to original contractor, see, ante, § 1184 and note.

128. Mine superintendent—Claim of salary.—The superintendent of an oil-mining company is not entitled to a lien for his claim for unpaid salary, for the reason that such claim does not come within the purview of the above section, providing for the filing of claims of lien.—*McCreary v. Toronto Midway Oil Co., Ltd.*, 38 Cal. App. 17, 175 Pac. 87, approving doctrine in *Durkheimer v. Copper Opolis Copper Company*, 55 Oreg. 37, 114 Pac. 895.

129. Nature of lien.—Claim of lien is not an instrument in nature of written contract to be reformed by court of equity in appropriate cases. It is rather a prerequisite to maintenance of proceedings which gives plaintiff an extraordinary remedy, to secure benefit of which he must comply

with terms on which statute extends to him statutory relief.—*Goss v. Strelitz*, 54 Cal. 640, 644.

130. Nonsuit—Should be granted when there is fatal variance between evidence and statement in complaint as to claim of lien.—*Wagner v. Hansen*, 103 Cal. 104, 107, 37 Pac. 195.

131. Notice of completion—Delayed filing of claim—Defense—Estoppel—Pleading and proof.—In an action to foreclose a mechanics' lien the notice of claim of which was filed more than sixty days, but less than ninety days, after the completion of the work, where the plaintiff-claimant relies upon the failure of the defendant to file the notice of completion provided for in the above section, the burden is upon him to plead and prove the facts constituting an estoppel of the defendant to set up the defense that the claim of lien was not filed in time.—*Greeley v. Noble*, 40 Cal. App. 628, 181 Pac. 666.

132. Same—Error in date—Want of injury.—A lien-claimant under the provisions of the above section, who neither files his notice of claim within thirty days of the date of completion as stated in the notice of completion filed by the owner nor within thirty days from the date on which such notice is filed, where the latter date is found by the court to have been the actual date of completion, is not injured by the fact that the notice filed by the owner contains a misstatement as to the date of completion.—*Pacific Mfg. Co. v. Rasmussen*, 42 Cal. App. 742, 184 Pac. 54.

133. Same—Failure to file—Pleading and proof.—In an action to foreclose a mechanics' lien which was not filed within sixty days from the completion of the contract, the burden of alleging and proving the failure of the owner to file the notice of completion required by the provisions of the above section is upon the plaintiff-claimants.—*Perazzi v. Doe Estate Co.*, 40 Cal. App. 607, 181 Pac. 398, following doctrine in *Greeley v. Noble*, 40 Cal. App. 628, 181 Pac. 666.

134. Same—Same—Time for original contractor to file claim.—Where the owner under a building-contract, with knowledge that improvements are being made on his property, although he is not a party to the contract therefor, fails to file a notice of completion, a claim of lien by an original contractor filed after the expiration of sixty-day period but within ninety days after completion, is within time.—*Krenwinkel v. Henne*, 42 Cal. App. 580, 183 Pac. 957.

135. Same—Filing by owner—Released contractor and sureties.—In the case of a building-contract in which the owner, with full knowledge of the facts in the premises, files with the recorder a notice of completion this will have the effect to release the contractor and his sureties from obligations for any portion of the work

actually remaining uncompleted, under the terms of the contract.—*Summers v. L. F. S. Syndicate*, — Cal. App. —, 189 Pac. 286, following doctrine in *Sirch E. & T. Laboratories v. Garbutt*, 113 Cal. App. 435, 110 Pac. 140; *Mannix v. Wilson*, 18 Cal. App. 595, 601, 123 Pac. 981, 983.

136. Same—Same—Reservation as to latent defects—Effect of.—In those cases in which the owner files a notice of completion under the provisions of the above section, with a special reservation as to latent and unknown defects, and it appears that there were defects some of which at least were not apparent at the time when the notice of completion was filed, this would be sufficient to take the cause out of the general rule stated in the preceding paragraph, and would not constitute an acceptance by the owner.—*Summers v. L. F. S. Syndicate*, — Cal. App. —, 189 Pac. 286.

137. Notice of lien—Complaint to foreclose—Variance fatal.—In an action to foreclose a mechanics' lien in which the notice of lien filed sets forth two separate and distinct contracts under and in accordance with which plaintiff, as therein stated, performed work and labor in superintending the installation of plumbing fixtures in a building which defendant, as owner, was constructing, and in the complaint each of these contracts is made the subject of a separate cause of action and in the first count thereof alleged that "defendant, through his duly authorized agent made a contract with plaintiff to superintend the installation of all rough plumbing and plumbing proper in building of the defendant . . . at all times during its construction and until completion" which "said plumbing is and shall be known and referred to herein as the original contract work," stating that the building is a laundry building, and, in addition to the plumbing and pipe-fitting aforesaid (that is, the "rough plumbing and plumbing proper"), has installed in it plumbing fixtures, supply and waste pipes; system of piping to and from laundry machinery for hot and cold water; for treated and untreated water; high and low pressure steam-lines; gas, oil, and compressed air-lines; a vacuum-cleaner system and a sprinkling system, all of which was to be put in and was actually put in and installed in said building of defendant and used by him as and for a laundry; and alleging promise of defendant to pay for said work as superintendent of the installation of said plumbing proper as aforesaid only, being the original contract work in the building, a designated sum, a portion of which has been paid and such allegation sets forth a different contract from the contract set forth in the notice of lien with great particularity and detail, the variance will be fatal in so far as the work alleged in the complaint to have been done which was called for in the notice of lien filed was extra work over and above that called for, and there can be

no recovery for such extra work.—*Finn v. Diamond Laundry Co.*, — Cal. App. —, 198 Pac. 657, following doctrine in *Santa Monica Lumber & Mill Co. v. Hege*, 119 Cal. 376, 51 Pac. 555.

As to notice of claim of lien and sufficiency of generally, see pars. 137, 138, this note.

138. Same—Terms of payment—Variance—Fatal when.—A notice of lien of a materialman stating that "payments shall be made on or before thirty days from deliveries" is insufficient where the statement in the proposal which resulted in the contract was that the materials were "subject to two per cent cash discount, payments to be made on or before the tenth of the month following delivery."—*Schultheiss Bros. Co. v. Hunziker*, 42 Cal. App. 73, 183 Pac. 347, approving the doctrine in *California Cement Co. v. Wentworth Hotel Co.*, 16 Cal. App. 713, 118 Pac. 103, 113.

139. "Original contractor"—Meaning of term.—Unless person who works for materialman upon materials which he furnishes to owner would have lien upon building in construction of which they were used, for value of labor, he is not original contractor within meaning of that word as used in code.—*Sparks v. Butte Gold Min. Co.*, 55 Cal. 389, 392.

140. Ownership.—There is no limitation upon term "owner," as used in above section, nor does it refer to owner with whom contract for improvement was made, or to owner at any other time than at day of filing claim.—*Corbett v. Chambers*, 109 Cal. 178, 180, 41 Pac. 873.

141. Same—Reputed owner—Lienholder who in good faith files lien giving name of reputed owner shall not lose his lien if he shall afterward ascertain that some other person is owner.—*Corbett v. Chambers*, 109 Cal. 178, 179, 184, 41 Pac. 873; *Santa Cruz Rock Paving Co. v. Lyons*, 133 Cal. 114, 119, 65 Pac. 329.

142. Same—The same person may be both owner and reputed owner, and statement that name is name of owner is none less positive because it is also declared to be name of reputed owner.—*Arata v. Tellurium Gold & S. Min. Co.*, 65 Cal. 340, 341, 4 Pac. 195.

143. Preliminary work—Claim of lien for—When to be filed.—In a case in which a laborer performs work in the nature of preparatory work in clearing and grading a lot so as to put the lot in condition for the execution of a contract for the erection of an apartment house, such labor is not labor under the contract for the erection of the apartment house and such laborer not having been paid, who does not file his notice of claim until sixty days after the completion of the building, does not file the claim within the time, if he ever had the right to claim a lien; if such right to lien exists at all, which is very doubtful, the C. C. P.—166

claim should be filed within sixty days after the completion of the preparatory labor, according to the provisions of the above section.—*Fly v. Cline*, — Cal. App. —, 193 Pac. 615.

144. Personal judgment—May be entered in favor of lien-claimant for amount due him, although his lien be invalid.—*Ascha v. Flitch*, 5 Cal. Unrep. 486, 46 Pac. 298. See *Lacore v. Leonard*, 45 Cal. 394; *Morris v. Wilson*, 97 Cal. 644, 32 Pac. 801.

145. Personal judgment entered in favor of claimants by decision of court in which lien was denied because claim was prematurely filed is only proper judgment under circumstances.—*Marchant v. Hayes*, 120 Cal. 137, 139, 52 Pac. 154.

146. Same—Materialman held not entitled to personal judgment against owners of building for value of lumber furnished to contractors and used in building.—*Santa Clara Valley Mill & Lumber Co. v. Williams*, 3 Cal. Unrep. 700, 31 Pac. 1128, 1129.

147. Pleading—Answer—Denial on information and belief in answer as to claim of lien is sufficient to raise issue as to alleged claim of lien, even though claim was recorded in office of county recorder, but where inspection of paper showed that it was inartificially drawn, and not in language of complaint, and question arose as to whether or not it was sufficient to meet requirement of statute to create lien.—*Hagman v. Williams*, 88 Cal. 146, 150, 25 Pac. 1111.

148. Compare: *Humphrey v. McCall*, 9 Cal. 59; *Loveland v. Garner*, 74 Cal. 298, 15 Pac. 844, holding that where facts are alleged in verified complaint which are presumptively within knowledge of defendant, he is not permitted to deny them upon information and belief, but must answer positively.

149. Same—Complaint in action to enforce lien.—Claimant in action to enforce lien must state in his complaint all facts essential to recovery and show that person with whom he dealt had authority from owner, either express or implied, to create lien upon his property.—*Corbett v. Chambers*, 109 Cal. 178, 183, 41 Pac. 873.

150. Complaint which fails to set forth plans and specifications of original contract in regard to portion of work provided for in contract is sufficient as against general demurrer.—*Slight v. Patton*, 96 Cal. 384, 388, 31 Pac. 248. See *Jewell v. McKay*, 82 Cal. 144, 146, 23 Pac. 139.

151. Premature filing of claim—No lien raised.—Claim filed before completion of building is prematurely filed and lien based thereon can not be enforced.—*Perry v. Brainard*, 2 Cal. Unrep. 591, 8 Pac. 882.

152. Filing of claim before completion of building is premature and confers no right.—*Roylance v. San Luis Hotel Co.*, 74 Cal. 273, 276, 20 Pac. 573; *Willamette Steam Mill*

Lumber & Mfg. Co. v. Los Angeles College Co., 94 Cal. 229, 237, 29 Pac. 629.

153. Under statute, claim must be filed after completion of contract or building, filing before completion being held of no effect.—*French v. Powell*, 135 Cal. 636, 640, 68 Pac. 92. See *Roylance v. San Luis Hotel Co.*, 74 Cal. 273, 278, 20 Pac. 573; *Willamette Steam Mill Lumber & Mfg. Co. v. Los Angeles College Co.*, 94 Cal. 229, 29 Pac. 629.

154. **Property affected—Lien must cover entire structure**, although work entitling to lien was bestowed only upon part of structure.—*Williams v. Mountaineer G. M. Co.*, 102 Cal. 134, 140, 34 Pac. 702, 36 Pac. 388. See *Dickenson v. Bolger*, 55 Cal. 285; *Helm v. Chapman*, 66 Cal. 291, 5 Pac. 352; *Silvester v. Coe Quartz Min. Co.*, 80 Cal. 510, 22 Pac. 217; *Farmers' Loan & T. Co. v. Candler*, 87 Ga. 241, 13 S. E. 560; *Midland R. Co. v. Wilcox*, 122 Ind. 84, 23 N. E. 506.

155. **Railroad—In more than one county—Recording lien**.—Statute does not require nor have courts power to amend statute by requiring filing of lien in every county where any part of property is situated upon which lien is asserted.—*Brigham v. Knox*, 127 Cal. 40, 44, 59 Pac. 198.

156. **Reformation of claim of lien—Not permissible**.—Notice of lien is an instrument not susceptible of reformation; therefore monuments and lines by which property is said in notice to be "properly described" can not be expunged from notice, but must be read as part of it.—*Fernandez v. Burleson*, 110 Cal. 164, 167, 52 Am. St. Rep. 75, 42 Pac. 566. See *Wagner v. Hansen*, 103 Cal. 104, 107, 37 Pac. 195.

157. **Schoolhouse, building—Contractor's bond—Liens of laborers and materialmen—Filing claims of lien—Sufficiency**.—The statute under which the bond of a contractor erecting a schoolhouse requiring that verified claims be filed with the board of education within ninety days from the "completion of the contract," and not from the completion of the building or structure where the contractor abandoned his work and work upon the building thereafter ceased for more than thirty days, before the board of education took up and completed the work and finished the building and claims of laborers and materialmen were filed within ninety days thereafter with the board of education as in the statute provided they were filed within time, the provisions of the above section, by its express terms being confined to the matter provided for in the code alone with relation to mechanics' liens and the thirty days therein specified are not applicable in a contract under the statute in accordance with the terms of which the contractor's bond was given; the words "completion of the contract" in the statute should be given their ordinary acceptation; the contract was completed when the building was finished in accordance with the terms of the contract, regardless of whether the work was done

by the contractor or by the board of education, and under the terms of the statute claims filed within ninety days after such completion were filed within time.—*Nelson v. Trounce*, 184 Cal. 732, 195 Pac. 393.

158. **Service of notice**.—Provision as to serving notice upon reputed owner by materialman or other creditor is not applicable where, under valid contract for contract-price exceeding one thousand dollars, owner makes premature payments. In such case declaration of statute that such payments shall be deemed as not made and shall be applicable to such liens, etc., is to be given effect.—*Ganahl v. Weir*, 130 Cal. 237, 239, 62 Pac. 512.

159. **Subcontractor**.—Amount of claims of subcontractors can be ascertained only after all work and materials have been furnished and after building has been completed so far as contractor is required to complete same.—*Roylance v. San Luis Hotel Co.*, 74 Cal. 273, 278, 20 Pac. 573. See *Davis v. Bullard*, 32 Kan. 234, 4 Pac. 75, decided under similar statute.

160. **Sufficiency of claim of lien—Allegations and requisites**.—As to generally, see par. 85, this note.

161. **Time of filing claim of lien—Commences to run when, and sufficiency of filing**.—As to generally, see par. 161, this note.

162. **"Trivial imperfections"—Meaning of term**.—The term "trivial imperfections" refers to imperfect and deficient performance of work upon a building which is claimed to have been completed, not to case in which building is admittedly incomplete and workmen are still engaged in constructing substantial portions thereof.—*Bianchi v. Hughes*, 124 Cal. 24, 27, 56 Pac. 610. See *Santa Monica Lumber & Mill Co. v. Hege*, 119 Cal. 376, 379, 51 Pac. 555.

163. The phrase "trivial imperfections," as found in the code, relates to question as to whether or not there has been actual completion of building.—*Marble Lime Co. v. Lordsburg Hotel Co.*, 96 Cal. 332, 336, 31 Pac. 164; *Bianchi v. Hughes*, 124 Cal. 24, 27, 56 Pac. 610.

164. In a case in which a contractor agreed to excavate a cellar, and to erect walls of concrete, with steps to the street, upon which claimant did work for the contractor, the work being accepted by the owner on July 26, but in August employed a carpenter to place a frame in the cellar doorway where the steps led to the street, and at the same time requested claimant to fill a small hole outside of the cellar; the lack of this additional work was held to be a "trivial imperfection" within the meaning of the code, and that the filing of claim of lien on August 29 was not within the thirty days required by statute.—*Lipfert v. Lasar*, 4 Cal. Unrep. 74, 33 Pac. 797.

165. **Same—Question of fact**.—Trivial imperfection is question of fact in each

instance.—Willamette Steam Mill Lumber & Mfg. Co. v. Los Angeles College Co., 94 Cal. 229, 238, 29 Pac. 629.

166. What constitutes "trivial imperfections" is question of fact in each instance.—Willamette Steam Mill Lumber & Mfg. Co. v. Los Angeles College Co., 94 Cal. 229, 238, 29 Pac. 629; *Blanchi v. Hughes*, 124 Cal. 24, 27, 56 Pac. 610.

167. Same — Same — Alterations made after construction of house, held trivial in comparison with cost of construction of house, see *Santa Clara Valley Mill & Lumber Co. v. Williams*, 3 Cal. Unrep. 700, 31 Pac. 1128, 1129.

168. Variance between contract and claim of lien—As to generally.—Where court found that claim of lien set forth in contract was to deliver materials at reasonable market rates, but that contract was an express one, to wit, to deliver materials at specific rate, held that this was fatal variance and prevented recovery by materialman.—*Buell & Co. v. Brown*, 131 Cal. 158, 162, 63 Pac. 167.

169. Same.—Claim of lien must contain a true statement of the facts required by the statute, and unless so stated the variance is fatal; but a variance between the pleading and proof is not material, unless the adverse party has been thereby misled to his prejudice.—*Acme Lumber Co. v. Wessling*, 19 Cal. App. 406, 126 Pac. 167.

170. Same.—Same.—Agreement as to price.—Statement of express agreement as to price in the notice and complaint and showing in evidence that there was no agreement to pay any definite amount is not such a variance as will defeat the action.—*Lucas v. Rea*, 10 Cal. App. 641, 646, 101 Pac. 537; *Lucas v. Gobbi*, 10 Cal. App. 648, 652, 103 Pac. 157.

171. Same — Same — Between notice of lien and proof.—Where the claim for lien alleged that payment for the materials furnished was to be made upon delivery, proof that payment was to be made on the 10th of each month was held a fatal variance.—*California Portland Cement Co. v. Wentworth Hotel Co.*, 16 Cal. App. 713, 118 Pac. 103.

172. Same — Complaint upon quantum meruit.—Where notice of lien stated an employment at fixed rate of compensation, and complaint proceeded upon quantum meruit, it is held to be such variance as to preclude recovery.—*Malone v. Big Flat Gold Min. Co.*, 76 Cal. 578, 581, 18 Pac. 772; *Santa Monica L. M. Co. v. Hege*, 119 Cal. 376, 380, 51 Pac. 555. See *Reed v. Norton*, 90 Cal. 590, 26 Pac. 767, 27 Pac. 426; *Wagner v. Hansen*, 103 Cal. 104, 37 Pac. 195.

173. Same.—Immateriality of.—In an action to foreclose a mechanics' lien, the fact that the evidence disclosed that the building was constructed for an agreed price, while the claim of lien stated that the work

performed and material supplied was to be paid for on the basis of their reasonable value, it was held that this did not constitute a variance, inasmuch as the evidence showed that the prices charged were the prevailing market prices at the time the labor was performed and the material furnished.—*Acme Lumber Co. v. Wessling*, 19 Cal. App. 406, 126 Pac. 167.

174. In an action to foreclose a mechanics' lien, where the complaint proceeded upon the theory that the claim of lien was founded upon a single contract, while the evidence showed that in fact the lien was founded upon several separate contracts, it was held that the variance was not material, inasmuch as the defendant was not prejudiced thereby, and was not thereby prevented from availing himself of any defense he may have had to the action.—*Acme Lumber Co. v. Wessling*, 19 Cal. App. 406, 126 Pac. 167.

175. Where, in an action to enforce a mechanics' lien, the several items are founded upon the statement of an agreed price for the materials furnished, while the evidence shows, in some instances, that no price was agreed upon, yet the evidence shows that the alleged agreed price of the materials furnished in every instance was a reasonable value thereof, the statement of the terms of the several contracts as set forth in the several classes of liens was substantially correct, and the variance, if any, must be held to be immaterial.—*Blanck v. Commonwealth Amusement Corp.*, 19 Cal. App. 720, 127 Pac. 805, 808.

176. Same — Notice — Requirement of proof.—When notice states that terms, time, or conditions were agreed upon, then proof must come up to statement.—*Reed v. Norton*, 90 Cal. 590, 597, 26 Pac. 767, 27 Pac. 426.

177. Verbal contract.—Fact that contract is verbal and not recorded does not relieve claimant from compliance with provision of this section.—*Madera Flume & Trading Co. v. Kendall*, 120 Cal. 182, 184, 65 Am. St. Rep. 117, 52 Pac. 304. See *Wood v. Wrede*, 46 Cal. 637; *Phelps v. Maxwell's Mill Co.*, 49 Cal. 336; *Davis v. MacDonough*, 109 Cal. 547, 550, 42 Pac. 450.

As to vendor's lien, in general, see *Kerr's Cyc. Civ. Code*, 2d ed., §§ 3046, 3047 and notes.

178. Verification of claim.—Statute does not require that verification shall be in form like that attached to pleading. Affidavit attached to each claim that same "is true" is sufficient, and omission to state "of affiant's own knowledge" is not defect.—*Arata v. Tellurium Gold & S. Min. Co.*, 65 Cal. 340, 342, 4 Pac. 195.

179. Same.—By attorney.—Where attorney verified claim and states "that as such attorney he has knowledge of the facts" and makes affidavit for claimant on account of his absence from state, this is sufficient.

—Jones v. Kruse, 138 Cal. 613, 617, 72 Pac. 146.

As to complaint in action upon lien not required to be verified, see, ante, § 1183 and note par. 556.

180. Void contract—In general.—If contract is wholly void, there is neither "contract" nor "original contractor," and in such case every person claiming lien must file his claim within thirty days after completion of building, as he is required to do whenever he makes direct contract with owner in person.—Sparks v. Butte Consol.

Gold Min. Co., 55 Cal. 389, 392; Schwartz v. Knight, 74 Cal. 432, 434, 16 Pac. 235; Willamette Steam Mill Lumber & Mfg. Co. v. Los Angeles College Co., 94 Cal. 229, 237, 29 Pac. 629.

181. Same—Materialman has lien for materials under statute, though contract is void for non-compliance with statute. In such case statute and not contract measures extent of recovery.—Giant Powder Co. v. San Diego Flume Co., 97 Cal. 263, 266, 32 Pac. 172. See Kellogg v. Howes, 81 Cal. 170, 6 L. R. A. 588, 22 Pac. 509.

See, ante, § 1183 and note.

§ 1188. LIENS UPON TWO OR MORE PIECES OF PROPERTY. AMOUNT DUE FROM EACH TO BE DESIGNATED. In every case in which one claim is filed against two or more buildings, mining claims, or other improvements owned by the same person, the person filing such claim must at the same time, designate the amount due to him on each of such buildings, mining claims, or other improvements; otherwise the lien of such claim is postponed to other liens. The lien of such claimant does not extend beyond the amount designated, as against other creditors having liens, by judgment, mortgage, or otherwise, upon either of such buildings or other improvements, or upon the land upon which the same are situated.

History: Enacted March 11, 1872.

MECHANICS' LIEN—UPON TWO OR MORE PIECES OF PROPERTY.

1. Construction—Application of section.
2. Same—Statement of separate amounts.
3. Grading streets—Does not constitute "improvements."
4. Mining locations—Consolidation of.
5. Same—Description of mine by name.
6. Substantial compliance—As to what constitutes.
7. Two houses built on same lot.
8. Trust-deed—Constitutes lien upon property within section.

1. Construction of section—As to application.—This section applies only to cases in which one claim is filed against two or more separate and distinct "buildings, mining claims, or other improvements owned by same person," and not to case where all of work was performed upon one and same piece of property, although upon different portions of it.—Dickenson v. Bolyer, 55 Cal. 285, 286.

2. Same—Statement of separate amounts.—While this section requires claimant who files lien against two or more buildings or other improvements to designate specific amount for which he claims lien upon each of such improvements, it does not require him to make such distinction unless there is in fact specific amount due to him on each of such improvements.—Warren v. Hopkins, 110 Cal. 506, 510, 511, 42 Pac. 986; Southern Cal. Lumber Co. v. Peters, 3 Cal. App. 478, 86 Pac. 816.

3. Grading streets—Does not constitute "improvements" to different blocks as contemplated in this section and for which separate liens are authorized.—Warren v. Hopkins, 110 Cal. 506, 511, 42 Pac. 986.

4. Mining locations—Consolidation of.—Two or more mining locations, where consolidated into one claim, and therefore treated and worked as one claim, do not constitute different locations or claims within meaning of this section.—Tredinnick v. Red Cloud Gold Min. Co., 72 Cal. 78, 84, 13 Pac. 152.

5. Same—Description of mine by name is sufficient for identification of property, where it appears from evidence that property was well known by name given to it.—Tredinnick v. Red Cloud Gold Min. Co., 72 Cal. 78, 81, 13 Pac. 152. See Hotelling v. Cronise, 2 Cal. 60, 63; Tibbetts v. Moore, 23 Cal. 208, 212; Haley v. Amestoy, 44 Cal. 132.

6. Substantial compliance—As to what constitutes.—Claims substantially comply with requirements of statute, as to statement of terms, time given, and conditions of contract, which set forth the kind and number of days of labor performed, with dates between which it was performed, price agreed to be paid for labor per day, with aggregate amount then due, and stating "that terms of payment for said labor were cash as soon as such labor was performed."—Tredinnick v. Red Cloud Gold Min. Co., 72 Cal. 78, 80, 13 Pac. 152. See Blackman v. Marsicano, 61 Cal. 638; Hills v. Ohlig, 63 Cal. 104.

7. Two houses built on same lot.—Where two houses are built on same lot, and it does not appear how much material and labor were furnished for one and how much for other, such circumstances would only have effect, under this section, of giving precedence as to liens, and would be of no concern of owner of lot.—Dickenson v.

Boyle, 55 Cal. 285; Booth v. Pendola, 88 Cal. 36, 43, 23 Pac. 200, 25 Pac. 1101. See Southern Cal. Lumber Co. v. Peters, 3 Cal. App. 478, 86 Pac. 816.

8. Trust-deed—Constitutes lien upon property within section, assumed, but not decided.—Southern Cal. Lumber Co. v. Peters, 3 Cal. App. 478, 86 Pac. 816.

§ 1189. CLAIM TO BE RECORDED. FEES OF RECORDER. The recorder must record the claim in a book kept by him for that purpose, which record must be indexed as deeds and other conveyances are required by law to be indexed, and for which he may receive the same fees as are allowed by law for recording deeds and other instruments.

History: Enacted March 11, 1872.

See, ante, § 1183 and note.

§ 1190. TIME OF CONTINUANCE OF LIEN. No lien provided for in this chapter binds any property for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same; or, if a credit be given, then ninety days after the expiration of such credit; but no lien continues in force for a longer time than one year from the time the work is completed, by any agreement to give credit, and in case such proceedings be not prosecuted to trial within two years after the commencement thereof, the court may in its discretion dismiss the same for want of prosecution, and in all cases the dismissal of such action (unless it be expressly stated that the same is without prejudice) or a judgment rendered therein that no lien exists, shall be equivalent to the cancelation and removal from the record of such lien.

History: Enacted March 11, 1872; amendment approved May 1, 1911, Stats. and Amdts. 1911, p. 1317.

MECHANICS' LIEN—CONTINUANCE OF LIEN.

1. Action to foreclose—Brought within ninety days—Lien continues until termination of cause—Lis pendens not required.
2. Amendment of complaint—Relates back to original action, when.
3. Foreclosure of lien—Continuance of lien—Notice of proceeding—Rights of purchaser.
4. Same—Timely filed—Filing of previous lien.
5. Intervention—Right of materialman.
6. Limitation of action to foreclose—Begins to run, when.
7. Lis pendens—Not required.

See, ante, § 1183 and note.

As to construction of section generally, see, ante, § 1183, note pars. 122-155.

As to section to be given liberal construction, see, post, § 1203a, "Sec. 14."

1. Action to foreclose—Brought within ninety days—Lien continues until termination of cause—Lis pendens not required.—Under the provisions of the above section

when an action to foreclose a mechanics' lien is commenced within ninety days, the lien continues during the pendency of the action, and the filing of a lis pendens is not essential to a continuance of the lien.—Tulloh v. Boyce (Cal. Sup.), 37 Cal. App. 763, 177 Pac. 847.

As to lis pendens not required, see pars. 3, 7, this note.

2. Amendment of complaint—Relates back to original action, when.—Where suit was brought to enforce lien within ninety days after claim of lien was filed, and complaint was amended about two years thereafter, but which amended complaint was based upon same cause of action, held, that amendment related back to date upon which original complaint was filed.—White v. Soto, 82 Cal. 654, 658. See Jones v. Frost, 28 Cal. 246; Easten v. O'Reilly, 63 Cal. 305.

3. Foreclosure of lien—Continuance of lien—Notice of proceeding—Rights of purchaser.—The provisions of the above section imply that when proceedings to foreclose a mechanics' lien are commenced within the time designated, that the lien continues, rendering it unnecessary to file

a notice of such proceedings to charge and hold the property against purchasers pendente lite.—*Tulloch v. Boyce*, 37 Cal. App. 761, 174 Pac. 680, approving the doctrine in *Empire Land & Canal Co. v. Engley*, 18 Colo. 388, 392, 33 Pac. 153, 155.

As to *lis pendens* not required, see pars. 1, 7, this note.

4. **Same—Timely filed—Filing of previous lien.**—In the case in which a claimant files a claim of lien within the statutory period after the happening of any event which makes such event equivalent to a completion of the building or improvement, he is entitled to foreclose the same in an action commenced within the time limited by the above section, notwithstanding the fact that he had previously filed a similar claim of lien, the right to foreclose which had been lost by reason of the limitations of the above section.—*Schwarz & Gottlieb Inc. v. Marcuse*, 175 Cal. 401, 165 Pac. 1015.

5. **Intervention—Right of materialman** as intervener is not barred by provisions of above section where he seeks to intercept contract-price in hands of owner by giving notice provided for in section 1184, ante.—*First Nat. Bank v. Perris Irr. Dist.*, 107 Cal. 55, 65, 40 Pac. 45.

6. **Limitation of action to foreclose—** Begins to run when the owner has completed building on the contractor's default, and not from date on which contractor quits work on building.—*Hughes Bros. v. Hoover*, 3 Cal. App. 145, 84 Pac. 681.

As to limitation and bar of action, see, ante, § 1183, note pars. 228, 280.

7. **Lis pendens—Not required** in suits for the foreclosure of liens under the above section, and a purchaser of land is held to constructive notice of such a lien.—*Sax v. Clark*, 180 Cal. 287, 180 Pac. 821.

See, also, pars. 1, 3, this note.

§ 1191. LIEN UPON LOT FOR IMPROVING. Any person who, at the request of the owner of any lot or tract of land, grades, fills in, or otherwise improves the same, or the street, highway, or sidewalk in front of or adjoining the same, or constructs any areas, or vaults, or cellars, or rooms, under said sidewalks, or makes any improvements in connection therewith, has a lien upon said lot or tract of land for his work done and materials furnished; provided, that in cases where the improvement made or work done is subject to acceptance by any municipal board or officer, the time for filing claims of lien shall not commence to run until after such acceptance shall have been made.

History: Enacted March 11, 1872; amendment approved March 18, 1885, Stats. and Amdts. 1884-5, p. 145; March 15, 1887, Stats. and Amdts. 1886-7, p. 155; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 190, held unconstitutional, see history, § 5 ante; amendment approved May 30, 1913, Stats. and Amdts. 1913, p. 333. In effect August 10, 1913.

MECHANICS' LIEN—UPON LOT FOR IMPROVING.

1. Amendment of section—Repeal by implication.
2. City lot only affected.
3. Constitutionality of section.
- 4, 5. Construction with section 1187, ante—In general.
6. Same—Lien on lots for improvements.
7. Same—Power to impress lien—Depends upon, what.
8. Evidence.
- 9, 10. Grading—Lien for.
11. Grading lot—Want of contract—No right to lien.
12. Judicial notice that city is incorporated.
13. "Lot"—What included in term.
14. Misdescription in memorandum—Does not destroy its sufficiency.
15. Notice of claim—Time of filing—Construction with section 1187, ante.

16, 17. Planting of vineyard an "improvement" within section.

18. Pleading contract—Variance.
19. "Request of reputed owner."
20. Street-improvement work—Lien for—Incorporation in contract of reference to above section.
21. Substantial compliance.
22. System of sewers—Is an improvement.
23. Uncertainty in findings.
24. Written contract not required.

See, ante, § 1183 and note.

1. **Amendment of section—Repeal by implication.**—Section as it stood in 1885 was not repealed by implication by amendment of 1887. Legislative intent is that later law should supersede former law in sense not of repeal by implication, but as question of enforcing will of legislature last expressed on very same subject.—*Santa Cruz Rock Pavement Co. v. Lyons*, 133 Cal. 114, 117, 65 Pac. 329.

2. **City lot only affected.**—Lien provided for in this section can be acquired and enforced only against lot in an incorporated city or town, and where complaint shows upon its face that work is to be done outside of an incorporated city or town, or, under most favorable view that could be taken of complaint, it was uncertain in this respect, and therefore insufficient under demurrer for uncertainty, demurrer to complaint is properly sustained. In such case it is within discretion of trial court to grant leave to amend.—*Durrell v. Dooner*, 119 Cal. 411, 412, 51 Pac. 628.

As to what included in term "lot," see par. 13, this note.

3. **Constitutionality of section.**—Above section is unconstitutional so far as it purports to authorize creation of lien upon land by virtue of contract for improvement of street adjacent thereto entered into with one who is only reputed owner of land, so as to affect interest of real owner therein.—*Santa Cruz Rock Pavement Co. v. Lyons*, 117 Cal. 212, 213, 59 Am. St. Rep. 174, 46 Pac. 1097.

4. **Construction with section 1187, ante.**—In general.—As to, see, ante, § 1183, note pars. 135-137.

5. The plain meaning of the statute is that whoever contributes to the substantial improvement of the lot, either by furnishing work or material, is entitled to the privilege of so enforcing his claim.—*Grom v. Center*, 26 Cal. App. 198, 146 Pac. 186.

6. **Same.—Lien on lots for improvements.**—Above section does not contemplate a building but provides for improvements to the lot or street or sidewalk in front of or adjoining the same.—*Grom v. Center*, 26 Cal. App. 198, 146 Pac. 186.

7. **Same.—Power to impress lien.—Depends on, what.**—Power to subject each lot within an assessment district to lien for its due proportion of contract for street or sewer work rests solely upon assumption that lot is improved, i. e., enhanced in value in an amount at least equal to its assessment, and accordingly it is held that lot alone is liable, owner being free of any personal liability.—*Williams v. Rowell*, 145 Cal. 259, 261, 78 Pac. 725. *Shaw, Angellotti, J.J.*, dissenting and holding that section is not applicable to public improvements such as public sewers composing part of general system for town or city, and further, that in this action, conceding that in proper case lot would be subject to lien for its proportional part, according to frontage, of total cost of sewer constructed at owners' request, complaint is insufficient to warrant holding that there was lien for such improvement. See *Taylor v. Palmer*, 31 Cal. 241, 254.

8. **Evidence.**—Trial court must determine where preponderance of evidence lay in issue as to substantial performance of contract, and findings of that court will not

be disturbed upon such issue where evidence is conflicting.—*De Haven v. McAuley*, 138 Cal. 573, 574, 72 Pac. 152. See *Puget Sound Lumber Co. v. Krug*, 89 Cal. 237, 26 Pac. 902.

9. **Grading.—Lien for grading blocks in city is given under this section.**—*Warren v. Hopkins*, 110 Cal. 506, 510, 42 Pac. 986.

10. This section applies to grading or other improvements of lot done independent of and not as necessary part of construction of building.—*Macomber v. Bigelow*, 126 Cal. 9, 13, 58 Pac. 312.

11. **Grading lot.—Want of contract.—No right to lien.**—Under the provisions of the above section a person grading a lot without previously entering into a contract therefor, is not entitled to a lien upon the lot for work done in grading and leveling the same, is proposal to do the work not having been unconditionally accepted, or squarely assented to by the owner of the lot.—*McCray v. Wotkins*, 41 Cal. App. 449, 182 Pac. 972.

As to what included in term "lot," see par. 13, this note.

12. **Judicial notice that city is incorporated.**—Where it is objected that in notice of lien and complaint for improving street or sidewalk in front of lot in incorporated city or town that notice of lien and complaint do not state that property is in incorporated city or town, held that court will take judicial knowledge of fact that city is incorporated.—*Bryan v. Abbott*, 131 Cal. 222, 225, 63 Pac. 363. See *Duggins v. Hartshorne*, 108 Cal. 154, 157, 41 Pac. 283.

13. **"Lot"—What included in term.**—"Lot" upon which lien is authorized by this section is not limited to any artificial subdivision upon surface of earth or to any official designation upon map, but its meaning includes whatever division is owned by person which he may cause to be worked upon under single contract.—*Warren v. Hopkins*, 110 Cal. 506, 511, 42 Pac. 986.

14. **Misdescription in memorandum.—Does not destroy its sufficiency,** but where such misdescription was apparent and lot was properly described in contract, error is capable of correction by proper averment and proof.—*Yancy v. Morton*, 94 Cal. 558, 29 Pac. 1111.

15. **Notice of claim.—Time of filing.—Construction with section 1187, ante.**—In the case of an action to foreclose a lien claimed under the provisions of the above section, where the work was done more than sixty days and less than ninety days before the filing of the claim of lien the burden is upon the plaintiff-claimant to plead and establish the fact that the defendant-owner did not file a notice of completion under the provisions of section 1187, ante; in the case of work for which a lien is provided under the provisions of the above section, in view of the provisions of section 1187, ante, a notice of claim of lien filed more than sixty days after the completion of the

work is not in time unless the owner has failed to file the notice of completion provided for in said section, in which case a notice filed within ninety days from the time of completion will be in time.—*Greeley v. Noble*, 40 Cal. App. 628, 181 Pac. 666.

16. Planting of vineyard an "improvement" within section.—The planting of a vineyard on property within the incorporated limits of a town is an "improvement" of the property within the meaning of above section, providing that "any person who, at the request of the reputed owner of any lot in any incorporated city or town, grades, fills in, or otherwise improves the same . . . has a lien upon said lot for his work done and materials furnished."—*Grom v. Center*, 26 Cal. App. 198, 146 Pac. 186.

17. It is not essential to the existence of such a lien that the claimant furnish the vines, since whoever contributes to the substantial improvement of the property, either by furnishing work or material, is entitled to the lien.—*Grom v. Center*, 26 Cal. App. 198, 146 Pac. 186.

18. Pleading contract—Variance.—As to contract too uncertain and indefinite to entitle it to be admitted in evidence under allegation of complaint where contract and contents of lien are pleaded according to their legal tenor and effect, and not in *hæc verba*, see *Rauer v. Fay*, 110 Cal. 361, 366, 42 Pac. 902.

19. "Request of reputed owner."—Appellate court can not consider question as to whether there is any evidence to show request, and for that reason, whether there can be valid lien under this section on appeal from an order granting new trial, where only record before appellate court is judgment-roll and bill of exceptions pre-

pared and settled for purposes of motion for new trial in trial court and where there are no specifications in bill of exceptions directed at insufficiency of such evidence in these respects.—*De Haven v. McAuley*, 138 Cal. 573, 575, 72 Pac. 152.

20. Street-improvement work—Lien for—Incorporation in contract of reference to above section.—The lien for the contract-price for work done upon a public street is created by law, and a contract providing for liens "as provided by above section, by reference makes the law concerning liens for work done on public streets a part of the contract."—*Hutchinson Co. v. Gould*, 180 Cal. 356, 181 Pac. 651.

21. Substantial compliance.—Notice of lien as filed held as conforming substantially to requirements of statute, and deemed sufficient.—*Rauer v. Fay*, 110 Cal. 361, 365, 369, 42 Pac. 902.

22. System of sewers—Is an improvement of lots within sewer district within meaning of above section and entitles to lien upon lot so improved for cost of main sewer and for laterals.—*Williams v. Rowell*, 145 Cal. 259, 261, 78 Pac. 725.

23. Uncertainty in findings is to be construed so as to support judgment as to lien rather than to defeat same.—*Warren v. Hopkins*, 110 Cal. 506, 512, 42 Pac. 986. See *Breeze v. Brooks*, 97 Cal. 72, 22 L. R. A. 256, 31 Pac. 742.

24. Written contract not required.—Contract for constructing sidewalks in cities, when exceeding one thousand dollars, is not void under statute if not in writing. Provision as to contracts void under section 1183, ante, is not applicable to contracts for construction of sidewalks.—*Kreuzberger v. Wingfield*, 96 Cal. 251, 257, 31 Pac. 109.

§ 1191a. SAME. FOR CONNECTING HOUSE WITH SEWER, WHEN. Any health officer or governing board of any city, town or sanitary district, having served written notice upon the owner or reputed owner of real estate upon which there is a dwelling-house, and such owner or reputed owner, after thirty days, having refused, neglected or failed to connect such dwelling house, together with all toilets, sinks, and other plumbing therein, properly vented, and in a sanitary manner, with the adjoining street sewer, may construct the same at a reasonable cost, and the person doing said work at the request of such health officer or governing board, has a lien upon said real estate for his work done and materials furnished, and such work done and materials furnished shall be held to have been done and furnished at the instance of such owner or reputed owner, or person claiming or having any interest therein.

History: Enactment approved April 19, 1909, Stats. and Amdts. 1909, p. 986.

§ 1192. BUILDING HELD TO HAVE BEEN CONSTRUCTED AT OWNER'S INSTANCE. Every building or other improvement or work men-

tioned in any of the preceding sections of this chapter constructed, altered or repaired upon any land with the knowledge of the owner or of any person having or claiming any estate therein, and the work or labor done or materials furnished mentioned in any of said sections with the knowledge of the owner or persons having or claiming any estate in the land, shall be held to have been constructed, performed or furnished at the instance of such owner or person having or claiming any estate therein, and such interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner or person having or claiming any estate therein shall, within ten days after he shall have obtained knowledge of such construction, alteration or repair or work or labor, give notice that he will not be responsible for the same by posting a notice in writing to that effect in some conspicuous place upon the property, and shall also, within the same period, file for record a verified copy of said notice in the office of the county recorder of the said county in which said property or some part thereof is situated. Said notice shall contain a description of the property affected thereby sufficient for identification, with the name and the nature of the title or interest of person giving the same [and], said copy so recorded may be verified by any one having a knowledge of the facts, on behalf of the owner or person for whose protection the notice is given.

History: Enacted March 11, 1872; amendment approved March 30, 1874, Code Amdts. 1873-4, p. 410; March 18, 1907, Stats. and Amdts. 1907, p. 577, Kerr's Stats. and Amdts. 1906-7, p. 481; May 1, 1911, Stats. and Amdts. 1911, p. 1317.

**MECHANICS' LIEN — BUILDING HELD
CONSTRUCTED AT OWNER'S
INSTANCE.**

1. Acquiescence of owner as to improvements.
2. Alterations by lessee — Knowledge by owner—Nonliability notice.
3. Same—Same — Same — Defense to be pleaded and proved.
4. Construction of section—As to generally.
5. Same—Amendment of 1911—Extends provisions to street improvements.
- 6, 7. Same—Building at owner's instance.
8. Same—Legislative purpose.
9. Same—Limitation of right.
10. Same—Rule "noscitur a sociis," is applicable.
11. Corporation—Constructive notice to.
- 12, 13. Failure of owner to give notice.
14. Findings of court will not be disturbed.
15. Grading lot—Owner having knowledge of work—Disclaimer of liability.
16. Husband as agent of wife.
17. Improvements by lessee—Where lessor had knowledge.
18. Interest in property subject to lien.
19. Interest of lessee in land—Is subject to lien.
20. Joint action of husband and wife.
21. Knowledge of improvement—Notice of nonresponsibility—Constitutionality.
22. Same—Notice imparted by what.
23. Same—Want of knowledge.
24. Mining—Estoppel of owner.
25. Same—"Drifting in a tunnel."
26. Same—Lessor of machinery affixed to mine of lessees.
27. Mortgagee—Is not person having "an interest in lands."
28. Notice of nonresponsibility—Acknowledgment—Filing copy.
29. Same—Same—Construction of provision.
30. Same—Same—"Verification"—Meaning of term.
31. Same — Actual notice of claim of — Compliance with statute not waived.
32. Same—Failure to give—Knowledge of improvements—Liability of owner.
33. Same—Time of filing.
34. Owner is not referred to, when.
35. Partnership venture—Absence of notice by owner—Property is subject to liens and foreclosure.
36. Personal liability of owner—Want of privity — Employees and materialmen of contractor.
37. Pleading—Complaint not required to allege attorney's fees.

38. Same—As to right to recover attorney's fees.
39. Same—Complaint is not required to allege owner of real estate did not give notice.
40. Priority of lien.
41. Property referred to and affected.
42. Time of giving notice.
43. Same—Finding as to.
44. Vendor's lien.

See, ante, § 1183 and note.

1. Acquiescence of owner as to improvements.—Where owner in fee of lands stands by and sees his tenants erecting large and costly building upon his lot, without giving notice under above section, he can not be afterwards heard to say that men who performed labor upon, and furnished material for, such building have no lien upon his lot therefor, because building had not become part of realty and not an improvement upon his property.—*West Coast Lumber Co. v. Apfield*, 86 Cal. 335, 340, 24 Pac. 993.

2. Alterations by lessee—Knowledge by owner—Nonliability notice.—A knowledge on the part of owners of a given premises that certain alterations and repairs are contemplated and to be made by the lessees, or the sublessees of their lessees, is sufficient to require such owners to file the notice of nonliability prescribed by the above section, as a condition of relieving their property from liability for the cost of the work performed at the request of the lessee, or sublessee, although such owners have no knowledge as to the scope of the work to be done or of the improvements to be made.—*Perazzi v. Doe Estate Co.*, 40 Cal. App. 617, 181 Pac. 398, following doctrine in *Gentle v. Britton*, 158 Cal. 328, 332, 111 Pac. 9.

As to improvement by lessee with owner's knowledge, see par. 17, this note.

3. Same—Same—Same—Defense to be pleaded and proved.—Where plaintiff-claimants seeking to foreclose mechanics' lien on leasehold estate have shown that the owner of the leasehold had knowledge of the improvements made, or to be made, the burden of showing notice of nonliability under the above section becomes a matter of defense to be pleaded and proved by the defendants.—*Perazzi v. Doe Estate Co.*, 40 Cal. App. 617, 181 Pac. 398, following doctrine in *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 277, 22 Pac. 231; *Boscus v. Bohling*, 173 Cal. 687, 691, 162 Pac. 100.

4. Construction of section—As to generally.—Under above section, every building or improvement constructed upon any lands, with knowledge of owner, shall be held to have been constructed at instance of such owner, and his interest is subject to lien unless he shall within three days after he shall have obtained knowledge of construction, or intended construction, give notice

that he will not be responsible for same by posting notice in writing to that effect in some conspicuous place on the premises.—*Hines v. Miller*, 122 Cal. 517, 520, 55 Pac. 401.

As to liberal construction to be given section, see, post, § 1203a, "Sec. 14."

5. Same—Amendment of 1911—Extends provisions to street improvements.—The amendment to the above section by the legislature of 1911 has the effect, and it was the intention of the legislature, to extend the operation of the statutory estoppel provided for to street-work liens under the provisions of section 1191, ante.—*Ralsch v. Helfrich*, — Cal. App. —, 190 Pac. 848, distinguishing *Santa Cruz Rock Pavement Co. v. Lyons*, 117 Cal. 212, 59 Am. St. Rep. 174, 48 Pac. 1097, on the ground that the case was decided prior to the amendment of 1911 to the above section.

6. Same—Building at owner's instance.—The effect of above section is to put the non-disclaiming owner (with notice) in the position he would have occupied if he had himself authorized the construction. If the owner of a lot was chargeable with notice of the erection of a building thereon, he becomes by statute identified with the persons who actually caused the erection. Where the building was in fact authorized to be built on the lot the result of the authorization and construction falls upon those at whose instance the work must, under the statute, be held to have been done.—*Hammond Lumber Co. v. Brown*, 165 Cal. 193, 131 Pac. 368.

7. An owner is not required to give the notice of nonresponsibility as provided herein where there is a valid recorded contract made on his behalf and with his knowledge and consent, the contract being the measure of his liability.—*Pacific Mfg. Co. v. Perry*, 31 Cal. App. 274, 160 Pac. 246.

8. Same—Legislative purpose in providing that owner give notice within three days after he shall have obtained knowledge of construction or intended construction, can not be construed to compel owner to give notice within three days after he has knowledge of intended construction, as to so hold would in most cases give no effect to provision as to notice where he had knowledge of actual construction.—*Birch v. Magic Transit Co.*, 139 Cal. 496, 500, 73 Pac. 238.

9. Same—Limitation of right.—Above section limits right of lien to building or other improvement mentioned in section 1183, ante, and is not applicable to work done in improvement of street in front of one's property.—*Santa Cruz Rock Pavement Co. v. Lyons*, 117 Cal. 212, 214, 59 Am. St. Rep. 174, 48 Pac. 1097.

10. Same—Rule "noscitur a sociis," is applicable to "person having an interest" under above section. Section provides mode for binding owner or person having an interest—that is, one having legal estate less

than fee, or such an equity as made by securing transfer of legal estate.—*Williams v. Santa Clara Min. Assoc.*, 66 Cal. 193, 200, 5 Pac. 85.

11. Corporation—Constructive notice to.—Doctrine of constructive or implied notice on part of corporation as to improvements on mine can not be applied where evidence shows that defendant, although directed at time work was done, had work performed upon his own responsibility and not for corporation in any way, and where evidence further shows that party contracting with defendant contracted with him as an individual and wholly apart from any official relation to defendant corporation, and where party looked to defendant personally and alone for payment of his share of contract-price of work.—*Ayers v. Green Gold Min. Co.*, 116 Cal. 333, 336, 48 Pac. 221.

As to swings and seats used in connection with dancing halls, not "structures" within meaning of above section, and section 1183, ante.—See, ante, § 1183 and note.

12. Failure of owner to give notice required by above section renders his interest in land subject to lien, and such failure warrants court in finding that building was constructed with knowledge of owner upon permission previously given, notwithstanding fact that building may not have been constructed in particular form, or at place authorized on property.—*Santa Monica Lumber & Mill Co. v. Hege*, 119 Cal. 376, 379, 51 Pac. 555.

13. Land on which a building is erected is subject to a lien where the owner had knowledge of the construction and failed to file the disclaimer provided herein. The filing of such notice is a matter of defense to an action to foreclose the lien, and the fact that the owner accepted the completed work is conclusive upon the question of knowledge.—*Boscus v. Bohlrig*, 173 Cal. 687, 162 Pac. 100.

14. Findings of court will not be disturbed as to question whether liens were filed within time required by law after last work was done on building, where number of such liens had been filed before all work had ceased, but not until building was so nearly completed except only as to trivial imperfections in work.—*West Coast Lumber Co. v. Apfield*, 86 Cal. 335, 341, 24 Pac. 993.

15. Grading lot—Owner having knowledge of work—Disclaimer of liability.—In a case in which a man's proposal to level and grade a lot has not been unconditionally accepted or squarely assented thereto by the owner thereof and such owner has no knowledge, either actual or constructive, during the progress of the work, that the lot is being graded, the person doing such work is not entitled to a lien, under the provisions of the above section, by reason of the failure of the owner to post and record a notice disclaiming liability.—*McCray v. Wotkins*, 41 Cal. App. 449, 182 Pac. 972.

16. Husband as agent of wife.—Finding of court that husband made contract in behalf of wife as her agent, ostensible or actual, held sufficiently supported by circumstantial evidence notwithstanding testimony of husband and wife that husband acted without direct authority from his wife.—*Santa Cruz Rock Pavement Co. v. Lyons*, 133 Cal. 114, 119, 65 Pac. 329.

17. Improvements by lessee — Where lessor had knowledge of lessee's intention to add to, alter, and repair buildings and structures on premises, and of general purpose of such additions and repairs, and where no notice disclaiming responsibility was posted, reversionary interest of lessor is subject to lien, and, under circumstances, held that lessor was charged with knowledge sufficient to put him upon inquiry as to particular facts relating to improvement.—*Evans v. Judson*, 120 Cal. 282, 284, 52 Pac. 585. See *Moore v. Jackson*, 49 Cal. 109; *West Coast L. Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231; *Harlan v. Stufflebeem*, 87 Cal. 508, 513, 25 Pac. 686; *Santa Monica L. & M. Co. v. Hege*, 119 Cal. 376, 51 Pac. 555.

As to alteration by lessee, see pars. 2, 3, this note.

18. Interest in property subject to lien.—Under the provisions of the above section and of section 1183, ante, the interest of the owner or other person having or claiming any interest in the land, no matter what that interest may be, whether legal or equitable, is subject to mechanics' liens.—*Allen v. Wilson*, 178 Cal. 674, 174 Pac. 661.

19. Interest of lessee in land.—Is subject to lien for materials used in construction of building thereon which was erected under contract made by owner of leasehold estate. And where lessee has knowledge of completion of building and fails to give notice that he will not be responsible for same his leasehold interest is subject to lien.—*West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231; *Harlan v. Stufflebeem*, 87 Cal. 508, 513, 25 Pac. 686.

20. Joint action of husband and wife is not necessary to creation of lien upon homestead.—*Palmer v. Lavigne*, 104 Cal. 30, 34, 37 Pac. 775.

21. Knowledge of improvement — Notice of nonresponsibility — Constitutionality.—The provisions of the above section and section 1 and section 1183, ante, are not to be construed as making the person in possession of the property or the reputed owner the agent of the real owner, and therefore unconstitutional as depriving the real owner of his property against his will, but as declaring that an owner or person having any interest in the property who has knowledge of an improvement being constructed on his land and who permits the improvement to be made and receives the benefit of it, must pay for it.—*Allen v. Wilson*, 178 Cal. 674, 174 Pac. 661.

22. Same.—Notice imparted by what.—Facts and circumstances construed to im-

part knowledge of construction or intended construction of building where notice was not posted in time.—*Santa Monica Lumber & Mill Co. v. Hege*, 5 Cal. Unrep. 628, 48 Pac. 69, 70.

23. Same—Want of knowledge is to be alleged and proved, in order to charge interest of owner of soil, though it need not be stated in notice of lien.—*Jewell v. McKay*, 82 Cal. 144, 146, 23 Pac. 139.

24. Mining—Estoppel of owner.—Owner of mining claim is estopped from raising objection as to sufficiency of lien upon his claim where, although his ownership is several, he was cognizant of fact that his property and other claims upon which lien was asserted were being developed as single mine or claim, and that improvement and labor thereon, wherever placed, was with purpose and effect of enhancing value, not only of property as an entirety, but of each of several locations thereon, and where, having such knowledge, he did not post notice required by above section.—*Hamilton v. Delhi Min. Co.*, 118 Cal. 148, 152, 50 Pac. 378.

25. Same—"Drifting in a tunnel," held not same as "running a tunnel," and not construction, alteration, or repair of any building or improvement in mine—and where such work is done, even with knowledge of owner, mine is not subject to lien therefor, although notice was not given under above section.—*Jurgenson v. Diller*, 114 Cal. 491, 493, 55 Am. St. Rep. 83, 46 Pac. 610. See *Reese v. Bald Mountain Consol. Gold Min. Co.*, 133 Cal. 285, 289, 65 Pac. 578, where court found that labor performed in mine was "for development, improvement, protection, and preservation of said premises,"—although this finding is said to be outside the issues,—and "that owner had full notice of work done," and yet lien was not allowed. The strict and strained construction of law in these two cases resulted in amending section 1183, ante, in 1903, so as to include work upon mine in its development by subtractive process as well as work for its development by constructive process—process appearing in these decisions to have been more important than purpose.

26. Same—Lessor of machinery affixed to mine of lessees is not required, in order to protect himself against claim of lien upon mine, to post notice required of owner of lands or person having or claiming interest therein as directed by above section, since such personal property, where leased with right reserved to remove same, can not be treated as part of realty.—*Jordan v. Myres*, 126 Cal. 565, 567, 58 Pac. 1061. See *Hendy v. Dinkerhog*, 57 Cal. 3, 40 Am. Rep. 107.

27. Mortgagee—Is not person having "an interest in lands" within meaning of above section, as mortgagee has but mere right to have his debt paid out of proceeds of sale of mortgaged property unless it should be otherwise paid.—*Williams v. Santa Clara Min. Assoc.*, 66 Cal. 193, 201, 5 Pac. 85.

As to lien of recorded mortgage or deed of trust taking priority over subsequent mechanics' lien, see, ante, § 1186 and note.

28. Notice of nonresponsibility—Acknowledgment—Filing copy.—The mere acknowledgment and filing for record of a copy of a notice of nonresponsibility does not constitute a sufficient compliance with the requirements of the above section to relieve the owner from liability.—*Pasqualetti v. Hilson*, 43 Cal. App. 718, 185 Pac. 693.

29. Same—Same—Construction of provision.—The provision of the above section as amended in 1911, was intended to require a strict compliance with its provisions on the part of owners of property upon which work or labor was to be done or material furnished in order to relieve themselves from responsibility for the value of such labor and work or materials under the provisions of the code relating to mechanics, materialmen, and laborers.—*Pasqualetti v. Hilson*, 43 Cal. App. 718, 185 Pac. 693.

30. Same—Same—"Verification"—Meaning of term.—The term "verified," wherever used in the Code of Civil Procedure, requires the oath or affidavit of the party executing the instrument, in order to amount to a sufficient verification thereof.—*Pasqualetti v. Hilson*, 43 Cal. App. 718, 185 Pac. 693.

31. Same—Actual notice of claim of—Compliance with statute not waived.—The fact that notice of nonresponsibility was posted upon the property upon which labor was performed and materials furnished, and that the lien-claimants had actual notice of such claim, do not render the filing of such notice in the form required by statute immaterial, such actual notice does not waive compliance with the requirements of the statute by the owner.—*Pasqualetti v. Hilson*, 43 Cal. App. 718, 185 Pac. 693, distinguishing *Street v. Hazard*, 27 Cal. App. 263, 149 Pac. 770, as having been decided prior to the date of the amendment of the above section requiring the recordation of a copy of the posted notice.

32. Same—Failure to give—Knowledge of improvements—Liability of owner.—In a case in which an owner stands by and sees another improve his property without putting him on notice that the owner will not be responsible therefor, he must be held responsible for the value of the improvements, because under such circumstances the owner is not an innocent party.—*Krenwinkel v. Henne*, 42 Cal. App. 580, 183 Pac. 957.

33. Same—Time of filing.—Under the provisions of the above section as amended in 1911, the owner is relieved of personal responsibility for improvements made upon his property by another by filing a notice of nonresponsibility within the time limited, after knowledge by him of the actual improvements being made or to be made.—

Whiting-Meade Commercial Co. v. Brown, 44 Cal. App. 371, 186 Pac. 386.

34. Owner is not referred to, when.—Owner or person having or claiming interest in lands on which improvement is erected, is not person referred to in section 1186, ante, as having lien, mortgage, or encumbrance.—*Williams v. Santa Clara Min. Assoc.*, 66 Cal. 193, 200, 5 Pac. 85.

35. Partnership venture—Absence of notice by owner—Property subject to liens and foreclosure.—In a case in which A conveys a lot to B and takes back a deed of trust or mortgage, and there is between them an understanding and agreement that B is to construct a building, and that both are to be equally interested in the property and to share whatever profits might be enjoyed, it follows that both A and B are liable for the cost of the building; and the building itself is subject to a lien for labor done or materials furnished, in the absence of the notice by the owner provided for in the above section.—*City Lumber Co. v. Brown*, — Cal. App. —, 189 Pac. 830.

36. Personal liability of owner—Want of privity—Employees and materialmen of contractor.—In those cases in which there is no contract, either express or implied, between the owner and the lien-claimants for materials furnished and labor performed, such owner can not be held personally responsible therefor, but under the provisions of the above section it was to be presumed that the improvement was constructed or made in the instance of the owner of the premises, and said premises were subject to liens filed for materials and labor used in such work and improvement.—*Mott v. Wright*, 43 Cal. App. 21, 184 Pac. 517.

37. Pleading—Complaint not required to allege attorney's fees.—Allegation need not be inserted in complaint for foreclosure of mechanic's lien relative to claim of plaintiff for attorney's fees; and allegation on that subject if made does not bind even party making it.—*Mulcahy v. Buckley*, 100 Cal. 484, 490, 35 Pac. 144; *Clancy v. Plover*, 107 Cal. 272, 274, 40 Pac. 394.

38. Same—As to right to recover attorney's fees, like right to recover ordinary costs, is a necessary incident to the judgment establishing plaintiff's lien, and does not depend upon any averment in the complaint except such as are necessary to establish the lien.—*Mulcahy v. Buckley*, 100 Cal. 484, 35 Pac. 144.

39. Same—Complaint is not required to allege owner of real estate did not give

notice that he would not be responsible for construction of building. Such notice under above section, if given, is matter of defense to be set up by defendant.—*West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 277, 22 Pac. 231.

40. Priority of lien.—Where owner failed to give any such notice as is prescribed by above section, or court finds that he consented to and advised construction of dwelling-house, although he was not owner of lands until subsequent date when he acquired same and gave and executed mortgage to grantor as security for purchase-price, held that, even in absence of provisions of code, vendor of land, having advised construction of dwelling-house upon land then owned by him, under most elementary principles of equity he would not be permitted to avail himself of this increased value for purpose of enhancing his own security at expense of materialmen who had themselves given value to land.—*Avery v. Clark*, 87 Cal. 619, 628, 22 Am. St. Rep. 272, 25 Pac. 919.

As to priority of mechanics' liens, see, ante, § 1186 and note.

41. Property referred to and affected.—Section of code refers to an estate or interest in land which may be sold and conveyed, and does not provide that mere lien shall become "subject" to any subsequent lien, in sense that latter lien shall acquire precedence over prior lien.—*Williams v. Santa Clara Min. Assoc.*, 66 Cal. 193, 201, 5 Pac. 85.

42. Time of giving notice.—Notice given five days after owner had knowledge, through lease, of intended construction, but within three days after actual construction was commenced, is sufficient to protect owner, and failure to give such notice within three days after owner shall have obtained knowledge of intended construction does not necessarily deprive him of protection given by statute.—*Birch v. Magic Transit Co.*, 139 Cal. 496, 500, 73 Pac. 238.

43. Same—Finding as to whether or not owners gave notice of nonresponsibility within three days after knowledge that building was being constructed is immaterial and not required where there was no such issue made by pleadings.—*Buell v. Brown*, 131 Cal. 158, 162, 63 Pac. 167.

44. Vendor's lien.—Reasoning as to mortgage in *Williams v. Santa Clara Min. Assoc.*, 66 Cal. 193, 201, 5 Pac. 85, applies to vendor's lien as well as mortgage, and holders of vendor's lien are not required to post notice under above section of interest in property.—*Kuschel v. Hunter*, 5 Cal. Unrep. 793, 50 Pac. 397, 398.

§ 1193. CONTRACTOR. AMOUNT MAY RECOVER. Any contractor shall be entitled to recover, upon a lien filed by him, only such amount as may be due him according to the terms of his contract, after deducting all claims

of other parties for work done and materials furnished, as aforesaid, and embraced within his contract; and in all cases where a lien shall be filed under this act for work done or for materials furnished to any contractor, he shall defend any action brought thereon at his own expense; and during the pendency of such action, the owner may withhold from the contractor the amount of money for which such lien is filed; and in case of judgment against the owner or his property upon the lien, the said owner shall be entitled to deduct from any amount due, or to become due by him to the contractor, the amount of such judgment and costs; and if the amount of such judgment and costs shall exceed the amount due by him to the contractor, or if the owner shall have settled with the contractor in full, he shall be entitled to recover back from the contractor, or his bondsmen or sureties on any bond given for the faithful performance of his contract, any amount so paid by him, the said owner, in excess of the contract price, and for which the contractor was originally the party liable. No act done by such owner in compliance with any of the provisions of this chapter shall be held to be a prevention of the performance of any such contract by the contractor, or to have exonerated the sureties on such or any bond given for faithful performance, or for the payment of liens of persons performing labor or furnishing materials, or both; provided, that such act was done in good faith and without design to injure or harass any one.

History: Enacted March 11, 1872; amendment approved March 30, 1874, Code Amdts. 1873-4, p. 411; May 1, 1911, Stats. and Amdts. 1911, p. 1318.

MECHANICS' LIEN—CONTRACTOR'S LIEN.

- 1, 2. Claims paid set off against contractor's lien.
3. Interest—Demand for extras does not draw.
4. Interpleader—Right of.
5. New trial—Deduction for costs and attorney's fees.
6. Recovery by contractor—Constitutionality.
7. Same—Judgment on pleadings.
8. Stop-notices—Subordinate to prior liens—Operate upon moneys to be paid contractor, only.
9. Subcontractor—Lien of—Indebtedness due employee.
10. Verification of complaint—Denial on information and belief.
11. Void contract—Application to.
12. Same—Refusal of court to continue cause.
13. Same—Set-off by owner.

See, ante, § 1183 and note.

As to, liberal construction, see, post, § 1203a, "Sec. 14."

1. Claims paid set off against contractor's lien.—Contractor is not entitled to recover upon lien filed by him where after

making deductions provided by above section nothing is found due to him, and where he fails to establish lien, he is not entitled to costs and attorney's fees.—*Stimson v. Dunham-Carrigan-Hayden Co.*, 146 Cal. 281, 285, 79 Pac. 968.

2. Owner is entitled to deduct from amount due to contractor amount of judgment and costs, including attorneys' fees, recovered upon debt, which owner was compelled to defend, but which was debt of contractor.—*Clancy v. Plover*, 107 Cal. 272, 275, 40 Pac. 394. See *Covell v. Washburn*, 91 Cal. 560, 27 Pac. 859.

As to right of successful lien claimant to recover costs and reasonable attorney's fees, see, ante, § 1184 and note pars. 225-227.

3. Interest—Demand for extras does not draw interest unless amount is ascertained by judgment of court.—*Macomber v. Bigelow*, 126 Cal. 9, 14, 58 Pac. 312; *Stimson v. Dunham-Carrigan-Hayden Co.*, 146 Cal. 281, 285, 79 Pac. 968.

As to interest and right to recover, see, ante, § 1183, note pars. 268-270, 311, 312.

4. Interpleader — Right of. — A party served with notices intercepting payment of amounts due laborers and materialmen can not be held beyond contract-price and charged with additional cost and expenses created or incurred by contractor, as under code such party is required to withhold

sufficient moneys to pay such claims and attorneys' fees to each claimant to extent of one hundred dollars, and having money on hand with which to make such payments due, and desiring to pay it to proper parties, so that one decree may settle all rights, party has right to pay into court and bring in all interested parties that their respective rights may be determined.—*Stimson v. Dunham-Carrigan-Hayden Co.*, 146 Cal. 281, 284, 79 Pac. 968. See *Rosenkranz v. Wagner*, 62 Cal. 151, 154; *Turner v. Strenzel*, 70 Cal. 28, 30, 11 Pac. 389; *Brill v. De Turk*, 130 Cal. 241, 244, 62 Pac. 462.

5. New trial—Deduction for costs and attorney's fees.—Where in action for services and materials upon building contract which was void for failure to comply with requirements of section 1183, ante, as to recording, etc., and where it is pleaded and admitted that two foreclosure suits against property and against defendant in action were pending, and that to properly protect right of defendant in such actions, plaintiff's assignor, the contractor, should bear expense of foreclosure suits, and secure to defendant right to deduct from amount any amount that may accrue in such foreclosure costs, it was error for court to refuse to continue cause until amount of such costs and attorney's fees in foreclosure could be determined and set off against plaintiff named in action, and for such error it was proper for court to grant new trial.—*Macomber v. Bigelow*, 123 Cal. 533, 534, 56 Pac. 449.

As to "original contractor," meaning of, see, ante, § 1187 and note par. 373.

6. Recovery by contractor—Constitutionality.—The legislature has power to enact a statute which shall limit the lien-claimant's recovery to the unpaid portion of the contract-price.—*Pacific Portland Cement Co. v. Hopkins*, *Webster-Mace Construction Co.*, 53 Cal. Dec. 100, 162 Pac. 1016.

7. Same—Judgment on pleadings.—In an action for the foreclosure of a mechanics' lien a judgment on the pleadings is properly entered, where there is no denial of the execution of the contract for the performance of the work, or of the completion of the work and its acceptance by the defendants, but simply a denial on information and belief that the amount claimed, or any amount claimed, is or was the reasonable value of the work performed and materials furnished.—*Boscus v. Bohlrig*, 173 Cal. 687, 162 Pac. 100.

8. Stop-notices—Subordinate to prior liens—Operate upon moneys to be paid contractor, only.—In a case in which there are already valid liens against a building which has been erected, the contract for the erection of which was abandoned by the contractor and the building completed by the owner, and there was an amount remaining between the contract-price for the erection

of the building and the actual amount expended by the owner in the completion of the work after its abandonment, this balance will be subject to the equitable garnishment of lien-claimants only in the case in which, and to the extent, money of that balance is to be paid to the contractor; if the valid prior liens absorb all of that amount the mechanics' lien claimants will have no interest in such fund, and claims being subordinate to the prior claims.—*Hubbard v. Jurian*, — Cal. App. —, 190 Pac. 1052.

As to stop-notices generally, see, ante, § 1184, note pars. 72-94.

9. Subcontractor—Lien of—Indebtedness due employee.—Under the provisions of the above section, as the same existed at the time of the trial in the instance case, a subcontractor, who employed a third person to do part of the work and is legally bound to pay him therefor, may include in his claim of lien the value of the services of the employee, and recover therefor, if the employee has filed no claim of lien.—*Holden v. Mensinger*, 175 Cal. 300, 165 Pac. 950.

10. Verification of complaint—Denial on information and belief.—Duty is imposed upon defendant who proposes to deny an allegation in the complaint for foreclosure of mechanics' lien as to filing and recording of claim of lien in recorder's office, to ascertain from public records to which he had access and which afford all means of information necessary to obtain positive knowledge of fact, and to deny otherwise than upon information or belief; and where denial is made upon information and belief, such denial is paramount to admission in such case of averment in complaint as to filing and recording.—*Mulcahy v. Buckley*, 100 Cal. 484, 489, 35 Pac. 144.

11. Void contract—Application to.—Requirement that contractor defend at his own expense any action brought against property which is subject of contract, for work done or materials furnished, applies to contract void for failure to comply with requirements of code as to recording, as well as to valid contracts.—*Macomber v. Bigelow*, 123 Cal. 532, 534, 56 Pac. 449. See *Covell v. Washburn*, 91 Cal. 560, 27 Pac. 859.

12. Same—Refusal of court to continue cause until such attorney's fees are ascertained is ground for granting a new trial.—*Macomber v. Bigelow*, 123 Cal. 532, 533, 56 Pac. 449.

13. Same—Set-off by owner.—Owner in action upon void building-contract is entitled to set-off of costs and attorney's fees (incurred in defending foreclosure suit of subcontractor) against claim of the contractor on quantum meruit.—*Macomber v. Bigelow*, 123 Cal. 532, 533, 534, 56 Pac. 449. See *Covell v. Washburn*, 91 Cal. 560, 562, 27 Pac. 859.

§ 1194. DEFICIENCY OF PROCEEDS ON SALE UNDER DECREE OF FORECLOSURE. Whenever on the sale of the property subject to any of the liens provided for in this chapter, under the judgment or decree of foreclosure of such lien, there is a deficiency of proceeds, judgment for the deficiency may be docketed against the party personally liable therefor in like manner and with like effect as in action for the foreclosure of mortgages.

History: Enacted March 11, 1872; amendment approved March 30, 1874, Code Amdts. 1873-4, p. 412; March 18, 1885, Stats. and Amdts. 1884-5, p. 146; May 1, 1911, Stats. and Amdts. 1911, p. 1318.

MECHANICS' LIEN—DEFICIENCY OF PROCEEDS.

1. Deficiency—Constitutionality.
2. Execution as upon mere personal judgment.
3. Same—Deficiency.
4. Joinder of causes of action.
5. Judgment—Form of.
6. Marshaling of liens.
7. Personal action.
8. Personal judgment.
- 9-13. Subcontractor—Who is a.

See, ante, § 1183 and note.

As to construction of section generally, see, ante, § 1183, note pars. 122-145.

As to liberal construction, see, post, § 1203a, "Sec. 14."

1. **Deficiency—Constitutionality.**—Above section as it existed prior to the amendment of 1911 was constitutional. — *Hihn-Hammond Lumber Co. v. Elsom*, 171 Cal. 570, 154 Pac. 12.

2. **Execution as upon mere personal judgment** can not be issued and levied upon property of owner of leasehold interest upon undertaking on appeal from judgment, unless by direction of court upon showing that property upon which lien was adjudged was no longer available, and that bond given did not operate to stay enforcement of lien upon property described in judgment. — *Central Lumber & Mill Co. v. Center*, 107 Cal. 193, 198, 40 Pac. 334.

3. **Same—Deficiency.**—Judgment is not enforceable as personal judgment, except for deficiency shown upon sheriff's return. — *Hines v. Miller*, 126 Cal. 683, 684, 59 Pac. 142. See *Painter v. Painter*, 98 Cal. 625, 33 Pac. 483; *Central Lumber & Mill Co. v. Center*, 107 Cal. 193, 40 Pac. 334; *Kreling v. Kreling*, 116 Cal. 458, 48 Pac. 383.

4. **Joinder of causes of action.**—Cause of action against contractor united with cause of action for foreclosure of lien against owner is not misjoinder of causes of action. — *Giant Powder Co. v. San Diego Flume Co.*, 78 Cal. 193, 199, 20 Pac. 419. See *Quale v. Moon*, 48 Cal. 478.

5. **Judgment—Form of.**—Judgment does not violate provisions of above section, which after decreeing "that judgment be, and same is, hereby entered in favor of plaintiffs and against defendants," in certain

specified sum, and that liens of plaintiffs upon mining claim be foreclosed against defendants, directing that property be sold by sheriff in manner provided by law, and, "if amount derived from sale of said property be not sufficient to pay each of plaintiffs in full, that upon coming in of return, . . . clerk of court docket judgment for such deficiency against defendants," naming them. Under these provisions there can be no judgment docketed until after sale by sheriff and his return showing deficiency. — *Hines v. Miller*, 126 Cal. 683, 684, 59 Pac. 142.

6. **Marshaling of liens.**—Mechanics' liens of a certain class shall share equally in land, and this can only be accomplished by compelling lien-claimants to postpone enforcement until completion of building. — *French v. Powell*, 135 Cal. 636, 640, 68 Pac. 92.

As to "original contractor," meaning of, see, ante, § 1187 and note par. 373.

7. **Personal action**, provided for in simple action upon contract against person who purchases materials for contractor or owner, has no reference to lien given by statute. In such action plaintiff, even though he filed lien, can not recover attorney's fee, this item being incident to foreclosure of lien and not to personal action. — *Central Lumber & Mill Co. v. Center*, 107 Cal. 193, 197, 40 Pac. 334. See *Bates v. Santa Barbara Co.*, 90 Cal. 543, 548, 27 Pac. 438.

8. **Personal judgment.**—The right to money judgment against person who employs mechanics or purchases material is not lost or waived by proceeding to enforce lien or to recover from owner balance of contract-price remaining in his hands. — *Bates v. Santa Barbara County*, 90 Cal. 543, 548, 27 Pac. 438. See *Brennan v. Swasey*, 16 Cal. 140, 76 Am. Dec. 507; *Germania Building & L. Assoc. v. Wagner*, 61 Cal. 349.

9. **Subcontractor—Who is a.**—Literally, a subcontractor is one who agrees with another to perform a part or all of the obligation which the second party owes by contract to a third party, but with respect to above section the word has a much narrower meaning, which must be determined by reference to the classification provided by the section and to the subject to which it relates, and embraces all persons who agree with the original contractor to

furnish the material and construct for him on the premises some part of the structure which the original contractor has agreed to erect for the owner.—*Hihn-Hammond Lumber Co. v. Elsom*, 171 Cal. 570, 154 Pac. 12.

10. One who contracts to furnish the material and labor necessary to complete the lathing and plastering upon a building, according to specifications attached to the contract, is a subcontractor and not a materialman.—*Hihn-Hammond Lumber Co. v. Elsom*, 171 Cal. 570, 154 Pac. 12.

11. One who agrees to furnish and place in the building a considerable part of the floors and walls thereof is a subcontractor, as are likewise persons who respectively agree to furnish and set in place the tile for the bathroom walls, the laying of fibre stone flooring and furnishing the material in a certain room and on certain porches, and the furnishing of the material and the putting on the building of a mission tile roof—all constituting substantial and important parts of the building and of the work constructing it. — *Hihn-Hammond Lumber Co. v. Elsom*, 171 Cal. 570, 154 Pac. 12.

12. In determining the question whether one who claims a lien upon a building is a contractor or materialman, something more than a mere comparison of the cost of the labor of attaching material to the building with the total price of the work and materials is necessary in many cases; generally speaking, one who, under an agreement with the contractor, enters upon the premises and there, with material furnished by himself, erects a definite part of the structure composing the building, is a subcontractor within the meaning of the section, regardless of the comparative cost of labor and material.—*Hihn-Hammond Lumber Co. v. Elsom*, 171 Cal. 570, 154 Pac. 12.

13. One who agrees to furnish and set in place in the building all "tin, galvanized iron and copper work, including copper sash bars, galvanized iron caps, copper flashings at back of wall, two rows of cross bars and a half bar at wall line the full length," according to plans and specifications of the building is a subcontractor.—*Hihn-Hammond Lumber Co. v. Elsom*, 171 Cal. 570, 154 Pac. 12.

§ 1195. ANY NUMBER OF LIEN-HOLDERS MAY JOIN IN ACTION. Any number of persons claiming liens may join in the same action and when separate actions are commenced, the court may consolidate them. The court must also allow, as a part of the costs, the money paid for verifying and recording the lien, such costs to be allowed to each claimant whose lien is established, whether he be plaintiff or defendant, or whether they all join in one action or separate actions are consolidated.

History: Enacted March 11, 1872; amendment approved March 30, 1874, Code Amdts. 1873-4, p. 412; March 18, 1885, Stats. and Amdts. 1884-5, p. 146; May 1, 1911, Stats. and Amdts. 1911, p. 1319.

MECHANICS' LIEN — FORECLOSURE — JOINDER OF CLAIMANTS—ATTORNEY'S FEES.

1. Appeal—Modification—Judgment failing to allow costs and attorney's fees.
2. Same—Nature of.
3. Consolidated actions—Practice in making separate findings and judgments.
4. Same — Court should treat actions as single action.
- 5, 6. Constitutionality of section.
7. Construed with Rule XXIV of the supreme court.
8. Construction of section — Attorney's fees.
9. Contractor—Does not come within provisions of statute.
10. Evidence—As to attorney's fees.
- 11, 12. Incident of judgment — Right to recover reasonable attorney's fees.
13. Same—Cost of recording lien and attorney's fees.

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14. Jurisdiction of claims in consolidated actions.
- 15, 16. Jury trial.
17. Lien of attorney's fees.
18. Misjoinder — Actions for liens upon mining claims.
19. Premature action.
20. Pleading—Attorney's fees.
21. Same—Cause of action.
22. Same—No allegations as to attorney's fees is necessary.
23. Same—Right to attorney's fees is dependent upon right of lien naturally.
24. Separate owners.
25. Separate statement of causes of action.
26. Stipulation as to attorney's fees.
- 27-29. Trial court — Must allow attorney's fees.
- 30-32. Same—Services on appeal.

See, ante, § 1183 and note.

As to liberal construction, see, post, § 1202a, "Sec. 14."

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1. **Appeal—Modification—Judgment failing to allow costs and attorney's fees** provided for under above section will be modified so as to include costs and reasonable attorney's fees, including expense of recording lien.—*Scammon v. Denio*, 72 Cal. 393, 397, 14 Pac. 98.

2. **Same—Nature of.**—Appeal from order allowing attorney's fees and also from judgment as modified stands upon same plane as an appeal from an order made upon motion to retax costs.—*Schallert-Ganahl Lumber Co. v. Neal*, 94 Cal. 192, 194, 29 Pac. 622. See *Dooly v. Norton*, 41 Cal. 439, 442; *Empire Gold Min. Co. v. Bonanza Gold Min. Co.*, 67 Cal. 406, 7 Pac. 810.

3. **Consolidated actions—Practice in making separate findings and judgments** is inconsistent with court's order consolidating actions, and is attended with great inconvenience and possibility of serious complication. Provision authorizing consolidation is placed in same category with that permitting several claimants to join as plaintiffs in one action.—*Willamette Steam Mill Lumber & Mfg. Co. v. Los Angeles College Co.*, 94 Cal. 229, 232, 29 Pac. 625.

4. **Same—Court should treat actions as single action** after order of consolidation has been made, and embody its decision in single set of findings upon which single judgment should be entered.—*Willamette Steam Mill Lumber & Mfg. Co. v. Los Angeles College Co.*, 94 Cal. 229, 232, 29 Pac. 625.

5. **Constitutionality of section.**—Under familiar rules of construction there is nothing in provisions of section 15, article XX, of California constitution to limit ordinary powers of legislature, or to take from it specific power exercised under above section; nor is constitutional provision to be construed as repealing existing provisions of this code on subject of "liens of mechanics and others," among which is above section.—*Peckham v. Fox*, 1 Cal. App. 307, 308, 82 Pac. 91.

6. **Provisions of above section are not in conflict** with section 1 of fourteenth amendment to federal constitution, or with any other provision of federal or state constitution.—*Pickham v. Fox*, 1 Cal. App. 307, 308, 82 Pac. 92.

7. **Construed with Rule XXIV of supreme court.**—Rule which provides that "in all cases in which judgment or order appealed from is reversed or modified, and order of reversal or modification contains no directions as to costs of appeal, clerk will enter upon record and insert in remittitur and judgment that appellants recover costs of appeal," has no application to case involving attorney's fees and costs under above section; for under above section such matters are placed in hands of superior court.—*Schallert-Ganahl Lumber Co. v. Neal*, 94 Cal. 192, 193, 29 Pac. 622.

8. **Construction of section—Attorney's fees.**—Cases coming under provisions of

above section and similar statutes are to be distinguished from cases of foreclosure of mortgages where there is no statutory provision providing for attorney's fees in the absence of a provision in the mortgage.—*Peckham v. Fox*, 1 Cal. App. 307, 308, 82 Pac. 91, 92; *Monroe v. Fohl*, 72 Cal. 568, 570, 14 Pac. 514; *Hotaling v. Monteith*, 128 Cal. 556, 557, 61 Pac. 95.

As to right of successful lien-claimant to recover costs and reasonable attorney's fees, see, ante, §1184 and note pars. 225-227.

9. **Contractor—Does not come within provisions of statute** as to costs and attorney's fees where he fails to attach lien upon amount due to him according to terms of contract.—*Stimson v. Dunham-Carrigan-Hayden Co.*, 146 Cal. 281, 285, 79 Pac. 968.

10. **Evidence—As to attorney's fees.**—Validity of judgment awarding attorney's fees is not affected by failure of plaintiff to produce evidence on that question, as court is not bound by testimony touching value of attorney's fees in suits for foreclosure of mechanics' liens.—*Clancy v. Plover*, 107 Cal. 272, 275, 40 Pac. 394. See *Rapp v. Spring Valley Gold Co.*, 74 Cal. 532, 16 Pac. 325; *Watson v. Sutro*, 103 Cal. 169, 172, 37 Pac. 201.

11. **Incident of judgment—Right to recover reasonable attorney's fees,** like ordinary right to recover costs, is necessary incident to judgment establishing lien, and does not depend upon an averment in complaint except such as are necessary to establish lien.—*Mulcahy v. Buckley*, 100 Cal. 484, 490, 35 Pac. 144. See *Carriere v. Minturn*, 5 Cal. 435; *Rapp v. Spring Valley Gold Co.*, 74 Cal. 532, 16 Pac. 325; *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231.

12. **Attorney's fees referred to in above section** are not considered part of costs, but as matter separate and distinct therefrom. Still, such fees bear some resemblance to costs inasmuch as they are incident to judgment.—*Schallert-Ganahl Lumber Co. v. Neal*, 94 Cal. 192, 193, 29 Pac. 622.

13. **Same—Cost of recording lien and attorney's fees** are required to be provided for by court "as an incident to judgment."—*Peckham v. Fox*, 1 Cal. App. 307, 308, 82 Pac. 91. See *Rapp v. Spring Valley Gold Co.*, 74 Cal. 532, 535, 16 Pac. 325; *McIntyre v. Trautner*, 78 Cal. 449, 21 Pac. 15; *Schallert-Ganahl Lumber Co. v. Neal*, 94 Cal. 192, 29 Pac. 622; *San Joaquin Lumber Co. v. Welton*, 115 Cal. 1, 46 Pac. 735, 1057; *Sweeney v. Meyer*, 124 Cal. 512, 517, 57 Pac. 479.

14. **Jurisdiction of claims in consolidated actions.**—It is in exercise of its jurisdiction in equity that superior court entertains suit to enforce liens of mechanics and others provided for in statute where plaintiffs unite in one action to enforce their several alleged liens for labor done by them respectively upon certain mining ground, demand of each plaintiff set forth in support of action being in each instance less than

three hundred dollars, though in aggregate, claims amounted to more than three hundred dollars held that superior court has jurisdiction to enforce liens by virtue of its jurisdiction in equity for such several amounts, but that court has no jurisdiction to render personal judgment under such circumstances on any demand less than three hundred dollars in amount, and that accumulation of several claims in one action can not confer jurisdiction to render such personal judgment.—*Miller v. Carlisle*, 127 Cal. 327, 329, 59 Pac. 785. See *Brock v. Bruce*, 5 Cal. 279; *Thomas v. Anderson*, 58 Cal. 99; *Derby v. Stevens*, 64 Cal. 287, 30 Pac. 820; *Curnow v. Happy Valley Blue Gravel & Hydraulic Co.*, 68 Cal. 262, 9 Pac. 149.

15. Jury trial.—Motion for jury trial is properly denied by court upon defendant's motion in consolidated action, where defendant refuses to comply with conditions upon which court was willing to order issue in case to be tried by jury, that is that defendant should make deposit of money with clerk sufficient to pay clerk's and sheriff's fees for summoning jury and jury fees for one day for twenty jurors estimated to amount to sixty dollars in all.—*Curnow v. Happy Valley Blue Gravel & Hydraulic Co.*, 68 Cal. 262, 264, 9 Pac. 149.

16. Action for foreclosure of laborers' liens upon real property as security for money due to persons performing manual labor on same. is an equitable one, and party in such proceeding is not entitled as matter of right to jury trial.—*Curnow v. Happy Valley Blue Gravel & Hydraulic Co.*, 68 Cal. 262, 264, 9 Pac. 149. See *Societe Francaise v. Selhelmer*, 57 Cal. 623.

17. Lien of attorney's fees.—Attorney's fees are lien upon property foreclosed.—*Reid v. Clay*, 134 Cal. 207, 215, 216, 66 Pac. 262; *Peckham v. Fox*, 1 Cal. App. 307, 308, 82 Pac. 91, 92. See *Rapp v. Spring Valley Gold Co.*, 74 Cal. 532, 16 Pac. 325; *McIntyre v. Trautner*, 78 Cal. 449, 21 Pac. 15; *Schallert-Ganahl Lumber Co. v. Neal*, 94 Cal. 192, 29 Pac. 622; *San Joaquin Lumber Co. v. Welton*, 115 Cal. 1, 46 Pac. 735, 1057.

18. Misjoinder—Actions for liens upon mining claims.—In action to foreclose laborers' lien, plaintiff being assignee of liens for labor performed upon several mining claims owned and operated by one owner, held under circumstances several claims all adjoining each other are to be considered as one piece of property for purpose of liens, and that there was no misjoinder of causes of action.—*Malone v. Big Flat Gold Min. Co.*, 76 Cal. 578, 583, 18 Pac. 772.

19. Premature action.—Action to foreclose mechanics' lien can not be maintained until debt for which lien is made and held as security has become payable. In such action, as in all other actions, complaint must show cause of action, otherwise it will not support judgment.—*Harmon v. Ashmead*, 60 Cal. 439, 441. See *Abbe v. Marr*,

14 Cal. 210; *Frisch v. Caler*, 21 Cal. 71; *Kinsey v. Wallace*, 36 Cal. 463; *Roberts v. Treadwell*, 50 Cal. 520, 521.

20. Pleading—Attorney's fees.—Allowance of attorney's fees is an incident of judgment, and is to be fixed by court, irrespective of any averment in complaint.—*Pacific Mut. Life Ins. Co. v. Fisher*, 106 Cal. 224, 234, 39 Pac. 759. See *Rapp v. Spring Valley Gold Co.*, 74 Cal. 532, 16 Pac. 325; *Mulcahy v. Buckley*, 100 Cal. 484, 490, 35 Pac. 144.

21. Same—Cause of action.—Perfect statement of defective cause of action is not cured by failure to answer or by verdict.—*Harmon v. Ashmead*, 60 Cal. 439, 442. See *Abbe v. Marr*, 14 Cal. 210; *Choyinski v. Cohen*, 39 Cal. 501, 502; *Township of Lincoln v. Cambria Iron Co.*, 103 U. S. 412, 26 L. ed. 518.

22. Same—No allegations as to attorney's fees is necessary in complaint, and no finding is necessary, since above section provides that court must allow attorney's fees in superior and supreme courts.—*Ah Louis v. Harwood*, 140 Cal. 500, 507, 74 Pac. 41.

23. Same—Right to attorney's fees is dependent upon right of lien naturally.—*Bates v. Santa Barbara County*, 90 Cal. 543, 546, 27 Pac. 438.

24. Separate owners.—Where action is brought under above section in which number of persons join in same action claiming liens against same property, trial court does not err in refusing to grant separate trial upon each cause of action.—*Curnow v. Happy Valley Blue Gravel & Hydraulic Co.*, 68 Cal. 262, 263, 9 Pac. 149.

25. Separate statement of causes of action is sufficient where there is distinct statement of facts as to each lien, as there is no necessity that they should be numbered or otherwise formally designated.—*Booth v. Pendola*, 88 Cal. 36, 42, 23 Pac. 200, 25 Pac. 1101.

26. Stipulation as to attorney's fees.—Where stipulation as to attorney's fees is entered into through misunderstanding application should first be made to trial court to be relieved from such stipulation. Where this is not done allowance made by trial court, where it could not be said that amount is not reasonable, will not be disturbed.—*Rapp v. Spring Valley Gold Co.*, 74 Cal. 532, 535, 16 Pac. 325.

27. Trial court—Must allow attorney's fees.—Application for attorney's fees under above section must be made to superior court.—*San Joaquin Lumber Co. v. Welton*, 115 Cal. 1, 5, 46 Pac. 735, 1057.

28. Fixing of attorney's fees is duty devolved upon trial court by statute.—*San Joaquin Lumber Co. v. Welton*, 115 Cal. 1, 46 Pac. 735, 1057; *Sweeney v. Meyer*, 124 Cal. 512, 57 Pac. 479.

29. Duty is imposed upon trial court of providing for costs of recording lien and for attorney's fees as incident to judgment.—

Peckham v. Fox, 1 Cal. App. 307, 308, 82 Pac. 91, 92.

30. **Same—Services on appeal.**—Reasonable fee for services of attorney in supreme court may be allowed under above section and trial court may be directed upon the going down of remittitur to make such allowance.—West Coast Lumber Co. v. Newkirk, 80 Cal. 275, 281, 22 Pac. 231.

31. Where allowance is made by trial court for attorney's fees without indicating that it intended to limit such allowance for services in superior court, if for any reason

further allowance is proper for services in supreme court, application therefor should be made to trial court where propriety of allowance as well as amount to be allowed can be more readily determined.—Williams v. Gaston, 127 Cal. 641, 642, 60 Pac. 427.

32. Attorney's fees may be allowed under above section in supreme court as well as in superior court.—Clark v. Taylor, 91 Cal. 522, 554, 27 Pac. 860; West Coast Lumber Co. v. Newkirk, 80 Cal. 275, 281, 22 Pac. 231; Smith v. Solomon, 84 Cal. 537, 24 Pac. 286; Harlan v. Stufflebeem, 87 Cal. 508, 513, 25 Pac. 686.

§ 1196. ATTACHMENT, ETC., AGAINST MATERIALS. Whenever materials shall have been furnished for use in the construction, alteration, or repair of any building or other improvement, such materials shall not be subject to attachment, execution, or other legal process, to enforce any debt due by the purchaser of such materials, except a debt due for the purchase-money thereof, so long as in good faith the same are about to be applied to the construction, alteration, or repair of such building, mining claim, or other improvement.

History: Enacted March 11, 1872; amendment approved March 30, 1874, Code Amdts. 1873-4, p. 412; repeal by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 190, held unconstitutional, see history, § 5 ante.

See, ante, § 1183 and note.

As to the liability of materials to be at-

tached at suit of the contractor's creditors, see note Ann. Cas. 1913A, 876.

§ 1197. LIEN DOES NOT IMPAIR RIGHT OF PERSONAL ACTION TO RECOVER DEBT. Nothing contained in this chapter shall be construed to impair or affect the right of any person to whom any debt may be due for work done or materials furnished to maintain a personal action to recover said debt against the person liable therefor; and the person bringing such personal action may take out an attachment therefor, notwithstanding his lien, and in his affidavit to procure an attachment need not state that his demand is not secured by a lien; but the judgment, if any, obtained by the plaintiff in such personal action shall not be construed to impair or merge any lien held by said plaintiff under this chapter; provided, only, that any money collected on said judgment shall be credited on the amount of such lien in any action brought to enforce the same, in accordance with the provisions of this chapter.

History: Enacted March 11, 1872; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 351; May 1, 1911, Stats. and Amdts. 1911, p. 1319.

MECHANICS' LIEN—RIGHT TO FORECLOSE AND PURSUE OTHER REMEDIES, SIMULTANEOUSLY.

1. Action upon implied contract.
2. Payment of third instalment when building is completed.

As to liberal construction, see, post, § 1203a, "Sec. 14."

As to right to enforce mechanics' lien and to pursue other remedies simultaneously, see 3 Ann. Cas. 1100.

As to right of money judgment not lost or waived by proceeding to enforce lien, see, ante, § 1194 and note pars. 7, 8.

1. **Action upon implied contract.**—Statute does not expressly or by necessary implication prohibit an action upon implied contract to recover value of labor or materials, although such value may exceed one thousand dollars.—Rebman v. San Gabriel Valley Land & Water Co., 95 Cal. 390, 394, 30 Pac. 564. See Klæssig v. Allspaugh, 91 Cal. 231, 234, 13 L. R. A. 418, 27 Pac. 655;

but see, ante, § 1183 and note paragraphs 304, 305, showing that case of *Rebman v. San Gabriel Valley Land & Water Co.* has been overruled.

2. Payment of third instalment when building is completed does not affect or im-

pair any claim or lien of materialman where right of such materialman would have been no different if payment had been made two days later, when certificate of approval was given.—*Valley Lumber Co. v. Struck*, 146 Cal. 266, 271, 80 Pac. 405.

§ 1198. RULES OF PRACTICE. Except as otherwise provided in this chapter, the provisions of part two of this code are applicable to, and constitute the rules of practice in, the proceedings mentioned in this chapter.

History: Enacted March 11, 1872.

See, ante, § 1183 and note.

§ 1199. NEW TRIALS AND APPEALS. The provisions of part two of this code relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this chapter, apply to the proceedings mentioned in this chapter.

History: Enacted March 11, 1872.

See, ante, § 1183 and note.

§ 1200. WHERE CONTRACTOR FAILS TO PERFORM CONTRACT.
[Repealed.]

History: Enacted March 18, 1885, Stats. and Amdts. 1884-5, p. 146; repeal approved May 1, 1911, Stats. and Amdts. 1911, p. 1319.

MECHANICS' LIEN—ABANDONMENT OF CONTRACT.

1. Abandonment of contract—As to what it is.
2. Same—Payment of liens—Proportion of contract-price applicable.
3. Same—Same—Amount applicable to payment of liens—Proper findings.
4. Same—Value of work performed—Sufficiency of finding.
5. Breach of contract—Nonpayment of instalment.
6. Construction of section—In general.
7. Contract-price—Payable in instalments—Abandonment of contract—Portion of contract-price available for liens.
8. Credits—Owner is entitled to allowance of lawful credits.
9. Effect of failure of owner to comply with section.
10. Failure of contractor to perform contract—Construction.

See, ante, § 1183 and note.

1. Abandonment of contract—As to what it is.—Contractor abandons contract as contemplated in above section when he leaves off work without cause; and subcontractor's rights in such case are measured by provision of above section.—*Golden Gate Lumber Co. v. Sahrbacher*, 105 Cal. 114, 116, 38 Pac. 635.

2. Same—Payment of liens—Proportion of contract-price applicable.—Under the provisions of the above section, as it existed

prior to its repeal in 1911, there is recognized the right of a contractor to terminate a building-contract by abandonment of the work, and provision made as to a method of arriving at the proportion of the contract-price applicable to liens in that event; and under it, in case of abandonment, the performance of the contract came to an end, and the rights of all parties thereunder were to be adjusted as so they did.—*Pacific Mfg. Co. v. Perry*, 40 Cal. App. 708, 181 Pac. 820.

3. Same—Same—Amount applicable to payment of liens—Proper findings.—In the case of an action to foreclose liens under a contract concluded by abandonment, under the provisions of the above section as it stood prior to its repeal in 1911, the court, having found that at the time of the abandonment the contract had been completed to a given per cent of the whole, it properly held that such per cent of the contract-price, less the payments made to the contractor, was applicable to the discharge of such abandonment; the actual cost of completing the building being immaterial.—*Pacific Mfg. Co. v. Perry*, 40 Cal. App. 708, 181 Pac. 820.

4. Same—Value of work performed—Sufficiency of findings.—In an action to foreclose a contractor's and materialman's liens under the above section, prior to its repeal in 1911, where the contract had not been completed and the work abandoned by the contractor, a finding by the court that the value of the work and materials already done and finished at the time of the aban-

donment by the contractor, including materials then actually delivered and on the ground, estimated as nearly as may be by the standard of the whole contract-price, exclusive of the extra work, was a stated aggregate sum, being a given per cent of the contract-price, on account of which there had been paid the contractor at the time of the abandonment of the work a stated sum, followed by a finding as to the reasonable value of the extra work performed under authorization from the owners, the amount paid on account thereof, and the balance due therefor, was held to be a sufficient finding of fact.—*Pacific Mfg. Co. v. Perry*, 40 Cal. App. 708, 181 Pac. 820.

5. Breach of contract—Nonpayment of instalment of contract-price when due is such breach of contract as to justify contractor in leaving work and recovering upon quantum meruit.—*Porter v. Arrowhead R. Co.*, 100 Cal. 500, 35 Pac. 146; *Golden Gate L. Co. v. Sahrbacher*, 105 Cal. 114, 116, 38 Pac. 635.

6. Construction of section—In general.—See, ante, § 1183, note pars. 146-150.

7. Contract-price—Payable in instalments—Abandonment of contract—Portion of contract-price available for liens.—In a case in which a building-contract provided that seventy-five per cent of the value of the labor performed and materials furnished during each month was to be paid on the first day of the succeeding month until final acceptance of the building of the remaining twenty-five per cent thirty-five days after such acceptance, and the contract was abandoned before completion of the building, the proper amount for the court to take as a basis for the calculation of the

portion of the contract-price available to materialmen and applicable to the satisfaction of their liens, under the provisions of the above section as it stood before its repeal, was the total value of the work and materials placed on the land before such abandonment and not the amount of money which had been paid to the contractor at the time of abandonment.—*Bellingham Bay Lumber Co. v. Hopkins*, 34 Cal. App. 534, 168 Pac. 159.

8. Credits—Owner is entitled to allowance of lawful credits under this section and to deductions therefor from unpaid instalments of contract-price.—*Reed v. Norton*, 90 Cal. 590, 593, 26 Pac. 767, 27 Pac. 426.

9. Effect of failure of owner to comply with section.—Where owner does not choose to avail himself of mode of limiting his liabilities provided in this section labor done and materials furnished by all persons mentioned in section 1183, ante, shall be deemed to have been done and furnished at personal instance of owner, and they shall have lien for value thereof.—*Willamette Steam Mill Lumber & Mfg. Co. v. Los Angeles College Co.*, 94 Cal. 229, 237, 29 Pac. 625.

10. Failure of contractor to perform contract—Construction.—Where a building contract had been abandoned by the contractor prior to completion the portion of the contract-price applicable to the liens of other persons than the contractor prior to the repeal of this section, the actual value of the work and materials was not the test, but the value estimated as near as may be by the standard of the whole contract-price.—*Olson-Mahoney Lumber Co. v. Dunne Inv. Co.*, 30 Cal. App. 332, 159 Pac. 178.

§ 1200a. [No such section.]

Editorial Note: Section 13 of chapter 281 of the Laws of 1911 (Stats. and Amdts. 1911, p. 1319), purports to repeal §§ 1183, 1200 and 1200a of the Code of Civil Procedure. There is no such section in that code as § 1200a. Turning to the title of the act we find the purpose of the legislature, as expressed in the title to the act, was to repeal §§ 1183, 1200 and 1203a; but this they manifestly did not do. This mistake in the difference between the title of the bill and the provisions in Sec. 13 of the act is a defect inherent in the bill at the time it was drafted, and was carried through all the progressive stages and signed as a law with this inherent defect. There is a failure to comply with § 24 of art. IV of the Constitution. Just what the effect will be on the repeals there attempted is for the courts to say; but it is manifest that § 1203a was not repealed as the legislature intended.

§ 1201. WRITTEN CONSENT TO WAIVE CLAIMS. It shall not be competent for the owner and contractor, or either of them, by any term of their contract, or otherwise, to waive, affect, or impair the claims and liens of other persons, whether with or without notice, except by their written consent, and any term of the contract to that effect shall be null and void.

History: Enactment approved March 18, 1885, Stats. and Amdts. 1884-5, p. 146.

1. Construction.—This section does not apply where contract-price is less than one thousand dollars.—*Southern Cal. Lumber Co. v. Jones*, 133 Cal. 242, 245, 65 Pac. 378.

§ 1202. WHAT FORFEITS LIEN. Any person who shall wilfully give a false notice of his claim to the owner under the provisions of section one thousand one hundred and eighty-four shall forfeit his lien. Any person who shall wilfully include in his claim filed under section one thousand one hundred and eighty-seven work or materials not performed upon or furnished for the property described in the claims shall forfeit his lien.

History: Enactment approved March 18, 1885, Stats. and Amdts. 1884-5, p. 146; amendment approved May 1, 1911, Stats. and Amdts. 1911, p. 1319.

1. Construction.—Provision in this section that any person who shall "wilfully include in his claim," etc., must not only be strictly construed, but evidence under which it is invoked should be clear and convincing that violation was wilful and intentional.—*Schallert-Ganahl Lumber Co. v. Neal*, 91

Cal. 362, 365, 27 Pac. 743; *Pacific Mut. Life Ins. Co. v. Fisher*, 106 Cal. 224, 235, 39 Pac. 758.

As to construction of section generally, see, ante, § 1183, note pars. 146-150, and, post, § 1203a, "Sec. 14."

§ 1203. MISTAKE IN STATEMENT NOT TO INVALIDATE LIEN. No mistake or errors in the statement of the demand, or of the amount of credits and offsets allowed or of the balance asserted to be due to claimant, nor in the description of the property against which the claim is filed, shall invalidate the lien, unless the court finds that such mistake or error in the statement of the demand, credits and offsets, or of the balance due, was made with the intent to defraud, or the court shall find that an innocent third party, without notice, direct or constructive, has since the claim was filed, become the bona fide owner of the property liened upon, and that the notice of claim was so deficient that it did not put the party upon further inquiry in any manner.

History: Original section enacted March 18, 1885, Stats. and Amdts. 1884-5, p. 147; repeal approved March 15, 1887, Stats. and Amdts. 1886-7, p. 155; enactment of new section approved March 23, 1893, Stats. and Amdts. 1893, p. 202; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 190, held unconstitutional, see history, § 5 ante; enactment approved May 1, 1911, Stats. and Amdts. 1911, p. 1319.

MECHANICS' LIEN — WHAT FORFEITS LIEN.

1. Construction—Language of statute.
- 2-6. Constitutionality of section.
7. Same—Question not involved.
8. Filing of undertaking essential.
9. Lien on real property—Is entirely different from personal obligation.
10. Notice of claim of lien—Mistake in not to invalidate—Variance fatal, when.
11. Schoolhouse—Bond for construction—Estoppel to deny liability.
12. Statement of amount in contract.
13. Testimony as to character of bond.

See, ante, § 1183 and note.

1. Construction—Language of statute.—Meaning to be given clause in undertaking which follows language of statute to effect that bond shall inure to benefit of persons who performed labor for or furnished ma-

terials to contractor, held not to apply to persons advancing moneys for use by contractor under contract with him for division of profits where such contract did not create partnership.—*Cadenasso v. Antonelle*, 127 Cal. 382, 387, 59 Pac. 765.

As to construction of section, see, post, § 1203a, "Sec. 14."

2. Constitutionality of section.—Provisions of above section requiring that building contract shall be accompanied by bond are unconstitutional and void.—*Gibbs v. Tally*, 133 Cal. 373, 377, 60 L. R. A. 815, 65 Pac. 970; *Shaughnessy v. American S. Co.*, 138 Cal. 543, 545, 69 Pac. 250, 71 Pac. 701; *Snell v. Bradbury*, 139 Cal. 379, 380, 73 Pac. 150.

3. Above section is unconstitutional.—*Montague v. Furness*, 145 Cal. 205, 206, 78 Pac. 240. See *San Francisco Lumber Co. v. Bibb*, 139 Cal. 192, 193, 194, 72 Pac. 964; 139 Cal. 325, 326, 73 Pac. 864.

4. Distinguished from Mangrum v. Truesdale, 128 Cal. 145, 60 Pac. 775; *Carpen-*

ter v. Furrey, 128 Cal. 665, 61 Pac. 369 (in first of which cases no question was raised as to constitutionality of section, and second of which cases attacked validity of law upon grounds only, first, that subject was not expressed in title of the act, and second, that it was special law); Gibbs v. Tally, 133 Cal. 373, 377, 60 L. R. A. 815, 65 Pac. 970; Shaughnessy v. American Surety Co., 138 Cal. 543, 546, 69 Pac. 250, 71 Pac. 701.

5. Requirement of bond is entirely outside of protection of constitutional provision as to mechanics' lien and is in violation of the safeguard of both the state and federal constitutions. — Shaughnessy v. American Surety Co., 138 Cal. 543, 545, 69 Pac. 250, 71 Pac. 701.

As to provisions in section 1184, ante, being unconstitutional upon reasoning employed in declaring this section unconstitutional, see, ante, § 1184 and note par. 13.

6. Above section is not unconstitutional.—Carpenter v. Furrey, 128 Cal. 665, 668, 61 Pac. 369; Gibbs v. Tally, 6 Cal. Unrep. 621, 63 Pac. 168, 169.

See pars. 2-4, this note.

7. Same—Question not involved.—Validity of statutory bond upon building contract held not to involve question as to constitutionality of section.—Peoples Lumber Co. v. Gillard, 136 Cal. 55, 57, 68 Pac. 576.

8. Filing of undertaking essential.—Failure of owner and contractor to see that law is complied with and that undertaking is duly and properly filed, renders undertaking worthless and materialmen and laborers in such case have remedy against owner and contractor for such damages as they may have suffered.—Mangrum v. Truesdale, 128 Cal. 146, 147, 60 Pac. 775.

9. Lien on real property.—Is entirely different from personal obligation in form of bond; the latter is not included in the former and is totally different kind of security.—Shaughnessy v. American Surety Co., 138 Cal. 543, 545, 69 Pac. 250, 71 Pac. 701.

10. Notice of claim of lien—Mistakes in not to invalidate—Variance fatal, when.—Under the provisions of the above section

no mistakes or errors in the statement of the demand or claim of lien, or of the amount of credits and off-sets allowed, or of the balance asserted to be due claimant, or in the description of the property against which the claim is filed shall have the effect to invalidate the claim of lien; but this saving clause does not go far enough to relieve the claimant from making a "statement of the price," and when payable, required under the provisions of section 1187, ante, and that where there is a material variance between the price and terms of payment as set forth in the notice of claim and the statement in the proposal of sale which resulted in the contract will be fatal to the validity of the lien.—Schultheiss Bros. Co. v. Hunziker, 42 Cal. App. 73, 183 Pac. 347.

As to notice of lien generally, see, ante, § 1187; note pars. 368, 423-425.

11. Schoolhouse—Bond for construction—Estoppel to deny liability.—Contractor who delivers bond for construction of schoolhouse as an independent security and thereby induces party to make full payment of contract-price for construction of building, is in no position to deny his liability upon it, and he is estopped to dispute truth of particular recital contained in bond as to such fact.—Union Sheet Metal Works v. Dodge, 129 Cal. 390, 394, 395, 62 Pac. 41. See Kiessig v. Allspaugh, 91 Cal. 234, 27 Pac. 662; Kiessig v. Allspaugh, 99 Cal. 454, 34 Pac. 106.

12. Statement of amount in contract.—Contract is not void under above section because amount agreed to be paid thereunder is not stated in contract filed for record only where contract does not show on its face whether such amount is greater or less than one thousand dollars.—Snell v. Bradbury, 139 Cal. 379, 380, 73 Pac. 150.

13. Testimony as to character of bond.—Court does not err in sustaining objection to question asked of witness in cross-examination as whether he relied upon statutory bond at time of entering into contract, as it is not province of witnesses to determine as to whether bond is common-law bond or statutory bond.—Union Sheet Metal Works v. Dodge, 129 Cal. 390, 397, 62 Pac. 41.

§ 1203a. MISTAKES OR ERRORS IN STATEMENT NOT TO INVALIDATE. No mistakes or errors in the statement of the demand, or of the amount of credits and offsets allowed, or of the balance asserted to be due to claimant, nor in the description of the property against which the claim is filed, shall invalidate the lien, unless the court finds that such mistake or error in the statement of the demand, credits and offsets, or of the balance due, was made with the intent to defraud, or the court shall find that the innocent third party, without notice, direct or constructive, has since the claim was filed, become the bona fide owner of the property liened upon, and that the notice of

claim was so deficient that it did not put the party upon further inquiry in any manner.

History: Enactment approved March 22, 1907, Stats. and Amdts. 1907, p. 858; Kerr's Stats. and Amdts. 1906-7, p. 482; re-enacted verbatim *adlitteratim*, but numbered § 1203; but as § 1203 was not repealed, for the reasons stated in editorial note to § 1200a, ante, the numbering § 1203a is retained rather than § 1203[2].

Editorial Note: The effort of the legislature at the session of 1911 to repeal the above section was manifestly insufficient to accomplish that object. See editorial note to § 1200a, ante.

MECHANICS' LIEN—MISTAKE IN STATEMENT NOT TO INVALIDATE LIEN.

1. Construction of section—As not retroactive.
2. Price of materials—Immaterial variance.

See, ante, § 1183 and note.

1. **Construction of section—As not retroactive.**—As to generally, see, ante, § 1183, note par. 151.

2. **Price of materials—Immaterial variance.**—A claim of lien which states the contract-price for materials furnished is not invalid because a small part of the materials were furnished under an implied contract to pay their reasonable value, the total amount due being correctly stated and there being an absence of fraud or intentional misrepresentation.—*Jarvis v. Frey* 175 Cal. 687, 166 Pac. 997.

Sec. 14. [**CONSTRUCTION TO BE PLACED ON ACT.**] The provisions of this act shall be liberally construed with a view to effect its purpose. They are not intended as a re-enactment of the provisions of former statutes, with the policy heretofore impressed upon the same by the courts of this state, but are intended to reverse that policy to the extent of making the liens provided for, direct and independent of any account of indebtedness between the owner and contractor, thereby making the policy of this state conform to that of Nevada and other Pacific coast states.

History: Enactment approved May 1, 1911, and the above provision constituting section 14, of act adding to, amending and repealing sections of Chapter II, Stats. and Amdts. 1911, pp. 1319, 1320.

[Chapter III of Title IV of Part III of the Code of Civil Procedure and each and every section of said Chapter III are repealed and a new Chapter III is substituted to take the place thereof in said code to read as follows:]

CHAPTER III.

CERTAIN LIENS FOR SALARY AND WAGES.

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| <p>§ 1204. Preferred creditors when assignment of property is made.</p> <p>§ 1205. Same. Against estates.</p> <p>§ 1206. Same. In case of execution or attachment.</p> | <p>§ 1207. Dispute of claim or some portion thereof—costs.</p> <p>[§ 1207a.] Distribution of proceeds where the entire claim can not be paid.</p> |
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§ 1204. PREFERRED CREDITORS WHEN ASSIGNMENT OF PROPERTY IS MADE. When any assignment, whether voluntary or involuntary, is made for the benefit of the creditors of the assignor, or results from any proceeding in insolvency commenced against him, the wages and salaries of miners, mechanics, salesmen, servants, clerks, laborers, and other persons, for services rendered for him within sixty days prior to such assignment, or to the commencement of such proceeding, and not exceeding one hundred dollars

each, constitute preferred claims, and must be paid by the trustee or assignee before the claim of any other creditor of the assignor or insolvent.

History: Enacted March 11, 1872; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 352; March 9, 1893, Stats. and Amdts. 1893, p. 97; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 191, held unconstitutional, see history, § 5 ante; former section repealed and present enacted in place thereof March 16, 1907, Stats. and Amdts. 1907, p. 321, Kerr's Stats. and Amdts. 1906-7, p. 482.

WAGES AND SALARIES—PREFERRED IN ASSIGNMENTS.

1. Assignment for benefit of creditors—Preferences.
2. Preferences—Effect of special contract.

1. Assignment for benefit of creditors—Preferences.—Held to apply to all assignments within the definition of the language used, and not to be limited to assignments made in insolvent proceedings, or under the terms of sections 3449 et seq., Civil Code.—*Bank of Visalia v. Dillonwood Lumber Co.*, 148 Cal. 27, 82 Pac. 374.

As to assignments for benefit of creditors in general, see Kerr's Cyc. Civ. Code, 2d ed., §§ 3449-3473 and notes.

2. Preferences—Effect of special contract.—The principal creditors of a corporation debtor bind only themselves by a special agreement that one of their number who undertakes the management of the business of the corporation for the benefit of its creditors shall be preferred to the extent of his salary and the advances made by him for the purpose of financing the business; and the rights of the laborers hereunder can not be affected thereby.—*Bank of Visalia v. Dillonwood Lumber Co.*, 148 Cal. 25, 82 Pac. 374.

§ 1205. SAME. AGAINST ESTATES. Upon the death of any employer, the wages, not exceeding one hundred dollars in amount, of each miner, mechanic, salesman, clerk, servant, laborer, or other employee, for work done or services rendered within sixty days prior to such death, must be paid before any other claim against the estate of such employer, except his funeral expenses, and expenses of the last sickness, the allowance to the widow and infant children, and the charges and expenses of administration.

History: Enacted March 11, 1872; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 352; March 9, 1893, Stats. and Amdts. 1893, p. 97; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 191, held unconstitutional, see history, § 5 ante; former section repealed and present enacted in place thereof March 16, 1907, Stats. and Amdts. 1907, p. 321, Kerr's Stats. and Amdts. 1906-7, p. 482.

As to preferred claims against estates of deceased persons, see, post, §§ 1643 et seq. and notes.

§ 1206. SAME. IN CASE OF EXECUTION OR ATTACHMENT. Upon the levy of any attachment or execution, not founded upon a claim for labor, any miner, mechanic, salesman, servant, clerk, laborer, or other person who has performed work or rendered services for the defendant within sixty days prior to the levy, may file a verified statement of his claim therefor with the officer executing the writ, and give copies thereof to the debtor and the creditor, and such claim, not exceeding one hundred dollars, unless disputed, must be paid by such officer from the proceeds of such levy remaining in his hands at the filing of such statement.

If any claim is disputed, within the time, and in the manner prescribed in section twelve hundred and seven, the claimant must within ten days thereafter commence an action for the recovery of his demand, which action must

be prosecuted with due diligence, or his claim to priority of payment is forever barred.

The officer must retain in his possession until the determination of such action so much of the proceeds of the writ as may be necessary to satisfy the claim, and if the claimant recovers judgment, the officer must pay the same, including the costs of suit, from such proceeds.

History: Enacted March 11, 1872; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 352; March 9, 1893, Stats. and Amdts. 1893, p. 87; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 191, held unconstitutional, see history, § 5 ante; former section repealed and present enacted in place thereof March 16, 1907, Stats. and Amdts. 1907, p. 321, Kerr's Stats. and Amdts. 1906-7, p. 482.

WAGES AND SALARIES—PRIORITY IN EXECUTION OR ATTACHMENT.

1. Action is not required.
2. Appeal—Jurisdiction—Action arising in justices' court.
3. Same—Presumption.
4. Assignment of claims—Laborers asserting preferred claims.
5. Conflicting affidavits—It is for trial court to determine.
6. Constitutional law—In general.
7. Same—Notice is essential to constitutionality of act.
8. Equitable jurisdiction of court can not be invoked.
9. Intention of legislature.
10. Liability of sheriff—Action upon indemnity bond.
11. Lien not given.
12. Parties—Laborer who serves notice of claim, is party interested.
13. Purpose of notice provided for.
14. Sale under stipulation.
15. Service of notice—Necessity of.
16. Same—Effect of.
17. Sheriff is not required to respond.

1. Action is not required to be commenced by laborer to establish his claim unless it is disputed.—Carter v. Green Mountain Gold Min. Co., 83 Cal. 222, 224, 23 Pac. 317.

2. Appeal—Jurisdiction—Action arising in justices' court.—Where action under above section was commenced in justices' court for recovery of amount less than three hundred dollars under disputed claim for labor, whether viewed as action to enforce or foreclose lien, or as ordinary action for wages due, no appeal lies to supreme court from judgment or any order in such case.—Edsall v. Short, 122 Cal. 533, 534, 55 Pac. 327.

3. Same—Presumption.—Appellate court, where record is absolutely silent as to whether debtor disputed claims, will not presume that suit was unnecessary. It is duty of appellant to make it so appear by record.—Rauer v. Silva, 128 Cal. 42, 44, 60 Pac. 525.

4. Assignment of claims—Laborers asserting preferred claims under above section do not by assignment lose benefit of liens conferred by section after same have attached by reason of notice.—Mohle v. Tschirch, 63 Cal. 381, 383.

5. Conflicting affidavits—It is for trial court to determine from evidence before it whether notice was served, where there are conflicting affidavits as to such service.—Rauer v. Silva, 128 Cal. 42, 44, 60 Pac. 525.

6. Constitutional law—In general.—Section is not unconstitutional.—Mohle v. Tschirch, 63 Cal. 381, 382.

7. Same—Notice is essential to constitutionality of act, which would otherwise deprive debtor of his property without due process of law.—Taylor v. Hill, 115 Cal. 143, 145, 44 Pac. 336, 46 Pac. 922. See Cosica v. Kyle, 15 Nev. 394.

8. Equitable jurisdiction of court, can not be invoked by plaintiffs in action under above section to recover for labor performed within sixty days next before attachment of property, under notice served as provided by statute, and asking that an order be made requiring sheriff to sell property to satisfy plaintiffs' demands, together with costs, and asking further that plaintiffs have deficiency judgment in case proceeds are insufficient. In such action, plaintiffs, not being entitled to lien upon property, have plain, speedy, and adequate remedy at law, and are not entitled to relief of equitable nature.—Winrod v. Wolters, 141 Cal. 339, 402, 74 Pac. 1037.

9. Intention of legislature is that debtor as well as creditor shall have notice of claim and opportunity to dispute it.—Taylor v. Hill, 115 Cal. 143, 145, 44 Pac. 336, 46 Pac. 922.

10. Liability of sheriff—Action upon indemnity bond.—Where notice of claims was given sheriff and to attaching creditor under above section, and judgment was rendered in favor of attaching creditor (defendant here), and property was sold to him, and attaching creditor induced sheriff to deliver property to him without payment, upon his agreement that he would furnish sheriff with "a good and sufficient bond indemnifying him against all loss and liability which

he may incur by reason of delivering" such property, it being admitted by pleadings that such bond was never given, held that liability of sheriff upon such claims was conclusively established by judgments in suits against him and that indemnitor could not dispute such liability upon ground of unconstitutionality of above section.—*Showers v. Wadsworth*, 81 Cal. 270, 273, 22 Pac. 663.

11. Lien not given.—Above section carries with it no lien upon debtor's property. It gives only preferred claim against debtor and prescribes manner of enforcing this claim.—*Winrod v. Wolters*, 141 Cal. 339, 402, 74 Pac. 1037.

12. Parties—Laborer who serves notice of claim under above section, although not formally party to action, is in effect intervenor and party interested.—*Carter v. Green Mountain Gold Min. Co.*, 83 Cal. 222, 225, 23 Pac. 317.

13. Purpose of notice provided for is to divert from execution or attaching creditor money which he would otherwise be entitled to claim and receive as result of levy.—*Carter v. Green Mountain Gold Min. Co.*, 83 Cal. 222, 223, 224, 23 Pac. 317.

14. Sale under stipulation.—Where sale under stipulation was substituted for sale under execution, it does not destroy preference of claimants upon their claims for labor.—*Mohle v. Tschirch*, 63 Cal. 381, 383.

15. Service of notice—Necessity of.—Statute does not expressly require service of notice of claim for wages upon attachment or execution debtor, but it clearly implies that he is to have notice, for it provides that if debtor disputes claim he must within ten days "after receiving notice" serve upon claimant and officer executing writ verified statement in writing, setting forth that no part, or not more than specific portion of said claim, is justly due.—*Taylor v. Hill*, 115 Cal. 143, 145, 44 Pac. 336, 46 Pac. 922.

16. Same—Effect of.—Notice does not serve to initiate new and independent proceeding, and it is not required to be served like summons upon parties, and not upon attorney.—*Carter v. Green Mountain Gold Min. Co.*, 83 Cal. 222, 225, 23 Pac. 317.

17. Sheriff is not required to respond to claim notice of which is served upon him for his protection as well as for protection of all parties interested.—*Rauer v. Silva*, 128 Cal. 42, 44, 60 Pac. 525.

§ 1207. DISPUTE OF CLAIM OR SOME PORTION THEREOF—COSTS.

Within five days after receiving a copy of the statement provided for in the preceding section, either the debtor or the creditor may file with the officer a verified statement denying that any part of such claim is due for services rendered within sixty days next preceding the levy of the writ, or denying that any part of such claim, beyond a sum specified, is so due.

If a part of the claim is admitted to be due, and the claimant nevertheless brings suit and does not recover more than the amount so admitted, he can not recover costs, but the costs must be adjudged against him, and the amount thereof deducted from the sum found due him.

History: Enactment approved March 7, 1883, Stats. and Amdts. 1883, p. 47; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 192, held unconstitutional, see history, § 5 ante; former section repealed and present enacted in place thereof March 16, 1907, Stats. and Amdts. 1907, p. 322, Kerr's Stats. and Amdts. 1906-7, p. 483.

DISPUTE OF CLAIMS—STATEMENT.

1. Service of notice upon attorney of claimant.
2. Status of claimants.

1. Service of notice upon attorney of claimant meets requirements of statute.—*Carter v. Green Mountain Gold Min. Co.*, 83 Cal. 222, 224, 23 Pac. 317; *Taylor v. Hill*, 115 Cal. 143, 149, 44 Pac. 336, 46 Pac. 922.

2. Status of claimants.—Claims of laborers, etc., under above section are purely

statutory and the claimants are treated as interveners and have no superior rights to those of the plaintiff in the action except that of the first recourse to the moneys realized from the sale. They are beneficiaries of a special statutory privilege which must be strictly followed, and they and their rights to the money realized from the sale are as much subject to the power of the court in the matter of the fixing of costs, such as keeper's fees, etc., as is the plaintiff or his rights in the premises.—*Legg v. Worthington*, 157 Cal. 488, 492, 493, 108 Pac. 284.

[§ 1207a.] DISTRIBUTION OF PROCEEDS WHERE THE ENTIRE CLAIMS CAN NOT BE PAID. If the claims presented under section twelve hundred and six and not disputed, or, if disputed, established by judgment, exceed the proceeds of the writ not disposed of before their presentation, such proceeds must be distributed among the claimants in proportion to the amount of their respective claims.

History: Enactment approved March 16, 1907, and misnumbered 1208, instead of 1207a, Stats. and Amdts. 1907, p. 322, Kerr's Stats. and Amdts. 1906-7, p. 483.

CHAPTER IV.

CERTAIN LIENS UPON ANIMALS.

§ 1208. Liens arising from acts done in preventing cruelty to animals, how enforced.

§ 1208. LIEN FOR ACTS DONE IN PREVENTING CRUELTY TO ANIMALS, HOW ENFORCED. Any person having a lien upon any animal or animals under the provisions of sections five hundred and ninety-seven a, or five hundred and ninety-seven b, of the Penal Code may satisfy such lien as follows:

[When not satisfied—Resort to court—Sale on published notice.] If such lien be not discharged and satisfied, by the person responsible, within three days after the obligation becomes due, then the person holding such lien may resort to the proper court to satisfy the claim; or he, three days after the charges against such property become due, may sell the same, or such undivided fraction thereof as may become necessary, to defray the amount due and costs of sale, by giving three days' notice of the sale by advertising in some newspaper published in the county, or city and county, in which the lien has attached to the property; or, if there is no paper published in the county, then by posting notices of the sale in three of the most public places in the town or township for three days previous to the sale.

[Notice to contain, what—Proceeds of sale.] Said notices shall contain an accurate description of the property to be sold, together with the terms of sale, which must be for cash, payable on the consummation of the sale. The proceeds of the sale must be applied to the discharge of the lien and the costs of sale; the remainder, if any, must be paid over to the owner, if known, and if not known must be paid into the treasury of the humane society of the county, or city and county, wherein the sale takes place; if no humane society exists in the county, then the remainder shall be paid into the county treasury.

History: Enactment approved March 21, 1905, Stats. and Amdts. 1905, p. 632.

As to misnumbered § 1208, see, ante, [§ 1207a].

TITLE V. OF CONTEMPTS.

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| <p>§ 1209. What acts or omissions are contempts.</p> <p>§ 1210. Re-entry on property after eviction, when a contempt.</p> <p>§ 1211. A contempt committed in the presence of the court may be punished summarily—When not so committed an affidavit or statement shall be made.</p> <p>§ 1212. A warrant of attachment may issue or a notice to show cause.</p> <p>§ 1213. Bail may be given by a person arrested under such warrant.</p> <p>§ 1214. Sheriff must, upon executing the warrant, arrest and detain the person until discharged.</p> | <p>§ 1215. Bail-bond. form and conditions of.</p> <p>§ 1216. Officer must return warrant and undertaking, if any.</p> <p>§ 1217. Hearing.</p> <p>§ 1218. Judgment and penalty, if guilty.</p> <p>§ 1219. If the contempt is the omission to perform any act, the person may be imprisoned until performance.</p> <p>§ 1220. If a party fail to appear, proceedings.</p> <p>§ 1221. Illness sufficient cause for non-appearance of party arrested—Confinement under arrests for contempt.</p> <p>§ 1222. Judgment and orders in such cases final.</p> |
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§ 1209. WHAT ACTS OR OMISSIONS ARE CONTEMPTS. The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

1. **Disorderly, contemptuous, or insolent behavior toward the judge** while holding the court, tending to interrupt the due course of a trial or other judicial proceeding;
2. **A breach of the peace**, boisterous conduct, or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding;
3. **Misbehavior in office**, or other wilful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner, or other person, appointed or elected to perform a judicial or ministerial service;
4. **Abuse of the process or proceedings of the court**, or falsely pretending to act under authority of an order or process of the court;
5. **Disobedience of any lawful judgment**, order or process of the court;
6. **Assuming to be an officer**, attorney, or counselor of a court, and acting as such, without authority;
7. **Rescuing any person or property** in the custody of an officer by virtue of an order or process of such court;
8. **Unlawfully detaining a witness**, or party to an action, while going to, remaining at, or returning from the court where the action is on the calendar for trial;
9. **Any other unlawful interference** with the process or proceedings of a court;
10. **Disobedience of a subpoena duly served**, or refusing to be sworn or answer as a witness;
11. **When summoned as a juror in a court**, neglecting to attend or serve as such, or improperly conversing with a party to an action, to be tried at such court, or with any other person, in relation to the merits of such action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court.

12. Disobedience by an inferior tribunal, magistrate, or officer, of the lawful judgment, order, or process of a superior court, or proceeding in an action or special proceeding contrary to law, after such action or special proceeding is removed from the jurisdiction of such inferior tribunal, magistrate, or officer.

13. [Practising without a license.] Practising law, or advertising or holding one's self out as practising or as entitled to practise law, in any court, except a justice's or police court, without having received a license as attorney and counselor, issued under the laws of this state.

But no speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings.

History: Enacted March 11, 1872; amendment approved February 17, 1891, Stats. and Amdts. 1891, p. 6; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 192, held unconstitutional, see history, § 5 ante; amendment approved March 16, 1907, Stats. and Amdts. 1907, p. 319, Kerr's Stats. and Amdts. 1906-7, p. 483.

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12. Acts must be shown.

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 87. Questions asked witness must be pertinent and material.
 88. Superior court must possess all powers necessary.
 89. Taking of deposition is in no true sense a proceeding.
 90. Witness should be compelled to answer by court.
- IV. DISOBEDIENCE OF PROCESS AND ORDERS.
91. Attorney—Subdivision 3—Violating order of court directing client to deliver.
 92. Character of offense—Same regardless of how committed.
 - 93, 94. Complaint or answer of party may be stricken out.
 95. Disobeying restraining order — On three several days.
 - 96-98. Failure to pay alimony—In general.
 99. Same—Jurisdiction of court.
 100. Same—Prima facie showing.
 101. Same—Refusal to pay alimony and counsel fees ordered.
 102. Failure to pay fine—For violation of injunction.
 103. Same — Additional sentence of imprisonment.
 104. Judgment—Disobedience of—Subdivision 5.
 105. Judgment-debtor—Who disposed of property in order to defeat order.
 106. Knowledge of an order can not be imputed.
 107. Modification, amendment, repeal.
 108. Notary taking deposition—Can not punish for contempt.
 109. Notice of order disobeyed—In general.
 110. Same—Actual notice of injunction binds party.
 111. Same—When proof of service unnecessary.
 112. Order to make final accounting—Refusal to obey — Commitment for contempt.
 113. Original order—Not requiring party to perform act.

- 114. Proceeding in taking of depositions—Proceedings of court.
- 115. Prohibitory and mandatory injunctions pending appeal.
- 116, 117. Refusing to obey subpoena issued by notary public.
- 118. Service of judgment or order disobeyed, or demand.
- 119. Mode of service of order to show cause—Upon corporation.
- 120. Unauthorized order—Awarding alimony.
- 121. Violation or disregard of unlawful order—Can not be punished.
- 122. Wilful refusal of party to comply with decree.

V. INTERFERING WITH PROCESS.

- 123. Attempt to appeal from judgment which has been made final.
- 124. Attorney has right to address himself to court.
- 125. Juror wilfully and corruptly permitting any communication.
- 126. Letters sent to grand jury—Without purpose except to exasperate jurors.
- 127. Liberty of press stops where further exercise would invade rights.
- 128. Obstructing and taking from police officer by means of legal process.
- 129. Power to punish for contempt—Vested in courts for their own protection.

I. IN GENERAL.

As to publication of evidence taken in suit heard in camera—that is, in chamber; camera regia, King's chamber (old English law)—as contempt of court, see note Ann. Cas. 1912B, 452.

1. As to generally.—Judgments or orders made by a court or judge in cases of contempt are final and conclusive; and, therefore, such judgments or orders are non-appealable.—*Gale v. Tuolumne County Water Co.*, 169 Cal. 46, 145 Pac. 532.

2. An appeal does not lie from the judgment, even though it appear that the court adjudging one guilty of contempt has acted without jurisdiction. The party aggrieved in such a case must resort to other remedies.—*Gale v. Tuolumne County Water Co.*, 169 Cal. 46, 145 Pac. 532.

3. A violation in 1914 of a perpetual injunction, granted by a district court in 1870, constituted contempt of the superior court, which was the successor of the district court.—*Gale v. Tuolumne County Water Co.*, 169 Cal. 46, 145 Pac. 532.

4. One who has acquired the properties from the original plaintiff, in an action to enjoin the diversion of waters of a certain creek, is entitled to all the benefits which the original plaintiff acquired under a judgment awarding a perpetual injunction in C. C. P.—168

his favor, and has the same right to initiate contempt proceedings for violation of the injunction that the original plaintiff would have had if he had never disposed of the properties.—*Gale v. Tuolumne County Water Co.*, 169 Cal. 46, 145 Pac. 532.

5. The successor in interest of the defendant in an action to enjoin the diversion of waters of a certain creek, being bound by a perpetual injunction issued against said defendant, is guilty of contempt of court in violating said injunction with notice thereof.—*Gale v. Tuolumne County Water Co.*, 169 Cal. 46, 145 Pac. 332.

6. A contempt proceeding, though it may arise in a case in equity, is an independent proceeding between the contemner and the court, criminal or quasi-criminal in its nature, and is not itself a case "in equity."—*Gale v. Tuolumne County Water Co.*, 169 Cal. 46, 145 Pac. 532.

7. Section 963, ante, providing that an appeal lies "from any special order made after final judgment," being general in its character, is controlled by the special law contained in section 1222, post, which makes a judgment of contempt final and conclusive, and, therefore, non-appealable.—*Gale v. Tuolumne County Water Co.*, 169 Cal. 46, 145 Pac. 532.

8. For certain purposes, the law, recognizes a difference between a direct contempt, or that committed in the immediate view or presence of the court, and constructive contempt, or that committed elsewhere; but our code makes no distinction whatever so far as the right of appeal in either case is concerned.—*Gale v. Tuolumne County Water Co.*, 169 Cal. 46, 145 Pac. 532.

9. In a suit to enjoin the defendant from diverting the waters of a certain creek, where the court rendered judgment in favor of the plaintiff, perpetually enjoining the defendant from interfering with the natural flow of the waters in such a way as to prevent the waters from coming to plaintiff's ditch, no question of title to the waters is involved in a subsequent proceeding, instituted for the purpose of having the defendant adjudged guilty of contempt in violating the injunction; and the contention that in the contempt proceeding there was a distinct question of title, both heard and determined, and that the injunction had either taken the form of an order made after final judgment, and is therefore appealable, or is in itself a judgment, which is also appealable, can not be maintained.—*Gale v. Tuolumne County Water Co.*, 169 Cal. 46, 145 Pac. 532.

10. It is held in this proceeding for contempt in which the petitioner was ordered to pay a fine in the sum of five hundred dollars, or in default thereof, to be imprisoned in the county jail for a period in proportion of one day for each two dollars of such fine, or until such fine be otherwise satisfied, upon the authority of the case of *Lamberson v. Superior Court*, 151 Cal. 458,

the petitioner's contention that the whole proceeding is void because no affidavit was presented to the judge who ordered the citation to be issued prior to the issuance thereof, can not be maintained; and it is further held, upon the authority of *Ex parte Karlson*, 160 Cal. 378, that petitioner's contention that in no event could the imprisonment of petitioner extend beyond the period of five days, which is the maximum period where imprisonment alone is prescribed as the form of punishment under section 1218, post, is not maintainable.—*Ex parte La-bique*, 26 Cal. App. 258, 146 Pac. 690.

11. Acts constituting contempt—Wilful disobedience of court order.—Under the provisions of the above section and of section 166 of the Penal Code any wilful disobedience of a decree or order of a court having jurisdiction to make it constitutes a contempt of court.—*Selowsky v. Superior Court*, 180 Cal. 404, 181 Pac. 652.

12. Acts must be shown.—In proceedings for constructive contempt of court the affidavit which is made the basis for the proceeding should show upon its face the acts which constitute a contempt. It constitutes the complaint and unless it contains a statement of facts which show that a contempt has been committed the court is without jurisdiction to proceed in the matter and any judgment of contempt based thereon is void and will be so declared upon certiorari.—*Frowley v. Superior Court*, 158 Cal. 220, 110 Pac. 817.

As to knowledge not imputed, see par. 106, this note.

As to notice, see pars. 109-111, this note.

13. Addressing jury.—Passing by jury empaneled to try a criminal case while such jury were in the custody of deputy sheriffs going to the court room after a recess and exclaiming in a tone loud enough to be heard by the jurors, "Do not convict my friend" (meaning defendant) is a flagrant contempt.—*Ex parte Creely*, 8 Cal. App. 713, 717, 718, 97 Pac. 766.

14. In such case it was not necessary for the affidavit on which the proceedings were based to state any more than the facts. The fact that the person charged with the contempt so called out to the jury appears to be all the fact that could be stated. No one could tell the intent, object, or purpose of the remark. The remark itself tends to establish the person charged knew the defendant was on trial and that the jury had charge of the case with power either to convict or acquit and he must be presumed to have intended the ordinary consequences of his own deliberate act.—*Ex parte Creely*, 8 Cal. App. 713, 719, 97 Pac. 766.

15. Affidavit—As basis of proceedings.—An affidavit which is made the basis of a contempt proceeding must show facts constituting a contempt, or the court acquires no jurisdiction to proceed in the matter.—*Strain v. Superior Court*, 168 Cal. 216, 142 Pac. 62.

16. Same—As complaint.—The affidavit or affidavits upon which a contempt proceeding is based constitutes a complaint; and unless they, upon their faith, charge facts constituting a contempt, the court is without jurisdiction to proceed.—*Mitchell v. Superior Court*, 163 Cal. 423, 125 Pac. 1061.

As to burden of proof under affidavit charging criminal contempt, see, post, § 1217, note par. 1.

As to court acquiring jurisdiction on affidavit, only, see pars. 15-17, 31, this note.

As to the sufficiency of an affidavit on information and belief to support a contempt proceeding, see note 14 Ann. Cas. 1042.

As to when affidavit not required, see *In re Northern*, 18 Cal. App. 52, 121 Pac. 1010.

17. Same—Scope and effect of affidavit.—In a proceeding to punish a husband for contempt for failure to pay alimony, the affidavit is not merely to set in motion the machinery of the law for the punishment for the delinquent litigant. Its prayer is that he be required to show cause why he has not complied with the court's command, and this merely differentiates the proceedings from the ordinary simple prosecution and emphasizes its quality as something ancillary to the divorce action and subject to the rules with reference to the competency of witnesses in that cause.—*Mitchell v. Superior Court*, 163 Cal. 423, 125 Pac. 1061.

18. Appeal—Contempt of court is a specific criminal offense, and the charge and the finding and judgment of the court thereon are to be strictly construed in favor of the accused. The findings and judgment do not conclude a review court from an examination of the record to determine the jurisdictional facts, and, while all natural and proper conclusions from the record will be indulged in, where the performance or taking of necessary steps which ought to appear of record is not shown, it will be presumed that such steps were not taken.—*Reymert v. Smith*, 5 Cal. App. 380, 382, 90 Pac. 470.

As to appealability of judgment in contempt under appeal statute, see note 17 Ann. Cas. 321.

As to Penal Code having no application in civil contempt, see par. 24, this note.

As to procedure as in criminal cases, see pars. 56, 57, this note.

19. Applicable to probate court.—Above section is.—*Ex parte Smith*, 53 Cal. 204, 207.

20. Attorney—Filing answer as a guardian ad litem for infant—Without order appointing him would be guilty of contempt. Record being silent as to such appointment, presumption is that such order was regularly made.—*Emeric v. Alvarado*, 64 Cal. 529, 598, 2 Pac. 418.

As to contempt of attorney where client is ordered to deliver, see par. 91, this note.

21. Bond to stay execution—On appeal from order for delivery of property—Duty

of court.—The enforcement of such an order can not be stayed on appeal unless the appellant give a bond in an amount to be fixed by the court, as provided by sections 943 and 945, ante, and when the court omits to comply with appellant's request to fix such amount, the latter is unable to take the steps necessary to procure a stay, and in such case no contempt proceedings should be entertained against him for violating the injunction.—*Clute v. Superior Court*, 155 Cal. 20, 99 Pac. 362.

22. Bringing action which can not be maintained would rarely afford grounds for proceedings against party for contempt any more than would setting up an unmaintainable defense. Such action may be instituted in entire good faith, and, if so, there would be no use of process. Law affords redress against parties bringing such actions by costs which they incur and which are taxed against them. If action is prosecuted maliciously, party aggrieved may have action for damages.—*Reay v. Butler*, 69 Cal. 572, 583, 11 Pac. 463.

23. Civil contempt.—The declaration of section 6 of the Penal Code that no act shall be punishable as a crime except such as may be made a crime by statute, and then only in the manner prescribed or authorized by statute, has no application to contempts punishable under this section.—*Ex parte Karlson*, 160 Cal. 383, 117 Pac. 447.

As to constructive contempt, see par. 28, this note.

As to contempt of court being a specific criminal offense, see par. 18, this note.

As to criminal contempt, see, post, § 1217, note par. 1.

As to practice on constructive contempt, see par. 52, this note.

24. Same.—Penal Code has no application, and the question as to whether the particular act is punishable as a criminal contempt under section 166 of the Penal Code is immaterial to any inquiry arising hereunder.—*Ex parte Karlson*, 160 Cal. 383, 117 Pac. 447.

See pars. 56 and 57, this note.

25. Construction of section—Amendment of 1891.—The purpose of the 1891 amendment to subdivision 13, was to prevent the punishment of ordinary citizens not connected with the court, and not owing it any special duty of fidelity and respect for any "speech or publication" in censure or abuse of the court or its justices, to whomsoever made in the exercise of the privilege of free speech.—*Matter of Shay*, 160 Cal. 405, 117 Pac. 442.

26. Amendment of 1891 so modifies subdivision 3 as to prevent the punishment as a contempt thereunder of any violation of the duty of an attorney which consists solely in the making of a speech or publication reflecting upon the court, and its members, not in the presence of the court, nor in such manner as to actually interfere

with its proceedings (*Angellotti, J.*, dis. op.).—*Matter of Shay*, 160 Cal. 409, 117 Pac. 442.

27. Same—Disrespect of attorney.—The effect is to make any act of disrespect toward the court by an attorney thereof a contempt and punishable as such.—*Matter of Shay*, 160 Cal. 407, 117 Pac. 442.

28. Constructive contempt.—Where contempt is constructive and not committed in the presence of the court, an affidavit setting forth the contempt is essential to the jurisdiction of the court to proceed to punish it.—*In re McCarty*, 154 Cal. 534, 539, 98 Pac. 540.

As to civil contempt, see pars. 23 and 24, this note.

29. "Contempt"—Made special title in this code wherein specific instances thereof are enumerated, and mode and limit of punishment therefor defined, but the right for protecting itself against contempts of its authority and enforcing punishment therefor is essentially inherent in every court of general jurisdiction; and any definition of acts constituting contempt or limitation upon mode or extent of punishment thereof has its appropriate place in statute relating to jurisdiction and procedure of court.—*Ex parte Clancy*, 90 Cal. 553, 556, 27 Pac. 411.

30. Same—Proceedings are quasi-criminal in their nature, and an intent to commit a forbidden act is as essential to guilt as in case of criminal offense.—*Hutton v. Superior Court*, 147 Cal. 156, 160, 81 Pac. 409.

31. Court must acquire jurisdiction by affidavit or it has no jurisdiction to proceed and therefore if the affidavit lacks those statements essential to give the court jurisdiction they can not be supplied at the hearing.—*Frowley v. Superior Court*, 158 Cal. 220, 110 Pac. 817.

As to affidavit as complaint, and scope and effect of affidavit, see pars. 15 and 16, this note.

32. Dismissal of action.—Party can not shield himself from legal consequences of his acts by dismissal of action.—*Ex parte Acock*, 84 Cal. 50, 55, 23 Pac. 1029.

33. Disobedience of restraining order.—As to generally.—See Part IV, this note, par. 95.

34. Every misbehavior by officer—Mentioned in above section does not constitute contempt of court. Such misbehavior must be "in respect to" such court or some proceeding therein.—*Hutton v. Superior Court*, 147 Cal. 156, 161, 81 Pac. 409.

35. Executor—In one sense an officer of court.—Court makes and revokes his appointment, and usually all his acts are performed under or subject to direction of court and have no validity until court gives its approval. In respect to those matters in which he acts only under direction and subject to approval of the court, he may be

regarded as an officer of the court, and his obedience to orders of court may be enforced by attachment for contempt.—*Ex parte Smith*, 53 Cal. 204, 208.

36. Fact that party may be prosecuted in criminal and civil actions does not prevent prosecution for contempt. Party may be liable civilly and criminally for contempt upon officer in open court, and at the same time may be punished for indignity laid upon court.—*Ex parte Acock*, 84 Cal. 50, 55, 23 Pac. 1029.

36a. Failure of court to proceed against editors who have published accounts detrimental to defendant in criminal action, whereby such defendant has failed to obtain fair and impartial trial, gives him right to make that appear upon his motion for new trial; and question will thus come properly before supreme court for review.—*People v. Durrant*, 116 Cal. 179, 209, 10 Am. Crim. Rep. 499, 48 Pac. 75.

37. Finality and conclusiveness of judgments and orders, expressly provided for.—*People v. Latimer*, 160 Cal. 720, 117 Pac. 1051.

38. Imprisonment authorized, when.—Only instance where imprisonment authorized in contempt proceedings under above section and following sections, other than the maximum of five days as an alternative judgment authorized by section 1218, post (*Angellotti, J., dis. op.*).—*Ex parte Karlson*, 160 Cal. 384, 117 Pac. 447.

As to punishment for contempt of court, see par. 60, this note.

As to when imprisonment is authorized, see par. 103, this note.

39. In presence of court—Filing and presenting affidavits, contemptuous in character, is a contempt of court committed in the immediate view and presence of the court, and a citation to show cause does not require the support of an affidavit.—*Lamberson v. Superior Court*, 150 Cal. 461, 91 Pac. 100.

40. Judgment convicting of contempt—Recital of facts—Contempt in presence of court.—A judgment adjudging one guilty of contempt is not required to contain a recital of the facts in those cases in which the alleged contempt is committed in the immediate presence of the court.—*In re Selowsky*, 38 Cal. App. 569, 177 Pac. 301.

41. Jurisdiction of the court.—Proceedings in contempt are criminal in their character, and the court exercises but a limited jurisdiction therein, and the record upon which the party is adjudged guilty of contempt should show upon its face the facts upon which the judicial action is based, and upon which the jurisdiction of the court depended.—*In re McCarty*, 154 Cal. 540, 98 Pac. 540.

As to jurisdiction of court on failure to pay alimony, see par. 99, this note.

42. Legislative enactment—Having omitted feature of power existing inherently in

court to punish for contempt does not mean that such power has ceased or been taken away. It still remains as part of powers given by constitution.—*Burns v. Superior Court*, 140 Cal. 1, 4, 73 Pac. 597.

43. Legislature—Could not provide different procedure for contempts of superior court committed while in exercise of its jurisdiction, in proceedings for insolvency, from that which is provided for those committed while exercising jurisdiction in any other matter.—*Ex parte Clancy*, 90 Cal. 553, 557, 27 Pac. 411.

44. Ministerial officers—Can not punish for contempt.—Construction should not be given to constitution which would allow ministerial officers power to punish individuals with fine and imprisonment. Such power involves personal liberty of citizen and is in its nature judicial power of highest degree. It can not be exercised except after due process of law, and this implies that it must be vested in some court, except in those cases where constitution has either expressly or by necessary implication vested it elsewhere.—*Burns v. Superior Court*, 140 Cal. 1, 12, 13, 73 Pac. 597.

45. Municipal corporation—Can not be attached for violation of injunction, but its officers who disobeyed writ may be; but other corporations may be punished for contempts.—*Golden Gate Consol. Hydraulic Min. Co. v. Superior Court*, 65 Cal. 187, 192, 3 Pac. 628. See *Mayor of New York v. Staten Island*, 64 N. Y. 624; *People v. Albany & V. R. Co.*, 12 Abb. Pr. (N. Y.) 171, 20 How. Pr. 358; *United States v. Memphis R. Co.*, 6 Fed. 237.

46. Nuisance—Abatement of—Red Light Abatement Act.—The provisions of the above section and of section 1218, post, relating to contempts of court, are not in conflict with section 6 of the Red Light Abatement Act prescribing penalty for the failure to obey an injunctive order under that act.—*In re Selowsky*, 38 Cal. App. 569, 177 Pac. 301, following the doctrine in *People v. Barbiere*, 33 Cal. App. 700-780, 166 Pac. 812, 816.

47. Order of commitment—Requisites of—Failure to state facts showing contempt.—In those cases in which the evidence discloses facts which would authorize the making of an order imprisoning for wilful contempt of court, where the order itself is fatally defective, in that it fails to find as a fact that the person, having property from which a judgment could have been paid, had refused to comply with an order to appropriate it to the satisfaction of such claim, or any portion thereof to the payment of such judgment, it will be insufficient because of its failure to show wilful disobedience of the court's order, under the provisions of subdivision 5 of the above section and the provisions of section 1219, post.—*Myers v. Superior Court*, — Cal. App —, 199 Pac. 109.

48. Party agreeing to secure judgment in favor of certain persons in action pending in court, in consideration of certain sum of money, although such judgment had already been rendered before such agreement is guilty of contempt of court (conc. op. by Myrick, J.).—In matter of Buckley, 69 Cal. 1, 13, 10 Pac. 69.

49. Power of court—Created by constitution to punish for contempt, can not be limited or controlled by legislature (dis. op. by Ross, J.).—In matter of Buckley, 69 Cal. 1, 2, 10 Pac. 69.

50. Same—To punish for contempt—In its nature arbitrary and its exercise is not to be upheld except under such circumstances and in manner prescribed by law. It is essential to validity of proceedings in contempt subjecting party to fine and imprisonment that showing be made that case in point of jurisdiction is within provisions of law by which such proceedings are authorized, for mere presumptions and intendments are not to be indulged in, in support of such proceedings.—Batchelder v. Moore, 42 Cal. 414; Lezinsky v. Superior Court, 72 Cal. 510, 511, 14 Pac. 104.

51. Same—Same—Power to punish for contempt is inherent in all courts; its existence is essential to preservation of order in judicial proceeding and enforcement of judgments, orders, and rights of court.—Burns v. Superior Court, 140 Cal. 1, 4, 73 Pac. 597. See Copper's Case, 32 Vt. 253; Ex parte Robinson, 86 U. S. (19 Wall.) 505, 22 L. ed. 205.

52. Practice when contempt constructive.—Where the contempt is based upon a disobedience of the order of the court, not committed within the presence of the court, as a failure to pay alimony within a specified time, it is constructive, and the filing of an affidavit setting forth the fact of such non-compliance is a prerequisite, without which the court has not jurisdiction to consider and punish it.—In re McCarty, 154 Cal. 539, 98 Pac. 540.

53. Presentation upon theatrical stage—Play which is reproduction of facts in murder case on trial before court can not be prevented by court. Liberty of press would be restricted if court attempted to prohibit such play. Order of trial court commanding party not to exhibit such play was in effect an order not to commit contempt of court, and such practice is novel in extreme. Court has ample power to protect itself in ministration of justice after contempt committed. At to offender, it could punish him; as to defendant on trial, if publication deprived him of fair and impartial trial, new trial would be awarded him.—Dailey v. Superior Court, 112 Cal. 94, 99, 53 Am. St. Rep. 160, 32 L. R. A. 273, 44 Pac. 458.

54. Proceedings for settlement of estate—Not civil action within meaning of constitution, nor is amount of money which by order of distribution executor is required to pay over to distributees a debt due from

executor to distributees. Issuance of execution for enforcement of order of distribution is not provided for by code, and in many cases such remedy would be wholly inadequate. Executors hold property of estate in trust for creditors and heirs and others interested in estate, and as such trustees their obedience to orders of probate court may be compelled by proceedings for contempt.—Ex parte Smith, 53 Cal. 204, 208.

55. "Proceeding"—Necessarily has different meanings according to context and subject to which it relates. In its more general sense it means all steps and measures adopted in prosecution or defense of an action, and proceeding in court is act done by authority or direction of court, express or implied.—Burns v. Superior Court, 140 Cal. 1, 5, 6, 73 Pac. 597.

56. Procedure as in criminal cause.—Where the contempt is not committed in the presence of the court each essential step to a proper accusation and plea in a criminal cause should be taken. The accused must be served with notice, or an order to show cause, showing the charge, and must be given an opportunity to plead and answer, or the court will not have acquired jurisdiction.—Reymert v. Smith, 5 Cal. App. 380, 381, 90 Pac. 470.

As to contempt of court being a specific criminal offense, see par. 18, this note.

57. Proceedings in contempt are of a criminal nature and no intendments or presumptions are to be indulged in aid of the sufficiency of a complaint. The affidavits (the complaint) must set forth facts showing in themselves the fact that a contempt has been committed by the party charged and failing to do so the court is absolutely without jurisdiction in the matter.—Frowley v. Superior Court, 158 Cal. 220, 110 Pac. 817.

58. Procedure for investigation of charge for contempt—Analogous to a criminal procedure, and judgment against a person guilty of the offense is visited with fine or imprisonment or both—essential elements of judgment for criminal offense.—Ex parte Gould, 99 Cal. 360, 361, 37 Am. St. Rep. 57, 21 L. R. A. 751, 33 Pac. 1112.

59. Publication by newspaper of fair and true report of evidence in divorce case heard behind closed doors and with witness excluded from room, and in which court had made order "that no public report or publication of any character of testimony in case be made," is not contempt of court under any circumstance, and judgment of court punishing editor for contempt for such publication will be annulled on certiorari.—In matter of Shortridge, 99 Cal. 526, 528, 535, 37 Am. St. Rep. 78, 21 L. R. A. 755, 34 Pac. 227.

60. Punishment provided not affected by provisions of Penal Code as to maximum of imprisonment in satisfaction of fine.—Ex parte Karlson, 160 Cal. 380, 117 Pac. 447.

61. Review of order on appeal.—An order in a contempt proceeding is not reviewable on appeal. This is the law generally, and is expressly declared in section 1222, post.—*Abbott v. Abbott*, 24 Cal. App. 475, 141 Pac. 939.

62. Source of power of superior court to punish for contempt is not statutory. It is derived from constitution, which created court and thereby invested it with all powers incidental to courts of common law and courts of equity, of which it is successor.—*Burns v. Superior Court*, 140 Cal. 1, 4, 73 Pac. 597.

63. Taking of depositions.—Clearly one of proceedings of court, as was taking of testimony before master or examiner in suit in equity.—*Burns v. Superior Court*, 140 Cal. 1, 9, 73 Pac. 597.

64. Same.—Witness summoned to attend and give his deposition in action is person connected with judicial proceeding before court, and his attendance is matter appertaining to proceeding in court. His conduct in failing to attend in obedience to subpoena is therefore matter which can be controlled by court, and, if so, control can be made effective only by existence of power to punish for disobedience.—*Burns v. Superior Court*, 140 Cal. 1, 11, 12, 73 Pac. 597.

II. ABUSE AND CRITICISM OF COURT.

As to contempt committed by insulting written communication to judge, see note 26 Am. Rep. 752, 753.

As to contempt of court by libelous newspaper publications, see note 50 Am. St. Rep. 572-585.

As to liability of newspaper proprietor for libel, published without his knowledge or consent, see note 26 L. R. A. 779-781.

As to power of court to prevent publication of evidence or proceedings, see note 98 Am. Dec. 414-420.

65. Affidavit for change of place of trial.—On ground of bias or prejudice of judge being material, relevant, and pertinent to issue before court, is ground for change of venue, and party seeking such change would have right to state in affidavit facts upon which his charges of bias are based, and could not be punished for contempt of court for so doing.—*Works v. Superior Court*, 130 Cal. 304, 309, 62 Pac. 507. See *In matter of Jones*, 103 Cal. 397, 398, 37 Pac. 385.

66. Affidavit objecting to competency of judge to try cause on ground of bias and prejudice may be filed by party in support of such motion without incurring penalties of contempt, unless he purposely includes matters wholly irrelevant and immaterial and which are justly offensive to judge who must pass upon motion.—*Works v. Superior Court*, 130 Cal. 304, 309, 62 Pac. 507.

67. Brief of counsel.—Using language disrespectful to judge of trial court, brief will be stricken from files by supreme court.—

Sears v. Starbird, 75 Cal. 91, 93, 16 Pac. 531. See *Friedlander v. Sumner Gold & S. Min. Co.*, 61 Cal. 116, 117.

68. Counsel in case.—Willfully employing language manifestly disrespectful to judge of superior court—a thing not to be anticipated—supreme court will deem it their duty to try such conduct as contempt of that court, and to proceed accordingly. Even in such case, however, party represented by counsel committing offense ought not ordinarily to be deprived of any of his legal rights, and supreme court will reserve power to examine transcript to ascertain if errors had occurred in court below.—*Friedlander v. Sumner Gold & S. Min. Co.* 61 Cal. 116, 117; *Sears v. Starbird*, 75 Cal. 91, 92, 16 Pac. 531.

69. Judge on bench can not cast aspersions upon character of person not party to or participant in case on trial without right in latter to defend himself, any more than against any other party.—*McClatchy v. Superior Court*, 119 Cal. 413, 417, 39 L. R. A. 691, 51 Pac. 696.

70. Liberty of press to fairly criticize conduct of judge or decisions of courts, and to expose and bring to light any wrongful, corrupt, or improper act of judicial officer is one that should be carefully preserved and protected by courts. If public supervision and censure through press or otherwise is necessary to suppress corruption and keep channels of justice pure and untainted, right to exercise such supervision and to censure and expose wrongdoer should be and must be upheld by court.—*Ex parte Barry*, 85 Cal. 603, 608, 20 Am. St. Rep. 248, 25 Pac. 256.

71. Liberty of speech and press is unlimited and unrestrained upon all subjects whatsoever, whether it be decision or character of judge. Only check upon this liberty is responsibility for abuse of it.—*Ex parte Barry*, 85 Cal. 603, 607, 20 Am. St. Rep. 248, 25 Pac. 256.

72. Publication.—Affecting judge in individual capacity, and not interfering with proceedings of court over which he presides, remedy could not be by proceeding for contempt.—*Ex parte Barry*, 85 Cal. 603, 607, 20 Am. St. Rep. 248, 25 Pac. 256.

73. Same.—During course of trial, which reflects on court or assails litigants, or seeks to intimidate witness, or spreads before jury an opinion upon merits of controversy, or threatens them with public odium, or attempts to dictate decision, or in any improper way endeavors to influence determination, is unquestionably contempt of court.—*People v. Durrant*, 116 Cal. 179, 209, 10 Am. Crim. Rep. 499, 48 Pac. 75. See *In matter of Shortridge*, 99 Cal. 526, 533, 37 Am. St. Rep. 78, 21 L. R. A. 755, 34 Pac. 27.

74. Same.—Of truth as to legal proceedings is not contempt of court, and criticism of action of judge, if made only in proper response to unjust charge against pub-

lisher's veracity without intent to improperly influence proceedings of court, would not be contemptuous.—*McClatchy v. Superior Court*, 119 Cal. 413, 417, 39 L. R. A. 691, 51 Pac. 696.

76. Same—Publisher of newspaper who assumes to criticize or censure public officer or proceedings of court must know whereof he speaks. If he censures or charges falsely, he must be held strictly accountable. While his right of free speech is protected, his abuse of it must be punished.—*Ex parte Barry*, 85 Cal. 603, 608, 20 Am. St. Rep. 248, 25 Pac. 256.

III. COMPELLING WITNESS TO ANSWER QUESTIONS.

As to disobedience to subpoena or refusal to be sworn or answer as witness being punished for contempt, see, post, § 1991 and note.

As to refusal to testify or answer particular questions, see note 13 L. R. A. 66, 68.

As to rights and duties of witnesses, see, post, §§ 2064-2070 and notes.

As to witnesses being bound to answer questions, see, post, § 2064 and note.

76. After issue to which questions were material has been determined and investigation thereof by grand jury finally concluded, superior court has no power to compel answer to questions.—*Rogers v. Superior Court*, 145 Cal. 88, 94, 95, 78 Pac. 344.

77. Any one of many questions propounded to witness being relevant and pertinent, witness may be properly adjudged to be in contempt for refusing to answer such one question unless he fairly show that his answer would have tendency to incriminate or degrade him.—*In re Rogers*, 129 Cal. 468, 469, 62 Pac. 47.

78. Assertion that his testimony would have tendency to subject to punishment for felony is no answer to refusal to be sworn as witness. Such privilege can not be urged until question is put to him after being sworn, answer to which would have tendency stated.—*Ex parte Stice*, 70 Cal. 51, 53, 11 Pac. 459.

79. Construction which would deprive court of power to punish for interference with its proceeding, which would take from court its inherent power to compel production of evidence necessary to decision of causes, and substitute system which would leave ability to secure evidence required for just and proper decision to depend upon voluntary submission of unwilling witnesses summoned by an imbecile subpoena issued by powerless ministerial officer, does not commend itself to judgment.—*Burns v. Superior Court*, 140 Cal. 1, 10, 73 Pac. 597.

80. Court must adjudge—Whether answer to question would have tendency to subject witness to punishment for felony, and it can not be called on to do this in

advance of question being put. To allow party to refuse to be sworn for such reason would make such person and not court final judge, and exclude court from any consideration of matter whatever.—*Ex parte Stice*, 70 Cal. 51, 53, 11 Pac. 459.

81. Decision as to relevancy and pertinency of questions propounded to witness is matter which rests with judge and not with witness. But such decision of judge is reviewable by supreme court under writ of habeas corpus. Otherwise production of evidence would cease to be under control of court and would depend upon opinion of witness.—*In re Rogers*, 129 Cal. 468, 469, 62 Pac. 47.

82. Deposition taken before judge.—By consenting to take deposition of witness, judge does not act as mere ministerial functionary, but in discharge of his duty as judge. Matter on hearing is cause pending in his court awaiting final judgment, and in every step of process is wholly within his jurisdiction. Judge is not like notary in such case, mere ministerial functionary endowed with no power except to write down what witness consents to say; he is judge of court engaged in performance of legitimate jurisdictional duty; he may order attendance of witnesses to give their depositions, and command them to answer proper questions. If his orders are disobeyed, he may punish summarily for contempt.—*Crocker v. Conrey*, 140 Cal. 213, 217, 73 Pac. 1006.

83. Evidence immaterial—Effect of.—Matter sought to be elicited from witnesses not having any bearing on case on trial, nor being material of matter in issue, it is hard to understand what right court had to inquire into it or how refusal of witness to answer it constituted contempt of court.—*Ex parte Zeelandelaar*, 71 Cal. 238, 240, 12 Pac. 259.

See par. 87, this note.

As to refusal to answer immaterial question, see par. 86, this note.

84. Grand juror—Can not be required to answer question as to how he voted with respect to finding of particular indictment, and his refusal to do so is not contempt of court.—*Ex parte Sontag*, 64 Cal. 525, 527, 4 Am. Crim. Rep. 523, 2 Pac. 402.

85. Grand jury—Part of court by which it is convened, and is under control of court. Witness who appears before it is subject to lawful authority and control of court in same manner and to same extent as witnesses before trial jury, and court has jurisdiction to deal with witness who defies authority of grand jury and to adjudge him guilty of contempt of court and to punish him.—*In matter of Gannon*, 69 Cal. 541, 543, 11 Pac. 240.

86. Immaterial question—Refusal to answer.—In a litigation concerning a mine located under a grub-stake contract, a witness refusing to answer a question relating to the title of a person not a party to the

action and which title was not at issue in the case, is not guilty of contempt under the provisions of subdivisions 5 and 10 of the above section read in connection with the provisions of section 2065, post.—*Kimball v. Superior Court*, 38 Cal. App. 761, 177 Pac. 488, following doctrine in *Ex parte Zeehandelaar*, 71 Cal. 238, 240, 12 Pac. 259; *Rogers v. Superior Court*, 145 Cal. 88, 91, 78 Pac. 344.

See par. 87, this note.

As to effect where evidence immaterial, see par. 83, this note.

87. Questions asked witness must be pertinent and material to issue. Court has no power to compel witness to answer any others, and refusing to answer questions not pertinent and material is not contempt of court.—*Overend v. Superior Court*, 131 Cal. 280, 286, 63 Pac. 372.

See pars. 83, 86, this note.

88. Superior court must possess all powers necessary to compel production of evidence for use in cases tried before it that were possessed by courts of equity from time immemorial, including power to provide for taking of deposition and for enforcement of proceedings to that end by punishment for contempt.—*Burns v. Superior Court*, 140 Cal. 1, 7, 73 Pac. 597.

89. Taking of deposition is in no true sense a proceeding in or of court of justice, and furnishes no authority for order adjudging party guilty of contempt for refusing to attend before notary in obedience to subpoena issued by such notary (dis. op. by Angellotti, J.).—*Burns v. Superior Court*, 140 Cal. 1, 16, 73 Pac. 597.

90. Witness should be compelled to answer by court in case where rights of parties are affected, and upon his refusal to do so, court should commit him for contempt.—*Crocker v. Conrey*, 140 Cal. 213, 218, 73 Pac. 1006.

IV. DISOBEDIENCE OF PROCESS AND ORDERS.

91. Attorney—Subdivision 3—Violating order of court directing client to deliver.—An attorney is guilty of contempt in violating an order of court directing his client to deliver the custody of her minor children to their father during a fixed portion of each year, by mistakenly advising her that an appeal taken from such order stayed all subsequent proceedings affecting such custody pending the appeal.—*Hughes v. Moncur*, 28 Cal. App. 462, 152 Pac. 968.

92. Character of offense—Same regardless of how committed.—The character of offense is same whether committed by disobeying order made in proceeding in insolvency, or in probate, or in any civil action. Any law for punishment of this offense is necessarily of general nature, and must have uniform operation. It is dignity of court or majesty of state as represented by court against which offense is committed.—

Ex parte Clancy, 90 Cal. 553, 557, 27 Pac. 411.

93. Complaint or answer of party may be stricken out as penalty of disobedience to subpoena when such disobedience is wilful or intentional.—*Clifford v. Allman*, 84 Cal. 528, 533, 24 Pac. 292.

94. Disobedience of order for final distribution of estate by one of executors of last will of deceased is contempt of court.—*Ex parte Smith*, 53 Cal. 204, 207.

As to disobedience of lawful judgment or order of court by executor, see, post, § 1440 and note.

As to penalty for refusing to obey citation of probate court, see, post, § 1460 and note.

95. Disobeying restraining order—On three several days, makes party guilty of three separate contempts. Each act violative of injunction is separate contempt.—*Golden Gate Consol. Hydraulic Min. Co. v. Superior Court*, 65 Cal. 187, 192, 3 Pac. 628.

96. Failure to pay alimony—in general.—In a proceeding to punish a husband for contempt for failure to pay alimony and counsel fees where the affidavit fails to state that a copy of the order for the payment of alimony has been personally served upon the husband, or that he had actual knowledge of the signing and filing of the order, or of its contents, such failure did not render the affidavit insufficient, where it recited that the defendant had duly appeared in the action in all the proceedings therein and at all the times mentioned. These allegations amounted to a statement that defendant was present when the order was made, and it was consequently unnecessary to allege or to prove that he had been served with notice of the original order.—*Mitchell v. Superior Court*, 163 Cal. 423, 125 Pac. 1061.

97. In a proceeding to punish a husband for contempt for failure to pay alimony and counsel fees, the court takes cognizance of the pendency of the main cause, and there is no necessity of setting forth in the affidavit the fact of the pendency of the divorce action itself, or the provisions of the order which has been violated.—*Mitchell v. Superior Court*, 163 Cal. 423, 125 Pac. 1061.

98. A proceeding to punish a husband for contempt for failure to pay alimony and counsel fees, although partaking of some of the characteristics of a prosecution for a criminal offense, is properly entitled in the style of the divorce proceeding itself, and not as a separate action.—*Mitchell v. Superior Court*, 163 Cal. 423, 125 Pac. 1061.

99. Same—Jurisdiction of court.—Such noncompliance constitutes a contempt committed out of the presence of the court, and an affidavit setting forth the facts is an essential prerequisite to the exercise of jurisdiction to punish the same, and an order made without such affidavit is void for want of jurisdiction; but if the husband should voluntarily appear, and admit noncompli-

ance, and had expressed his intention not to comply with the order for payment, such conduct may be treated as a contempt committed in the presence of the court, and may be punished as such, without the affidavit referred to, but in such case, the record of conviction for contempt must show the facts.—*In re McCarty*, 154 Cal. 539, 98 Pac. 540.

As to jurisdiction of court in contempt proceedings, see par. 41, this note.

100. Same—Prima facie showing.—An affidavit of the wife, setting out the original order, and averring refusal or failure of the husband to comply therewith, constitutes a prima facie showing of contempt, and it is not necessary to aver that he had the ability to pay at the time he was required to do so, in order to confer jurisdiction upon the court to consider and punish as for contempt, in the event of the failure of the husband to present a legitimate excuse for his noncompliance with the order.—*In re McCarty*, 154 Cal. 537, 98 Pac. 540.

101. Same—Refusal to pay alimony and counsel fees ordered.—The contempt or refusal to pay temporary alimony and counsel fees ordered by the court is one not committed in the immediate view and presence of the court, and the fact essential to show the jurisdiction of the court to proceed therewith must be embodied in an affidavit stating the facts constituting the contempt, presented to the court or judge, in the absence of any other showing provided for in section 1211, post.—*In re Northern*, 18 Cal. App. 52, 53, 121 Pac. 1010.

102. Failure to pay fine—For violation of injunction.—Where the court in a contempt case for a violation of an injunction, imposed a fine, it had jurisdiction to impose imprisonment for the nonpayment of the fine at the rate of two dollars per day until the fine is paid.—*In re Jorgensen*, 19 Cal. App. 217, 124 Pac. 1055.

103. Same—Additional sentence of imprisonment.—The fact that the court also imposed additional imprisonment for the contempt of court would not take from the court its power to enforce the nonpayment of the fine by imprisonment at the special rate.—*In re Jorgensen*, 19 Cal. App. 217, 124 Pac. 1055.

As to punishment for contempt, see pars. 38 and 60, this note.

104. Judgment—Disobedience of—Subdivision 5.—Every separate act of disobedience is a separate contempt; the continuous operation of a ferry service upon three separate days in violation of a temporary injunction restraining the operation thereof constitutes three separate contempts.—*Solano Aquatic Club v. Superior Court*, 165 Cal. 278, 131 Pac. 874.

105. Judgment-debtor—Who disposed of property in order to defeat order of referee upon proceedings supplemental to execu-

tion, is not excused in not complying with order thereafter made commanding him to turn over such property so disposed of to sheriff to be applied towards satisfaction of execution against him, and he may properly be punished for contempt for not complying with such order.—*Ex parte Kellogg*, 64 Cal. 343, 345, 30 Pac. 1030. See *Ex parte Cohen*, 6 Cal. 318; *Galland v. Galland*, 44 Cal. 475, 478, 13 Am. Rep. 187.

106. Knowledge of an order can not be imputed to one not a party to the action and it must appear that the order or judgment had been previously served on the one charged or that he had actual notice thereof.—*Frowley v. Superior Court*, 158 Cal. 220, 110 Pac. 817.

See pars. 12 and 14, this note.

107. Modification, amendment, repeal.—The effect of the 1891 amendment to subdivision 13 of above section was not to modify, amend, or repeal subdivision 3, of the same section, defining a contempt of court, and indirectly making any act of disrespect such a contempt.—*Matter of Shay*, 160 Cal. 406, 117 Pac. 442.

See, also, ante, § 282 and note.

108. Notary taking deposition—Can not punish for contempt.—Special reasons exist why power to punish for contempt should not be vested with officer taking deposition. He has not means at hand to enable him to act advisedly. Dispute may exist as to whether or not deposition is taken in good faith or is resorted to for purpose of abusing privilege in order to obtain information for an object foreign to suit in which it is taken. So there might be question asked calling for immaterial evidence which witness is not bound to answer. Court in which action is pending has ultimate decision and should have control of proceedings for production of evidence, and it is proper tribunal for decision of all such questions. They can properly be presented and decided upon hearing charge of contempt.—*Burns v. Superior Court*, 140 Cal. 1, 13, 73 Pac. 597.

As to power of notary to punish for contempt, see note 36 L. R. A. 822.

109. Notice of order disobeyed—In general.—Party can not excuse himself by showing that he had no notice of making order which he disobeyed where he had notice of application for such order and was present and resisted it.—*Romine v. Cralle*, 83 Cal. 432, 437, 23 Pac. 525.

110. Same—Actual notice of injunction binds party, although not served with writ, and disobedience of such injunction is contempt.—*Golden Gate Consol. Hydraulic Min. Co. v. Superior Court*, 65 Cal. 187, 190, 3 Pac. 628.

111. Same—When proof of service unnecessary.—In contempt proceedings to punish a husband for failure to comply with an order of court requiring him to pay alimony and counsel fees, the un-denied allegation of the defendant's pres-

ence at the time of the making of the order rendered a showing of service of notice upon him entirely unnecessary.—*Mitchell v. Superior Court*, 163 Cal. 423, 125 Pac. 1061.

As to necessity of showing acts, see par. 12, this note.

As to knowledge of order not being imputed, see par. 106, this note.

112. Order to make final accounting—Refusal to obey—Commitment for contempt.—Under the provisions of subdivision 5 of the above section a warrant of commitment which recites that the petitioner in the immediate view, presence and hearing of the court, while the court was in session, refused to obey the order of the court that he render a final account in a proceedings pending before the court, and that the court at the same time by its order adjudged and declared such party "had been guilty of a contempt of said court by his refusal to obey the said order of said court that he render said final account" the commitment must be sustained.—*Ex parte Philbrook*, — Cal. App. —, 191 Pac. 77.

113. Original order—Not requiring party to perform act which order in contempt proceedings enjoined upon him and for non-performance of which he was ordered to be imprisoned, party punished for contempt for such non-performance may bring certiorari and have proceedings against him annulled.—*Dewey v. Superior Court*, 81 Cal. 64, 67, 22 Pac. 333.

114. Proceeding in taking of depositions—Proceedings of court within meaning of above section and refusal to obey subpoena issued by officer taking deposition for attendance of witness at such taking is unlawful interference with proceedings, and as such is punishable as contempt of court in which action is pending upon proper charge made to court by affidavit.—*Burns v. Superior Court*, 140 Cal. 1, 14, 73 Pac. 597.

115. Prohibitory and mandatory injunctions pending appeal.—Prohibitory injunction remains in full force pending appeal, and court may enforce obedience thereto; but mandatory injunction is stayed by operation of such appeal. Result to final adjudication might even be barren victory. Pending such appeal, therefore, from mandatory injunction, trial court could not compel party to do any act which would change subject of litigation from state as it existed when decree was rendered.—*Dewey v. Superior Court*, 81 Cal. 64, 68, 22 Pac. 333.

116. Refusing to obey subpoena issued by notary public before whom his deposition was to have been taken upon notice does not authorize superior court to punish such person for contempt. In such case there is no actual contempt of court because party has committed no act in presence of court, nor has he without presence of court disobeyed any of its judgments, orders, or processes.—*Lezinsky v. Superior Court*, 72 Cal. 510, 511, 14 Pac. 104.

117. Compare: *Burns v. Superior Court*, 140 Cal. 1, 14, 73 Pac. 597.

118. Service of judgment or order disobeyed, or demand upon person who is bound to obey it, to do so, is not made condition precedent by statute to issuing attachment against him for disobeying it. Proof of technical service of order, and of demand that it be complied with, would doubtless establish case of disobedience unless person upon whom demand was made was unable to comply with it. But it should by no means follow that disobedience of order might not be shown without proof of such formal service and demand.—*Ex parte Cottrell*, 59 Cal. 420, 421.

119. Mode of service of order to show cause—Upon corporation in contempt proceedings is not expressly provided for in codes. View taken is that service of such order, like summons, must be made upon president or other head of corporation.—*Golden Gate Consol. Hydraulic Min. Co. v. Superior Court*, 65 Cal. 187, 191, 3 Pac. 628.

120. Unauthorized order—Awarding alimony, and failure to obey same, does not bring party into contempt of court.—*Hennessey v. Nicol*, 105 Cal. 138, 142, 38 Pac. 649.

121. Violation or disregard of unlawful order—Can not be punished as contempt of court. An attempt to do so by means of imprisonment is excess of jurisdiction, remedial by writ of habeas corpus.—*Ex parte Brown*, 97 Cal. 83, 85, 31 Pac. 840. See *Brown v. Moore*, 61 Cal. 432, 435.

122. Wilful refusal of party to comply with decree of court of competent jurisdiction directing him to execute conveyance constitutes contempt of such court, and may be punished as such.—*The '76 Land & Water Co. v. Superior Court*, 93 Cal. 139, 143, 28 Pac. 813.

V. INTERFERING WITH PROCESS.

123. Attempt to appeal from judgment which has been made final by the supreme court, query, whether or not it is contempt as deceit or abuse of process of court.—*Heinlen v. Beans*, 73 Cal. 240, 241, 14 Pac. 855.

124. Attorney has right to address himself to court for purpose of putting in motion power of court to prevent commission of criminal acts on part of jury, or to vacate proceedings obtained by them, or to convict and punish persons guilty of them, but it is altogether irregular, unlawful, and criminal to send accusatory and threatening communication to court or jury sitting with it while engaged in discharge of its duties.—In matter of *Tyler*, 64 Cal. 434, 436, 1 Pac. 884.

125. Juror wilfully and corruptly permitting any communication to be made to him relating to any cause or matter pending before him, except according to regular course of proceedings, or to receive any

bribe upon agreement that his vote or decision upon any question which is or may be brought before him for decision shall be influenced thereby, may be punished for contempt of court as well as criminally, for such actions taint with suspicion proceedings which they touch and delay courts in exercise of their functions, and if suffered to pass unpunished by court they result in paralysis of judicial confidence.—In matter of Tyler, 64 Cal. 434, 436, 1 Pac. 884.

126. Letter sent to grand jury—Without purpose except to exasperate jurors by aspersions upon their official conduct which it contained, or to deter them from performing their duties by threats of public clamor, or to create distrust and want of confidence in any action they might take, is punishable as contempt of court. Attorney sending such letter unlawfully interferes with proceedings of court.—In matter of Tyler, 64 Cal. 434, 437, 438, 1 Pac. 884.

127. Liberty of press stops where further exercise would invade rights of others. It can not assail litigants during

progress of trial, dictate verdict or judgment, or spread before juries its opinion of merits of cases which are on trial.—In matter of Shortridge, 99 Cal. 526, 528, 535, 37 Am. St. Rep. 78, 21 L. R. A. 755, 34 Pac. 227.

128. Obstructing and taking from police officer by means of legal process certain personal property taken by such officer under search-warrant issued by judge of superior court for purpose of securing certain documents averred to have been used as means of committing felony, is contempt of court, and punishable as such.—In matter of Lowenthal, 74 Cal. 109, 110, 5 Am. St. Rep. 424, 15 Pac. 359.

129. Power to punish for contempt—Vested in courts for their own protection.—Its object is to insure respect for their rules and orders, obedience to their processes, and freedom from disturbance, or interference with due and regular course of their proceedings.—People v. Durrant, 116 Cal. 179, 209, 10 Am. Crim. Rep. 499, 48 Pac. 75.

§ 1210. RE-ENTRY ON PROPERTY AFTER EVICTION, WHEN A CONTEMPT. Every person dispossessed or ejected from any real property by the judgment or process of any court of competent jurisdiction, who, not having right so to do, re-enters into or upon or takes possession of any such real property, or induces or procures any person not having right so to do, or aids or abets him therein, is guilty of a contempt of the court by which said judgment was rendered or from which such process issued.

Upon a conviction for such contempt the court must immediately issue an alias process, directed to the proper officer, and requiring him to restore such possession to the party entitled under the original judgment or process, or to his lessee, grantee, or successor in interest, and no appeal from the order directing the issuance of an alias writ of possession stays the execution thereof, unless a written undertaking is executed on the part of the appellant, with two or more sureties to the effect that he will not commit or suffer to be committed any waste thereon, and if the order is affirmed, or the appeal dismissed, he will pay the value of the use and occupation of the property from the time of his unlawful re-entry until the delivery of the possession thereof, pursuant to the judgment or order, not exceeding a sum to be fixed by the judge of the court by which the order for the alias writ was made, and which must be specified in the undertaking.

History: Enacted March 11, 1872; amendment approved March 23, 1893, Stats. and Amdts. 1893, p. 281; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 193, held unconstitutional, see history, § 5 ante; amendment approved March 16, 1907, Stats. and Amdts. 1907, p. 320, Kerr's Stats. and Amdts. 1906-7, p. 484.

CONTEMPT OF COURT—RE-ENTRY AFTER EVICTION.

1. Alias writ of restitution must issue.
2. Same—Appeal.
3. Issue of title—Can not be tried by proceedings for contempt.

4. Judgment having been fully executed—By putting plaintiff into possession.
5. Mandamus will lie—To compel judge to hear and determine.
6. Person accused — Must be one who has been ejected.

7. Proceeding is not barred—By reason of not having been commenced.
8. Section is designed not only to protect court.

See, ante, § 1209 and note.

1. **Alias writ of restitution must issue** upon conviction of defendant of contempt for re-entering lands from which he had been ejected; court has no discretion to refuse it.—*Huerstal v. Muir*, 62 Cal. 479, 480.

2. **Same—Appeal.**—The amendment of 1907 to the above section does not give a right of appeal from an order adjudging guilty of contempt a party who has retaken possession of real property from which he had been dispossessed under a judgment and process against him, and directing an alias writ to issue to restore the possession to the party entitled thereto under the judgment.—*Bond v. Superior Court*, 174 Cal. 376, 163 Pac. 496, following the doctrine in *Huerstal v. Muir*, 62 Cal. 479.

3. **Issue of title—Can not be tried by proceedings for contempt.**—If after judgment for plaintiff defendant acquires title to premises in dispute, he has right of entry, and court can not punish him for entering under his title; but issue of such title should be tried in appropriate action in which verdict of jury or findings of court may be had upon issues properly framed for purpose of definitely determining question of title.—*Larrabee v. Selby*, 52 Cal. 506,

508. See *Mahoney v. Van Winkle*, 33 Cal. 448, 458.

4. **Judgment having been fully executed—By putting plaintiff into possession,** alias writ will not issue except upon an adjudication that defendant was guilty of contempt.—*Rousset v. Reay*, 3 Cal. Unrep. 717, 31 Pac. 900.

5. **Mandamus will lie—To compel judge to hear and determine** proceedings to have defendant in action brought to recover possession of certain land adjudged guilty of contempt for re-entering upon land from which he had been ejected under execution issued in said action.—*Temple v. Superior Court*, 70 Cal. 211, 212, 11 Pac. 699.

6. **Person accused—Must be one who has been ejected or dispossessed** as provided in section, and unless he be such person act has no application and he can not be guilty of contempt.—*Batchelder v. Moore*, 42 Cal. 412, 415.

7. **Proceeding is not barred—By reason of not having been commenced** within five years after date of judgment.—*Temple v. Superior Court*, 70 Cal. 211, 11 Pac. 699.

8. **Section is designed not only to protect court from contempt of its authority,** judgment, or process, but also to give party materially injured an additional remedy by restoring him to possession of property from which he was dispossessed by act of contempt. — *People ex rel. Lamby v. Dwinelle*, 29 Cal. 632, 634.

§ 1211. A CONTEMPT COMMITTED IN THE PRESENCE OF THE COURT MAY BE PUNISHED SUMMARILY. WHEN NOT SO COMMITTED AN AFFIDAVIT OR STATEMENT SHALL BE MADE.

When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in the immediate view and presence of the court, or judge at chambers, an affidavit shall be presented to the court, or judge, of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators or other judicial officer.

History: Enacted March 11, 1872, re-enactment of § 481 Practice Act.

CONTEMPTS IN PRESENCE OF COURT AND CONSTRUCTIVE CONTEMPTS.

- 1, 2. Affidavit of facts constituting contempt.
3. Same—Constitutes complaint.
4. Same—Distinction between complaint or affidavit.
5. Charge made upon information and belief—Will not make judgment of conviction void.
6. Contempt committed in presence of court—Construction.

7, 8. Same—Sufficiency of affidavit made on information and belief.

9. Same—What order must show.

10. Contempt committed without presence of court—By instructing party not to produce certain books.

11. Same—Affidavit must show what.

12. Same—Judgment convicting of—Recital of facts.

13. Contempt proceeding—Is presented in cause out of which it grows.

14. Court takes judicial notice of proceedings before it.

15. Failing to appear in person before court when ordered to do so.
16. Injunction restraining nuisance—Violation of—Affidavits for, sufficiency of.
17. Loss of jurisdiction by lapse of time—Contempt committed in presence of court.
- 18, 19. Order for contempt must show jurisdiction.
20. Same—Failure to urge want of jurisdiction.
21. Order for contempt—Not stating questions asked witness.
22. Party is entitled to know with what he is charged.
23. Requirement—That act to be performed should be specified.
24. Same—That facts be stated in order.
25. Violation of injunctive order—Sufficiency of affidavits.

See, ante, § 1209 and note.

1. **Affidavit of facts constituting contempt** shall be presented when alleging contempt is not committed in presence of court. If no affidavit be presented, there is nothing to set power of court in motion, and if affidavit as presented fails to state substantive facts constituting contempt on part of accused, same results must follow—for there is no distinction between utter absence of affidavit and presentation of one which is defective in substance in stating facts constituting alleged contempt.—*Batchelder v. Moore*, 42 Cal. 412, 415.

As to sufficiency of affidavit made on information and belief, see pars. 6-8, this note.

As to sufficiency of affidavit charging violation of injunctive order, see pars. 16, 25, this note.

2. **Affidavit need not set forth pendency of case or proceeding, nor provisions of order of court which had been violated**, for although contempt of court is specific criminal offense and judgment of conviction thereof is same as judgment in criminal case, yet practice has always been to prosecute matter of contempt in case or proceedings out of which it arose, and not as separate proceedings with title of its own.—*Ex parte Ah Men*, 77 Cal. 198, 200, 11 Am. St. Rep. 263, 19 Pac. 380.

3. **Same—Constitutes complaint, and unless it charges facts constituting contempt, court is without jurisdiction to proceed**.—*Hutton v. Superior Court*, 147 Cal. 156, 159, 81 Pac. 409.

4. **Same—Distinction between complaint or affidavit which charges no offense at all, and one which, though inartificially drawn, intimates existence of facts necessary to constitute offense, must be made in determining on habeas corpus whether court had**

jurisdiction.—*Ex parte Ah Men*, 77 Cal. 198, 201, 11 Am. St. Rep. 263, 19 Pac. 380.

5. **Charge made upon information and belief—Will not make judgment of conviction void after party has had full and fair hearing.** It would be impossible in many cases of contempt committed out of presence of court to secure apprehension of guilty parties if every fact essential to sustain judgment were required to be stated in positive terms.—*Ex parte Acock*, 84 Cal. 50, 54, 23 Pac. 1029.

6. **Contempt committed in presence of court—Construction.**—A judge can not be said to have instituted the proceedings for contempt where an affidavit showing contemptuous conduct has been presented to him.—*Hughes v. Moncur*, 28 Cal. App. 462, 152 Pac. 968.

7. **Same—Sufficiency of affidavit made on information and belief.**—Whatever the rule may be with respect to the rights of persons held under an attachment which has been issued upon an affidavit made on information and belief alone, it is not true that after a full and fair hearing, in which the prisoner has been given full opportunity to present his defense to the charge made against him, a judgment of conviction can be held to be void because some of the charges are made on information and belief. It would be impossible in many cases of contempt committed out of the presence of the court to secure the apprehension or conviction of the guilty parties, if every fact material to sustain the judgment were required to be stated in positive terms.—*Hughes v. Moncur*, 28 Cal. App. 462, 152 Pac. 968.

As to requisites and sufficiency of affidavits, see pars. 1-4, 16, 25, this note.

8. **The legality of the order adjudging the attorney guilty of contempt is not subject to attack on the ground of the insufficiency of the affidavit upon which the contempt proceeding was based, where the accused appears in person and by attorney and is given full opportunity to be heard, and interposes no objection to the sufficiency of the affidavit.**—*Hughes v. Moncur*, 28 Cal. App. 462, 152 Pac. 968.

9. **Same—What order must show.**—Order adjudicating contempt must contain recital of facts which make out case of contempt.—*Overend v. Superior Court*, 131 Cal. 230, 284, 63 Pac. 372. See *People ex rel. Field v. Turner*, 1 Cal. 152, 155; *Ex parte Rowe*, 7 Cal. 181, 183; *Batchelder v. Moore*, 42 Cal. 412, 415; *Ex parte Zeelandelaar*, 71 Cal. 238, 241, 12 Pac. 259; *Schwarz v. Superior Court*, 111 Cal. 106, 112, 43 Pac. 580.

10. **Contempt committed without presence of court—By instructing party not to produce certain books in court which he had been ordered to produce, does not authorize commitment for contempt unless preceded by affidavit showing facts constituting contempt, or by citation or notice to**

show cause.—*Ex parte Rickert*, 126 Cal. 244, 245, 58 Pac. 549.

As to contempts committed without presence of court, and attachment therefor, see, post, § 1212 and note.

11. **Same—Affidavit must show what.**—Affidavit of facts forming basis of jurisdictional action for contempt committed without presence of court must show upon its face cause of contempt, and if it does not then court is wanting in jurisdiction, and order of contempt is void.—*Overend v. Superior Court*, 131 Cal. 280, 284, 63 Pac. 372; *Hutton v. Superior Court*, 147 Cal. 156, 159, 81 Pac. 409.

12. **Same—Judgment convicting of—Recital of facts.**—In the case of a constructive contempt—that is, where the alleged contempt is committed out of the immediate presence of the court or judge at chambers—the proceeding is required to be inaugurated by the filing of an affidavit or affidavits which must recite the facts constituting the contempt, under the provisions of the above section.—*In re Selowsky*, 38 Cal. App. 569, 177 Pac. 301, following the doctrine in *Overend v. Superior Court*, 131 Cal. 284, 63 Pac. 372, 374; *Hutton v. Superior Court*, 147 Cal. 159, 81 Pac. 409, 410.

13. **Contempt proceeding—Is presented in cause out of which it grows,** as matter of convenience, but it is separate and distinctive matter and no part of original case.—*People v. Durrant*, 116 Cal. 179, 209, 10 Am. Crim. Rep. 499, 48 Pac. 75.

14. **Court takes judicial notice of proceedings before it,** and orders made, and facts constituting contempt are sufficiently stated if acts done in violation of order or writ are set forth.—*Ex parte Ah Men*, 77 Cal. 198, 201, 11 Am. St. Rep. 263, 19 Pac. 380.

15. **Failing to appear in person before court when ordered to do so,** and show cause why he should not be punished for contempt in failing to obey order requiring payment of alimony in action then pending before court, is not contempt committed in presence of court, and there should be an affidavit stating facts constituting contempt.—*Ex parte Gordan*, 92 Cal. 478, 480, 27 Am. St. Rep. 154, 28 Pac. 489.

16. **Injunction restraining nuisance—Violation of—Affidavits for, sufficiency of.**—In a contempt proceedings for violation of a decree perpetually enjoining the use of premises for the purpose of lewdness, assignation, or prostitution, a general allegation in the affidavit that the affiant knows of his known knowledge that the premises are being used for such purpose, is sufficient to give the court jurisdiction of the proceeding, without an allegation of the commission of specific acts of lewdness.—*Selowsky v. Superior Court*, 180 Cal. 404, 181 Pac. 652, approving the doctrine in *Betts v. State*, 93 Ind. 375; *State v. Schaffer*, 74 Iowa 704, 39 N. W. 89; *Drake v. State*, 14 Neb. 535, 17 N. W. 117; *State v. Dame*, 60 N. H. 479, 40 Am. Rep. 331; *State*

v. Paterson, 29 N. C. (7 Ired. L.) 70, 45 Am. Dec. 506; *State v. Jones*, 53 W. Va. 613, 45 S. W. 916; *State v. Burnell*, 29 Wis. 435.

As to requirement of and sufficiency of affidavits, see pars. 1-4, 25, this note.

As to sufficiency of affidavits made on information and belief, see pars. 6-8, this note.

17. **Loss of jurisdiction by lapse of time—Contempt committed in presence of court,** but no steps being taken to punish party or retain jurisdiction until fifty days thereafter when order adjudging party guilty of contempt and imposing fine was made without notice of any kind, court lost jurisdiction of process against party for contempt, and order and commitment are void.—*In re Foote*, 76 Cal. 543, 544, 18 Pac. 678.

18. **Order for contempt must show jurisdiction.**—Court exercises special and limited jurisdiction in cases of contempt, and its authority to impose fine or term of imprisonment must be shown by record to convict. Order stating that party was sworn and examined as witness but refused to answer certain questions (not stating them) after being ordered to do so by court, and adjudging him guilty of contempt until he shall answer such questions, is wholly insufficient to show jurisdiction, and official reporter's notes of proceedings leading up to order are no part of record.—*Ex parte Hoar*, 146 Cal. 132, 133, 79 Pac. 853.

19. **Facts shown by order adjudging party guilty of contempt in presence of court,** not in fact showing such contempt, party must be released on habeas corpus.—*Ex parte Zeelandelaar*, 71 Cal. 238, 241, 12 Pac. 259.

As to reciting the facts, see, post, § 1219 and note.

20. **Same—Failure to urge want of jurisdiction before trial court,** adjudging him guilty of contempt does not preclude party from availing himself of such objection thereafter on writ of habeas corpus of supreme court. If court is entirely without jurisdiction, order is void.—*Ex parte Zeelandelaar*, 71 Cal. 238, 242, 12 Pac. 259.

21. **Order for contempt—Not stating questions asked witness,** which he was adjudged guilty of contempt for not answering, it follows that supreme court does not know anything about either their materiality or pertinency to issue on trial. There being no recital in order of contempt that questions and answers thereto were material and pertinent to issue, there is no affirmative showing of jurisdiction, and order adjudging defendant guilty of contempt is void, and should be annulled.—*Overend v. Superior Court*, 131 Cal. 280, 286, 63 Pac. 372.

22. **Party is entitled to know with what he is charged,** and contempt being criminal proceeding, it will not be presumed by supreme court in proceedings on certiorari

that party was held guilty of some act not specifically alleged in affidavit or covered thereby. Offense being criminal in its nature, both charge and finding and judgment of court thereon are to be strictly construed in favor of accused.—*Schwarz v. Superior Court*, 111 Cal. 106, 112, 43 Pac. 580.

23. Requirement—That act to be performed should be specified in warrant of commitment had in view object of affording means to other courts of judging of its correctness. Warrant of commitment should state all material facts upon which action of court is predicated.—*Ex parte Rowe*, 7 Cal. 181, 183.

24. Same—That facts be stated in order adjudging party guilty of contempt demands that questions addressed to witness for refusal to answer which he was ad-

judged guilty of contempt must be stated in order.—*Overend v. Superior Court*, 131 Cal. 280, 286, 63 Pac. 372.

25. Violation of injunctive order—Sufficiency of affidavits.—In the case of an injunctive order issued in a proceedings under the Red Light Abatement Act, and an alleged violation of such injunctive order, the affidavits in a contempt proceedings must state all the facts upon which the contempt proceeding is based showing a violation of such injunctive order; such affidavits constitute the complaint in the proceeding.—*In re Selowsky*, 38 Cal. App. 569, 177 Pac. 301.

As to requisites of and sufficiency of affidavits, see pars. 1-4, 16, this note.

As to sufficiency of affidavits made on information and belief, see pars. 6-8, this note.

§ 1212. A WARRANT OF ATTACHMENT MAY ISSUE OR A NOTICE TO SHOW CAUSE. When the contempt is not committed in the immediate view and presence of the court or judge, a warrant of attachment may be issued to bring the person charged to answer, or, without a previous arrest, a warrant of commitment may, upon notice, or upon an order to show cause be granted; and no warrant of commitment can be issued without such previous attachment to answer, or such notice or order to show cause.

History: Enacted March 11, 1872, substantial re-enactment of § 482 Practice Act.

CONTEMPT—WARRANT OF ATTACHMENT—NOTICE TO SHOW CAUSE.

1. Denial to party of benefit of notice—Would be in effect to deny that he is entitled to notice at all.
2. Failing to appear in person before court—On order to show cause.
3. Inability to comply with order.
4. Order to show cause—May be issued upon affidavit.
5. Same—Appearance by counsel in answer to order to show cause.
6. Same—Party need not necessarily be present at hearing.
7. Party who wilfully conceals himself to avoid service of order to show cause.
8. Proceedings required by above section must be taken.
9. Question whether order has been disobeyed—One of fact.
10. Service of papers—Mere delivery to person in Missouri of certified copy of order.
- 11, 12. Same—Mode of service to show cause—Upon corporation in contempt.
- 13-15. Same—Same—Upon attorney of party.
16. Warrant of commitment—Not being preceded by affidavit.

See, ante, § 1209 and note.

1. Denial to party of benefit of notice—Would be in effect to deny that he is en-

titled to notice at all.—No person shall be personally bound until he has had his day in court, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity lacks all attributes of judicial determination; its judicial usurpation and oppression can never be upheld where justice is justly administered.—*McClatchy v. Superior Court*, 119 Cal. 413, 420, 39 L. R. A. 691, 51 Pac. 696.

2. Failing to appear in person before court—On order to show cause why he should not be adjudged guilty of contempt for failing to pay alimony in divorce action pending before court, is no jurisdictional basis for presumption for contempt. Party has right to appear either in person or by counsel. An appearance by counsel is sufficient.—*Ex parte Gordan*, 92 Cal. 478, 480, 27 Am. St. Rep. 154, 28 Pac. 489.

See par. 5, this note.

3. Inability to comply with order is reason why person should not be punished for disobeying it. But question whether it was in his power to obey is one of fact which court making order had to determine, and statement of party under oath that he was unable to comply with such order is not absolutely conclusive. Court may have good and sufficient reasons for disbelieving such statement, and supreme court could not determine that question upon application for habeas corpus without reviewing all

evidence introduced upon hearing before superior court, and that they are not allowed to do in such proceeding.—*Ex parte Cottrell*, 59 Cal. 420, 422.

4. Order to show cause—May be issued upon affidavit stating facts constituting contempt if not committed in presence of court.—*Ex parte Henshaw*, 73 Cal. 486, 497, 15 Pac. 110.

As to necessity for notice, see par. 1, this note.

5. Same—Appearance by counsel in answer to order to show cause, and submitting evidence upon merits of application, and resisting same without objection of want of personal service, is sufficient to give court jurisdiction.—*Foley v. Foley*, 120 Cal. 33, 39, 63 Am. St. Rep. 147, 52 Pac. 122.

6. Same—Party need not necessarily be present at hearing, nor can he be required to be there.—*Foley v. Foley*, 120 Cal. 33, 39, 63 Am. St. Rep. 147, 52 Pac. 122. See *Ex parte Gordan*, 92 Cal. 478, 480, 27 Am. St. Rep. 154, 28 Pac. 489.

7. Party who willfully conceals himself to avoid service of order to show cause why he should not be adjudged guilty of contempt for disobeying legal order of court can not, by such means, defeat power of court. Such party being officer of corporation, which appeared by its attorney, court may direct order to show cause to be served on attorney, since defendant, by reason of his own acts, could not be served personally.—*Golden Gate Consol. Hydraulic Min. Co. v. Superior Court*, 65 Cal. 187, 192, 3 Pac. 628.

8. Proceedings required by above section must be taken to bring petitioner into contempt, otherwise he will be discharged on habeas corpus. Party is entitled to notice of order, and opportunity to show cause why he should not be imprisoned for disobedience of order of court.—*Ex parte Rush*, 60 Cal. 5, 6.

9. Question whether order has been disobeyed—One of fact which the court making order had to determine, and such determination can not be reviewed in appli-

cation for discharge upon habeas corpus.—*Ex parte Cottrell*, 59 Cal. 420, 421.

10. Service of papers—Mere delivery to person in Missouri of certified copy of order made by court in this state would not be service upon him within meaning of law.—*Johnson v. Superior Court*, 63 Cal. 578, 580

11. Same—Mode of service to show cause—Upon corporation in contempt proceedings is not expressly provided for. Order to show cause is "paper to bring party into contempt" within meaning of sections 1015, 1016, ante, and ordinarily service of such paper like that of summons must be upon president or other head of corporation.—*Golden Gate Consol. Hydraulic Min. Co. v. Superior Court*, 65 Cal. 187, 191, 3 Pac. 628.

12. Compare: *Johnson v. Superior Court*, 63 Cal. 578, 580; *Hennessy v. Nicol*, 105 Cal. 138, 38 Pac. 649; *Larson v. Larson*, 9 S. D. 1, 5, 67 N. W. 842.

13. Same—Same—Upon attorney of party to bring such party into contempt is not proper. Order must be served on party himself before he can be brought into contempt for not complying with such order.—*Johnson v. Superior Court*, 63 Cal. 578, 580; *Hennessy v. Nicol*, 105 Cal. 138, 142, 38 Pac. 649.

14. Compare: *Golden Gate Consol. Hydraulic Min. Co. v. Superior Court*, 65 Cal. 187, 192, 3 Pac. 628; *Foley v. Foley*, 120 Cal. 33, 39, 63 Am. St. Rep. 147, 52 Pac. 122.

15. Service upon attorneys is authorized where party conceals himself to avoid compliance with orders of court and service of its process, and court in such case, upon proper showing, may direct order to show cause to be served upon attorneys of record. This method of procedure, under such circumstances, is authorized, and constitutes valid service.—*Foley v. Foley*, 120 Cal. 33, 39, 63 Am. St. Rep. 147, 52 Pac. 122.

16. Warrant of commitment—Not being preceded by affidavit showing facts constituting contempt or by citation, or notice to show cause, party will be discharged from custody on habeas corpus.—*Ex parte Rickert*, 126 Cal. 244, 245, 58 Pac. 549.

§ 1213. BAIL MAY BE GIVEN BY A PERSON ARRESTED UNDER SUCH WARRANT. Whenever a warrant of attachment is issued, pursuant to this title, the court or judge must direct, by an indorsement on such warrant, that the person charged may be let to bail for his appearance, in an amount to be specified in such indorsement.

History: Enacted March 11, 1872, re-enactment of § 483 Practice Act as amended 1859, Stats. 1859, p. 139.

See, ante, § 1209 and note.

§ 1214. SHERIFF MUST, UPON EXECUTING THE WARRANT, ARREST AND DETAIN THE PERSON UNTIL DISCHARGED. Upon executing the warrant of attachment, the sheriff must keep the person in custody, bring him

before the court or judge, and detain him until an order be made in the premises, unless the person arrested entitle himself to be discharged, as provided in the next section.

History: Enacted March 11, 1872, re-enactment of § 484 Practice Act.

See, ante, § 1209 and note.

§ 1215. BAIL-BOND, FORM AND CONDITIONS OF. When a direction to let the person arrested to bail is contained in the warrant of attachment, or indorsed thereon, he must be discharged from the arrest, upon executing and delivering to the officer, at any time before the return day of the warrant, a written undertaking, with two sufficient sureties, to the effect that the person arrested will appear on the return of the warrant and abide the order of the court or judge thereupon; or they will pay as may be directed, the sum specified in the warrant.

History: Enacted March 11, 1872, re-enactment of § 485 Practice Act.

See, ante, § 1209 and note.

§ 1216. OFFICER MUST RETURN WARRANT AND UNDERTAKING, IF ANY. The officer must return the warrant of arrest and undertaking, if any, received by him from the person arrested, by the return day specified therein.

History: Enacted March 11, 1872, re-enactment of § 486 Practice Act.

See, ante, § 1209 and note.

§ 1217. HEARING. When the person arrested has been brought up or appeared, the court or judge must proceed to investigate the charge, and must hear any answer which the person arrested may make to the same, and may examine witnesses for or against him, for which an adjournment may be had from time to time, if necessary.

History: Enacted March 11, 1872, re-enactment of § 487 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amtds. 1900-1, p. 193, held unconstitutional, see history, § 5 ante.

CONTEMPT OF COURT—HEARING.

1. Answer—Which has no tendency to exonerate person from charge.
2. Constitutional right to be heard in defense.
3. Contempts not committed within presence of court.
4. Court must be clearly satisfied of party's guilt.
- 5, 6. Jurisdiction of court to make order in contempt.
7. Production of witnesses may be waived.
8. Record is taken as true—On application for certiorari.
9. Right of defense.
10. Supreme court is not precluded from inquiring.
11. Truth of facts published may always be proven in defense.
12. Utah statute identical.

See, ante, § 1209 and note.

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1. Answer—Which has no tendency to exonerate person from charge is not required to be heard by court, nor is court required to permit examination of witnesses on matters which are not relevant to alleged contempt (dis. op. by Harrison, J.).—*McClatchy v. Superior Court*, 119 Cal. 413, 424, 39 L. R. A. 691, 51 Pac. 696.

2. Constitutional right to be heard in defense, gravamen of charge being alleged false character of publication in newspaper relating to evidence in case on trial and wrongful intent in making them to bring court into contempt and thus interfere with orderly administration of justice. Party has right to show that publications were in fact true, and not made with any wrongful intent, and it is error to refuse to permit him to make such effort.—*McClatchy v. Superior Court*, 119 Cal. 413, 416, 39 L. R. A. 691, 51 Pac. 696.

3. Contempts not committed within presence of court, issue is made up by answer, witnesses are called and examined, and trial

is had as in other cases.—In matter of Buckley, 69 Cal. 1, 4, 10 Pac. 69.

4. Court must be clearly satisfied of party's guilt before adjudging him guilty of contempt.—In matter of Buckley, 69 Cal. 1, 3, 4, 10 Pac. 69.

5. Jurisdiction of court to make order in contempt proceedings must affirmatively appear.—Overend v. Superior Court, 131 Cal. 280, 286, 63 Pac. 372; Rogers v. Superior Court, 145 Cal. 88, 91, 78 Pac. 344.

6. Statute conferring right to condemn citizen without opportunity of being heard in his own defense would be violative of constitution. Judicial department has no more power to disregard such rules of law than any other department of government.—McClatchy v. Superior Court, 119 Cal. 413, 420, 39 L. R. A. 691, 51 Pac. 696.

7. Production of witnesses may be waived and party may consent to try case on evidence.—Roe v. Superior Court, 60 Cal. 93, 94.

8. Record is taken as true.—On application for certiorari to set aside commitment for contempt, and if party raises objection in supreme court that witnesses were not examined, and record is silent on such point, presumption will be in favor of judgment, and if contrary is fact, it must be corrected by motion or suggestion to court below.

Supreme court can not alter record.—Roe v. Superior Court, 60 Cal. 93.

9. Right of defense.—Proceedings for contempt will be annulled on certiorari where party has been denied right to present valid defense.—McClatchy v. Superior Court, 119 Cal. 413, 421, 39 L. R. A. 691, 51 Pac. 696.

10. Supreme court is not precluded from inquiring whether acts charged and found to have been done really constitute contempt, although superior court has determined that averments of affidavit on which order to show cause was based were true, and that commission of acts alleged in affidavit constitute contempt.—Ex parte Henshaw, 73 Cal. 486, 497, 15 Pac. 110.

11. Truth of facts published may always be proven in defense, and publisher has absolute right to present such defense.—McClatchy v. Superior Court, 119 Cal. 413, 417, 39 L. R. A. 691, 51 Pac. 696.

12. Utah statute identical.—Sections 3366 and 3367 of Utah are identical with above section and section 1218, post. Held that where one is charged in affidavit with criminal contempt, with intent to interfere with judicial action, burden is on state to show such intent.—Herald-Republican Pub. Co. v. Lewis, 42 Utah 188, 129 Pac. 624, 631.

§ 1218. JUDGMENT AND PENALTY, IF GUILTY. Upon the answer and evidence taken, the court or judge must determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding five hundred dollars or he may be imprisoned not exceeding five days, or both.

History: Enacted March 11, 1872, re-enactment of § 488 Practice Act; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 193, held unconstitutional, see history, § 5 ante.

CONTEMPT OF COURT — JUDGMENT AND PENALTY, WHERE GUILTY.

1. Contempt of court is public offense.
2. Discretion of court—As to punishment.
3. Final order of court—By which party is adjudged to have been guilty of contempt.
4. Nuisance — Order abating — Disobedience of order—Contempt—Punishment.
5. Punishment for contempt—Absence from jail in violation of law.
6. Same—Judgment of fine—Enforceable by execution as on judgment in civil cases.
7. Same—Jurisdiction of court—Action must be commenced.
8. Same—Same—Court exceeded its jurisdiction, when.
9. Same—Same—Court finding that party is unable to pay alimony.
10. Same—Same—Defendant in an action for divorce—Can not legally be denied process.

11. Same—Same—Hard labor.

12. Same—Same—Imposition of fine of five hundred dollars, or imprisonment until paid at rate of two dollars per day.

13. Same—Same—Mere preponderance of evidence—Not sufficient to warrant.

14. Same—Same—Order for imprisonment of party until he complies.

15. Same—Maximum punishment—Constitutionality of provision.

16. Same—Power of legislature.

17-21. Same—Regulated by statute.

See, ante, § 1209 and note.

As to construction of an identical statute in Utah, see Herald-Republican Pub. Co. v. Lewis, 42 Utah 188, 129 Pac. 628, 631.

1. Contempt of court is public offense, and by section 166 of Penal Code is expressly declared to constitute misdemeanor. It none the less is a criminal offense because statute authorizes it to be punished by summary proceedings.—Ex parte Gould,

99 Cal. 360, 361, 37 Am. St. Rep. 57, 21 L. R. A. 751, 33 Pac. 1112.

2. Discretion of court—As to punishment.—Orderly proceedings of court having been subjected to unseemly interruption, when only question is whether offender shall be punished by fine or imprisonment in order to vindicate dignity of tribunal and his example to others, discretion of court to punish or condone offense is absolute. But when right of party can only be secured by committing to prison contemner of lawful orders of court until he offers to purge himself of contempt, exercise of power to commit becomes obligatory. In such case "may" means "must," and court may be compelled by mandamus to proceed against offending party as of contempt.—*Crocker v. Conrey*, 140 Cal. 213, 218, 73 Pac. 1006.

3. Final order of court—By which party is adjudged to have been guilty of contempt should always show upon its face facts upon which exercise of power is based and adjudication made.—*People ex rel. Field v. Turner*, 1 Cal. 152, 155.

4. Nuisance—Order abating—Disobedience of order—Contempt—Punishment.—The provisions of the Red Light Abatement Act authorizing the punishment as for contempt of any person guilty of disobedience of the order of abatement, or of the permanent injunction, is not void, because, in point of severity, it conflicts with the above code provisions, which fix a penalty for contempt generally.—*People ex rel. Bradford v. Barbieri*, 33 Cal. App. 770, 166 Pac. 812.

5. Punishment for contempt—Absence from jail in violation of law can not be considered as having been spent in jail in satisfaction of judgment, which requires actual imprisonment. Sentence of court being that party pay fine and that he be imprisoned in county jail until such fine was paid at proportion of one day for every dollar of fine. Time which party spends free from confinement under order of court and upon undertaking given by party on appeal to supreme court in said judgment of contempt will not count as any part of penalty.—*Ex parte Vance*, 90 Cal. 208, 210, 13 L. R. A. 574, 27 Pac. 209.

6. Same—Judgment of fine—Enforceable by execution as on judgment in civil cases, or by commitment under criminal law. A person against whom judgment imposing fine and imprisonment until it is paid has been pronounced has privilege of either paying it by money or imprisonment. If he pays money, there can be no commitment. If he refuses to pay, commitment follows as incident to judgment until judgment has been complied with according to law.—*In matter of Tyler*, 64 Cal. 434, 438, 1 Pac. 884. See *Ex parte Crittenden*, 62 Cal. 534, 535; *Ex parte Vance*, 90 Cal. 208, 210, 13 L. R. A. 574, 27 Pac. 209.

7. Same—Jurisdiction of court—Action must be commenced in order that court may have jurisdiction of subject-matter, and or-

der of arrest made prior to filing of complaint is void for want of jurisdiction.—*Ex parte Cohen*, 6 Cal. 318, 320, 321.

8. Same—Same—Court exceeded its jurisdiction when requiring party to deliver over certain books and papers to receiver where uncontradicted affidavit of party shows it was not in his power to so deliver such books and papers, and court does not find that party had such power.—*Ex parte Cohen*, 6 Cal. 318, 320.

9. Same—Same—Court finding that party is unable to pay alimony, and that he had made no disposition of his property in fraud of his creditors, adjudging party guilty of contempt on ground that court had allowed such party month or more to seek employment by which he might have earned money to make weekly payments of alimony as prescribed in said order, and he had wholly failed and neglected to make any effort to obtain employment, is clearly in excess of power of court.—*Ex parte Todd*, 119 Cal. 57, 58, 50 Pac. 1071.

10. Same—Same—Defendant in an action for divorce—Can not legally be denied process which law has provided for procuring testimony of witnesses residing beyond jurisdiction of state on ground that he has not obeyed order of court requiring him to pay plaintiff her costs and counsel fees, of which certified copy was delivered him in state of Missouri.—*Johnson v. Superior Court*, 63 Cal. 578, 579.

11. Same—Same—Hard labor.—Judgment providing for imprisonment at hard labor would be void. Code allows imprisonment in county jail until fine imposed is paid or satisfied by imprisonment or otherwise, but does not authorize imprisonment at hard labor.—*In re Fil Kl*, 80 Cal. 201, 203, 22 Pac. 146.

12. Same—Same—Imposition of fine of five hundred dollars, or imprisonment until paid at rate of two dollars per day for every day's imprisonment is within jurisdiction of court. Imposition of fine of five hundred dollars exhausted statutory power of punishment; but committal was not additional punishment; it was simply written mandate or process by which court undertook to enforce its judgment.—*In matter of Tyler*, 64 Cal. 434, 438, 1 Pac. 884.

13. Same—Same—Mere preponderance of evidence—Not sufficient to warrant infliction of so serious a punishment as fine or imprisonment or both. There is no rule of law of this state authorizing any court to fine or imprison person on mere preponderance of evidence as to his guilt. Guilt must be established by clear and satisfactory proof, and generally, if not always, in criminal cases, beyond reasonable doubt. It would be against all correct rules of law and principles of justice to permit guilt on conviction of which punishment so serious and severe may follow to be established by less than clear and satisfactory proof.—*In matter of Buckley*, 69 Cal. 1, 3, 10 Pac. 69.

14. **Same—Same—Order for imprisonment of party until he complies with order of court** is equivalent to sentence of imprisonment for life in case where party is unable to comply with direction of court, and is without jurisdiction of court to make.—*Ex parte Cohen*, 6 Cal. 318, 320.

15. **Same—Maximum punishment—Constitutionality of provision.**—The provision of the above section limiting the power of a court to punish for a constructive contempt to a fine of not exceeding five hundred dollars, or imprisonment not exceeding five days, or both fine and imprisonment, is not unconstitutional as an infringement of the inherent power of a court to punish for contempt.—*In re Garner*, 179 Cal. 409, 177 Pac. 162.

16. **Same—Power of legislature.**—It is not within the power of the legislature, whether by procedural rules or the inadequacy of the penalty fixed to substantially impair or destroy the implied power of the court to punish for contempt, yet it may provide rules of procedure and fix the maximum penalty which, if adequate for the purpose designed, must be deemed operative in controlling the action of the court.—*In re Garner*, 179 Cal. 409, 177 Pac. 162.

17. **Same—Regulated by statute, and punishment is limited therein.** Courts of equity have no right to bring parties into contempt for disobedience of orders or

rights to which said parties would otherwise be entitled.—*Johnson v. Superior Court*, 63 Cal. 578, 579.

18. From earliest time courts of equity have used process of contempt for purpose of compelling party to pay money or perform some pecuniary obligation which he may have been ordered to pay or perform by decree of court as well as to force obedience to decree directing performance of some act such as execution of deeds or delivery up of documents.—*Galland v. Galland*, 44 Cal. 475, 477, 13 Am. Rep. 167.

19. Purpose is to vindicate dignity and authority of court, not to indemnify plaintiff for any damages he may have sustained by reason of misconduct of party. It is special proceeding, criminal in character, in which state is real party or prosecutor.—*Ex parte Gould*, 99 Cal. 860, 862, 37 Am. St. Rep. 57, 21 L. R. A. 751, 33 Pac. 1112.

20. Proceeding is criminal or quasi-criminal, and punishment may be fine or imprisonment or both—punishment appropriate to criminal offenses.—*In matter of Buckley*, 69 Cal. 1, 3, 10 Pac. 69.

21. Power conferred by above sections is not affected by any provisions of Penal Code, and power to punish for contempt of court, and limitations thereon must be sought elsewhere than in Penal Code.—*Ex parte Abbott*, 94 Cal. 333, 334, 29 Pac. 622.

§ 1219. IF THE CONTEMPT IS THE OMISSION TO PERFORM ANY ACT, THE PERSON MAY BE IMPRISONED UNTIL PERFORMANCE.

When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he have performed it, and in that case the act must be specified in the warrant of commitment.

History: Enacted March 11, 1872, re-enactment of § 489 Practice Act.

CONTEMPT OF COURT—OMISSION TO PERFORM—IMPRISONMENT UNTIL PERFORMANCE.

1. Action having been abated—Party who has refused to answer questions.
2. Alimony—Party may be imprisoned until he complies with order.
3. Same—Failure to pay alimony as directed by court—Not contempt of court, when.
4. Same—Selling or encumbering homestead.
5. Court inflicting fine—May direct that party stand committed until fine be paid.
- 6, 7. Court not finding that it was within power of party to comply.
8. Imprisonment for debt—In civil action.
9. Indefinite imprisonment—Party can be.
10. Same—For non-performance of an impossibility.

11. Same—Of witness for refusing to answer question.
12. Judgment-debtor—Ability to pay—Commitment under supplementary proceedings.
13. Justices' court.
14. Until fine is "paid" or "satisfied."

See, ante, § 1209 and note.

1. Action having been abated—Party who has refused to answer questions is no longer in position to answer them, and order of court imprisoning such person until he shall have complied by answering questions propounded can have no effect after action has been discontinued, and party imprisoned is entitled to be released on habeas corpus. If party should signify his willingness to answer, he could not do so. Court could not pursue cause abandoned by parties. Law does not require vain act to be done.—*Ex parte Rowe*, 7 Cal. 175, 177; *Ex parte Overend*, 122 Cal. 201, 203, 54 Pac. 740.

2. Alimony—Party may be imprisoned until he complies with order of court provided he has ability to comply. If it is not in his power to do what he has been commanded to do, he can not be confined to perpetual imprisonment for failure to perform an impossibility. This being so and every court being in contempt proceedings court of strictly limited jurisdiction, it is essential to validity of judgment directing imprisonment of person until he complies with order of court that it should be found that he is able to comply.—*Ex parte Silvia*, 123 Cal. 293, 294, 69 Am. St. Rep. 58, 55 Pac. 988.

3. Same—Failure to pay alimony as directed by court—Not contempt of court when it is not within power of party so to do, and order adjudging him guilty does not change case by reciting that party wilfully refuses to pay. Such recital is not equivalent to showing that it is within his ability to comply with order, and imprisonment for debt merely is not permitted: it is only allowed as punishment for commission of some crime or offense, and it is neither crime nor offense to refuse to comply with order of court when it is not within power of party to do so.—*In re Cowden*, 139 Cal. 244, 246, 73 Pac. 156.

4. Same—Selling or encumbering home—stead can not be enforced against party ordered to pay alimony in divorce proceedings pending before court, and if he is unable otherwise to comply with order, judgment against such party punishing him for contempt is unlawful, and party will be released on habeas corpus.—*Ex parte Silvia*, 123 Cal. 293, 294, 69 Am. St. Rep. 58, 55 Pac. 988.

5. Court inflicting fine—May direct that party stand committed until fine be paid, although there is no specific affirmative grant of power in statute to make such direction.—*Ex parte Crittenden*, 62 Cal. 534, 535; *Ex parte Robertson*, 27 Tex. App. 628, 632, 11 Am. St. Rep. 211, 11 S. W. 669.

6. Court not finding that it was within power of party to comply with certain order to deliver over certain books and papers to receiver appointed in action, and uncontradicted affidavit of party showing that it was not within his power, order of court that such party be imprisoned until he had complied with such order is beyond jurisdiction of court.—*Ex parte Cohen*, 6 Cal. 318, 320.

7. Order that defendant be imprisoned until he has paid amount ordered to be paid is improper, unless party is physically able to make such payment. Imprisonment is limited to five days (conc. op. by Beatty, C. J.).—*Ex parte Todd*, 119 Cal. 57, 58, 50 Pac. 1071.

8. Imprisonment for debt—In civil action, except in cases of fraud, is forbidden by constitution, and judgment in contempt against party for refusal to pay rent of mortgaged premises to receiver, pending

foreclosure suit and order directing him to stand committed until he pay rent, would be violative of provision of constitution and void if rent due shall be regarded as debt and it is so regarded.—*Knutte v. Superior Court*, 134 Cal. 660, 661, 66 Pac. 875.

9. Indefinite imprisonment—Party can be indefinitely imprisoned for contempt only under above section, and then only when contempt exists in omission to perform act which is yet in power of person to perform; he can not be imprisoned for neglecting or refusing to do what it appears is out of his power to do. Order of commitment in such case would be void.—*Ex parte Overend*, 122 Cal. 201, 203, 204, 54 Pac. 740.

10. Same—For non-performance of an impossibility can not be allowed. Above section allows party to be punished indefinitely only when contempt consists in omission to perform act which is yet in his power to perform. Order of commitment is void where party is imprisoned for omitting to do that which is out of his power to perform.—*Ex parte Overend*, 122 Cal. 201, 204, 54 Pac. 740.

11. Same—Of witness for refusing to answer question would not be authorized when party could not have opportunity to purge his contempt by answer, and discharge of jury and discontinuance of trial at which party refused to answer questions would leave no opportunity for him to purge his contempt.—*Ex parte Overend*, 122 Cal. 201, 204, 54 Pac. 740.

12. Judgment-debtor—Ability to pay—Commitment under supplementary proceedings.—In a case in which the court has found on investigation under supplementary proceedings that a judgment-debtor could perform, and for that reason was amenable to an order made in such supplementary proceedings directing him to satisfy the judgment, under the provisions of the above section, the court could order that the judgment-debtor be committed to the custody of the sheriff until he shall have complied with the order directing the satisfaction of the judgment.—*Ex parte Myers*, 46 Cal. App. 92, 188 Pac. 1006, approving doctrine in matter of Gutierrez, 46 Cal. App. 94, 188 Pac. 1004, distinguishing as not in point *Ex parte Overend*, 122 Cal. 201, 54 Pac. 740.

13. Justices' court.—Above section is applicable to proceedings in justices' courts. If otherwise, justice would be in great measure powerless to compel obedience to orders, and there is nothing in organization, powers, and course of proceeding in justices' courts in least degree incompatible with exercise of such power.—*Ex parte Latimer*, 47 Cal. 131, 133.

14. Until fine is "paid" or "satisfied."—Judgment for contempt that party be fined one hundred dollars, and that in default of payment of said fine he be imprisoned in county jail until said fine be paid, such imprisonment not to exceed one day for every

twenty dollars that shall so remain unpaid is valid, although word "paid" is used instead of statutory word "satisfied." Peti-

tioner would have right to discharge part of fine by imprisonment for part of time.—*Ex parte Krouse*, 148 Cal. 232, 82 Pac. 1043.

§ 1220. IF A PARTY FAIL TO APPEAR, PROCEEDINGS. When the warrant of arrest has been returned served, if the person arrested do not appear on the return day, the court or judge may issue another warrant of arrest, or may order the undertaking to be prosecuted, or both. If the undertaking be prosecuted, the measure of damages in the action is the extent of the loss or injury sustained by the aggrieved party by reason of the misconduct for which the warrant was issued, and the costs of the proceeding.

History: Enacted March 11, 1872, re-enactment of § 491 Practice Act.

See, ante, § 1209 and note.

§ 1221. ILLNESS SUFFICIENT CAUSE FOR NON-APPEARANCE OF PARTY ARRESTED. CONFINEMENT UNDER ARRESTS FOR CONTEMPT. Whenever, by the provisions of this title, an officer is required to keep a person arrested on a warrant of attachment in custody, and to bring him before a court or judge, the inability, from illness or otherwise, of the person to attend, is sufficient excuse for not bringing him up; and the officer must not confine a person arrested upon the warrant in a prison, or otherwise restrain him of personal liberty, except so far as may be necessary to secure his personal attendance.

History: Enacted March 11, 1872, re-enactment of § 492 Practice Act.

See, ante, § 1209 and note.

§ 1222. JUDGMENT AND ORDERS IN SUCH CASES FINAL. The judgment and orders of the court or judge, made in cases of contempt, are final and conclusive.

History: Enacted March 11, 1872, re-enactment of the first portion of § 493 Practice Act.

CONTEMPT OF COURT—JUDGMENTS AND ORDERS IN.

- 1-4. Appeal does not lie.
5. Same—Want of jurisdiction to adjudge party guilty of contempt.
6. Certiorari lies.
7. Fact that process has not been served by proper attorney.
8. Habeas corpus lies.
9. Same—Judgment on habeas corpus remanding petitioner.
10. Same—Jurisdiction.
11. Same—Mere irregularities or omissions.
12. Judgment in contempt proceedings—Construction.
13. Jurisdiction will be presumed.
14. Same—Court may determine conclusively.
15. Prohibition lies.
16. Remedy of party proceeded against.

17, 18. Review of decision.

19. Supreme court has no jurisdiction to correct errors.

See, ante, § 1209 and note.

1. **Appeal does not lie** from order of court adjudging party guilty of contempt. In some cases supreme court has entertained appeals from such orders where questions of jurisdiction were involved, but where no question of that kind is involved, although it is manifest that orders may in their effects be as important as recovery of possession of land, yet it must be held that appeal will not lie.—*Larrabee v. Selby*, 52 Cal. 506, 508; *Tyler v. Connolly*, 65 Cal. 28, 31, 2 Pac. 414.

2. **Compare:** *People v. O'Neill*, 47 Cal. 109, 110; *Ex parte Hollis*, 59 Cal. 405, 408.

3. Litigant has no appeal from action of judge in dealing with matter of contempt. Litigant may not control this process, which is designed for protection of court, and which is to be invoked or not, as discretion of court may dictate, but which should be

employed freely where interests of justice and rights of litigants demand it. Issuance of contempt proceedings lies in sound discretion of court.—*People v. Durrant*, 116 Cal. 179, 209, 10 Am. Crim. Rep. 499, 48 Pac. 75.

4. Section is not intended to declare absurdity that judgments when rendered without jurisdiction may not be annulled by proper proceeding. To give effect to its language, judgments and orders in cases of contempt must be held to be "final and conclusive" in sense that they are not appealable.—*Huerstal v. Muir*, 62 Cal. 479, 481; *Dewey v. Superior Court*, 81 Cal. 64, 66, 22 Pac. 333; *Frazer v. Lynch*, 88 Cal. 621, 624, 26 Pac. 344; *Ex parte Clancy*, 90 Cal. 553, 554, 27 Pac. 411; *Natoma Water & Min. Co. v. Hancock*, 4 Cal. Unrep. 529, 36 Pac. 100; *Cosby v. Superior Court*, 110 Cal. 45, 53, 42 Pac. 460; *People v. Kuhlman*, 118 Cal. 140, 141, 50 Pac. 382; *Mott v. Clarke*, 6 Cal. Unrep. 244, 56 Pac. 545.

5. Same—Want of jurisdiction to adjudge party guilty of contempt does not give right of appeal.—*Huerstal v. Muir*, 62 Cal. 479, 481; *Tyler v. Connolly*, 65 Cal. 28, 32, 2 Pac. 414.

6. *Certiorari* lies to annul contempt order.—*Huerstal v. Muir*, 62 Cal. 479, 481.

7. Fact that process has not been served by proper attorney or that warrant or order upon which prisoner has been arrested is void and arrest unlawful will not render judgment void and subject to collateral attack.—*Ex parte Ah Men*, 77 Cal. 198, 201, 11 Am. St. Rep. 263, 19 Pac. 380.

8. Habeas corpus lies to annul contempt order.—*Huerstal v. Muir*, 62 Cal. 479, 481.

9. Same—Judgment on habeas corpus remanding petitioner is not as matter of law a bar to subsequent application of same kind to same or another court, and it certainly can not have such effect as to review of contempt proceedings. Doctrine of res adjudicata is not, in absence of statutory provisions, applicable to decision of court or judge remanding person in habeas corpus proceedings.—*Rogers v. Superior Court*, 145 Cal. 88, 89, 78 Pac. 344.

10. Same—Jurisdiction depending on fact that it is litigated in suit and adjudged in favor of party averring jurisdiction, then question of jurisdiction is judicially decided, and judgment record is conclusive record of jurisdiction until set aside or reversed by direct proceeding.—*Ex parte Sternes*, 77 Cal. 156, 163, 11 Am. St. Rep. 251, 19 Pac. 275. See *Romine v. Cralle*, 83 Cal. 432, 436, 437, 23 Pac. 525.

11. Same—Mere irregularities or omissions not going to jurisdiction of court can not be taken advantage of in proceeding by habeas corpus to relieve party from judgment of contempt.—*Ex parte Fil Kl*, 79 Cal. 584, 586, 21 Pac. 974.

12. Judgment in contempt proceedings—Construction.—This provision, being special, controls the general provision of section 963, ante, making an appeal possible from any special order made after final judgment.—*Gale v. Tuolumne County Water Co.*, 169 Cal. 46, 145 Pac. 532.

13. Jurisdiction will be presumed.—Record being silent as to jurisdiction.—*Ex parte Ah Men*, 77 Cal. 198, 202, 11 Am. St. Rep. 263, 19 Pac. 380. See *Roe v. Superior Court*, 60 Cal. 93, 94; *White v. Superior Court*, 110 Cal. 60, 65, 42 Pac. 480.

As to jurisdiction of supreme court to correct errors of law, see par. 19, this note.

14. Same—Court may determine conclusively its own jurisdiction or power by declaring existence of facts upon existence of which its jurisdiction depends.—*Ex parte Sternes*, 77 Cal. 156, 163, 11 Am. St. Rep. 251, 19 Pac. 275; *Ex parte Ah Men*, 77 Cal. 198, 202, 11 Am. St. Rep. 263, 19 Pac. 380; *The '76 Land & Water Co. v. Superior Court*, 93 Cal. 139, 143, 28 Pac. 813; *Farmers' & M. Bank v. Board of Equalization*, 97 Cal. 318, 328, 32 Pac. 312; *White v. Superior Court*, 110 Cal. 60, 65, 42 Pac. 480; *Ex parte Clark*, 110 Cal. 405, 406, 42 Pac. 905.

15. Prohibition lies to arrest proceedings of court about to punish party for contempt in certain instances.—*Huerstal v. Muir*, 62 Cal. 479, 481.

16. Remedy of party proceeded against.—Judicial officer about to exceed his jurisdiction by trying party for contempt without legal power to do so, party threatened may stay proceedings by prohibition; if he actually adjudges one guilty of contempt without jurisdiction, his judgment may be annulled by certiorari; if judgment imposes imprisonment, person may be discharged on habeas corpus. Remedy of party in each case is ample by resort to common law or statutory writ.—*Huerstal v. Muir*, 62 Cal. 479, 481; *Tyler v. Connolly*, 65 Cal. 28, 32, 33, 2 Pac. 414.

See pars. 6, 8-11, 15, this note.

17. Review of decision adjudging one guilty of contempt may be had by writ of certiorari.—*Rogers v. Superior Court*, 145 Cal. 88, 92, 78 Pac. 344.

18. Review of decision of court adjudging one guilty of contempt may be had by habeas corpus.—*Rogers v. Superior Court*, 145 Cal. 88, 89, 92, 78 Pac. 344; *Ex parte Zeehandelaar*, 71 Cal. 238, 239, 12 Pac. 259; *In re Rogers*, 129 Cal. 468, 469, 62 Pac. 47.

19. Supreme court has no jurisdiction to correct errors of law or fact which may have been committed by trial court in granting restraining order when matter comes before it on contempt for violating such restraining order. Appeal does not lie from such judgment of contempt, and errors, therefore, can not be examined on such attempted appeal.—*Natoma Water & Min. Co. v. Hancock*, 4 Cal. Unrep. 529, 36 Pac. 100.

TITLE VI.

OF THE VOLUNTARY DISSOLUTION OF CORPORATIONS.

- § 1227. How dissolved.
- § 1228. Application, what to contain.
- § 1229. Application, how signed and verified.
- § 1230. Filing application and publication of notice.
- § 1231. Objections may be filed.
- § 1332. Hearing of application.
- § 1233. Judgment-roll and appeals.
- § 1234. Application by savings and loan society. [Unclaimed deposits.]
- § 1235. Application for dissolution of trust company.

§ 1227. HOW DISSOLVED. A corporation may be dissolved by the superior court of the county where its principal place of business is situated, upon its voluntary application for that purpose.

History: Enacted March 11, 1872; amendment approved February 25, 1878, Code Amdts. 1877-8, p. 108; April 16, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 109.

VOLUNTARY DISSOLUTION OF CORPORATION.

1. As to facts required—Burden of proof.
2. Change of law—Constitutional power.
- 3, 4. Constitutionality of statutes.
5. Construction of section—With section 362 of Civil Code.
6. Same—With section 400 of Civil Code—Cumulative remedy.
7. Contingent liability.
8. Dissolution for purpose of reincorporation in another state—Constitutionality.
9. Same—New corporation—Transfer to of property of former corporation—Issuance of stock therefor by transferee—Liability of stockholder.
10. Distribution of capital stock.
11. Same—Shares simply represent, what.
12. Same—Rights of directors upon involuntary dissolution.
13. False statement—In application for dissolution.
14. Payment of debts on—Levy of assessment.

1. As to facts required—Burden of proof.—Obviously the facts required to be stated in the petition must be proved otherwise the court would be without the power or jurisdiction to decree a dissolution and the burden of proving all the facts required to be set forth in the petition is on the corporation.—In re Belfour, 14 Cal. App. 261, 111 Pac. 615.

As to false statement in application for voluntary dissolution, see par. 13, this note.

2. Change of law—Constitutional power.—Power to alter all laws concerning corporations reserved by section 1 of article XII of the constitution becomes a part of

the contract of every stockholder of corporations organized under the laws of this state, and therefore, the amendment of 1907 to above section providing that dissolution might be had upon a vote of the holders of two-thirds of the subscribed capital stock can not be complained of by one who became a stockholder prior thereto when the law required the consent of a two-thirds vote of all the stockholders.—Matter of Dissolution of College Hill Land Assoc., 157 Cal. 596, 598, 108 Pac. 681.

3. Constitutionality of statutes.—Code provisions as to dissolution of corporations are not unconstitutional on the ground that the only notice is by publication, and the opportunity of creditors to recover is therefore restricted, and the obligation of contracts impaired.—Crossman v. Vivienda Water Co., 150 Cal. 579, 89 Pac. 335.

4. Where the proceedings are in full accord with the provisions of the code, an alleged false statement that all claims and demands have been satisfied and discharged does not go to the jurisdiction of the court to decree dissolution, but is solely a question of fact for the determination of the court.—Crossman v. Vivienda Water Co., 150 Cal. 578, 89 Pac. 335.

5. Construction of section—With section 362 of Civil Code.—The mere fact that the method provided herein is another and better method than that fixed by section 362 of the Civil Code can not prevent the construction given in the opinion of this case to section 362.—Tognazzini v. Jordan, 165 Cal. 19, Ann. Cas. 1914C, 655, 130 Pac. 879.

6. Same—With section 400 of Civil Code—Cumulative remedy.—The remedy afforded by section 400 of the Civil Code is cumulative to that provided by above section.—In re Belfour, 14 Cal. App. 261, 111 Pac. 615.

7. Contingent liability which will crystallize into an unconditional enforceable

right is sufficient to interrupt the dissolution.—*In re Belfour*, 14 Cal. App. 261, 111 Pac. 615.

8. Dissolution for purpose of re-incorporation in another state—Constitutionality.—When the disincorporation of a corporation has been accomplished the corporation is dead, and the "right, title, and interest" of a dead corporation can not be transferred anywhere. The fact that the same individuals who comprise the officers and directors of the corporation seeking dissolution may hereafter go to another state, and under the laws of such other state that may believe more freedom of action will be given to them, while one of such parties may not approve of that course, still it is a violation of no law and is but the exercise of a right guaranteed under the constitution of the United States.—*Dammann v. Hydraulic Clutch Co.*, 45 Cal. App. 511, 187 Pac. 1069.

9. Same—New corporation—Transfer to of property of former corporation—Issuance of stock therefor by transferee—Liability of stockholder.—In an action to recover judgment upon the statutory liability of certain stockholders of a corporation in a case in which a former corporation had been voluntarily dissolved and another corporation was formed and became the successor in business of the first corporation taking over all its property, the defendant stockholder can not question the validity of a transaction between the present corporation and its corporate predecessor in business, by the terms of which the assets and business of the first corporation were taken over by the second and existing corporation and the stock in the new corporation issued to the stockholders, although the transaction was in violation of section 309 of the Civil Code and of the above and following sections to and including section 1232, post.—*Huey v. Paterson*, 37 Cal. App. 335, 174 Pac. 939, basing holding upon doctrine in *O'Dea v. Hollywood Cemetery Assoc.*, 154 Cal. 53, 67, 97 Pac. 1.

10. Distribution of capital stock.—The method prescribed by the code for the dissolution of a corporation is exclusive, and there can be no distribution of its capital stock under any other circumstances.—*Kohl v. Lillenthal*, 81 Cal. 378, 386, 387, 20 Pac. 401, 6 L. R. A. 520, 22 Pac. 689.

11. Same—"Shares simply represent the proportion to which the respective shareholders, who may be such at the date of

distribution, are severally entitled in the distribution of profits arising from the corporate business, which may be made from time to time, and in the final distribution of the estate of the corporation, when from any cause it shall cease to exist, and its estate shall have been fully administered. This event may happen at the expiration of the term of its corporate existence, or it may be accomplished earlier with the consent of the holders of two-thirds of its shares, and upon the judgment of a court of competent jurisdiction."—*Kohl v. Lillenthal*, 81 Cal. 378, 386, 6 L. R. A. 520, 20 Pac. 301, 22 Pac. 689.

12. Same—Rights of directors upon involuntary dissolution.—Under sections 400, 565, ante, both of which refer to involuntary as well as voluntary dissolutions of corporations, the administration and distribution of the assets of a dissolved corporation are left, as a rule, to the directors in office at the date of dissolution, though such dissolution be upon judgment of forfeiture; and the appointment of a receiver is an exception, to be made only in cases of neglect of duty or abuse of power by the directors, when required for the protection of the rights of a creditor or stockholder.—*Havemeyer v. Superior Court*, 84 Cal. 327, 385, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121.

13. False statement—In application for dissolution.—False statement in application that all claims had been satisfied and discharged, is not ground for collateral attack upon the order of dissolution in an action by a creditor to enforce a claim against the dissolved corporation, in which it is not sought directly to set aside the decree of dissolution on the ground of fraud.—*Crossman v. Vivien Water Co.*, 150 Cal. 579, 89 Pac. 335.

As to statement required and burden of proof, see par. 1, this note.

14. Payment of debts on—Levy of assessment.—The method by which a corporation may wind up its affairs is provided under the above section and section 1228, post, which provides, as a legal prerequisite to winding up the affairs and dissolving the corporation that the debts of such corporation be paid, and, where it is necessary to do so, an assessment may be levied for that purpose under the provisions of section 331 of the Civil Code.—*Dammann v. Hydraulic Clutch Co.*, 45 Cal. App. 511, 187 Pac. 1069.

§ 1228. APPLICATION, WHAT TO CONTAIN. The application must be in writing, and must set forth:

1. That at a meeting of the stockholders or members called for that purpose, the dissolution of the corporation was resolved upon by a vote of two-thirds of the members or of the holders of two-thirds of the subscribed capital stock;

2. That all claims and demands against the corporation have been satisfied and discharged.

History: Enacted March 11, 1872; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 194, held unconstitutional, see history, § 5 ante; amendment approved March 16, 1907, Stats. and Amdts. 1907, p. 318, Kerr's Stats. and Amdts. 1906-7, p. 485.

§ 1229. APPLICATION, HOW SIGNED AND VERIFIED. The application must be signed by a majority of the board of trustees, directors, or other officers having the management of the affairs of the corporation, and must be verified in the same manner as a complaint in a civil action.

History: Enacted March 11, 1872.

§ 1230. FILING APPLICATION AND PUBLICATION OF NOTICE. Upon the filing of the application, the clerk must give notice of the same for such time as the court may order, but not less than thirty nor more than fifty days, by publication in some newspaper published in the county; or if there be no newspaper published therein, then by notices posted in three of the principal public places in the county.

History: Enacted March 11, 1872; amendment approved February 25, 1878, Code Amdts. 1877-8, p. 108; April 16, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 109; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 194, held unconstitutional, see history, § 5 ante; amendment approved March 16, 1907, Stats. and Amdts. 1907, p. 318, Kerr's Stats. and Amdts. 1906-7, p. 485.

§ 1231. OBJECTIONS MAY BE FILED. At any time before the expiration of the time of publication, any person may file his objections to the application.

History: Enacted March 11, 1872.

§ 1232. HEARING OF APPLICATION. After the time of publication has expired, the court may, upon five days' notice to the persons who have filed objections, or without further notice, if no objections have been filed, proceed to hear and determine the application, and if all the statements therein made are shown to be true, must declare the corporation dissolved.

A certified copy of the decree and order of the court dissolving the corporation must be filed in the office of the secretary of state.

History: Enacted March 11, 1872; amendment approved February 25, 1878, Code Amdts. 1877-8, p. 108; amendment March 20, 1907, Stats. and Amdts. 1907, p. 744, Kerr's Stats. and Amdts. 1906-7, p. 485.

As to notices, service of, etc., see, ante, §§ 1010 et seq. and notes.

§ 1233. JUDGMENT-ROLL AND APPEALS. The application, notices, and proof of publication, objections (if there be any), and declaration of dissolution, constitute the judgment-roll; and from the judgment an appeal may be taken, as from other judgments of the superior courts.

History: Enacted March 11, 1872; amendment approved February 25, 1878, Code Amdts. 1877-8, p. 108; April 16, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 109.

As to appeals to supreme court, see, ante, §§ 963-966 and notes

§ 1234. APPLICATION BY SAVINGS AND LOAN SOCIETY. [UNCLAIMED DEPOSITS.] If the applicant is a savings and loan association, or engaged in the business of receiving money on deposit, and there is any unclaimed deposit or dividend in its hands belonging to a person whose whereabouts are unknown to the trustees, directors, or other officers presenting the application, the application must set forth the name of the person making such deposit, or entitled to such dividend, the time when such deposit was made or dividend declared, the residence, if known, of such person at the time of such deposit, the amount of such deposit or dividend, and the fact that the whereabouts of such person are unknown. The same facts must be stated in the notice of the application given by the clerk.

[Proceedings.] If, at any time before the expiration of the time of publication, any person files a claim to such deposit or dividend, the court must, at the hearing and upon five days' notice to him, hear and determine his claim, and, if such claim is established, order such money to be paid to him. All such deposits or dividends not so claimed, or as to which no claim shall be established, must, upon order of the court, be paid into the state treasury, accompanied with a copy of the order, which must set forth the facts hereinbefore required to be stated concerning such deposits or dividends; and, upon production of the treasurer's receipt for such payment, the court may proceed to declare the corporation dissolved as in other cases.

All unclaimed deposits and dividends so paid into the state treasury must be received, invested, accounted for, and paid out, in the same manner and by the same officers as is provided by law in the case of escheated estates, and in section twelve hundred and seventy-two.

History: Enactment approved February 25, 1897, Stats. and Amdts. 1897, p. 33; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 194, held unconstitutional, see history, § 5 ante; amendment approved March 16, 1907, Stats. and Amdts. 1907, p. 318, Kerr's Stats. and Amdts. 1906-7, p. 485.

VOLUNTARY DISSOLUTION—SAVINGS AND LOAN SOCIETY.

1. Construction of section—With section 15 of Bank Act.
2. Same—Purpose in summary taking over.

1. Construction of section—With section 15 of Bank Act.—Section 15 of the Bank Act does not contemplate any change in the ownership of funds, but purports to deal with possession only, and to leave the matter of their ultimate ownership to be determined by such subsequent proceedings as are provided through the reference in the section to the provisions of above section, which latter section provides a procedure for the disposition of deposits in savings banks in process of liquidation and em-

braces such notice to the owners of such deposits as will clearly satisfy the constitutional requirements as to due process of law.—*State v. Security Savings Bank* (unreported), 20 Cal. App. Dec. 159, 154 Pac. 1070.

2. Same—Purpose in summary taking over.—The only purpose and effect in providing for the summary taking over of unclaimed deposits by the state treasurer is to merely work a temporary change in their possession until such time as they may be claimed by their owners, or as the more ample procedure for their ultimate disposition outlined in above section can be set in motion (unreported).—*State v. Security Savings Bank*, 20 Cal. App. Dec. 159, 154 Pac. 1070.

§ 1235. APPLICATION FOR DISSOLUTION OF TRUST COMPANIES. If the applicant is a trust company as defined by the bank act the application must be in writing and signed and verified as in this title provided, and need set forth only that at a meeting of the stockholders called for that purpose the

dissolution of the corporation was resolved upon by a vote of the holders of two-thirds of the subscribed capital stock; that all the debts of the corporation have been paid and that the applicant has either executed or been discharged from all court trusts, as defined by said bank act, theretofore accepted by it. The application shall request that the applicant be discharged as trustee from all of its trusts.

[Schedule showing additional matters.] There shall be attached to said application a schedule showing, wherever possible, the name or names of the trustor or trustors, and the name or names of the beneficiary or beneficiaries, and a description of the property of each trust of which the applicant is trustee.

[Order to show cause.] Upon the filing of the application, the court shall make an order setting forth the filing of the application and the name of the corporation by which it is filed, and directing all persons interested in said matter to appear before the court at a time and place specified not less than four nor more than eight weeks from the time of making such order, to show cause why the application shall not be granted.

[Publication.] A copy of the order to show cause must be published for four successive weeks in some newspaper of general circulation, to be designated in the order, printed in the county, if a newspaper be printed therein, or if no newspaper be printed in the county, a copy of such order to show cause shall be posted by the clerk of the court in three of the most public places in the county in which the court is held for a like period. Proof must be made to the satisfaction of the court of such publication or posting at the time of hearing of the application.

[Hearing.] Such application must be heard at such time as the court may appoint, and objections may be filed by any person who can in such objections show to the court good grounds therefor. Upon the hearing the court may examine on oath any of the applicants, remonstrators, or other persons touching the application.

[Designation of trustee upon dissolution.] The court may by decree discharge the applicant as trustee from all of its trusts and declare it dissolved, and appoint a person or persons, natural or corporate, duly qualified to accept and administer trusts under the laws of the state of California, to be designated by the court and named in the decree, trustee or trustees of said trusts in the place of and instead of the applicant. If, however, at the time of the hearing, the trustor and all of the beneficiaries under any particular trust, nominate a person or persons, natural or corporate, duly qualified to accept and administer trusts under the laws of the state of California, to act as trustee or trustees of such trust, then such nominated person or persons shall be appointed trustee or trustees of such trust in place of and instead of the applicant for dissolution.

[Section 2287 Civil Code not applicable.] The provisions of section two thousand two hundred eighty-seven of the Civil Code shall not be applicable to any proceeding pursuant to the provisions of this section. Thereupon the applicant shall be discharged as trustee from all of its trusts, and the person or persons, trust company or trust companies, appointed in its place and stead

shall be trustee or trustees of each and every of said trusts respectively, to administer the said trusts for fees not exceeding those agreed to be paid to the dissolved trust company. A certified copy of decree of the court must be filed as is provided on dissolution of other corporations.

[Judgment-roll.] The application with its accompanying schedule, the order to show cause, proofs of publication or posting, objections, if there be any, nominations, if there be any, and the decree shall constitute the judgment-roll, and from the judgment an appeal may be taken as from other judgments of the superior court.

[Disposition of funds.] The state treasurer, or other state officer or official having charge or custody of any securities, deposits or funds belonging to such corporation shall return all of the same to the directors of the corporation dissolved, or to such other persons as may be appointed by the court to wind up the affairs of such corporation, when furnished with a certified copy of the decree of the court, dissolving such corporation.

History: Enactment approved June 1, 1915, Stats. and Amdts. 1915, p. 1072. In effect August 8, 1915.

TITLE VII.

OF EMINENT DOMAIN.

- § 1237. Eminent domain defined.
- § 1238. Purposes for which it may be exercised.
- § 1239. Estates subject to public use.
- § 1240. Private property defined. Classes enumerated.
- § 1241. Facts necessary to be found by court before condemnation.
- § 1242. Parties may make location. May enter to make surveys.
- § 1243. Jurisdiction in superior court.
- § 1244. The complaint and its contents.
- § 1245. Summons, what to contain. How issued and served.
- § 1246. Who may defend.
- § 1247. Court shall have jurisdiction to regulate the mode of making crossings or of enjoying a common use.
- § 1247a. Court may regulate the removing of structures.
- § 1248. Court or jury to assess damages.
- § 1248a. Removal of railroads, etc., from right of way taken for roads.
- § 1249. The date with respect to which compensation shall be assessed, and the measure thereof.
- § 1250. New proceedings to cure defective title.
- § 1251. Payment of damages assessed. [Time of.]
- § 1252. Damages, to whom paid.
- § 1253. Final order of condemnation, what to contain. When filed, title vests.
- § 1254. Putting plaintiff in possession.
- § 1255. Costs may be allowed, apportionment thereof.
- § 1255a. Abandonment of condemnation proceedings.
- § 1256. Rules of practice.
- § 1257. New trials and appeals.
- § 1258. When title takes effect, and construction of.
- § 1259. When title takes effect.
- § 1260. Construction.
- § 1261. Pending proceedings not affected.
- § 1262. Rules of practice.
- § 1263. Exceptions.
- § 1264. Preference of proceedings over other civil actions.

§ 1237. EMINENT DOMAIN DEFINED. Eminent domain is the right of the people or government to take private property for public use. This right may be exercised in the manner provided in this title.

History: Enacted March 11, 1872.

EMINENT DOMAIN—PRELIMINARY
ANNOTATION.

- 1. Abandonment of the enterprise by plaintiff.
- 2-5. Appeal—Supersedes—Rights of appellant.
- 6. Same—Review of verdict—Objection not raised below.
- 7. Same—Rights of mortgagee.
- 8. Authority to maintain.
- 9. Canals, reservoirs, etc.
- 10. Complaint in, sufficiency of—Allegation as to prior selection.
- 11. Same—Allegation of use, and necessity of taking.
- 12-15. Condemnation—As to proceedings generally.
- 16. Same—Clearly for public use conclusive.
- 17. Same—Final decree only after compensation.
- 18. Same—Right in artificial or natural person.
- 19. Conditional dismissal.
- 20. Constitution—Extends common provision.
- 21. Constitutionality—Of section 1249, post.
- 22, 23. Same—Of section 1254, post—Preascertainment of damages.
- 24. Construction of eminent domain law—As to rule of strict construction.
- 25. Same—Of section 1251, post—Finality of judgment.
- 26. Same—Of section 1254, post, with section 949, ante.
- 27-31. Costs—Provided for in section 1255, post.
- 32, 33. Same—Attorney's and engineer's fees.
- 34. "Damaged"—Superadds guaranty of former constitution.
- 35. Damages—Compensatory—Construction of statute.
- 36. Same—Burden of proof is upon defendant.
- 37. Same—Caused by temporary use—When property not finally taken—Ascertainment of by court.
- 38. Same—Measure of damages—Assessed valuation.
- 39, 40. Same—Same—Market value—How determined.

41. Same—Same—Method of determining value of property taken.
42. Same—Only for special injury.
43. Same—Rule of damages.
44. Same—Speculative damages.
- 45, 46. Deposit to cover damages—In the event the property is not finally taken.
47. Determination of demand—Not subject to collateral attack.
48. Differentiation of proceedings from other actions.
49. Same—An attribute of sovereignty.
- 50-52. Dismissal after judgment.
53. Drainage.
- 54, 55. Electric power lines.
56. Exercise of power of—Delegation from state.
57. Same—Statutory provision—"Any person" construed.
58. Execution on.
- 59, 60. Extent of user—In general.
61. Same—Unnecessary waste not allowed.
62. Foreign corporation—Right to exercise power of.
63. Freight-house—Condemnation of land for.
64. Future needs.
65. Highways.
- 66, 67. Judgment and appeal.
68. Same—Value of leasehold.
69. Jurisdiction of superior court—Prohibition.
70. Same—Same—Prior public use.
71. Leasehold—Value of.
- 72, 73. Legislature determines what is public use.
- 74-76. Necessity for taking—Burden of proof.
77. Not bar to further condemnation.
78. Order of proof.
79. Owner may contest the right.
- 80, 81. Particular uses—Canals and ditches.
82. Same—Same—Sale of water to public.
83. Place of trial.
84. Private use shown—Condemnation denied.
- 85, 86. Proceedings to take and assess property—Statutory provisions.
87. Same—Defenses—Future possibilities.
- 88, 89. Same—Parties defendant to action.
90. Same—Pleading—Description of territory.
91. Same—Right to intervene—Adverse claimant to defendant.
92. Same—Value of land.
- 93, 94. Same—Variance immaterial.
- 95, 96. Same—Verdict—Interest of each defendant.
97. Prior necessary public use—Use in common.
98. Property subject to appropriation—Submerged lands.
99. Public highway—Demand for, legislative matter.
100. Public property subject to use.
101. Public-service corporation—As to right to exercise power of.
102. Same—Actually engaged in rendering public service, not required.
- 103, 104. Same—Complaint in condemnation.
105. Public use must be shown.
106. "Public use"—Definition of term.
107. Same—Determined from evidence.
- 108-110. Railroads—Right of way—As to generally.
- 111-127. Same—Wharves for—Evidence.
- 128-132. Same—Same—Instructions.
133. Same—Same—Title and estate given.
134. Right assured—Not restricted to recover as for tort.
135. "Right of way"—Easement for levee.
- 136-140. Riparian rights—Diversion of water.
- 141-145. Same—Jury trial.
- 146-149. School land surrounded by forest reserve.
150. Rules of practice.
- 151, 152. Selection of route, etc.
153. State's right of—An element of sovereignty.
154. Statement by plaintiff in open court.
155. Street opening act—Act of 1889.
156. Same—Award of damages.
157. Same—Rule of damages.
158. Street work by municipality—Not a taking.
159. Same—Owner notified, contractor exonerated.
160. Supervisors—Action of board of, conclusive.
161. Uses—Public or private—Judicial question.
162. Water—Inhabitants of county.
163. Same—Water and riparian rights.
164. Wharves—Condemnation of land for.
165. Word "damaged"—Superadds guaranty of former constitution.

As to mines, mineral and mining, see, ante, § 586 and note.

1. Abandonment of the enterprise by plaintiff, and dismiss the action upon payment of defendant's costs within the thirty days given in which to make payment or deposit the money when in fact no payment or deposit has been made.—Lincoln North-

ern R. Co. v. Wiswell, 8 Cal. App. 578, 580, 97 Pac. 536.

As to abandonment of condemnation proceedings, see, post, § 1255a and note.

As to dismissal after judgment, see pars. 50-52, this note.

2. Appeal—Supersedeas—Rights of applicant.—Where the plaintiff has deposited in court the amount of the judgment in condemnation proceedings, the fact that it has not been determined what specific amounts are due the respective parties is no ground for a supersedeas pending the determination of such amounts.—Reed Orchard Co. v. Superior Court, 19 Cal. App. 648, 128 Pac. 9, 15.

As to liability of land owner for costs on appeal in eminent domain proceedings, see note, Ann. Cas. 1912C, 533.

3. Where, in an application for a writ of supersedeas to prevent the occupancy of condemned lands pending appeal, there is no allegation that a lease of such land is in force, it will be assumed that, by its terms, such lease ceased to be operative on condemnation of the land.—Reed Orchard Co. v. Superior Court, 19 Cal. App. 648, 128 Pac. 9, 17.

4. In an action for a writ of supersedeas to prevent the occupancy of land by a railroad company pending appeal, since it appears from the petition herein that the plaintiff was the owner of the condemned property and the value of said property was found by the jury, the presumption would be, in the absence of a contrary showing, that this was the value of the owner's interest, and that the interest of the other defendants was of nominal or of no value. In this connection it is to be observed that the petition herein does not negative this presumption, since there is no allegation that the interest of either of the other defendants was of any value at the time the verdict was rendered.—Reed Orchard Co. v. Superior Court, 19 Cal. App. 648, 128 Pac. 9, 15.

5. Where judgment has been rendered in eminent domain proceedings, it would seem clear that the defendants had the burden of alleging and proving their interests and the value thereof, and that only the defendant meeting that burden should be permitted on application for a writ of supersedeas to question the disposition of the fund. The other defendants, having been regularly served with summons and having failed to appear and urge any claim to whatever fund might be awarded, should not be indulged now to stay this public improvement on the ground that the jury did not find the value of an interest which was not alleged to have any value and did not award these defendants money which in the lower court they declined to claim.—Reed Orchard Co. v. Superior Court, 19 Cal. App. 648, 128 Pac. 9, 16.

6. Same—Review of verdict—Objection not raised below.—Where a verdict in con-

demnation proceedings is defective, in that it does not specify the amounts due the different defendants, objection to such verdict, if not raised in the trial court, can not afterward be raised.—Reed Orchard Co. v. Superior Court, 19 Cal. App. 648, 128 Pac. 9, 17.

7. Same—Rights of mortgagee.—Where a portion of the land has been condemned under the right of eminent domain, a mortgagee of such land may resort to any unclaimed portion as security for his mortgage, but should this prove deficient, he may resort to the fund in the custody of the court.—Reed Orchard Co. v. Superior Court, 19 Cal. App. 648, 128 Pac. 9, 18.

8. Authority to maintain.—The language the complaint must contain, "a statement of the right of the plaintiff" used in this section evidently means a statement of the facts sufficient to show that the plaintiff is authorized to maintain the condemnation suit.—Tuolumne Water Power Co. v. Frederick, 13 Cal. App. 498, 502, 110 Pac. 134.

9. Canals, reservoirs, etc.—The taking of water must be for one of the uses authorized by above section. Water is as necessary for the uses and purposes mentioned in subdivisions 12 and 13 as is land. When the statute declares canals, reservoirs, etc., to be public uses it does not mean completed or already constructed canals, reservoirs, pipes, flumes, etc., but the right to take land to be used for the purpose of constructing these agencies or instrumentalities "for supplying, storing and distributing water" for the purposes named. Water is as essential to the use of canals, reservoirs, etc., as is the land. Each is useless without the other. Above section and section 1240, post, should be read together and so read mean water may be taken by the right of eminent domain in behalf of the following public uses, viz., canals, reservoirs, etc., in connection with the operation of machinery for the purpose of generating and transmitting electricity. Water is property and may be taken "in behalf of" any of the uses specified in this section.—Northern Light & Power Co. v. Stacher, 13 Cal. App. 404, 412, 109 Pac. 396.

See pars. 80-82, this note.

10. Complaint in, sufficiency of—Allegation as to prior selection.—In a suit by a railroad company to condemn a piece of ground for use as a freight house, it is not necessary, under the provisions of above section setting forth what must be contained in the complaint in such a suit, to allege that the property in question had been selected for the purpose by the regular action of its board of directors.—Central Pac. R. Co. v. Feldman, 152 Cal. 308, 92 Pac. 849.

As to complaint by public-service corporation, see pars. 103, 104, this note.

11. Same—Allegation of use, and necessity of taking.—In an action to condemn a parcel of land for use as a freight house, by a railroad company, an allegation of in-

adequacy of existing facilities by reason of increase of business, supplemented by a further allegation that "it is necessary to construct and maintain an adjunct or appendage to said railroad, to wit, a freight house, adjoining said station grounds and as part thereof, and that it is necessary that the parcel of land here involved . . . be taken for the erection of a freight house for the reception and delivery of freight," sufficiently shows the necessity for the taking for public use, herein prescribed.—*Central Pac. R. Co. v. Feldman*, 152 Cal. 308, 92 Pac. 849.

12. Condemnation — As to proceedings generally.—Land can only be taken for a public use, and if, in fact, the plaintiff claiming a right to condemn land for a public use really intends to devote it to a private use, this, if proven, would be sufficient to defeat the action.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

13. Except those relating to compensation, the issues of fact in a condemnation suit are to be tried by the court, and that if the court submits them to a jury it is nevertheless required to make findings either by adopting the verdict thereon or by making findings in its own language.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

14. Error in instruction in a condemnation suit upon other issues than that of compensation, and upon which the court itself has weighed the evidence and made findings, will not justify a reversal, unless upon the whole case, including the evidence, it is found that substantial injury has been caused thereby, or a miscarriage of justice resulted.—*Vallejo & Northern R. Co. v. Reed Orchard Co.* 169 Cal. 545, 147 Pac. 238.

15. When the evidence is conflicting, the granting or refusing of a new trial rests peculiarly in the discretion of the trial court, and the appellate court will interfere only in cases of a plain abuse of such discretion, and the party alleging error must show the abuse of discretion. The same rule applies to condemnation proceedings as to other civil actions.—*Colusa & H. R. Co. v. Glenn*, 25 Cal. App. 634, 144 Pac. 993.

16. Same—Clearly for public use, conclusive.—If it is sought to condemn property for use which is evidently private, or to accomplish some purpose which is not of a public character, courts will disregard legislative declaration; such use is public. The declaration by legislature is entitled to great consideration, and if purpose for which condemnation is sought is clearly for a public use, or one which in ordinary acceptance or experience expresses a public use, it will be conclusive upon the judiciary.—*Consolidated Channel Co. v. Central Pac. R. Co.*, 51 Cal. 269, 271; *San Mateo County v. Coburn*, 130 Cal. 631, 634. C. C. P.—170

63 Pac. 78, 621; *Madera R. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27, 30.

17. Same—Final decree only after compensation.—A final decree of condemnation can be made only after full compensation has been made to owner, or ascertained and paid into court for him.—*San Mateo County v. Coburn*, 130 Cal. 631, 637, 63 Pac. 78, 621.

18. Same—Right in artificial or natural person.—The right of a person, natural or artificial, to exercise power of eminent domain must be found in some statutory provision. The two provisions of law which are mainly important here are above section and section 1240, post.—*Marin County Water Co. v. Marin County*, 145 Cal. 586, 587, 79 Pac. 282.

19. Conditional dismissal.—There is a marked distinction between a conditional dismissal the effect of which is to order a dismissal to be entered upon the performance of certain conditions which is not to be effective until the conditions are performed and a dismissal ordered without the performance of the conditions but with an effort as a part thereof to render a judgment for an amount in excess of that which a court is authorized to order upon an absolute dismissal.—*Southern Pac. R. Co. v. Reis Estate Co.*, 15 Cal. App. 216, 114 Pac. 808.

As to attorney's fees on dismissal, see pars. 32, 33, this note.

20. Constitution—Extends common provision.—The provision of article I section 14 of constitution, providing that private property shall not be taken or damaged for public use without just compensation having been first made or paid into court, is an extension of common provision for protection of private property.—*Reardon v. San Francisco*, 66 Cal. 492, 501, 6 Pac. 317.

21. Constitutionality — Of section 1249, post.—That above section is not contrary to the provisions of section 14 of article I of the constitution has been repeatedly held.—*City of Los Angeles v. Gager*, 10 Cal. App. 378, 381, 102 Pac. 17.

22. Same — Of section 1254, post — Pre-ascertainment of damages.—Held not to contravene or conflict with the provisions of section 14 of article I of the constitution; and that that section of the constitution does not contemplate pre-ascertainment and award of damages by a jury.—*Hellbron v. Superior Court*, 151 Cal. 273, 90 Pac. 706.

23. The validity and constitutionality of above section, providing for the possession of the condemning railroad company pending an appeal has been expressly adjudicated, and can not now be questioned, since its object is to provide an adequate fund fully to reimburse the land owner, to be paid in court for that purpose, and thus to effectuate the constitutional intent.—*Reed Orchard Co. v. Superior Court*, 19 Cal. App. 448, 655, 128 Pac. 9.

24. Construction of eminent domain law—As to rule of strict construction.—While such rule prevails, and the power claimed must be clearly given by the statute, and can not be extended by implication, the construction should not be so narrow as to defeat the evident purpose of the legislature.—*Central Pac. R. Co. v. Feldman*, 152 Cal. 306, 92 Pac. 849.

As to constitutionality of section 1249, post, see par. 21, this note.

25. Same—Of section 1251, post—Finality of judgment.—In condemnation proceeding there is no element of contract. The final judgment mentioned in section 1251, post, as to the payment of which reference is made in section 1252, post, is the judgment fixing the amount of damages and is a final judgment in the proceeding and an appealable judgment. The subsequent final order of condemnation provided for in section 1253, post, is an order after final judgment.—*Lincoln Northern R. Co. v. Wiswell*, 8 Cal. App. 578, 580, 97 Pac. 536.

26. Same—Of section 1254, post, with section 949, ante.—Above section has not been replaced by implication by the amendment of section 949, ante, as amended in 1905, which does not except condemnation proceedings from the general law of appeals enacted in 1905. That revised or amended act must be considered a new and original piece of legislation, having no relation to condemnation proceedings; while the above section is a special statute, applicable only to eminent domain.—*Reed Orchard Co. v. Superior Court*, 19 Cal. App. 648, 656, 657, 128 Pac. 9.

27. Costs—Provided for in section 1255, post.—Costs here referred to are such as ordinarily attend the trial of causes. There is no provision for the allowance of attorney's fees upon a dismissal of the proceeding or in the proceeding except where the action is on the bond provided for in section 1251, post.—*Lincoln Northern R. Co. v. Wiswell*, 8 Cal. App. 578, 581, 97 Pac. 536.

As to costs and counsel fees generally, see post, § 1255 and note.

28. Counsel fees are not allowable to the defendant in a general judgment in his favor in proceedings for condemnation under the power of eminent domain.—*Pacific Gas & Elec. Co. v. Chubb*, 24 Cal. App. 265, 141 Pac. 36.

29. The "just compensation" to which the owner of property is entitled under section 14 of article I of the constitution in proceedings in eminent domain does not include reasonable disbursements made by him for attorneys at the trial; it has reference to the value of the property taken and the damage to property not taken, and nothing more.—*Pacific Gas & Elec. Co. v. Chubb*, 24 Cal. App. 265, 141 Pac. 36.

30. The costs referred to in section 1255, post, are the ordinary and usual costs attending trials and allowed under statutory

provisions; they do not include attorney's fees in condemnation suits.—*Pacific Gas & Elec. Co. v. Chubb*, 24 Cal. App. 265, 141 Pac. 36.

31. Under section 1255a, post, there must be an abandonment of the condemnation suit, express or implied, before attorney's fees are allowable to the defendant on a dismissal of the action.—*Pacific Gas & Elec. Co. v. Chubb*, 24 Cal. App. 265, 141 Pac. 36.

32. Same—Attorney's and engineer's fees.—No authority exists in the statute authorizing the court to render judgment for attorney's fees and fees of engineers for work and maps, in excess of costs, upon an unconditional order of dismissal after judgment, whatever may be its authority in imposing payment thereof as a condition precedent to dismissal.—*Southern Pac. R. Co. v. Reis Estate Co.*, 15 Cal. App. 217, 114 Pac. 808.

33. There is no authority in the statute authorizing a court to render judgment for attorney's fees in connection with an unconditional order dismissing a proceeding in condemnation whatever may be its authority in regard to imposing payment thereof as a condition precedent to dismissal.—*Southern Pacific R. Co. v. Reis Estate Co.*, 15 Cal. App. 216, 114 Pac. 808.

34. "Damaged"—Superadd guaranty of former constitution.—The convention inserting in constitution, article I, section 14, the word "damaged," in connection in which it is found, and people in ratifying work of convention did not intend to limit effect of this word to cases where party injured already had remedy to recover compensation, but it was intended to superadd to guaranty found in former constitution a guaranty against damage where none previously existed.—*Reardon v. San Francisco*, 66 Cal. 492, 505, 6 Pac. 317.

35. Damages—Compensatory—Construction of statute.—Section 1249, post, as amended by statutes of 1911, page 842, provides that, "For the purpose of assessing compensation and damages, the right thereof shall be deemed to have accrued at the date of the issuance of summons and its actual value at that date shall be deemed the measure of compensation for all property to be actually taken. . . . Provided, that in any case in which the issue is not tried within one year after the date of the commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of the trial. Nothing in above section shall be construed or held to affect pending litigation." Held, that the word "affect" was used in its ordinary signification, "to influence," "to produce an effect upon," "to act upon." It is equally clear that the new section does not affect "pending" litigation if the old law is applied to such litigation.—*Sacramento Terminal Co. v. McDougall*, 19 Cal. App. 562, 126 Pac. 503.

As to admissibility in evidence in eminent domain proceedings of the land owner's admissions as to value of his land condemned, see note Ann. Cas. 1912D, 289.

As to the compensation to the owner when lands are taken for a railroad's right of way, see note 19 Am. St. Rep. 458.

As to validity of a statute of eminent domain which fails to provide for notice to land owner of proceedings to condemn, apart from proceedings to fix compensation, see note Ann. Cas. 1913A, 1256.

36. Same—Burden of proof is upon defendant to prove the damages he will sustain.—Tuolumne Water Power Co. v. Frederick, 13 Cal. App. 498, 506, 110 Pac. 134.

37. Same—Caused by temporary use—When property not finally taken—Ascertainment of by court.—Power and jurisdiction of court is necessarily implied, and it can not be said that the owner is thus deprived of his property or suffers damage with respect thereto without compensation, in a legal sense.—Heilbron v. Superior Court, 151 Cal. 279, 90 Pac. 706.

38. Same—Measure of damages—Assessed valuation.—The assessed value of the property to be taken is not admissible (dictum).—Central Pac. R. Co. v. Feldman, 152 Cal. 310, 92 Pac. 849.

39. Same—Same—Market value—How determined.—Damages must be measured by the market value of the land at the time it is taken. The test is not the value for a special purpose but the fair market value of the land in view of all the purposes to which it is naturally adapted, and therefore, while evidence that it is "valuable" for this or that or another purpose may always be given and should be freely received, the value in terms of money, the price which one or another witness might think the land would bring for this or that or the other specific purpose is not admissible as an element in determining that market value, for such evidence opens wide the door to unlimited speculations concerning problematical prices which might, under possible contingencies, be paid for the land and distracts the mind of the jury from the single question—that of market value—the highest sum which the property is worth to persons generally purchasing in the open market in consideration of the land's adaptability for any proven use.—Sacramento So. R. Co. v. Heilbron, 156 Cal. 408, 412, 104 Pac. 979.

40. See Sacramento So. R. Co. v. Heilbron, 156 Cal. 408, 104 Pac. 979, where the authorities upon the question of what value shall be recovered in cases of eminent domain are reviewed and the earlier California cases discussed and harmonized.

41. Same—Same—Method of determining value of property taken.—The actual market value is the measure of damages, and not the value to the owner or the party taking; and the fact that defendant is unwilling to sell, or wished to improve him-

self, is immaterial.—Central Pac. R. Co. v. Feldman, 152 Cal. 309, 92 Pac. 849.

42. Same—Only for special injury.—The provision of article I, section 14 of constitution includes damage to private property, including land, and whatever is attached to it. If land and buildings on it, or either, are damaged this provision requires it to be compensated. This does not extend to such damage as owner of property injured sustains in common with other abutters on street or general public, but only to that special injury which he receives over and above such common injury.—Reardon v. San Francisco, 66 Cal. 492, 505, 6 Pac. 317.

43. Same—Rule of damages in actions in eminent domain which were pending at the time of the repeal and re-enactment of above section as amended by the legislature on April 10, 1911, is unaffected as to pending actions by the express provision therein contained that "Nothing in above section contained shall be construed or held to affect pending litigation," the effect of which saving clause is to preserve in force the previous statute so far as pending litigation is concerned, and to prevent the new law from being retroactive as to pending cases, or changing the existing order of things in relation thereto.—Sacramento Terminal Co. v. McDougald, 19 Cal. App. 562, 563, 564, 126 Pac. 503.

44. Same—Speculative damages.—The owner will not be permitted to show enhanced damages from being compelled to give up a scheme of improvements existing only in contemplation at the time of the trial.—Los Angeles v. Kerckhoff-Cuzner Mill & Lumber Co., 15 Cal. App. 676, 678, 115 Pac. 654.

45. Deposit to cover damages—In the event the property is not finally taken can not be withdrawn until the damages are paid, and the court having custody of the fund must have jurisdiction and power after temporary use has ceased, to ascertain the amount of the damage caused and direct payment therefor out of the fund.—Heilbron v. Superior Court, 151 Cal. 279, 90 Pac. 706.

46. Where a railroad company had obtained a judgment in eminent domain, and, in compliance with section 1254, post, had made the full amount of the deposits thereby required to secure all demands, though the failure thereof is not segregated, the court has jurisdiction under that section to permit the railroad company to take possession of and use the property pending the litigation, and the appellate court will not issue a writ of supersedeas to such order for the possession pending an appeal from the judgment.—Reed Orchard Co. v. Superior Court, 19 Cal. App. 648, 652, 653, 654, 128 Pac. 9.

47. Determination of demand—Not subject to collateral attack.—If tribunal established by legislature for determining demand for public highway, its location and

extent, proceeds in accordance with provisions of sections 2681 et seq., Political Code, it acquired jurisdiction to determine these questions, and its determination is not subject to collateral attack.—*San Mateo County v. Coburn*, 130 Cal. 631, 635, 63 Pac. 78, 621; *Madera R. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27, 29.

48. Differentiation of proceedings from other actions.—The proceeding to condemn property under the right of eminent domain is so differentiated from the ordinary actions or proceedings in courts of justice as to bring it within the settled test justifying the assignment of the proceeding to a particular class for the purpose of reasonable provisions not applicable to other classes of actions.—*City of Sacramento v. Swanston*, 29 Cal. App. 212, 155 Pac. 101.

49. Same.—An attribute of sovereignty.—Eminent domain is an attribute of sovereignty, and the right or power of a sovereign state to appropriate private property to particular uses without the consent of the owner.—*City of Sacramento v. Swans-ton*, 29 Cal. App. 212, 155 Pac. 101.

50. Dismissal after judgment.—Assumed, but not decided, that the right of dismissal of action after judgment is in discretion of court, subject to review and reversal in case of abuse, and that in the exercise of such discretion terms may be imposed.—*Southern Pac. R. Co. v. Reis Estate Co.*, 15 Cal. App. 217, 114 Pac. 808.

As to dismissal of proceedings generally, see, post, § 1255a and note.

51. Distinction drawn between absolute dismissal and conditional dismissal.—*Southern Pac. R. Co. v. Reis Estate Co.*, 15 Cal. App. 217, 114 Pac. 808.

52. Plaintiff may dismiss the action within thirty days after judgment on the statement "that the damages and values fixed by the jury were excessive," and such dismissal constitutes an abandonment by the plaintiff of his claim to the property.—*Southern Pac. R. Co. v. Reis Estate Co.*, 15 Cal. App. 217, 114 Pac. 808.

53. Drainage.—It is not necessary to prove that the draining of a drainage district is necessary; as a ditch or aqueduct for draining or reclaiming land is declared by the legislature to be a public use but only that the taking of the lands is necessary for such drainage.—*Laguna Drainage Dist. v. Charles Martin Co.*, 5 Cal. App. 166, 174, 89 Pac. 993.

54. Electric power lines.—The legislature has provided that the right of eminent domain may be exercised for electric power lines for public use. At the present day the use of electric power not only for lighting streets and private houses, but also for the purpose of moving railroad cars, street-cars, machinery, and for manufacturing purposes, and use in mines and smelters, has become so general that it is almost a necessity of our modern civilization, and the courts

would not be aiding the great enterprises of the West by adopting a narrow and restricted view of the meaning of the words "public use" as used by the legislature and in the constitution.—*Tuolumne Water Power Co. v. Frederick*, 13 Cal. App. 498, 503, 110 Pac. 134.

55. It is not necessary that the plaintiff should have made a contract to furnish electric power before it had installed its plant and procured the right of way for its line. To prevent the plaintiff from exercising the right of eminent domain until it shall have obtained a franchise from some city or village, or made a contract to furnish its product to some city or village, would be to deprive it of the means by which it would be enabled to construct its works and be in a position to make a contract.—*Tuolumne Water Power Co. v. Frederick*, 13 Cal. App. 495, 503, 110 Pac. 134.

56. Exercise of power of.—Delegation from state.—No person or corporation can avail himself or itself of the power of eminent domain, even in the aid of the recognized public use, unless the state has granted to such person or corporation the right to exercise the power for the particular use proposed. There must be a statute conferring the power, either expressly or by necessary implication, and the proposed use must be one which comes within the terms of the grant.—*San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 164 Cal. 221, 128 Pac. 924, 925.

57. Same.—Statutory provision.—"Any person" construed.—The words "any person," in section 1001 of the Civil Code, include any public or private corporation as well as any natural person, and by the terms of above section any such person may, "without further ratification," acquire property by condemnation for any public use specified in section 1238, post, and in doing so become "an agent of the state," and a "person in charge of the use" for that purpose. The state may authorize foreign corporations to exercise this right. Foreign corporations have always been allowed to enter this state and do any business therein that is within their corporate powers. For all purposes of every business within their capacity they are classed with domestic corporations, provided they comply with the statutes allowing them to do business in this state, and a statute which by necessary construction confers powers upon corporations in general is to be understood to confer that power upon foreign corporations doing business here as well as domestic corporations. The right of such foreign corporation to exercise the power of eminent domain was not withheld by section 407 of the Civil Code.—*San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 164 Cal. 221, 128 Pac. 924, 928.

58. Execution on.—Statute does not authorize execution to issue until after the thirty days have expired. What the rights of a defendant are where the money

awarded has been deposited within the thirty days required by section 1251, post, not decided.—*Lincoln Northern R. Co. v. Wiswell*, 8 Cal. App. 578, 580, 97 Pac. 536.

59. Extent of user.—In general.—In an action to acquire water for the purpose of irrigation by condemnation proceedings, there is no merit in the proposition that the plaintiff can not condemn the full quantity asked for, because a part of it would be lost in transmission to the place of use by seepage and evaporation. Some loss in this way is inevitable, and it must be considered a part of that which is necessary to be taken to supply the actual use proposed.—*San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 164 Cal. 221, 128 Pac. 924, 929.

60. Public service corporations can not determine and should not be required to determine in advance and set forth in their complaint that their present equipment is insufficient to meet the needs of the people. It is of course required that the particular property sought be available and can be used for the purpose desired and also that it is necessary to meet the public needs, but these are matters the particular facts in support of which is evidentiary rather than subjects of pleading.—*Northern Light & Power Co. v. Stacher*, 13 Cal. App. 404, 109 Pac. 896.

61. Same.—Unnecessary waste not allowed.—The right to divert water to be allowed unnecessarily to run to waste can not be acquired, even by the judgment of condemnation. Such a judgment when given would offer no protection for such taking.—*San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 164 Cal. 221, 128 Pac. 924, 926.

62. Foreign corporation.—Right to exercise power of.—A foreign corporation, which has complied with the laws of this state governing its right to do business herein, may exercise the power of eminent domain.—*Deseret Water Oil & Irr. Co. v. California*, 167 Cal. 147, 138 Pac. 981.

63. Freight-house.—Condemnation of land for, held included within the right granted to railroad companies.—*Central Pacific R. Co. v. Feldman*, 152 Cal. 308, 92 Pac. 849.

64. Future needs.—Electric light and power companies like other public service corporations have a right and it is their duty to anticipate future needs of the public. They can not reasonably be required to limit their preparations for future demands by their ability to provide for them out of the present supply. New uses for electricity are constantly being discovered and applied. The supply which in the same community would at present be sufficient might be insufficient in a short time nor can public service corporations state with certainty to what extent their facilities to serve the public will be availed of.—*Northern Light & Power Co. v. Stacher*, 13 Cal. App. 404, 109 Pac. 896.

65. Highways.—Above section applies to an action to condemn right of way for highway, and rights of action against several owners may be joined in one proceeding subject to the right of the court to require separate trial if it deems them advisable.—*Sacramento County v. Glann*, 14 Cal. App. 780, 113 Pac. 360.

See, also, pars. 155-157, this note.

66. Judgment and appeal.—The judgment entered upon the general verdict in a condemnation suit assessing the amount to be paid and adjudging the necessity for the taking, and not the final order of condemnation provided for in section 1253, post, is the "final judgment" from which an appeal may be taken, although after the entry of the former the court is required, upon the payment of the money assessed, to make what is called "a final order of condemnation."—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 24 Cal. App. 166, 140 Pac. 974.

As to appeal generally, see pars. 2-7, this note.

67. An appeal from a "preliminary order and judgment for condemnation," taken within six months after its entry, is in time where no notice of entry is given.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 24 Cal. App. 166, 140 Pac. 974.

68. Same.—Value of leasehold.—Where the judgment in eminent domain proceedings award a certain amount to the owner of the property and a certain amount to his lessees, who have the right, under the lease, to remove the improvements at the end of the term, it will be presumed, in an action on the lease to recover rent, wherein the lessees set up as a counter-claim that the award to them did not include the value of the right to remove the improvements, that in the judgment in the condemnation proceedings the rights of all parties interested in the property condemned, whether as owners or lessees, were fully and correctly determined, and the value of each particular interest fixed and award thereof made to the owner.—*Harrelson v. Oro Grande Lime & Stone Co.*, 23 Cal. App. 479, 138 Pac. 932.

69. Jurisdiction of superior court.—Prohibition.—The superior court has jurisdiction of an action in eminent domain where the complaint shows a case where property of the kind sought to be taken may be taken for the use for which it is sought, and whether the facts are such as to justify the taking is for its determination in the lawful exercise of such jurisdiction, and prohibition will not lie to prevent such exercise of jurisdiction.—*Reclamation Dist. v. Superior Court*, 151 Cal. 269, 90 Pac. 545.

70. Same.—Same.—Prior public use.—In an action to subject the right of way and levee of a reclamation district to the use in common of a railroad company, the question as to whether the proposed use would substantially or materially affect the efficiency of the prior use, as well as the ques-

tion whether the facts alleged and proved justify the proposed taking, is for the determination of the superior court, and the exercise of its jurisdiction in this respect can not be interfered with by writ of prohibition.—*Reclamation Dist. v. Superior Court*, 151 Cal. 270, 90 Pac. 545.

71. Leasehold—Value of.—As to generally, see par. 68, this note.

72. Legislature determines what is public use.—It is function of legislative department to determine in first instance what shall constitute public use, and whether any private property shall be taken for such use, as well as extent to which such property may be taken, and in above section and the following legislature has enumerated certain public uses for which state may exercise its eminent domain, as well as manner and extent of its exercise for those uses.—*County of San Mateo v. Coburn*, 130 Cal. 631, 634, 63 Pac. 78, 621.

As to public use, see pars. 47, 106, 107, this note.

73. Without doubt it is general rule that where there is any doubt whatever whether use to which property is proposed to be devoted is of public or private character, it is matter to be determined by legislature, and courts will not undertake to disturb its judgment in this regard, but where it appears, beyond possibility of question, that tax had been imposed, or property of citizen had been taken for use or purpose in no sense public, it would be duty of court to interfere and afford relief.—*Consolidated Channel Co. v. Central Pac. R. Co.*, 51 Cal. 269, 273; *Madera R. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27, 30.

74. Necessity for taking—Burden of proof.—The burden of establishing the issue of necessity for the taking is upon the plaintiff but it is not necessary to set forth in the complaint the evidence upon which it relies to prove the alleged necessity.—*Northern Light & Power Co. v. Stacher*, 13 Cal. App. 404, 408, 109 Pac. 896.

75. In determining the necessity for the taking for public use, not only present, but future, demands may be considered, those which exist and those which may be fairly anticipated.—*Central Pac. R. Co. v. Feldman*, 152 Cal. 309, 92 Pac. 849.

76. Right of way for an electric power line for the transmission of electricity to be sold to the public to furnish power, light and heat to counties, cities, villages and towns, and the inhabitants thereof, is for a public use, and a complaint showing such, is sufficient upon that point.—*Tuolumne Water Power Co. v. Frederick*, 13 Cal. App. 495, 503, 110 Pac. 134.

77. Not bar to further condemnation.—Judgment rendered by stipulation for right of way for pipe-line is one conclusive as to that particular pipe-line and the particular right of way given therefor and is not a bar to the condemnation of another or further

right of way through the same tract of land.—*Laguna Drainage Dist. v. Charles Martin Co.*, 5 Cal. App. 166, 173, 89 Pac. 993.

78. Order of proof.—The more orderly procedure is for the court to find upon the question of necessity before the issue of compensation is submitted to the jury, but if the jury has sufficient information as to the proposed action of the court to enable it to act intelligently upon the issue of compensation and without prejudice of the subsequent rights of the defendant the reservation by the court of the decision of the question of necessity until after the verdict is rendered is not even erroneous much less in excess of jurisdiction.—*Beaulieu Vineyard v. Superior Court*, 6 Cal. App. 242, 248, 91 Pac. 1015.

As to proceeding on condemnation, see pars. 85-96, this note.

79. Owner may contest the right.—It is not to be held that mere declaration by legislature, that object for which private property may be taken is public use, will preclude owner from contesting right to deprive him of his property.—*San Mateo County v. Coburn*, 130 Cal. 631, 634, 63 Pac. 78, 621; *Laguna Drainage Dist. v. Charles Martin Co.*, 144 Cal. 209, 217, 77 Pac. 933; *Madera R. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27, 30.

80. Particular uses—Canals and ditches.—By the provisions of subdivision 4, section 1238, post, which authorizes the condemnation of water-rights sought to be applied to public use in "supplying mines and farming in neighborhoods with water," a corporation has the right to acquire water-rights in such manner and carry such water in its canals through the neighboring counties to be distributed to the several farming neighborhoods along the canal routes.—*San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 164 Cal. 221, 128 Pac. 924, 926.

See par. 9, this note.

As to particular uses, see pars. 9, 53, 54, 63, 65, this note.

As to what constitutes a public use for which private property may be taken under an exercise of the power of eminent domain, see notes Ann. Cas. 1912D, 1002; 102 Am. St. Rep. 809.

As to public use as a judicial question, see note 88 Am. St. Rep. 926.

81. Under section 1238, post, subdivision 3, which gives the right of eminent domain for "canals, aqueducts, reservoirs, tunnels, flumes, ditches, or pipes for conducting or storing water for the use of the inhabitants of any county, and all other public uses for the benefit of any county, or the inhabitants thereof, which may be authorized by the legislature," it will be understood that water also may be taken to be carried in the canals and ditches, and that it is not necessary, to constitute a public use, that the water be furnished to every inhabitant of

the county, but it will be sufficient if all who are capable of enjoying it have an equal right to it.—*San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 164 Cal. 221, 128 Pac. 924, 927.

82. Same—Same—Sale of water to public.—It is settled that the use of water for sale, rental and distribution to the public generally is a public use. The question whether one who desires to condemn property to be devoted to such use has such right is to be determined by the provisions of the statute.—*San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 164 Cal. 221, 128 Pac. 924, 926.

83. Place of trial.—Proceedings in eminent domain under the provisions of above section required to be brought in the county where the property sought to be condemned is situated, and such proceedings are not within or affected by the provisions of section 395, ante, as to actions in general (dictum).—*John Heinlen Co. v. Superior Court*, 17 Cal. App. 662, 121 Pac. 293.

84. Private use shown—Condemnation denied.—If it can be shown by extrinsic evidence that end sought to be accomplished is not of public character, but is solely for private purposes, condemnation will be denied as being in excess of legislative power.—*San Mateo County v. Coburn*, 130 Cal. 631, 634, 63 Pac. 78, 621; *Laguna Drainage Dist. v. Charles Martin Co.*, 144 Cal. 209, 217, 77 Pac. 933.

85. Proceedings to take and assess property—Statutory provisions.—Section 1254, post, providing that "at any time after trial of judgment entered, or pending an appeal from the judgment to the supreme court, whenever the plaintiff shall have paid into court, for the defendant, the full amount of the judgment, and such further sum as may be required by the court as a fund to pay any further damages and costs that may be recovered in said proceeding, as well as all damages that may be sustained by the defendant, if for any cause the property shall not be finally taken for public use, the superior court in which the proceeding was tried may, upon notice of not less than ten days, authorize the plaintiff, if already in possession, to continue therein, and if not, then to take possession of and use the property during the pendency of and until the final conclusion of the litigation, and may, if necessary, stay all actions and proceedings against the plaintiff on account thereof," is constitutional.—*Reed Orchard Co. v. Superior Court*, 19 Cal. App. 648, 128 Pac. 9, 12.

As to rules of practice, see par. 150, this note.

As to order of proof, see par. 78, this note.

As to validity of eminent domain statute which fails to provide for notice to land owner of proceedings to condemn, as distinguished from proceeding to fix compensation, see note Ann. Cas. 1913A, 1256.

86. Section 1254, post, authorizing stay of proceedings by the superior court in certain cases, is not repealed by implication by section 949, ante, authorizing stay of proceedings in all cases not excepted from its terms, and condemnation proceedings not being excepted. The former is a special statute and hence must be upheld unless expressly repealed.—*Reed Orchard Co. v. Superior Court*, 19 Cal. App. 648, 128 Pac. 9, 14.

87. Same—Defenses—Future possibilities.—In an action to acquire water for irrigation by condemnation proceedings, the mere fact that such corporation would devote certain waters, the right to which was acquired in the past, to private use, was no defense to the action to acquire water to be applied to public use. If, after taking it, such corporation should convert it from public to private use, such conversion could be prevented, but where there is no evidence of such intent, the mere assertion that the plaintiff corporation may in the future wrongfully do so can not defeat its right to the condemnation.—*San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 164 Cal. 221, 128 Pac. 924, 930.

88. Same—Parties defendant to action.—Where a person is attempting to have condemned for public use a certain amount of water which is the riparian right of a certain riparian owner, since the lower riparian owners have no right to complain of such diversion, they are not necessarily parties to such action.—*San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 164 Cal. 221, 128 Pac. 924, 932.

89. Section 1244, post, requires the complaint in a condemnation proceeding to state "names of all owners and claimants of the property" as defendants. Section 1246, post, provides, in substance, that any person occupying or having or claiming any interest in the property sought to be condemned may appear, plead, and defend as to his interest. Section 1247, post, provides that in such actions the court shall have power to hear and determine all adverse or conflicting claims to the property sought to be condemned. It is obvious from this language that these provisions do not contemplate or authorize the admission of a person as a party who does not show that he has some interest or right to the property sought to be condemned or of a person whose statements of his right shows that he has no such interest.—*San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 164 Cal. 221, 128 Pac. 924, 926.

90. Same—Pleading—Description of territory.—The law does not require, in order to maintain an action to condemn water for public use, that the boundary of the territory to which it is to be dedicated shall be alleged and proven with absolute certainty. The nature of the use is such that this could not be done. The location of the proposed canal being shown, the situs of the proposed use is thereby fixed with suffi-

cient accuracy.—*San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 164 Cal. 221, 128 Pac. 924, 926.

As to complaint in condemnation generally, see pars. 10, 11, this note.

91. Same—Right to intervene—Adverse claimant to defendant.—In a special proceeding to condemn water for the benefit of the plaintiff as the purveyor of the public use, third persons not interested in the land in subordination to or in common with the person whose right is sought to be taken, but claiming adversely, have no right to intervene under section 387, ante.—*San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 164 Cal. 221, 128 Pac. 924, 930.

As to right of vendee of land condemned to compensation awarded, see note Ann. Cas. 1912A, 456; Ann. Cas. 1912A, 1056.

92. Same—Value of land.—The default of defendants in condemnation proceedings did not affect the duty of the jury to determine the value of the land which was taken, nor would they have been relieved of such duty if the owner had suffered default.—*Reed Orchard Co. v. Superior Court*, 19 Cal. App. 648, 128 Pac. 9, 16.

As to evidence of special value of property, see note 124 Am. St. Rep. 536.

93. Same—Variance immaterial.—In an action to condemn water for public use, where the allegation is that the water is to be devoted, sold and distributed in several named counties, whereas the proof shows that it can be sold and distributed only to inhabitants along the lands of its canals and wholly in the territory west of the river, there is no substantial variance. Where there is a general allegation to this fact, the specific facts alleged show clearly enough that the water is to be taken only to the lands on the west side.—*San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 164 Cal. 221, 128 Pac. 924.

94. In an action to acquire water for irrigation by condemnation proceedings, an objection that the proof showed that the water was not necessary to public use, except for a portion of the year was removed by the filing of an amended complaint wherein the taking of the water is limited to the season when it is actually required, the dates being specifically stated.—*San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 164 Cal. 221, 128 Pac. 924, 929.

95. Same—Verdict—Interest of each defendant.—Where, in condemnation proceedings, a verdict fails to specify the amount of interest of each defendant, the jury may, under section 619, ante, correct such verdict.—*Reed Orchard Co. v. Superior Court*, 19 Cal. App. 648, 128 Pac. 9, 17.

96. Where the jury, in condemnation proceedings, has failed to assess the separate interest of each defendant, the court may, under the provisions of section 1247, post, assess such claims.—*Reed Orchard Co. v. Superior Court*, 19 Cal. App. 648, 128 Pac. 9, 17.

97. Prior necessary public use—Use in common.—Where the public use to which it is proposed to subject the property can not be said to be more necessary than that to which it is already subjected, there can be no such interference with the prior use as will substantially or materially affect the efficiency thereof; but it can not be said as matter of law that a limited use, in common, of the right of way and levee of a reclamation district by a railroad can not be so regulated that there will be no material interference with the use of the reclamation works.—*Reclamation Dist. v. Superior Court*, 151 Cal. 269, 90 Pac. 545.

98. Property subject to appropriation—Submerged lands.—By the first section of the street opening act of 1889, the city council of any municipality is granted power "to condemn and acquire any and all land and property necessary and convenient for that purpose." Very early in the history of California the supreme court recognized and declared the right of state to surrender into the jurisdiction and control of a city, and to sell into private ownership, not only tide lands but those perpetually submerged. (*Eldridge v. Cowell*, 4 Cal. 87.) Jurisdiction over lands of this kind involves such incidental authority as the city may exercise in the condemnation of rights of way, the construction of streets and the like. The legislature has left the act in practically its original form; hence it must be presumed that words "land" and "lands" in that statute were used in the technical sense "territory."—*West Berkeley Land Co. v. City of Berkeley*, 164 Cal. 406, 129 Pac. 281, 282.

As to property subject to appropriation generally, see, post, § 1238 and note.

99. Public highway—Demand for, legislative matter.—Whether public highway is demanded in any particular region, as well as its location and extent, are matters of political or legislative character.—*San Mateo County v. Coburn*, 130 Cal. 631, 635, 63 Pac. 78, 621.

100. Public property subject to use.—This provision construed as not being restricted in its application to the property of individuals or corporations, nor to preclude its application to public property; and a railroad company may subject the right of way of a reclamation district for levee purposes and the levee constructed thereon, to a limited use for a right of way for its railroad, such use to be in common with the district; nor is there any constitutional objection to such a construction.—*Reclamation Dist. v. Superior Court*, 151 Cal. 267, 90 Pac. 545.

101. Public-service corporation—As to right to exercise power of.—The power "to acquire" property for the purposes of a public use, given to a public-service corporation by its articles of incorporation, includes the right "to condemn."—*Deseret Water, Oil & Irr. Co. v. California*, 167 Cal. 147, 138 Pac. 981.

102. Same—Actually engaged in rendering public service, not required.—The law does not contemplate that a corporation organized to render public service must first be engaged in such service before its right to condemn property under the power of eminent domain accrues, and hence its complaint in condemnation proceedings need not show it to be in charge of a public use.—*Deseret Water, Oil & Irr. Co. v. California*, 167 Cal. 147, 138 Pac. 981.

103. Same—Complaint in condemnation.—The fact that the complaint in condemnation alleged certain purposes of the proceedings not expressly enumerated in section 1238, post, does not operate against the judgment, when there was no demurrer, and the most of the purposes set forth in the complaint came strictly within the language of the section, and the evidence was ample to sustain the complaint in these respects.—*Deseret Water, Oil & Irr. Co. v. California*, 167 Cal. 147, 138 Pac. 981.

As to complaint in condemnation proceedings generally, see pars. 10, 11, this note.

104. Where the plaintiff in eminent domain seeks to condemn a whole section of land, not rights of way thereover, it is unnecessary for the complaint to conform to the requirements of section 1244, post, which is applicable to cases where a right of way only is sought.—*Deseret Water, Oil & Irr. Co. v. California*, 167 Cal. 147, 138 Pac. 981.

105. Public use must be shown.—It is not sufficient for a complaint to allege that the use for which property is to be taken is a public use. It must show that the use is one of those enumerated in the statute and the trial court can not obviate this requirement by finding the use to be a public use.—*Hercules Water Co. v. Fernandez*, 5 Cal. App. 726, 732, 91 Pac. 401.

106. "Public use"—Definition of term.—The term "public use" is a term of indefinite signification, and while what is a public use is a judicial question, yet in a doubtful case, the legislative declaration is of great persuasive force.—*Tuolumne Water Power Co. v. Frederick*, 13 Cal. App. 498, 503, 110 Pac. 134.

107. Same—Determined from evidence.—The term "public use" is an expression of indefinite signification, and its application to facts of any particular case is also to be determined from evidence.—*Lindsay Irr. Co. v. Mehrkens*, 97 Cal. 676, 680, 32 Pac. 802; *Madera R. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27, 30.

108. Railroads—Right of way—As to generally.—In an action to condemn land for a right of way for a railroad, it is proper to allow expert testimony to the effect that the market value of plaintiff's land will be greatly depreciated by the fact that the railroad, as it is intended to be constructed, will hold back flood waters and thereby cause damage to said land.—*Colusa & H. R. Co. v. Glenn*, 25 Cal. App. 634, 144 Pac. 993.

109. In this action to condemn certain land for a right of way, it is held that the evidence was irreconcilably conflicting, and that there was nothing to indicate that the court abused its discretion in granting the motion for a new trial.—*Colusa & H. R. Co. v. Glenn*, 25 Cal. App. 634, 144 Pac. 993.

110. In such a case the rule of damages is the difference between the value of the land immediately before and after the taking of the right of way, the real question in such cases being how much the market value of the property has been diminished by taking the right of way therefrom. In determining and fixing such damages, all matters and conditions which may reasonably be expected to follow the location and operation of the road and affect the value of the land should be considered.—*Colusa & H. R. Co. v. Glenn*, 25 Cal. App. 634, 144 Pac. 993.

111. Same—Wharves for—Evidence.—Evidence tending to show that the plaintiff had planned a railroad system, including a line from Vallejo to Sacramento, that the proposed route over defendant's land was a part of the Sacramento line, and that in pursuance of the plan it had constructed other parts of the line and obtained franchises and rights of way therefor, and that it was endeavoring to complete the same, is relevant to the question of the good faith of the plaintiff in proposing to build its road on the land sought to be acquired, and is proper to be considered upon the question as to the necessity for the taking of the land.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

112. Testimony of the president of the plaintiff describing his efforts to overcome the obstacles thrown in the way of the building of the road by other corporations and persons and in defeating the opposition to the enterprise, is likewise admissible on the question of good faith of the plaintiff in seeking condemnation.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

113. The fact that some of such evidence might tend to create or arouse prejudice against the defendants in favor of the plaintiff by creating a suspicion that other railroad corporations were instigating the defense or obstructing the building of the proposed railroad, is not a sufficient ground for its exclusion.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

114. A railroad corporation has the right to condemn land for freight wharves and sheds, as being land reasonably "necessary to successfully work and conduct the business of the road" and as a necessary appendage or adjunct thereto, within the meaning of section 465 of the Civil Code, where the railroad extends to a navigable river through a large area of highly productive land and upon such river there is

a heavy steamboat traffic engaged in carrying the products of such land.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

115. It is not necessary that a railroad corporation in order to obtain a right to maintain wharves as a part of its road that it should first obtain a wharf franchise in pursuance of sections 528 to 531, inclusive, and section 2921 of the Political Code.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

116. Sections 528 to 531 of the Civil Code apply only to corporations organized for the purpose of carrying on the business of conducting a public bridge ferry, wharf, chute, or pier, and have no applications to corporations formed for the purpose of constructing a railroad.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

117. Section 2921 of the Political Code was intended to give the board of supervisors discretion to grant an additional franchise to a railroad corporation to enable it to carry on a public wharf and charge tolls thereon where the board finds that such public wharf is necessary to the railroad franchise, and was not intended to forbid the railroad maintaining a wharf for its own purposes without the additional authority to be granted under the section by the board of supervisors.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

118. The use of the land along the river-front by the plaintiff for wharves as an adjunct to its railroad is not forbidden by clause of section 2 of article XV of the constitution declaring that no corporation claiming or possessing the frontage of navigable water "shall be permitted to exclude the right of way to such water whenever it is required for any public purpose."—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

119. On the question of the necessity of the taking, evidence is admissible of the nature of the country through which the road would pass and of the territory which would probably contribute freight and passengers to the road for carriage, of the amount and character of the products which such territory would probably yield at the present time and in its probable future growth and development, of the volume of passenger traffic probable from such territory, and, generally, of all other facts that would tend to show the amount of traffic to be handled within a reasonable time in the future.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

120. Evidence of the probable production of factories and quarries, arrangements with connecting roads for freight and passenger traffic, the feasibility of reclaiming swamp and overflowed lands and thereby increasing their production, the probability of such

reclamation, with the means whereby it could be accomplished and the measures taken by others for that purpose, the needs from probable traffic to and from the city of Sacramento over plaintiff's wharves and cars, the area required for yardage, and comparisons with yards of other similar railroad systems in actual operation, accompanied with proper explanations of the differences between the two systems, and also of the uses to be made of the spaces or passageways between the wharves, is likewise admissible.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

121. Where the president of the plaintiff testified on cross-examination that another corporation had projected a line from Woodland to Sacramento connecting with plaintiff's road near the bridge of the plaintiff on the land in controversy, and that plaintiff proposed to receive the cars of said company at this connection and run them hence to the city of Sacramento and other places over plaintiff's line, it is proper to permit him on redirect examination to explain that such other company was then constructing its line and to show that plaintiff's road would obtain business from it when completed.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

122. The opinion of a civil engineer of ten years' experience in the laying out, operation, and construction of interurban railroads is admissible on the question as to the proportion of the products of the counties through which the proposed road was to run that would probably be shipped over plaintiff's road if constructed.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

123. A report of the State Agricultural Society purporting to show the amount in tons, pounds, or measures, of the products of the counties through which the proposed road was to run is admissible.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

124. Upon the question of the future business of the road and the necessity for the proposed taking, testimony of a civil engineer shown to be familiar with the country lying along the Sacramento River is admissible as to the approximate areas of reclaimed and unreclaimed land, and land capable of reclamation in the Sacramento Valley, and sufficient foundation was held therein to have been laid for the admission in evidence of a map prepared by him showing such facts.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

125. Estimates of the approximate quantity of freight handled at Sacramento testified to by witnesses who based such estimates on investigations they had made by inquiries of shippers and others, on the testimony of other witnesses in the case and the reports of United States engineers,

is admissible.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

126. The admission in evidence of a report furnished by the plaintiff to the engineer who laid out the plan of tracks and other structures to be placed by plaintiff on the land sought to be condemned, for the purpose of explaining the testimony of the witness as to why it was that he had fixed upon the land as the area of the land necessary for plaintiff's use is not error, notwithstanding that such report also contained statements of the probable tonnage of freight coming from the counties through which the road would run.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

127. Upon the question of the value of the property sought to be condemned, it is not prejudicial error to refuse to permit a witness to give his opinion, who had no actual knowledge of any sales of land on the Yolo side of the Sacramento River and who until two years before the sale had lived on a ranch five miles north of Sacramento, and who had never been on the land except during a flood a few months before the trial.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

128. **Same—Same—Instructions.**—An instruction that the railroad company had a right to own and hold steamers and run them in connection with its railroad and condemn land necessary for the accommodation of steamers owned by itself or other persons for the delivery of freight and passengers to and from the railroad, is not prejudicial where the articles of incorporation of the plaintiff confer upon it power to own and operate steamers if necessary, proper, or convenient for the convenient use, accommodation, maintenance, and operation of its railroad.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

129. Instructions directing the jury that they could allow such quantity of land for wharves as they should believe reasonably necessary to accommodate the future business of the road in delivering and receiving freight to and from its cars to such steamers as they believed would probably be plying upon the river, are proper, notwithstanding the absence of any allegation in the complaint that the land, or any part of it, was needed for the use of steamer or steamer lines.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

130. An instruction stating, that as the power of eminent domain is necessary for the public good, "it would be unjust to the public that the plaintiff should be required to pay the owner more than a fair indemnity for the loss he sustains by the appropriation of his property for the general good. On the other hand, the owner being compelled to part with his property, whether he desires to sell or not, the law

allows him just compensation therefor," is not objectionable, as being argumentative.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

131. There is no error in instructing the jury that in determining the question of necessity they should take into consideration the character of the business proposed to be done by plaintiff's railroad and the manner of doing it and the future needs of the communities which the plaintiff would serve, and that in so doing they could consider the number of persons to be served.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

132. An instruction in exact accordance with section 1249, post, prior to its amendment in 1911, that in determining the compensation to be given the defendant they must consider the value of the land as it was at the date of the commencement of the action, is proper, notwithstanding the amendment to such section after the commencement of the action by providing "that in any action in which the issue is not tried within one year after the date of the commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of trial. Nothing in this section contained shall be construed or held to affect pending litigation."—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

133. **Same—Same—Title and estate given.**—There is no error in giving the plaintiff only an easement in the land for the right of way for main tracks and the necessary sidetracks and other tracks for chutes, yards, and storage purposes, and a fee simple estate in that part of the land to be used for a storehouse, a blacksmith-shop, a machine-shop, wharves, offices, and other purposes requiring the construction of substantial buildings thereon.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

134. **Right assured—Not restricted to recover as for tort.**—The right assured to owner by article I, section 14 of constitution is not restricted to case where he is entitled to recover as for tort at common law. If he is consequently damaged by work done, whether it is done carefully and with skill or not, he is still entitled to compensation under this provision.—*Reardon v. San Francisco*, 66 Cal. 492, 505, 6 Pac. 317.

135. **"Right of way"—Easement for levee** of a reclamation district constitutes a right of way within the meaning of that phrase as here employed, and is a right of way for one of the purposes mentioned in section 1238, post.—*Reclamation Dist. v. Superior Court*, 151 Cal. 267, 90 Pac. 545.

136. **Riparian rights—Diversion of water.**—In this proceeding in eminent domain to acquire the right to divert certain waters of the San Joaquin River as against riparian lands of the defendant, it is held that

the decision of the supreme court on the former appeal (164 Cal. 221) that the use which the appellant proposed to make of the waters sought to be condemned is one for which it is authorized to exercise the right of eminent domain, under section 1238, post, applies with equal force to the facts revealed on the second trial; and that as to the public character of the use the law was settled by that decision (unreported).—*San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 20 Cal. App. Dec. 61, 147 Pac. 258.

137. In such a case, where the issue tendered by the complaint involved simply the riparian right of the land described therein, the necessity for the condemnation of the right and the damage to this particular land, if said right should be taken, were all that concerned the jury, and the damage to this particular land was to be ascertained by deducting from the market value of the land as it existed at the time of the issuance of the summons the market value it would have if deprived of this riparian right; and it was prejudicial error to permit the defendant to introduce in evidence an elaborate scheme to prospective reclamation and irrigation of this land and in allowing evidence to damage to other lands than those described in the complaint (unreported).—*San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 20 Cal. App. Dec. 61, 147 Pac. 258.

138. The issue as to the necessity for the taking of the property sought to be condemned is one to be tried by the court, and not submitted to a jury, the rule in cases of eminent domain being that all questions, except those necessary to determine the compensation to be made to the owner for his property taken or damaged, are to be determined by the court; and this necessarily includes among the questions triable by the court without a jury, the question whether plaintiff's canal will unreasonably waste the water sought to be condemned and the quantity necessary for the use, after allowing for unavoidable waste; also the question whether the water which the plaintiff has already acquired the right to take, would be sufficient for its public use, if carried and distributed without unreasonable waste (unreported).—*San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 20 Cal. App. Dec. 61, 147 Pac. 258.

139. The question as to whether or not the plaintiff should be required to cement its canal to prevent waste by seepage is one of fact to be decided in each case upon all the circumstances, but no unreasonable expense should be imposed on the public-service company; and it is held by the supreme court in this case, on the petition to transfer the cause to it for rehearing that the opinion of the district court of appeal on this subject is not to be regarded as the law of the case on the retrial of the action (unreported).—*San Joaquin &*

Kings River Canal & Irr. Co. v. Stevinson, 20 Cal. App. Dec. 61, 147 Pac. 258.

140. The following instruction given at the request of the defendant is objectionable in implying that if the plaintiff acquired a prescriptive right to five hundred feet of water as against all other riparian owners except defendant the latter would have the right to all the rest of the river without regard to the claim of any other riparian owner: "By diverting a greater quantity of water than seven hundred and sixty cubic feet per second, the plaintiff could acquire no right against the lands of defendant, that are described in the complaint, but plaintiff could acquire, as against other riparian owners, the rights by prescription to take such excess of water. And if the plaintiff did acquire the rights of the other riparian owner by prescription, or otherwise, then the defendant would have a right as between it and plaintiff to use the entire flow of San Joaquin River in excess of said seven hundred and sixty cubic feet per second, and, that too, without regard to the rights of those riparian owners whose rights had been acquired by prescription by the plaintiff" (unreported).—*San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 20 Cal. App. Dec. 61, 147 Pac. 258.

141. *Same—Jury trial.*—It is held in denying the petition for a rehearing of this appeal in the supreme court, after decision in the district court of appeal, that in so far as that opinion holds that the issue as to the necessity for the taking of the property sought to be condemned must be submitted to a jury, unless a jury trial thereof is waived, it is erroneous. The rule is, that in cases of eminent domain all questions, excepting those necessary to determine the compensation to be made to the owner for his property taken or damaged, are to be determined by the court (unreported).—*San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 49 Cal. App. Dec. 376, 147 Pac. 258.

142. This necessarily includes among the questions triable by the court without a jury the question whether the plaintiff's canal will unreasonably waste the water to be condemned, and the quantity necessary for the use, after allowing for unavoidable waste; also the question whether the water which the plaintiff already has acquired the right to take would be sufficient for its public use, if carried and distributed without unreasonable waste (unreported).—*San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 26 Cal. App. 285, 147 Pac. 258.

143. It is also held, in denying the petition for a rehearing, that the discussion in the opinion of the district court of appeal with respect to the claim that the plaintiff should be disregarded on the new trial, as being the law of the case (unreported).—*San Joaquin & Kings River Canal & Irr.*

Co. v. Stevinson, 26 Cal. App. 285, 147 Pac. 258.

144. The right to a trial by jury in condemnation suits is limited to the issue of compensation, and all other issues are to be tried by the court, and if the court submits them to a jury, it is nevertheless required to make findings either by adopting the verdict thereon or by making findings in its own language.—Vallejo & Northern R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238.

145. The amendment of 1874 to section 592, ante, changed the effect of the section as applied to condemnation suits, so that a jury trial is imperative, if not waived, only with respect to the issue of compensation.—Vallejo & Northern R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238.

146. **School land surrounded by forest reserve.**—School land granted to the state by the federal government and surrounded by a national forest reserve is not appropriated to a public use, and may therefore be condemned in eminent domain proceedings instituted by a public-service corporation.—Deseret Water, Oil & Irr. Co. v. California, 167 Cal. 147, 138 Pac. 981.

As to lands that may be taken generally, see, post, § 1238 and note.

147. The taking of appropriate steps by the state in the various federal land offices to exchange such school land for other equivalent public land, pursuant to the provisions of sections 3398 to 3409 of the Political Code, which provide that such lands may be used as "bases for indemnity selections provided by law," does not constitute a dedication of such to "public use" so that it can not be condemned under the power of eminent domain.—Deseret Water, Oil & Irr. Co. v. California, 167 Cal. 147, 138 Pac. 981.

148. The state statutes do not say that state lands reserved from sale, or state lands not offered for sale, shall not be subject to the right of eminent domain. They declare that all the lands of the state shall be subject to this right, saving such lands alone as are devoted to a public use.—Deseret Water, Oil & Irr. Co. v. California, 167 Cal. 147, 138 Pac. 981.

149. The condemnation of state land, which is surrounded by United States forest reserves, by a public-service corporation under the power of eminent domain, is not contrary to public policy and the interest of the state.—Deseret Water, Oil & Irr. Co. v. California, 167 Cal. 147, 138 Pac. 981.

150. **Rules of practice.**—This title of the code on "Eminent Domain," is silent as to the steps to be taken in proceedings thereunder when the judge of the court where brought is disqualified, and, in determining the rules of practice applicable in such a case, reference must be had, as herein provided, to Title II of this code.—John Hein-

len Co. v. Superior Court, 17 Cal. App. 662, 121 Pac. 293.

As to procedure in condemnation proceedings, see pars. 85-94, this note.

151. **Selection of route, etc.**—If the first selection made on behalf of the public could be set aside on slight or doubtful proof, a second selection would be set aside in the same manner, and so ad infinitum. The improvement could never be secured because whatever location was proposed, it could be defeated by showing another just as good.—Tuolumne Water Power Co. v. Frederick, 13 Cal. App. 498, 506, 110 Pac. 134.

152. The selection of a particular route as permitted in the first instance to the person in charge of the public use, and unless there is something to show an abuse of discretion, the propriety of his selection ought not to be questioned, for certainly it must be presumed that the state or its agent has made the best choice for the public, and if this occasions peculiar and unnecessary damage to the owners of the property affected, the proof of such damage should come from them; and when an attempt is made to show that the location made is unnecessarily injurious, the proof ought to be clear and convincing, for otherwise no location could ever be made.—Tuolumne Water Power Co. v. Frederick, 13 Cal. App. 498, 505, 110 Pac. 134.

153. **State's right of—An element of sovereignty.**—The right of state to appropriate private property for public use is an element of sovereignty, and in section 14, article I of constitution people of this state have limited this right by declaring conditions upon which alone it may be exercised.—San Mateo County v. Coburn, 130 Cal. 631, 634, 63 Pac. 78, 621.

154. **Statement by plaintiff in open court** in connection with motion to dismiss to the effect that if such motion was granted it would abandon all claim to the property amounts to such an abandonment as will warrant order of dismissal.—Southern Pac. R. Co. v. Reis Estate Co., 15 Cal. App. 216, 114 Pac. 808.

155. **Street opening act**—Act of 1889 providing for the opening of streets, etc., was not repealed by the amendment of 1907 to above section.—Clute v. Turner, 157 Cal. 73, 76, 106 Pac. 240.

See, also, par. 65, this note.

156. **Same—Award of damages.**—The mode of ascertainment prescribed in the general street law does not preclude an abutting owner from insisting upon his constitutional right to submit the question to a jury.—Wilcox v. Engebretsen, 160 Cal. 299, 116 Pac. 750.

157. **Same—Rule of damages.**—Above section constitutes the rule for ascertaining the amount of compensation and damages to be paid for land acquired by proceedings had under the street opening act of 1903.—

City of Los Angeles v. Gager, 10 Cal. App. 378, 381, 102 Pac. 17.

See par. 35, this note.

158. Street work by municipality.—Not a taking.—When municipal corporation is engaged in doing street work, as building sewer, grading and widening street, in lawful manner and without malice, no liability for damages attaches to it, unless such liability is imposed by statute law, or the organic law of state. Acts done in proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be taking within meaning of constitutional provision.—Reardon v. San Francisco, 66 Cal. 492, 498, 6 Pac. 317.

159. Same.—Owner notified, contractor exonerated.—Where street work is performed by municipality in proper, discreet, and careful manner, doing no more damage than was necessary, and an owner of adjacent lands and buildings had due notice of grading of street, and might, by exercise of reasonable care, have protected his buildings from damage, but negligently omitted to do so, city had right to raise grade of street, and if contractor performed work with proper care and skill, he is not responsible for any damage resulting to contiguous property in an action under provision of article I, section 14 of constitution.—Reardon v. San Francisco, 66 Cal. 492, 497, 6 Pac. 317.

160. Supervisors.—Action of board of, conclusive.—After tribunal for determining questions of demand for location and extent of public highway has acquired jurisdiction in proceeding by public to condemn right of way for this public road, court is not authorized to review action of board of

supervisors in determining those questions.—San Mateo County v. Coburn, 130 Cal. 631, 635, 63 Pac. 78, 621; Pool v. Simmons, 134 Cal. 621, 625, 66 Pac. 872; Madera R. Co. v. Raymond Granite Co., 3 Cal. App. 668, 87 Pac. 27, 30.

161. Uses.—Public or private.—Judicial question.—The question whether uses for which property is taken by exercise of power of eminent domain are public or private is judicial question for court.—Consolidated Channel Co. v. Central Pac. R. Co., 51 Cal. 269; Lindsay Irr. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. 802; San Mateo County v. Coburn, 130 Cal. 631, 634, 63 Pac. 78, 621; Madera R. Co. v. Raymond Granite Co., 3 Cal. App. 668, 87 Pac. 27, 30.

162. Water.—Inhabitants of county.—Above section authorizes the exercise of the right of eminent domain (except as to towns, villages and incorporated cities) in behalf of canals, ditches, etc., for conducting or storing water for the use of the inhabitants of any county, not for the inhabitants of place in any county individually described nor for the inhabitants less than those of the entire county. All may not enjoy the use but the use must be capable of enjoyment by all.—Hercules Water Co. v. Fernandez, 5 Cal. App. 726, 731, 91 Pac. 401.

163. Same.—Water and riparian rights to water is property and may be taken in eminent domain like other property.—Northern Light & Power Co. v. Stacher, 13 Cal. App. 404, 409, 109 Pac. 896.

164. Wharves.—Condemnation of land for.—As to generally, evidence, instructions, title and estate granted.—See pars. 111-135, this note.

165. Word "damaged".—Superadds guaranty of former constitution.—As to generally, see par. 34, this note.

§ 1238. PURPOSES FOR WHICH MAY BE EXERCISED. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

1. **[Uses of United States.]** Fortifications, magazines, arsenals, navy yards, navy and army stations, lighthouses, range and beacon lights, coast surveys, and all other public uses authorized by the government of the United States.

2. **[Uses of state.]** Public buildings and grounds for the use of the state, or any state institution, and all other public uses authorized by the legislature of the state.

3. **[Public utilities, counties, cities, etc.]** Any public utility, and public buildings and grounds, for the use of any county, incorporation city, or city and county, village, town or school districts, ponds, lakes, canals, aqueducts, reservoirs, tunnels, flumes, ditches or pipes, lands, water system plants, buildings, rights of any nature in water, and any other character of property necessary for conducting or storing or distributing water for the use of any county, incorporated city, or city and county, village or town or municipal water district, or the inhabitants thereof, or any state institution, or necessary

for the proper development and control of such use of said water, either at the time of the taking of said property, or for the future proper development and control thereof, or for draining any county, incorporated city, or city and county, village or town; raising the banks of streams, removing obstructions therefrom, and widening and deepening or straightening their channels; roads, highways, boulevards, streets and alleys; public mooring places for water craft; public parks, including parks and other places covered by water, and all other public uses for the benefit of any county, incorporated city, or city and county, village or town, or the inhabitants thereof, which may be authorized by the legislature; but the mode of apportioning and collecting the costs of such improvements shall be such as may be provided in the statutes by which the same may be authorized.

4. **[Wharves, bridges, ferries, etc.]** Wharves, docks, piers, warehouses, chutes, booms, ferries, bridges, toll-roads, by-roads, plank and turn-pike roads; paths and roads either on the surface, elevated, or depressed, for the use of bicycles, tricycles, motorcycles and other horseless vehicles, steam, electric, and horse railroads, canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation, public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating logs and lumber on streams not navigable, and water, water-rights, canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation of lands furnished with water by corporations supplying water to the lands of the stockholders thereof only, and lands with all wells and water therein adjacent to the lands of any municipality or of any corporation, or person supplying water to the public or to any neighborhood or community for domestic use or irrigation.

5. **[Roads, flumes, etc., for mines.]** Roads, tunnels, ditches, flumes, pipes, aerial and surface tramways and dumping places for working mines; also outlets, natural or otherwise for the flow, deposit or conduct of tailings or refuse matter from mines; also an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines.

6. **By-roads** leading from highways to residences, farms, mines, mills, factories and buildings for operating machinery, or necessary to reach any property used for public purposes.

7. **Telegraph and telephone lines, systems and plants.**

8. **Sewerage** of any incorporated city, city and county, or of any village or town, whether incorporated or unincorporated, or of any settlement consisting of not less than ten families, or of any buildings belonging to the state, or to any college or university, also the connection of private residences and other buildings, through other property, with the mains of an established sewer system in any such city, city and county, town or village.

9. **Roads for transportation** by traction engines or road locomotives.

10. **[Pipe-lines.]** Oil pipe-lines.

11. **Railroads, roads and flumes** for quarrying, logging or lumbering purposes.

12. **Canals,** reservoirs, dams, ditches, flumes, aqueducts and pipes and outlets natural or otherwise for supplying, storing, and discharging water for the operation of machinery for the purpose of generating and transmitting electricity for the supply of mines, quarries, railroads, tramways, mills, and factories with electric power; and also for the applying of electricity to light or heat mines, quarries, mills, factories, incorporated cities and counties, villages or towns; and also for furnishing electricity for lighting, heating or power purposes to individuals or corporations; together with lands, buildings and all other improvements in or upon which to erect, install, place, use or operate machinery for the purpose of generating and transmitting electricity for any of the purposes or uses above set forth.

13. **[Power lines.]** Electric power lines, electric heat lines, electric light lines, electric light, heat and power lines, and works or plants, lands, buildings or rights of any character in water, or any other character of property necessary for the generation, transmission or distribution of electricity for the purpose of furnishing or supplying electric light, heat or power to any county, city and county or incorporated city or town, or the inhabitants thereof, or necessary for the proper development and control of such use of such electricity, either at the time of the taking of said property, or for the future proper development and control thereof.

14. **Cemeteries** for the burial of the dead, and enlarging and adding to the same and the grounds thereof.

15. **[Abstract and title companies.]** The plants, or any part thereof or any record therein of all persons, firms or corporations heretofore, now or hereafter engaged in the business of searching public records, or publishing public records or insuring or guaranteeing titles to real property, including all copies of, and all abstracts or memoranda taken from, public records, which are owned by, or in the possession of such persons, firms or corporations, or which are used by them in their respective businesses; provided, however, that the right of eminent domain in behalf of the public uses mentioned in this subdivision may be exercised only for the purpose of restoring or replacing, in whole or in part, public records, or the substance of public records, of any city, city and county, county or other municipality, which records have been, or may hereafter be, lost or destroyed by conflagration or other public calamity; and provided, further that such right shall be exercised only by the city, city and county, county or municipality, whose records, or part of whose records, have been or may be, so lost or destroyed.

16. **[Fairs.]** Expositions or fairs in aid of which the granting of public moneys or other things of value has been authorized by the constitution.

17. **[Gas-works, etc.]** Works or plants for supplying gas, heat, refrigeration or power to any county, city and county, or incorporated city or town, or the inhabitants thereof, together with lands, buildings, and all other improvements in or upon which to erect, install, place, maintain, use or operate machinery, appliances, works and plants for the purpose of generating, transmitting and distributing the same and rights of any nature in water, or property of any character necessary for the purpose of generating, transmitting and distri-

buting the same, or necessary for the proper development and control of such use of such gas, heat, refrigeration, or power, either at the time of the taking of said property, or for the future proper development and control thereof.

18. [Trees along highways.] Standing trees and ground necessary for the support and maintenance thereof, along the course of any highway within a maximum distance of three hundred feet on each side of the center thereof; and ground for the culture and growth of trees along the course of any highway within a maximum distance of three hundred feet on each side of the center thereof.

History: Enacted March 11, 1872; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 353; March 10, 1891, Stats. and Amdts. 1891, p. 348; March 11, 1893, Stats. and Amdts. 1893, p. 146; March 26, 1895, Stats. and Amdts. 1895, p. 89; March 4, 1897, Stats. and Amdts. 1897, p. 70; February 28, 1901, Stats. and Amdts. 1900-1, p. 72; March 21, 1905, Stats. and Amdts. 1905, p. 637; June 14, 1906, Stats. and Amdts. 1906, p. 68; March 20, 1907, Stats. and Amdts. 1907, p. 742, Kerr's Stats. and Amdts. 1906-7, p. 485; April 21, 1909, Stats. and Amdts. 1909, p. 1032; March 22, 1911, Stats. and Amdts. 1911, p. 431; amended April 28, 1911, repealing all acts in conflict with amendment as given in Biennial Supplement 1911 and Cumulative Supplement 1906-1913, as § 1238[a], Stats. and Amdts. 1911, p. 1206; amended April 10, 1915, without designating whether Act of March 22, or that of April 28, 1913, was intended to be amended, but presumably the latter, Stats. and Amdts. 1915, p. 38; April 5, 1917, Stats. and Amdts. 1917, p. 59; May 16, 1921, Stats. and Amdts. 1921, p. 140. In effect July 29, 1921.

PURPOSES FOR WHICH PROPERTY MAY BE CONDEMNED.

I. IN GENERAL, 1-29.

II. DRAINAGE, 30-35.

III. RAILROADS, 36-48.

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I. IN GENERAL.

1. Act relative to condemnation—Constitutional.
2. Canal in mining—Use a question of fact.
3. Conveyance to water company—Not legal necessity.
4. Eminent domain, exercise of—No part of municipal affairs.
5. Same—Right inherent in state.
6. Ferry—A quasi-public use.
7. Flume for mining for benefit of plaintiff only—Not public use.
8. Irrigation of arid lands—In general.
9. Same—Water for mines.
10. Land appropriated to public—Taken for more necessary use.
11. Oil pipe-line—Dedication to public use—Exercising right of eminent domain—Estoppel.
12. Private industry—Not encouraged by legislature.
13. Same—Water for working individual claim.
14. Property subject to public use—Public channel—Adverse possession.
15. Public roads—Method prescribed for laying out—Right of eminent domain.

16. Public-School district—Site for athletic building.

17. Public use—Not necessary of whole state.

18. Person, natural or artificial, may acquire property.

19. Reservoir—For debris and tailings of mine.

20. Right of way through another's mine—Private use.

21, 22. Sewer for city—No nuisance.

23. Stockholders in opposing corporation—No proof of private use.

24. Streets and alleys—City may acquire by condemnation.

25. Same—City may condemn for alley, if necessary.

26. Use, public or private—Determination by legislature.

27, 28. Same—Determination by legislature conclusive.

29. Warehouse-site—Amendment of city charter—Not retroactive.

II. DRAINAGE.

30. Advantage not for community outside district.

31. Reclamation—Public benefit.

32. Area less than one hundred and sixty acres.

33. Eminent domain—As police power.

34. Same—If for common benefit.

35. Enjoyment by entire public—Not necessary.

III. RAILROADS.

- 36, 37. Branch track—Tests.
- 38. Corporators of beneficiary and railroad company same.
- 39. Court can not interfere if special acts authorize.
- 40. Declaration of legislature—Not reviewable.
- 41. For horse and steam power.
- 42. Individual, advantage to—Road not less public.
- 43. Need for workshops—Question of fact.
- 44, 45. Private individual may construct.
- 46. Steam railroad for carrying passengers and freight.
- 47. Use—Does not depend on length of road.
- 48. Same—Public, if free to use by all.

IV. WATER SUPPLY.

- 49. Agricultural lands subdivided.
- 50. Farming neighborhood.
- 51. Incorporated city.
- 52. Inhabitants of town.
- 53. Mining and agricultural land not available without.
- 54. Obiter dictum in Mahoney v. Spring Valley Water Works overruled.
- 55. Whether public use for certain neighborhood—Question of fact.

See §§ 407 and 1001 and notes; ante, § 1237 and note.

As to the methods of acquisition of lands for public highways, see Kerr's Cyc. Political Code, 2d ed., § 2696 and note.

I. IN GENERAL.

1. Act relative to condemnation—Constitutional.—The provisions of the act relative to the condemnation of private property, land, water, etc., for the uses prescribed therein, are in harmony with the constitution and state laws, and in strict consonance with the views of the supreme court in the case of *Lux v. Haggin* (69 Cal. 255, 302, 305, 10 Pac. 674).—*Turlock Irr. Dist. v. Williams*, 76 Cal. 360, 370, 18 Pac. 378; *Central Irr. Dist. v. De Lappe*, 79 Cal. 351, 353, 21 Pac. 825; *Croll v. Board of Directors*, 87 Cal. 140, 145, 26 Pac. 797; *Board of Directors v. Tregoe*, 88 Cal. 334, 352, 26 Pac. 237; *In matter of Madera Irr. Dist.*, 92 Cal. 296, 307, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 675; *Woodward v. Fruitvale Sanitary Dist.*, 99 Cal. 554, 562, 34 Pac. 239; *In matter of Central Irr. Dist.*, 117 Cal. 382, 389, 49 Pac. 354.

See note 51 Am. St. Rep. 853.

2. Canal in mining—Use a question of fact.—Whether the use of waters of a proposed canal in mining the land of plaintiff and others is a private use is an issue of fact which should be submitted to a jury, a jury trial not having been waived nor a

reference ordered.—*Cummings v. Peters*, 56 Cal. 593, 597.

3. Convenience to water company—Not legal necessity.—That the land in controversy would be a great convenience and would enhance the value of a water company and secure a fuller water supply to the inhabitants of a city, does not constitute the elements of legal necessity. A public convenience is not such a necessity as authorizes the exercise of eminent domain.—*Spring Valley Water Works v. San Mateo W. W.*, 64 Cal. 123, 131, 28 Pac. 447; *Bennett v. City of Marion*, 106 Iowa 628, 632, 633, 76 N. W. 844; *Framingham Water Co. v. Old Colony R. Co.*, 176 Mass. 404, 411, 57 N. E. 680.

4. Eminent domain, exercise of—No part of municipal affairs.—The mode of exercising the power of eminent domain, and the conditions upon which it may be invoked, are no part of municipal organization. They are the subject of general laws applicable to every person alike, and the legislature has no power to make arbitrary discrimination in this respect between different classes of persons.—*City of Pasadena v. Stimson*, 91 Cal. 228, 249, 27 Pac. 604; *City of Santa Cruz v. Enright*, 95 Cal. 105, 111, 30 Pac. 197.

5. Same—Right inherent in state.—The right of eminent domain is inherent in the state and not conferred by the constitution. But the power of the state to condemn lands for public uses must, in the main, be exercised by agents, and for that reason this power may be delegated by the legislature of the state either to corporations or individuals, who act as such agents and under legislative control.—*Moran v. Ross*, 79 Cal. 159, 160, 21 Pac. 547.

6. Ferry—Quasi-public use.—A ferry is a quasi-public use. A franchise for a ferry is granted only by the board of supervisors (Pol. Code § 2843). Corporations for the purpose of operating a ferry may be formed under the statute (Civ. Code §§ 528 et seq.). The right of eminent domain may be invoked for acquisition of landings for ferry purposes under subdivision 4 of above section.—*Los Angeles Terminal Land Co. v. Muir*, 136 Cal. 36, 49, 68 Pac. 308.

7. Flume for mining for benefit of plaintiff only—Not public use.—A proposed flume to be constructed for the purpose of advantageously and profitably washing and mining plaintiff's mining ground, where it is not even pretended that any person other than the plaintiff will derive any benefit whatever from the structure when completed, is a private enterprise, to be conducted solely for the personal benefit of the plaintiff, in which the community has no concern and does not come within the meaning of that clause of the constitution which permits the taking of private property for a public use after just compensation made.—*Consolidated Channel Co. v. Central Pac. R. Co.*, 51 Cal. 269, 271; *Dower*

v. Richards, 73 Cal. 477, 480, 15 Pac. 105; Amador Queen M. Co. v. Dewitt, 73 Cal. 482, 485, 15 Pac. 74; San Mateo County v. Courn, 130 Cal. 631, 634, 63 Pac. 78, 621.

8. Irrigation of arid lands.—In general.—Whether the reclamation of the land be from excessive moisture to a condition suitable for cultivation or from excessive aridity to the same condition, the right of the legislature to authorize such reclamation must be upheld upon the same principle, viz., the welfare of the public, and particularly of that portion of the public within the district affected by the means adopted for such reclamation.—In matter of Madera Irr. Dist., 92 Cal. 296, 313, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 675; Laguna Drainage Dist. v. Charles Martin Co., 144 Cal. 209, 214, 77 Pac. 933.

9. Same.—Water for mines.—Perhaps to a greater extent than any of the other states, California, speaking through the acts of the legislature, her court of last resort, and constitution, seems to have considered the irrigation of lands and the supplying of mines with water as of great public concern.—Turlock Irr. Dist. v. Williams, 76 Cal. 360, 369, 18 Pac. 379; Herring v. Modesto Irr. Dist., 95 Fed. 715; People v. Brown Valley Irr. Dist., 119 Fed. 535, 538.

10. Land appropriated to public.—Taken for more necessary use.—Land belonging to a private person, which has been appropriated to a public use, as for a highway, may be taken for a more necessary public use than that to which it has been already appropriated, as for the construction and maintenance of a dam and reservoir for supplying the inhabitants of a county with pure and fresh water.—Marin County Water Co. v. Marin County, 145 Cal. 586, 588, 79 Pac. 282.

11. Oil pipe-line.—Dedication to public use.—Exercising right of eminent domain.—Estoppel.—Where a corporation incorporated for the purpose, among other things, of conducting and operating an oil pipe-line, availed itself of the right of eminent domain, under the provisions of the above section, in condemning property over which it constructed its pipe-line, under the provisions of the above section, that fact must be deemed conclusive evidence of a dedication of the property to public use, and it is estopped from afterwards disclaiming the use, upon the faith of which a judgment was rendered condemning the property.—Producers Transp. Co. v. Railroad Commission, 176 Cal. 499, 169 Pac. 59.

12. Private industry.—Not encouraged by legislature.—It is not competent for the legislature to authorize the levy of a public tax, or the taking of private property for the encouragement of a purely private industry.—Consolidated Channel Co. v. Central Pac. R. Co., 51 Cal. 269, 272; Dower v. Richards, 73 Cal. 477, 480, 15 Pac. 105; Amador Queen Min. Co. v. Dewitt, 73 Cal. 482, 485, 15 Pac. 74.

13. Same.—Water for working individual claim.—Where it is not shown that the use for which water was intended is a public use, and it clearly appears from the evidence that the main and substantial object of plaintiffs is to use the water in working their own mining claims, the power of eminent domain can not be exercised. Private property can not be taken for such a purpose.—Lorenz v. Jacob, 63 Cal. 73, 74. See St. Helena Water Co. v. Forbes, 62 Cal. 182, 45 Am. Rep. 659.

14. Property subject to public use.—Public channel.—Adverse possession.—No right by adverse possession can be acquired in and to public property, or property devoted to a public use, or owned by a municipality for public uses.—Martin v. City of Stockton, 39 Cal. App. 552, 179 Pac. 894.

15. Public roads.—Method prescribed for laying out.—Right of eminent domain.—Under the provisions of the above and following sections a municipality may maintain an action for the condemnation of land to be used as a public road without having complied with the requirements of sections 2681-2698 of the Political Code.—Adamson v. Los Angeles County, — Cal. App. —, 198 Pac. 52, following the doctrine in City of Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. 197; City of Los Angeles v. Leavis, 119 Cal. 164, 51 Pac. 34.

16. Public-school district.—Site for athletic building.—The provisions of the above section authorizing a school district to exercise the right of eminent domain for the purpose of acquiring public buildings and grounds for the use of any district, when read in conjunction with various other sections and provisions of the code and of the statute law relative to and regulating the public-school system, empowers a high school district, if not expressly, by necessary implication, to proceed by way of condemnation to secure land for a site for an athletic building.—Kern County Union High School District v. McDonald, 180 Cal. 7, 179 Pac. 180.

17. Public use.—Not necessarily of whole state.—The public use required need not be of the whole state or any considerable portion of it, but the use and benefit must be in common, not to particular individuals. Every public use is in more or less degree local and benefits a particular section more than others. This is true of railroads, as well as of ordinary highways.—Lindsay Irr. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. 802; Madera R. Co. v. Raymond Granite Co., 3 Cal. App. 668, 87 Pac. 27, 30.

18. Person, natural or artificial.—May acquire property.—A corporation, whether private or public, is a person (Civil Code, section 14). It follows, therefore, that, under this general law,—general in the widest and fullest sense of the term,—any public or private corporation, or any natural person, may, for any of the uses defined in this section, acquire private

property without the consent of the owner, by means of the proceedings prescribed in part 3, title 7, of this code (sections 1237-1263).—*City of Pasadena v. Stimson*, 91 Cal. 238, 248, 27 Pac. 604; *City of Santa Cruz v. Enright*, 95 Cal. 105, 111, 30 Pac. 197; *City of Los Angeles v. Leavis*, 119 Cal. 164, 165, 51 Pac. 34.

19. Reservoir—For debris and tailings of mine.—It is contended that under the provisions of this code, by virtue of which the proceedings for condemnation are had, authority is not given to condemn land to be used as a reservoir in which to store or impound water. In the enumeration of the public uses found in this section, the word "reservoir" is not found, but in classifying the estates and rights in land subject to be taken for public use, it is provided by section 1239, post, that a fee simple may be taken when needed for "public buildings or grounds, or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine."—*Lake Pleasanton Water Co. v. Contra Costa Water Co.*, 67 Cal. 659, 660, 8 Pac. 501; *Spring Valley W. W. v. Drinkhouse*, 92 Cal. 528, 531, 28 Pac. 681; *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 616, 57 Pac. 585.

See note 9 Am. St. Rep. 143.

20. Right of way through another's mine—Private use.—Under the provisions of above section the plaintiff can not have a right of way through defendant's mine condemned for its use in working its own mine. The mine of defendant is his private property, and it is clear that the plaintiff asks for the condemnation in order that it may appropriate a way through that property for its private use. This can not be done.—*Amador Queen Min. Co. v. Dewitt*, 73 Cal. 482, 483, 15 Pac. 74.

21. Sewer for city—No nuisance.—A city with sewage to dispose of, and having a sewer farm to which it has apparently a right to conduct it, has necessarily the right to construct such a sewer as this statute contemplates, and such a sewer can not be a nuisance in the strictest sense of the term.—*City of Pasadena v. Stimson*, 91 Cal. 238, 255, 27 Pac. 604.

22. Above section defines the purposes for which the power of eminent domain may be exercised, and among these is "sewerage of any city whether incorporated or unincorporated" (subdivision 8).—*Bishop v. Superior Court*, 87 Cal. 226, 232, 25 Pac. 435; *City of Pasadena v. Stimson*, 91 Cal. 238, 253, 27 Pac. 604.

23. Stockholders in opposing corporation—No proof of private use.—The fact that the stockholders of the Madera Granite Company were also stockholders of plaintiff company does not prove that the contemplated use is a private use.—*Madera R. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27, 32.

24. Streets and alleys—City may acquire by condemnation.—After the city and county of San Francisco had by proper proceedings thereunder determined to widen Mission Street, it was competent for it, under the principles laid down in the *City of Santa Cruz v. Enright*, 95 Cal. 105, 30 Pac. 197, to acquire by condemnation the lands of appellants in the manner prescribed in this code. Above section provides that "the right of eminent domain may be exercised on behalf of the following uses; . . . 3. . . . roads, streets and alleys . . . but the mode of apportioning and collecting the costs of such improvements shall be such as may be provided in the statutes, by which the same may be authorized."—*City etc. San Francisco v. Kierman*, 98 Cal. 614, 622, 33 Pac. 720; *City of Santa Ana v. Harlin*, 99 Cal. 538, 540, 34 Pac. 224.

25. Same—City may condemn for alley, if necessary.—An alley in a city or town is declared to be a public use (see also act of 1889, section 1); and no inquiry on that subject can be made in this action to condemn a strip of land as and for an alley, and when a city or town decides by appropriate proceedings that an alley is desirable, and institutes condemnation proceedings for a right of way therefor, it is only required to prove that the taking of the property sought to be condemned is necessary for the purposes of an alley.—*City of Santa Ana v. Brunner*, 132 Cal. 234, 237, 64 Pac. 287.

26. Use, public or private—Determined by legislature.—Whether an improvement is of sufficient importance to justify the exercise of the right of eminent domain is a question for the legislature to determine, subject only to the requirement that such improvement shall be for the public benefit and not for private purposes.—*Moran v. Ross*, 79 Cal. 159, 161, 21 Pac. 547.

27. Same—Determination by legislature conclusive.—It is the rule that, where there is any doubt whether the use to which the property is proposed to be devoted is of a public or private character, it is a matter to be determined by the legislature, and the courts will not undertake to disturb its judgment in that regard.—*Stockton & V. R. Co. v. City of Stockton*, 41 Cal. 147, 168; *Lux v. Hagglin*, 69 Cal. 255, 303, 10 Pac. 674; *In matter of Madera Irr. Dist.*, 92 Cal. 296, 310, 27 Am. St. Rep. 106, 14 L. R. A. 755, 23 Pac. 272, 675; *San Mateo County v. Coburn*, 130 Cal. 631, 634, 63 Pac. 78, 621; *State ex rel. Douglas Co. v. Cornell*, 53 Neb. 556, 559, 68 Am. St. Rep. 631, 74 N. W. 59.

28. The constitution does not assume to provide for what uses or purposes private property may be condemned, nor by whom. These matters are left entirely to the legislature, to be determined and regulated by statute, and the codes contain ample provisions therefor.—*Moran v. Ross*, 79 Cal. 159, 163, 21 Pac. 547.

29. Warehouse-site—Amendment of city charter—Not retroactive.—In an action under the provisions of the above section for the condemnation by a city of a site for a warehouse an amendment to the city charter providing, among other things, that the city shall have power to provide by purchase, lease, condemnation, or otherwise, and to own and maintain warehouses, such amendment to the charter, even were it competent for the city to assume the power in that way, could add nothing to the powers possessed by the city prior to such amendment, and could not avail the city in any way in an action commenced at a time prior to such amendment; an action in such a proceedings is commenced at the time when the summons is issued; and where the summons was issued in September, 1910, the provisions of subdivision 4 of the above section did not provide for such a proceeding, the amendment of 1913 having inserted in that subdivision the word "warehouses," after the words "wharves, docks, piers" and the amendment of 1913 could not be taken advantage of by the city in such an action, because under the provisions of subdivision 3 amendments to the code which do not expressly declare that they shall be retroactive can not be so construed.—*City of Los Angeles v. Koyer*, — Cal. App. —, 192 Pac. 301, approving the doctrine in *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 647, 57 Pac. 585.

As to condemnation for warehouse-site, evidence, instructions, title and estate of grantees, see, ante, § 1237, note pars. 111-135.

II. DRAINAGE.

30. Advantage not for community outside district.—It is no objection that the public benefit which is to be subserved is practically limited to those in the district whose lands are to be drained, and which will thereby be made valuable. In order that it shall constitute a public use it is not necessary that the advantages derived from the contemplated public improvement shall extend as effectually to the community outside the district as to those in it. It need not extend to the whole public or to any large portion of it. It is sufficient that all within the district will be in common benefited by it.—*Laguna Drainage Dist. v. Charles Martin Co.*, 144 Cal. 209, 217, 77 Pac. 933.

31. Reclamation — Public benefit.—The provisions of above section that "the right of eminent domain may be exercised in behalf of the following uses; 4. . . . draining and reclaiming lands," is a legislative declaration that, in general, "draining and reclaiming lands" in this state are matters of public utility and benefit, and the act of 1885 (Stats. 1885, p. 204) is in harmony with this declaration.—*Laguna Drainage Dist. v. Charles Martin Co.*, 144 Cal. 209, 214, 77 Pac. 933.

32. Area less than one hundred and sixty acres.—It can not be said that because the

area of overflowed land embraced in the district amounts to a fraction less than one hundred and sixty acres that the object of the district in this proceeding is not effectuating a public use within the meaning of the constitution. The area of a drainage district is not a matter from which, of itself, it can be determined whether the district corporation is exercising the right of eminent domain for the private advantage of the owners within its territory rather than as a public agency exercising it for a public use.—*Laguna Drainage Dist. v. Charles Martin Co.*, 144 Cal. 209, 218, 77 Pac. 933.

33. Eminent domain—As police power.—Not only is drainage legislation supported as being, from a material point of view, conducive to the public good, but it is equally sustained as being within the exercise of the police power of the state—in the interest of public health. Ponds, marshes, and low, swampy places are generally recognized as a nuisance to the public health of the neighborhood in which they exist, as generating malaria, and, hence, it is matter of public interest that they should be abated and removed.—*Laguna Drainage Dist. v. Charles Martin Co.*, 144 Cal. 209, 214, 77 Pac. 933.

34. Same—If for common benefit.—The claim that the drainage of this land will, from the facts of the complaint, inure mainly to the benefit of those within the district, presents no valid reason why the right of eminent domain for that purpose is not properly exercised in behalf of a "public use," where all the lands within the district are susceptible of one mode of drainage, and such a system for the common benefit is sought to be provided.—*Laguna Drainage Dist. v. Charles Martin Co.*, 144 Cal. 209, 217, 77 Pac. 933; *Madera R. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27, 30.

35. Enjoyment by entire public—Not necessary.—To render the supply of water a public use, it is not necessary that the entire public shall enjoy the use or even that it be capable thereof, but the use must be capable of enjoyment by all who may be within the neighborhood, and there must be within that neighborhood so great a number of the entire public as to destroy its character as a private use.—*Lindsay Irr. Co. v. Mehrrens*, 97 Cal. 676, 681, 32 Pac. 802.

III. RAILROADS.

As to condemnation by railroad for warehouse-site, see, ante, § 1137, note pars. 108-133.

36. Branch track—Tests.—The tests decisive of the question whether a branch track is to be constructed and operated for public or private purposes are these: If the track is to be open to the public, to be used upon equal terms by all who may at any time have occasion to use it, so that all persons who have occasion to do so can de-

mand that they be served without discrimination, not merely by permission but as of right, and if the track is subject to governmental control under general laws, as are the main lines of a railroad, then the use is a public one, and the legislature may grant the power to exercise the right of eminent domain to a corporation which is to operate such track; and if the purpose of the railroad corporation in building any particular branch track is to operate the same in conformity to these requirements, then the power granted by the legislature may be exercised in that particular case.—*Madera R. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27, 32.

37. Our statute does not define what is meant by "steam railroads," nor does it make any distinction between main lines and branches. A corporation may be formed to build a particular road which is to connect with another road and become a branch thereof. Such a corporation would have the right to condemn land for its right of way.—*Madera R. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27, 32.

38. **Corporators of beneficiary and railroad company same.**—Legitimate railroad enterprises are often projected into regions of little present profit, and ultimately prove unfortunate investments by lack of anticipated business. But they are nevertheless public in their objects; and a public use may be shown where only a single enterprise is primarily to be benefited, and the fact that the corporators in another company, which is the chief beneficiary, are also corporators of the railroad company, is not at all conclusive as to the character of the use.—*Madera R. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27, 33.

39. **Court can not interfere if special acts authorize.**—Where railroads are authorized by special act of the legislature it would be an unwarranted interference with legislative discretion for the courts to inquire into the policy or wisdom of the legislature in declaring that the building of those particular roads concerned the public interest.—*Contra Costa R. Co. v. Moss*, 23 Cal. 323, 324; *San Mateo County v. Coburn*, 130 Cal. 631, 63 Pac. 78, 621; *Madera R. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27, 29.

40. **Declaration by legislature—Not reviewable.**—Railroads concern the public interest as matter of legal judgment, and however that conclusion be opposed to the fact in the case at bar, makes no difference, the action of the legislature on the question not being open to review by the judicial department of the government.—*Stockton & V. R. Co. v. City of Stockton*, 41 Cal. 147; *San Mateo County v. Coburn*, 130 Cal. 631, 63 Pac. 78, 621; *Madera R. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27, 29.

41. **For horse and steam power.**—The power of eminent domain may be exercised in favor of a variety of public uses, among which are "horse and steam railroads," under subdivision 4 of above section.—*Southern Pac. R. Co. v. Southern Cal. R. Co.*, 111 Cal. 221, 227, 43 Pac. 602.

42. **Individual, advantage to—Road not less public.**—The fact that the advantage of road inures to a particular individual or class of individuals will not render the use any the less public.—*Madera R. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27, 32.

43. **Need for workshops—Question of fact.**—Whether or not workshops for the repair and safekeeping of the cars and locomotives of a railroad company are necessary appendages and adjuncts to a road under all the circumstances, and, if so, whether the land sought to be condemned is necessary as a site for said buildings, are questions of fact on which issues may be joined, to be decided at the trial.—*Southern Pac. R. Co. v. Raymond*, 53 Cal. 223, 228; *Moran v. Ross*, 79 Cal. 159, 164, 21 Pac. 547.

44. **Private individual may construct.**—The claim of defendant is that because the right to condemn lands for right of way of a railroad is expressly given by statute to corporations, it can not be exercised by any one else unless the right is conferred in the same way. But this does not follow. The rights, powers, and duties of a corporation are conferred and defined by statute. Without such statutory authority it could not exist nor transact any business. This is not so of a private individual. He may construct and operate a railroad on his own land or on land of another without statutory license. If the necessity of condemning the lands of another arises, in order to construct the road he must have constitutional or statutory authority to entitle him to proceed. This authority is given him in express terms by the codes.—*Moran v. Ross*, 79 Cal. 159, 164, 21 Pac. 547; 79 Cal. 549, 550, 21 Pac. 958; *City of Pasadena v. Stimson*, 91 Cal. 238, 248, 27 Pac. 604. See *San Francisco, A. & S. R. Co. v. Caldwell*, 31 Cal. 368, 371; *Southern Pac. Co. v. Hyatt*, 132 Cal. 240, 241, 64 Pac. 272.

45. The provisions of above section and of section 1001 of the Civil Code taken together confer upon private individuals the right of eminent domain in cases of condemnation of lands for right of way of railroad in plain and unequivocal terms.—*Moran v. Ross*, 79 Cal. 159, 162, 21 Pac. 547; 79 Cal. 549, 550, 21 Pac. 958; *City of Pasadena v. Stimson*, 91 Cal. 238, 248, 27 Pac. 604.

46. **Steam railroad for carrying passengers and freight.**—A complaint containing the allegation in effect that the plaintiff was incorporated for the purpose of constructing and operating a steam railroad "for the carrying of passengers and freight

... for hire," etc., is not demurrable on the specific point that this does not show that it was for "public transportation," as mentioned in subdivision 4 of above section. The clause in which the quoted expression occurs is intended to qualify only the words, "canals, ditches," etc., and has no application to the preceding words.—*San Francisco & San Jose Valley R. Co. v. Leviston*, 134 Cal. 412, 66 Pac. 473.

47. Use—Does not depend on length of road.—Neither the length of the road nor the fact that it is a branch or spur bears any necessary relation to the question of public use, or of the public interest to be subserved by it, except possibly as a circumstance bearing upon the alleged fact that the road is solely for the private use of plaintiff.—*Contra Costa Coal Mines R. Co. v. Moss*, 23 Cal. 323, 324; *Madera R. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27, 31.

48. Same—Public, if free to use by all.—Whether a way be public or private does not depend on the number of people who use it, but upon the fact that every one may lawfully use it who has occasion.—*Madera County v. Raymond Granite Co.*, 139 Cal. 128, 72 Pac. 915; *Madera R. Co. v. Raymond Granite Co.*, 6 Cal. App. 668, 87 Pac. 27, 30.

IV. WATER SUPPLY.

49. Agricultural lands subdivided.—The supplying of water to a tract of agricultural land, though of many thousand acres in extent, if occupied by an individual proprietor, would be for his private benefit, and not a public use, yet the same tract of land might be so subdivided and held in individual proprietorship as to render the supply of water to it a public instead of a private use.—*Lindsay Irr. Co. v. Mehrtens*, 97 Cal. 676, 680, 32 Pac. 802.

50. Farming neighborhood.—The provision of subdivision 4 of above section is a legislative declaration that the supplying of water to a farming neighborhood is a public use, and such declaration must be regarded as falling within the scope of legislative duty in providing for the public welfare.—*Lindsay Irr. Co. v. Mehrtens*, 97 Cal. 676, 679, 32 Pac. 802.

51. Incorporated city.—The supplying of the inhabitants of an incorporated city with pure fresh water is by this section declared to be a public use, in behalf of which the right of eminent domain may be exercised, and section 1239, post, provides in effect that the entire estate in a given piece of land may be taken when needed for a service in behalf of such use.—*Lake Pleasanton Water Co. v. Contra Costa W.*

Co., 67 Cal. 659, 660, 8 Pac. 501; *Spring Valley Water Works v. Drinkhouse*, 92 Cal. 528, 531, 28 Pac. 681.

52. Inhabitants of town.—There can be no sort of doubt that the supplying of the inhabitants of a town with pure fresh water is one of the "public uses" in behalf of which the legislature has declared the right of eminent domain may be exercised.—*St. Helena Water Co. v. Forbes*, 62 Cal. 182, 45 Am. Dec. 659.

53. Mining and agricultural land not available without.—A complaint that alleged that the uses for which the water of a proposed ditch is intended and designed are mining, irrigation, manufacturing, and household and domestic purposes; that along the line of the canal there are valuable mining claims and a large body of undeveloped mining land, besides much agricultural land; that such land can not be mined nor profitably cultivated without water brought upon it by artificial means; that said canal is intended to and will supply this want by the sale and distribution of said water along its line, with the avowal that it is a public use, that plaintiff is in charge of it; that the taking of a portion of land of defendant for said use is necessary, etc., is sufficient in proceedings for exercise of right of eminent domain under subdivision 4 of above section.—*Cummings v. Peters*, 56 Cal. 593, 596.

54. Obiter dictum in Mahoney v. Spring Valley Water Works overruled.—There is language in the case of *Mahoney v. Spring Valley W. Co.*, 52 Cal. 159, 161, to the effect that a proceeding to condemn lands for the purpose of waterworks could be commenced and continued by a corporation only, but a decision of that question was not necessary to a decision of the case, and it is quite clear that it was not carefully considered, if considered at all, and no authority is cited nor reason advanced in support of such a doctrine.—*Moran v. Ross*, 79 Cal. 159, 164, 21 Pac. 547.

55. Whether public use for certain neighborhood—Question of fact.—Whether the particular region is a farming neighborhood, and whether the supplying of water to that neighborhood constitutes a public use, are questions of fact which must be determined by the court before whom the proceeding is had, and its decision thereon must be held conclusive as in other cases. It is only when it appears that such decision is manifestly erroneous, either by an abuse of its discretion or by making its decision without evidence to support it, that the appellate court will call it in question.—*Lindsay Irr. Co. v. Mehrtens*, 97 Cal. 676, 681, 32 Pac. 802.

§ 1239. ESTATES SUBJECT TO PUBLIC USE. The following is a classification of the estates and rights in lands subject to be taken for public use:

1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine, or for the protection of water bearing lands from drought therefrom of any character whatsoever from any adjacent lands, or when the property is taken by any mutual water system, county, city and county, or incorporated city or town or a municipal water district or other political division.

2. **[Easement.]** An easement, when taken for any other use; provided, however, that when the taking is by a municipal corporation, and is for the purpose of constructing, equipping, using, maintaining or operating any works, roads, railroad, tramway, power plant, telephone line, or other necessary works or structures, for the preparation, manufacture, handling or transporting of any material or supplies required in the construction or completion by such municipal corporation of any public work, improvement, or utility, a fee simple may be taken if the legislative body of such municipal corporation shall, by resolution, determine the taking thereof to be necessary; and provided, further, that, when any land is taken for the use of a by-pass, or drainage way, or overflow channel, or a levee, or an embankment, or a cut required by the plans of the California debris commission referred to in that certain act of the legislature, entitled "An act approving the report of the California debris commission transmitted to the speaker of the house of representatives by the secretary of war on June 27, 1911, directing the approval of plans of reclamation along the Sacramento river or its tributaries or upon the swamp lands adjacent to said river, directing the state engineer to procure data and make surveys and examinations for the purpose of perfecting the plans contained in said report of the California debris commission, and to make reports thereof, making an appropriation to pay the expenses of such examinations and surveys, and creating a reclamation board and defining its power," approved December 24, 1911, or any modifications or amendments that may be adopted to the same, either a fee simple or easement may be taken as the reclamation board shall by resolution determine may be necessary. Such resolution shall be conclusive evidence that a taking of a fee simple or easement, as the case may be, is necessary.

3. **[Right of entry.]** The right of entry upon and occupation of lands, and the right to take therefrom such earth, gravel, stones, trees, and timber as may be necessary for some public use.

History: Enacted March 11, 1872; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 355; April 5, 1911, Stats. and Amdts. 1911, p. 618; June 14, 1913, Stats. and Amdts. 1913, p. 852. In effect August 10, 1913.

ESTATES SUBJECT TO EMINENT DOMAIN.

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| 1. Construction of section.
2. Dam, subsurface of—Taken for reservoir.
3. Dedication by owner to public use—Bars condemnation proceedings. | 4. Easement—Water in natural channel, acquired.
5. Same—Taken, is not one owned by defendant.
6. Fee simple and easement subject to.
7. Right of way involves taking of land.
See, ante, § 1237 and note. |
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1. Construction of section.—A judgment condemning land for railroad purposes is proper when it awards only an easement in the land for the right of way for the various kinds of tracks, and the fee for that part of the land to be used for a storehouse, blacksmith shop, machine shop, wharves, offices, and other substantial buildings, these being permanent buildings within the meaning of above section.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

2. Dam, subsurface of.—Taken for reservoir.—Where the evidence shows that from one-fifth to one-third of the entire bulk of the material filling a valley below the plane of saturation is water, the land in its natural state is therefore a reservoir, and the fee simple may be taken under this section for construction of a subsurface dam in order to make it better serve purpose of reservoir.—*City of Los Angeles v. Pomeroy*, 124 Cal. 597, 616, 57 Pac. 585.

3. Dedication by owner to public use.—Bars condemnation proceedings.—If the plaintiff had alleged that the land sought to be condemned had been already dedicated by the owner to the use of the public for a street, it would have alleged itself out of court; for in such case it would have shown the existence by virtue of the dedication of the only right that could be acquired under our statute by the condemnation proceedings, namely, an easement in the property for street purposes.—*City of San Jose v. Freyschlag*, 56 Cal. 8, 10; *City of San Jose v. Reed*, 65 Cal. 241, 242, 3 Pac. 806; *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 612, 57 Pac. 585.

4. Easement.—Water in natural channel, acquired.—By taking water that in its natural channel runs over defendant's land, plaintiff takes an easement in lands of defendant. If plaintiff by adverse use should acquire the right, it is equally clear that the interest so acquired would be an easement in the land of defendant. There is no difference in the nature of the same right

when acquired by condemnation proceedings.—*St. Helena Water Co. v. Forbes*, 62 Cal. 182, 184, 45 Am. Rep. 659; *Lux v. Haggin*, 69 Cal. 255, 300, 440, 10 Pac. 674.

5. Same.—Taken, is not one owned by defendant.—Water that runs over one's land is part and parcel of his land. Legislature has said that an "easement" in land may be taken for public use. This does not mean an easement owned by the person against whom the right to condemn is asserted. In other words, it authorizes the fee simple of all real property belonging to any person to be taken when needed for any of the public uses enumerated in subdivision 1 of above section, and an easement in all real property belonging to any person, to be taken when needed for any other public use.—*St. Helena Water Co. v. Forbes*, 62 Cal. 182, 184, 45 Am. Dec. 659. See *Lux v. Haggin*, 69 Cal. 255, 440, 10 Pac. 674.

6. Fee simple and easement subject to.—Statute subjects all real property belonging to any person to right of eminent domain, to be exercised in the cases and for the purposes therein stated. In other words, it authorizes the fee simple of all real property belonging to any person to be taken when needed for any of the public uses enumerated in subdivision 1 of above section, and an easement in all real property belonging to any person, to be taken when needed for any other public use.—*St. Helena Water Co. v. Forbes*, 62 Cal. 182, 184, 45 Am. Dec. 659.

7. Right of way involves taking of land.—In proceeding to acquire right of way by one railroad company across right of way of another railroad company (which statutes allow) and to acquire right of way over lands of defendant, an easement is sought to be acquired as provided in above section. If the easement is not technically an estate in the land, the acquisition of the right of way involves the taking of a parcel of land, within the meaning of the statute.—*California So. R. Co. v. Southern Pac. R. Co.*, 67 Cal. 59, 69, 7 Pac. 123.

§ 1240. PRIVATE PROPERTY DEFINED. CLASSES ENUMERATED.

The private property which may be taken under this title includes:

1. All real property belonging to any person;

2. **Lands belonging to this state**, including tide and submerged lands, not within the corporate limits of any city, or city and county, or to any county, incorporated city, or city and county, village or town, not appropriated to some public use; provided, that all sixteenth and thirty-sixth sections, both surveyed and unsurveyed, owned by the state or the United States, which may now or may hereafter be included within the exterior boundaries of a national reservation, or of a reserve, or within the exterior boundaries of lands withdrawn from public entry, shall be and hereby are withheld from the operation of this title and shall not be condemned as against the state or the United States;

3. **Lands belonging to the United States** or owned or held by the United States in trust, or otherwise, for any purpose, except lands owned or held for lighthouses, post-offices or other government buildings, forts, arsenals, or other military purposes; and except lands mentioned in the proviso to subdivision two hereof;

4. **Property appropriated to public use**; but such property shall not be taken unless for a more necessary public use than that to which it has already been appropriated; provided, that where any such property has been so appropriated by any individual, firm or private corporation, the use thereof for a public street or highway of a county, city and county, or incorporated city or town or the use thereof by a county, city and county, incorporated city or town, irrigation or municipal water-district, for the same public purpose to which it has been so appropriated, or for any other public purpose, shall be deemed more necessary uses than the public use to which such property has already been appropriated; and provided, further, that where property already appropriated to a public use or purpose, by any person, firm or private corporation, is sought to be taken by a county, city and county, incorporated city or town, irrigation or municipal water-district, for another public use or purpose, which is consistent with the continuance of the use of such property or some portion thereof for such existing purpose, to the same extent as such property is then used, or to a less or modified extent, then the right to use such property for such proposed public purpose, in common with such other use or purpose, either as then existing, or to a less or modified extent, may be taken by such county, city and county, incorporated city or town, irrigation or municipal water-district, and the court may fix the terms and conditions upon which such property may be so taken, and the manner and extent of the use thereof for each of such public purposes, and may order the removal or relocation of any structures, or improvements therein or thereon, so far as may be required by such common use. But property appropriated to the use of any county, city and county, incorporated city or town or municipal water-district, may not be taken by any other county, city and county, incorporated city or town, or municipal water-district, while such property is so appropriated and used for the public purposes for which it has been so appropriated.

5. **[Irrigation district property.]** Property appropriated to any public use by any irrigation district, may be taken by another irrigation district for another public use and purpose, which is consistent with the use of such property for such existing purposes to the same extent as such property is then used; provided, that the right to such limited use in common shall include the right to enlarge, change or improve the property so taken; provided, further, that such enlargement, change or improvement shall not interfere with the original use or any necessary extension or enlargement of such use.

6. **Franchises for any public utility**, and all kinds of property of any nature whatsoever used, either during the existence of or at the termination of said franchise, to supply and furnish the service of such public utility, but such franchise or property shall not be taken except for a more necessary public use.

7. **All rights of way** for any and all the purposes mentioned in section one

thousand two hundred thirty-eight, and any and all structures and improvements on, over, across or along such rights of way, and the lands held or used in connection therewith shall be subject to be connected with, crossed, or intersected by or embraced within any other right of way or improvements, or structures thereon. They shall also be subject to a limited use, in common with the owner thereof, when necessary; but such uses, crossings, intersections, and connections shall be made in manner most compatible with the greatest public benefit and least private injury;

[Railroad crossings.] no railroad main track crossing, outside the limits of any incorporated town, city, or city and county, shall be at grade, unless the party proposing such crossing at grade shall, at its own sole cost and expense, protect such crossing by the construction, operation and maintenance of an interlocking plant, with suitable signals and derails; but either party to such crossing may insist upon a separation of grades, in which case the cost of constructing such crossing with separate grades shall be equally divided between the railroad companies concerned; and provided, further, that where any such crossing has been constructed at grade, either company may, at any time thereafter, require a separation of the grades at such crossing, each company paying one-half of the expense of such separation; and provided, further, that the foregoing provisions shall not be construed as requiring a separation of grades where such separation is physically impracticable, and in case of any dispute or controversy as to the physical practicability of any under-grade or overhead crossing, the same shall be determined by the superior court of the county in which such crossing is situate in an action or proceeding brought by either party for that purpose;

8. **All classes of private property not enumerated** may be taken for public use, when such taking is authorized by law;

9. **[Condemnation of state property.]** Proceedings to condemn lands belonging to this state are hereby authorized, and must be maintained and conducted in the same manner as are other condemnation proceedings provided for in this title; except, that in such proceedings the summons and a copy of the complaint must be served on the governor, attorney-general, and surveyor-general of this state.

10. **[Condemnation of United States lands.]** Proceedings to condemn any of said lands belonging to the United States or owned or held by the United States in trust, or otherwise, for any purpose, are hereby authorized; and must be maintained and conducted in the same manner as are other condemnation proceedings provided for in this title; except, that in such proceedings, the summons and a copy of the complaint must be served on the United States district attorney for the district in which the land sought to be condemned is situated and also upon the United States surveyor-general for this state.

History: Enacted March 11, 1872; amendment approved March 15, 1901, Stats. and Amdts. 1900-1, p. 307; March 18, 1905, Stats. and Amdts. 1905, p. 126; March 16, 1907, Stats. and Amdts. 1907, p. 339, Kerr's Stats. and Amdts. 1906-7, p. 487; April 5, 1911, Stats. and Amdts. 1911, p. 620, repealing all acts and parts of acts in conflict (p. 623); June 10, 1913, Stats. and Amdts. 1913, p. 547; May 21, 1915, Stats. and Amdts. 1915, p. 711. In effect August 8, 1915.

EMINENT DOMAIN—PROPERTY THAT MAY BE TAKEN.

- 1, 2. As to construction of section—Subdivision 2.
3. Same—Subdivision 3.
4. Same—Subdivision 4.
5. All real property—Belonging to any person.
6. Same—Plaintiff who is already owner of interest in land.
7. Condemnation of water—Diversion at dam—Compensation—Measure of damages.
8. Money—Can not be exacted by government.
9. Private lands belonging to state.
10. Same—Already appropriated to public use.
- 11, 12. "Property appropriated to public use"—Is private property.
13. Same—Not protected against more necessary use.
14. Public road existing upon private land.
15. Right of way of one railroad by another railroad.
16. Riparian rights.
- 17, 18. Second appropriation for like use—Not permissible.
19. Street-railway company—Taking property of—Constitutional law—Compensation.

See, ante, § 1237 and note.

1. **As to construction of section—Subdivision 2.**—The state statutes do not say that state lands reserved from sale, or state lands not offered for sale, shall not be subject to the right of eminent domain. They declare that all of the lands of the state shall be subject to this right, saving such lands alone as are not devoted to public use.—*Pacific Power Co. v. State*, 32 Cal. App. 175, 162 Pac. 643.

2. School lands situated within the boundaries of a United States forest reservation may be condemned in eminent domain proceedings instituted by a public service corporation, where such lands had been surveyed prior to the time of the creation of the forest reservation.—*Pacific Power Co. v. State*, 32 Cal. App. 175, 162 Pac. 643.

3. **Same—Subdivision 3.**—This subdivision stands upon our statute books without the slightest efficacy until the United States government itself shall have authorized the states to bring itself and its land into their courts.—*Deseret Water, Oil & Irr. Co. v. California*, 167 Cal. 147, 138 Pac. 981.

4. **Same—Subdivision 4.**—This subdivision modifies subdivision 2 of section 1241, post, and was enacted to meet the case where it was proposed to condemn land already appropriated to public use. While the court will recognize as final the determination of the legislative body that the taking is necessary for public use, it must also

recognize the existing public use, and to provide the terms and conditions upon which the existing use may continue if in fact the two uses are capable of coexisting on the same premises.—*City of Los Angeles v. Los Angeles Pac. Co.*, 31 Cal. App. 100, 159 Pac. 992.

5. **All real property—Belonging to any person** is by statute subject to right of eminent domain, to be exercised in cases and for purposes stated.—*St. Helena Water Co. v. Forbes*, 62 Cal. 182, 184, 45 Am. Rep. 659.

As to all property being subject to right of eminent domain, see notes 9 Am. St. Rep. 139, 140; 4 L. R. A. 785; 7 L. R. A. 766; 1 L. R. A. (N. S.) 611-615.

As to frontages on navigable waters, see Const. 1879, art. XV, § 1, 1 Henning's General Laws, 3d ed., p. xcvi.

As to condemnation of shares of minority stockholders of corporation, see note 1 L. R. A. (N. S.) 605-617.

As to condemnation of waterworks by city, see brief 26 L. R. A. 272.

As to lateral support, see note 26 Am. Rep. 457-462.

As to railway crossings, see note 7 L. R. A. 767; briefs 3 L. R. A. 241; 10 L. R. A. 852.

As to taking cemetery for public park, see brief 16 L. R. A. 180.

As to taking city property by federal government, see brief 69 L. R. A. 723.

As to taking corporate rights and franchises, see Const., art. XII, § 8, 1 Henning's General Laws, 3d ed., p. lxxxvii; also notes 31 Am. Dec. 372; 33 Am. Dec. 515; 42 Am. Dec. 728, 729; 9 Am. St. Rep. 137; 4 L. R. A. 785; 12 L. R. A. 220; 13 L. R. A. (N. S.) 197; brief 31 L. R. A. 304.

As to tide-lands, see note 66 L. R. A. 897.

6. **Same—Plaintiff who is already owner of interest in land** may secure condemnation of outstanding interests in case which in other respects is proper one for condemnation.—*City of Los Angeles v. Pomero*y, 124 Cal. 597, 610, 57 Pac. 585.

7. **Condemnation of water—Diversion at dam—Compensation—Measure of damages.**—Under the provisions of subdivision 5 of the above section property appropriated to any public use by any irrigation district is subject to condemnation under the power of eminent domain, and where another district or party condemns and takes the water impounded at the dam merely, the compensation is to be governed by the principles in which the power of eminent domain is invoked and the original irrigation district will be entitled to such damages only as may justly compensate them for the taking of the use of the dam, there being no taking of the property or the dam itself, and no severance.—*Waterford Irr. District v. Turlock Irr. District*, — Cal. App. —, 194 Pac. 757.

8. Money—"Can not be exacted by government by right of eminent domain, excepting perhaps for direct use of state at large and when state at large is to make compensation. . . . The framers of constitution could not have intended to delegate to municipal corporations right of taking money under this power, because it is entirely unnecessary. Money can always be had by taxation; lands can not; and therefore lands may be taken by right of eminent domain, but money may not." . . . "Private property taken for public use by right of eminent domain is not taken as owner's share of contribution to public burden, but as so much beyond his share. Special compensation is therefore to be made in the latter case because government is debtor for property so taken, but not in former, because payment of taxes is duty and creates no obligation to repay otherwise than in proper application of the tax" (Ruggles, J., in *People ex rel. Griffin v. Mayor of Brooklyn*, 4 N. Y. 419).—*Emery v. San Francisco Gold Co.*, 28 Cal. 346, 351, 352.

9. Private lands belonging to state may be taken in condemnation proceedings under subdivision 2 of above section. Such proceedings commenced before passage of amendment adding subdivision 7 were not without authority.—*California & N. R. v. State*, 1 Cal. App. 142, 144, 81 Pac. 971.

10. Same.—Already appropriated to public use.—Lands belonging to state or to municipality which have already been appropriated to public use can not be taken under eminent domain for another public use.—*Marin County Water Co. v. Marin County*, 145 Cal. 586, 588, 79 Pac. 282.

See par. 13, this note.

11. "Property appropriated to public use"—Is private property, and to condemn right of way by one railroad over right of way of another railroad company is taking of private property for public use.—*Boca & L. R. Co. v. Sierra Valley R. Co.*, 2 Cal. App. 546, 84 Pac. 298, 304.

12. Property and franchises of corporations as well as of individuals, although dedicated to public uses, may be taken for other public uses.—*Southern Pac. R. Co. v. Southern Cal. R. Co.*, 111 Cal. 221, 226, 43 Pac. 602.

As to construction of telegraph line along right of way of railroad, see briefs 45 L. R. A. 223; 60 L. R. A. 146, 62 L. R. A. 943.

As to laying street across railroad track and through railroad yards, see brief 37 L. R. A. 190.

As to more necessary public use, see par. 13, this note; also, post, § 1241 and note pars. 31, 32.

As to rule that where two public uses can stand together without impairment of one by other they must stand, see note 61 L. R. A. 649.

As to taking property by eminent domain where exclusive privileges or franchises have been granted, see note 9 Am. St. Rep. 140-142.

As to taking property devoted to one public use for another public use, see notes 40 Am. Rep. 748, 749; 24 Am. Rep. 551, 552; 9 Am. St. Rep. 139; 1 L. R. A. 787, 790; 60 L. R. A. 383.

13. Same.—Not protected against more necessary use.—It is property appropriated to public use which is under subdivision 3 of above section protected from condemnation, except "for a more necessary public use"; and as to lands owned by defendant, but which have not been thus appropriated, and are not likely in future to be needed for existing public use, inhibition does not apply.—*Southern Pac. R. Co. v. Southern Cal. R. Co.*, 111 Cal. 221, 229, 43 Pac. 602; *Eureka & K. R. Co. v. California & N. R. Co.*, 48 C. C. A. 517, 109 Fed. Rep. 509, 512.

See par. 10, this note; also, post, § 1241 and note pars. 31, 32.

14. Public road existing upon private land by virtue of easement in favor of county for uses of highway may be appropriated under right of eminent domain by water company engaged in supplying pure and fresh water to inhabitants of county, for purpose of constructing and maintaining dam and reservoir thereon, when such use is more necessary public use than is that of road. Such appropriation is not of public land appropriated to public use, under subdivision 2 of above section, but of private lands which had been appropriated to public use and which could be taken for more necessary public use than that to which it had been already appropriated, under subdivision 3.—*Marin County Water Co. v. Marin County*, 145 Cal. 586, 588, 79 Pac. 282.

15. Right of way of one railroad by another railroad.—Appropriation of portion of right of way of railroad, not essential to its enjoyment of its franchise and property as such, by another railroad where essential to construction and existence of the latter, is to and for more necessary public use; and fact that some interference may be occasioned thereby, but which does not materially curtail rights and privileges of former, does not take case out of wholesome rule adopted by our code. Thus, where one railroad company acquires right of way one hundred feet in width along city street and maintains its road along center thereof, side portion being used for spur tracks, signal stations, etc., another road may acquire right of way along and upon such side portion thereof.—*Southern Pac. R. Co. v. Southern Cal. R. Co.*, 111 Cal. 221, 231, 232, 43 Pac. 602.

As to taking land of one railroad company by another, see notes 24 Am. Rep. 551, 552; 12 L. R. A. 220; 13 L. R. A. (N. S.) 197; briefs 3 L. R. A. 241; 31 L. R. A. 304.

As to rights of way through mountain passes, canyons, etc., see note 4 L. R. A. 791.

16. Riparian rights.—Right of private individual to enjoy flow of water in its natural channel upon and along his land is property right which comes within category of real property and may be taken for purpose of supplying town with fresh water.—*St. Helena Water Co. v. Forbes*, 62 Cal. 182, 183, 45 Am. Rep. 659.

As to taking riparian rights, see note 16 Am. St. Rep. 614, 615; brief 33 L. R. A. 648.

17. Second appropriation for like use—Not permissible.—"General principle is well settled and has been applied in great variety of cases, that land already legally appropriated to public use is not to be afterward taken for like use unless intention of legislature that it should be so taken has been manifested in express terms or by necessary implication" (Chief Justice Gray in *Boston & M. R. Co. v. Lowell & L. R. Co.*, 124 Mass. 368). Authorities in support of this proposition are numerous and usually uniform (see cases discussed by Mr. Justice Gray). These cases in the main involve circumstances under which former and later use may not stand together, or, in other words, cases in which later use must supersede former. This general rule

does not apply, however, where later use does not prevent former use.—*Southern Pac. R. Co. v. Southern Cal. R. Co.*, 111 Cal. 221, 227, 228, 43 Pac. 602.

18. Land appropriated by one company for purposes of railroad and necessary thereto can not subsequently be condemned by another company for like use.—*Contra Costa Coal Mines R. Co. v. Moss*, 23 Cal. 323, 330.

As to taking property already appropriated to public use for same public use, see notes 4 L. R. A. 789-791, 7 L. R. A. 766.

19. Street-railroad company—Taking of property of—Constitutional law—Compensation.—The taking of property of a street railroad for street purposes, longitudinally covering the right of way of the street-railroad company, constitutes a taking of the railroad company's property within the meaning of article I, section 14 of the constitution providing that private property is not to be taken for public use without just compensation and in view of the provisions of subdivision 4 of the above section providing that the court may fix the terms and conditions upon which property may be taken, investing in the city the right to regulate the same.—*City of Los Angeles v. Allen*, 32 Cal. App. 553, 163 Pac. 697.

§ 1241. FACTS NECESSARY TO BE FOUND BY COURT BEFORE CONDEMNATION. Before property can be taken, it must appear;

1. That the use to which it is to be applied is a use authorized by law;
2. That the taking is necessary to such use;
3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use; provided, that where such property has been so appropriated by any individual, firm or private corporation, the use thereof for a public street or highway of a municipal corporation, or the use thereof by a municipal corporation for the same public purpose to which it has been so appropriated, shall be deemed more necessary uses than the public use to which such property as been already appropriated.

History: Enacted March 11, 1872; amendment approved April 5, 1911, Stats. and Amdts. 1911, p. 282, repealing all acts and parts of acts in conflict, p. 623; June 10, 1913, Stats. and Amdts. 1913, p. 549. In effect August 10, 1913.

EMINENT DOMAIN—FACTS NECESSARY TO CONDEMNATION.

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| <ol style="list-style-type: none"> 1, 2. Authorized public use—Evidence. 3. Same—Extent of inquiry. 4-6. Same—Power of court to determine. 7. Same—Same—Code commissioners' note. 8. Same—Same—Railroads concern the public interest as matter of legal judgment. 9, 10. Same—Same—Roads are among public uses declared by legislature—Court can not inquire into necessity. 11. Same—Same—Where the public use is declared by general statute. | <ol style="list-style-type: none"> 12, 13. Same—Same—Where public use is declared by special statute. 14. Construction of section—Head-note to be considered. 15. Same—Subdivision 2. 16. Same—Subdivision 3. 17. Highway—Pleading—Determination as to necessity. 18. Same—Determination by board of supervisors—Conclusive. 19. Issues presented—Verdict and damages—Necessity for further findings. 20. Necessary to public use. 21-24. Same—Anticipated needs to be considered. |
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25. Burden of proof—Upon the plaintiff.
26. Same—Jury must determine whether taking is necessary for use stated.
- 27-30. Same—Location most compatible with public good.
31. Same—More necessary public use.
32. Same—Same—Provision not applicable, when.
33. Same—Necessity of public use need not be proved.
34. Same—Public convenience—Is not such a necessity as authorizes the exercise of the right.
35. Same—Same—Question of fact.
36. Same—Saving of expense.
37. Proof of incorporation of municipality—When plaintiff.
38. Terms upon which the right of eminent domain may be enforced.

See, ante, § 1237 and note.

1. **Authorized public use—Evidence.**—Mere fact of existence of corporation plaintiff, organized for purpose of operating railroad, proves no more than would existence of natural person seeking to condemn under authority of statute.—*Madera R. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27, 30.

2. Mere fact of organization and existence of corporation to build a railroad to connect with an existing railroad and to be a branch thereof, does not render such use not a public one, or the fact that all the stockholders in such corporation are stockholders in the existing railroad's corporation, does not render the use a private one.—*Madera R. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27.

As to authorized use, see, ante, § 1238 and note.

As to when question of existence of public use may be determined by courts, see notes 42 Am. St. Rep. 406, 407; 88 Am. St. Rep. 926-946; brief 70 L. R. A. 473.

3. **Same—Extent of inquiry.**—Good faith of corporators of plaintiff corporation can not be inquired into in proceedings in eminent domain, for purpose of determining public or private character of use.—*Madera R. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27, 31.

4. **Same—Power of court to determine.**—It is the function of legislative department to determine in first instance what shall constitute a public use and whether any private property shall be taken for such use. . . . It is not to be held, however, that mere declaration by legislature that object for which private property may be taken is public use will preclude owner from contesting right to deprive him of his property. If it is sought to condemn property for use which is evidently private, or to accomplish some purpose which is not of public character, courts will disregard legislative declaration that such use is pub-

lic. Declaration by legislature is entitled to great consideration, and if purpose for which condemnation is sought is clearly for public use, or one which in ordinary acceptance or experience expresses public use, it will be conclusive upon the judiciary; but if it is clear that it is for private purpose, legislative declaration will be of no avail. So, too, if it can be shown by extrinsic evidence that end sought to be accomplished is not of public character, but is solely for private purposes, condemnation will be denied as being in excess of legislative power.—*County of San Mateo v. Coburn*, 130 Cal. 631, 634, 63 Pac. 78, 621; *Lindsay Irr. Co. v. Mehrrens*, 97 Cal. 676, 679, 32 Pac. 802; *Consolidated Channel Co. v. Central Pac. R. Co.*, 51 Cal. 269, 273.

5. Determination as to whether or not right of eminent domain should be exercised, and as to what lands are necessary to be taken in the exercise of that right, is political and legislative question and not judicial one. Its determination rests exclusively with legislature or with such subordinate legislative bodies as it may be properly devolved upon, and question of whether exercise of power is wise or not is one with which judicial department has no concern. Question as to whether a given use is in fact a public use may be inquired into by courts, but that question determined in the affirmative, the power of the court is confined to seeing to it that burdens cast upon citizen are in conformity with methods prescribed by legislature, and that those methods are not in conflict with fundamental rights of the people.—*Wulzen v. Board of Supervisors*, 101 Cal. 15, 21, 40 Am. St. Rep. 17, 35 Pac. 353; *County of Siskiyou v. Gamlich*, 110 Cal. 94, 98, 42 Pac. 468; *Pool v. Simmons*, 134 Cal. 621, 625, 66 Pac. 872.

6. When legislature has determined a given purpose to be a public purpose the courts will so consider it unless they can see at first blush that it is not possible that it could be such.—*Stockton & V. R. Co. v. City of Stockton*, 41 Cal. 147, 175.

7. **Same—Same—Code commissioners' note.**—"There is no doubt that legislature has power to declare that taking of property is necessary or expedient. There is a question, however, as to whether action of legislature in declaring certain use to be public use can be reviewed by courts. On this question authorities are conflicting. Above section does not conflict with either view of case, leaving question open."

8. **Same—Same—Railroads concern public interest as matter of legal judgment;** and however that use may be opposed to fact in the case at bar makes no difference, action of legislature on the question not being open to review by the judicial department of the government.—*Napa Valley R. Co. v. Napa County*, 30 Cal. 435, 437; *Stockton & V. R. Co. v. City of Stockton*, 41 Cal. 147, 169, 178, 192; *Madera R. Co. v.*

Raymond Granite Co., 3 Cal. App. 668, 87 Pac. 27, 29.

9. **Same—Same—Roads are among public uses declared by legislature—Court can not inquire into necessity for highway, its location and extent, as these are matters of political and legislative character.** In the case of roads the statute has established a tribunal for determining these questions—the board of supervisors. If this tribunal proceeds in accordance with provisions of statute it acquires jurisdiction to determine these questions, and its determination is not subject to collateral attack. In a proceeding thereafter by the public to condemn right of way for such public road court is not authorized to review action of board of supervisors in determining these questions.—*County of San Mateo v. Coburn*, 130 Cal. 631, 635, 63 Pac. 78, 621; *Madera R. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27, 29.

10. It is the province and is made the duty of board of supervisors to decide the questions whether use to which land is to be applied is use authorized by law and that taking is necessary to such use, in all cases where private property is taken for highway purposes, under sections 2681, etc., of the political code. Necessity of use, its public character, route and termini of road, land necessary therefor, and apparent ownership thereof are to be determined by that body before steps can be initiated in courts for its condemnation for road purposes.—*Tehama County v. Bryan*, 68 Cal. 57, 63, 8 Pac. 673.

11. **Same—Same—Where public use is declared by general statute, enumerating the many objects that are thus designated, courts are not precluded from determining from all circumstances whether or not in the particular case the purpose is a public use.**—*Madera R. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27, 30.

12. **Same—Same—Where public use is declared by special statute.**—A distinction is taken between cases where legislature has by special act authorized taking of property for particular purposes and cases where public use is declared by general statute, enumerating the many objects that are thus designated. Amongst cases concerning the former class are: *Napa Valley R. Co. v. Napa County*, 30 Cal. 435; *Stockton & V. R. Co. v. City of Stockton*, 41 Cal. 147; *Contra Costa Coal Mines R. Co. v. Moss*, 23 Cal. 324; *Madera R. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27.

13. Where public character of railroad has received special recognition by passage of a special act courts will not undertake to determine whether use is in fact a public or private use.—*Contra Costa Coal Mines R. Co. v. Moss*, 23 Cal. 324, 327.

14. **Construction of section—Head-note to be considered.**—The head-note to above section is a part of the law and should be consulted in determining the will of the

legislature.—*San Joaquin & Kings River Canal & Irr. Co. v. Stevenson*, 26 Cal. App. 274, 277, affirmed by the Supreme Court, 26 Cal. App. 285, 147 Pac. 258.

15. **Same—Subdivision 2.**—The provisions of subdivision 2 are modified by subdivision 4 of section 1240, ante, which was enacted to meet the specifically designated case where it is proposed to condemn land already subject to public use.—*City of Los Angeles v. Los Angeles Pac. Co.*, 31 Cal. App. 100, 159 Pac. 992.

16. **Same—Subdivision 3.**—Land can only be taken for a public use, and if, in fact, the plaintiff claiming a right to condemn land for a public use really intends to devote it to a private use, this, if proven, would be sufficient to defeat the action.—*Vallejo & Northern R. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

17. **Highway—Pleading—Determination as to necessity.**—Under the provisions of the above section as it was amended in 1913, in an action brought on behalf of a county to enforce condemnation of a strip of land for public road purposes it is not necessary that it should appear by the allegations of the complaint that the board of supervisors had in a formal way by resolution declared the existence of the public necessity for the laying out of the road and the taking of the property, where it is alleged that all the steps required to be taken by sections 2681, etc., of the Political Code, from the filing of a petition by freeholders, including hearing on report of viewers, and the fixing of damages by the board, had been taken by the board of supervisors.—*Riverside County v. Alberhill Coal & Clay Co.*, 34 Cal. App. 538, 168 Pac. 152.

18. **Same—Determination by board of supervisors—Conclusive.**—The determination by the board of supervisors, after compliance with the provisions of sections 2681, etc., of the Political Code to estop a public road, is conclusive as to the necessity for such a road and as to the location of the road, and the amendment of 1913 to the above section has in no wise changed the law in this respect.—*Riverside County v. Alberhill Coal & Clay Co.*, 34 Cal. App. 538, 168 Pac. 152.

19. **Issues presented—Verdict and damages—Necessity for further findings.**—In an eminent domain proceeding, the verdict of a jury as to the value of the land sought to be taken does not constitute a decision in the cause, but the court is required, under the provisions of the above section, to determine the fact that there exists the necessity for subjecting the property to public use, regardless of whether the answer of the defendant constitutes a denial of such allegation of the complaint.—*Hinshaw v. Superior Court*, 45 Cal. App. 105, 187 Pac. 41, following the doctrine in *San Joaquin & Kings River Canal & Irr. Co. v. Stevenson*, 30 Cal. App. 405, 158 Pac. 768.

20. Necessary to public use.—There is no doubt of proposition that before land can be taken for public use it must appear that taking is necessary for such use.—*Spring Valley Water Works v. Drinkhouse*, 92 Cal. 528, 532, 28 Pac. 681.

21. Same—Anticipated needs to be considered.—Where water company supplying city with water is seeking to condemn land which it claims is necessary for reservoir site, not only present demands of the public upon plaintiff, but those which may be fairly anticipated on account of the future growth of the city, are to be considered.—*Spring Valley Water Works v. Drinkhouse*, 92 Cal. 528, 532, 28 Pac. 681.

22. As to necessity of right of way for railroad, existence of public use and the location through defendant's land establish the necessity.—*San Francisco & S. J. V. R. Co. v. Leviston*, 134 Cal. 412, 415, 66 Pac. 473.

23. In condemning land for use as reservoir site for purposes of supplying city with water, future needs of city may be considered in determining necessity of condemnation.—*City of Los Angeles v. Pomerooy*, 124 Cal. 597, 646, 57 Pac. 585.

24. When city or town decides by appropriate proceedings that an alley is desirable, and institutes condemnation proceedings for right of way therefor, it is only required to prove that taking of the property sought to be condemned is necessary for purposes of an alley.—*City of Santa Ana v. Brunner*, 132 Cal. 234, 235, 237, 64 Pac. 287.

25. Burden of proof—Upon plaintiff.—Evidence must be sufficient to show that land is reasonably acquired for purpose of effecting object or carrying on business for which plaintiff was organized.—*Spring Valley Water Works v. Drinkhouse*, 92 Cal. 528, 532, 28 Pac. 681.

26. Same—Jury must determine whether taking is necessary for use stated in complaint, where jury has not been waived.—*Wilmington C. & R. Co. v. Dominguez*, 50 Cal. 505, 506.

27. Same—Location most compatible with public good.—Failure to prove that location of sewer is most compatible with greatest public good and least private injury is not ground for nonsuit where there is no evidence that such sewer (an outfall sewer leading from city to sewer farm) as it is proposed to construct it, will be more of a nuisance than any other sewer would be. Sewers are in fact a necessary evil, but when they are planned and constructed with reasonable regard to results of sanitary teachings they are authorized by statute.—*City of Pasadena v. Stimson*, 91 Cal. 238, 254, 255, 27 Pac. 604.

As to showing that location of right of way is most compatible with greatest public benefit and least private injury, see, ante, § 1240, subdivision 5 and note; also, post, § 1242 and note.
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28. Fact, if proved, that another equally desirable and convenient line could be had by changing it to another place and passing over other grounds does not show that land sought to be taken is not necessary for use of plaintiff.—*California Cent. R. Co. v. Hooper*, 76 Cal. 404, 412, 18 Pac. 599. See *Rialto Irr. Dist. v. Brandon*, 103 Cal. 384, 387, 37 Pac. 484.

29. Evidence offered to prove that route of proposed sewer outfall is not so good as one that might have been selected, and that it would be greater private injury, should not be excluded. So held where offered testimony was to effect that witness had surveyed a route 1,432 feet shorter than that proposed, upon a better grade, through lands not so thickly settled.—*City of Pasadena v. Stimson*, 91 Cal. 238, 259, 27 Pac. 604.

30. When attempt is made to show that location is unnecessarily injurious, proof ought to be clear and convincing, for otherwise no location could ever be made. Selection of particular route is committed in first instance to person in charge of use, and unless there is something to show an abuse of discretion, propriety of his selection ought not to be questioned.—*City of Pasadena v. Stimson*, 91 Cal. 238, 255-257, 27 Pac. 604.

31. Same—More necessary public use.—That question whether or not intended use is "a more necessary public use" is question for legislature to decide, and not courts, has been urged. Conceding that such may be general rule, court held, concerning particular use in question (use of portion of public road by railroad), that legislature has specifically and directly authorized railroads to "construct their roads across, along, or upon . . . any . . . avenue or highway."—*Madera R. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27, 31. See *Arcata v. Arcata & M. R. Co.*, 92 Cal. 639, 28 Pac. 675; *Southern Pac. R. Co. v. Ferris*, 93 Cal. 263, 18 L. R. A. 510, 28 Pac. 828; *Montgomery v. Santa Ana Westminster R. Co.*, 104 Cal. 186, 43 Am. St. Rep. 89, 25 L. R. A. 654, 37 Pac. 786.

See, post, § 1244 and note pars. 35-37.

As to taking for more necessary public use, see, ante, § 1240, subdivisions 3, 4, and note.

32. Same—Same—Provision not applicable, when.—Where same land can be subjected to second servitude without disturbing the first, subdivision 3 has no application. Where it is clearly shown that sewer when constructed would not interfere with use of highway and that during its construction such use would not be seriously interrupted, there is no necessity of showing that new use would be superior to one to which property was already appropriated.—*Pasadena v. Stimson*, 91 Cal. 238, 256, 27 Pac. 604.

33. Same—Necessity of public use need not be proved.—When city or town decides

for itself, as it may do, that a sewer is desirable, it is not bound to prove that such sewer is necessary, but only that taking of property it seeks to condemn is necessary for construction of the sewer. When it shows that use to which property is to be applied is public use, inquiry on that head is closed. Facts proved held sufficient.—*City of Pasadena v. Stimson*, 91 Cal. 238, 253, 27 Pac. 604.

34. Same—Public convenience—Is not such a necessity as authorizes the exercise of the right of eminent domain. A finding that a taking of land would be a great convenience does not satisfy the requirements of code.—*Spring Valley Water Works v. San Mateo Water Works*, 64 Cal. 123, 131, 28 Pac. 447.

35. Same—Question of fact.—Necessity of taking land for public use is question of fact to be determined by court or jury in view of all the evidence in the case.—*Spring Valley Water Works v. Drinkhouse*, 92 Cal. 528, 532, 28 Pac. 681.

36. Same—Same—Saving of expense.—A corporation in charge of a public use can not condemn whatever it may find convenient and profitable to acquire on the ground merely that it may save expense.—*Spring Valley Water Works v. San Mateo Water Works*, 64 Cal. 123, 134, 28 Pac. 447.

As to procedure in eminent domain.—See *Madera County v. Raymond Granite Co.*, 139 Cal. 128, 133, 72 Pac. 915.

37. Proof of incorporation of municipality—When plaintiff, is unnecessary. Court will take judicial notice of fact.—*City of Pasadena v. Stimson*, 91 Cal. 238, 256, 27 Pac. 604.

38. Terms upon which the right of eminent domain may be enforced and the manner in which it shall be exercised are provided for in above section and sections 1242-1263, post.—*Moran v. Ross*, 79 Cal. 159, 161, 21 Pac. 547.

§ 1242. PARTIES MAY MAKE LOCATION. MAY ENTER TO MAKE SURVEYS. In all cases where land is required for public use, the state, or its agents in charge of such use, may survey and locate the same; but it must be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of section twelve hundred and forty-seven. The state, or its agents in charge of such public use, may enter upon the land and make examinations, surveys, and maps thereof, and such entry shall constitute no cause of action in favor of the owners of the land, except for injuries resulting from negligence, wantonness, or malice.

History: Enacted March 11, 1872.

EMINENT DOMAIN—LOCATION AND SURVEY.

1. Agents of state—Acts presumed lawful.
2. Greatest good to public—And least injury to individual.
3. Location injurious—Proof to be clear.
4. Map—Should indicate precise position of line.
5. Railroad company trespasser—Entering without condemnation proceedings.
6. Selection proper—If no abuse of discretion.
7. Two years' limitation to action for damages.

See, ante, § 1237 and note.

1. Agents of state—Acts presumed lawful.—The state or its agents in charge of a public use must necessarily survey and locate the land to be taken, and are by statute expressly authorized to do so. Exercising as they do, a public function under express statutory authority, it would seem that in this particular their acts should, in the absence of evidence to the contrary, be presumed correct and lawful.—*City of Pasadena v. Stimson*, 91 Cal. 238, 255, 27 Pac. 604.

2. Greatest good to public—And least injury to individual.—The question of necessity in a given case involves a consideration of facts which relate to the public, and also to the private citizen whose property may be injured. The greatest good on the one hand and the least injury on the other are the questions to be determined, and these questions are for the jury in passing on the question of necessity.—*City of Santa Ana v. Gildmacher*, 133 Cal. 395, 400, 65 Pac. 883.

3. Location injurious—Proof to be clear.—When an attempt is made to show that the location made is unnecessarily injurious, the proof ought to be clear and convincing; for otherwise no location could ever be made.—*City of Pasadena v. Stimson*, 91 Cal. 238, 256, 27 Pac. 604.

4. Map—Should indicate precise position of line.—This statute permits an entry upon land desired to be taken for public use to "survey and locate the same," and therefore there should be no difficulty in making a map that should show precisely the location of the road in all its parts. By map and survey is to be understood not only a de-

lineation on paper or other material, giving a general or approximate idea of the situation of the road, but also such full and accurate notes and data as are necessary to furnish complete means for identifying and ascertaining the precise position of every part of the line with courses and distances throughout, so that there can be no doubt where any portion of it is to be joined. A map can be made to contain all these data, so as to need no reference to field notes, but the information must exist somewhere.—*San Francisco & S. J. V. R. Co. v. Gould*, 122 Cal. 601, 603, 55 Pac. 411.

5. Railroad company trespasser—Entering without condemnation proceedings.—It is a mistaken construction of the statute to suppose that a railroad corporation can enter upon land and construct its road under sanction of law before commencing condemnation proceedings. When it does so it becomes a trespasser, as would a natural person under like circumstances, and the ordinary common-law remedies are open to the owner.—*Robinson v. Southern Cal. R. Co.*, 129 Cal. 8, 11, 61 Pac. 947.

6. Selection proper—If no abuse of discretion.—The selection of a particular route is committed in the first instance to the person in charge of the use, and unless there is something to show an abuse of discretion, the propriety of his selection ought not to be questioned; for certainly it must be presumed that the state or its agent has made the best choice for the public, and if this occasions peculiar and unnecessary damage to the owners of the property affected, the proof of such damage should come from them.—*City of Pasadena v. Stimson*, 91 Cal. 238, 255, 27 Pac. 604.

7. Two years' limitation to action for damages.—An action for damages for taking possession of a strip of land and constructing thereon a railroad track,—if it should be said that the complaint alleges a lawful occupation, i. e., under an implied permission and not under any statutory right as for condemnation, and not by grant or donation,—it would fall under the two-year provision relating to contracts not in writing, and the action would be barred by subdivision 1, section 339, ante.—*Robinson v. Southern Cal. R. Co.*, 129 Cal. 8, 11, 61 Pac. 947.

§ 1243. JURISDICTION IN SUPERIOR COURT. All proceedings under this title must be commenced in the superior court of the county in which the property sought to be taken is situated; provided, that where, of any one piece or article of property, or of any one interest in or to property, sought to be taken, a portion thereof is situated in one county and another portion thereof is situated in another county, the plaintiff may commence such proceedings in any of the counties where any portion of such piece or article of property, or interest in or to property, is situated, and the county so selected is the proper county for the trial of such proceedings;

[When plaintiff is county, etc.] and provided, further, that when the plaintiff is a county, city and county, incorporated city or town, or a municipal water-district, and the property sought to be taken is situated in more than one county, then the proceeding may be brought, at the option of the plaintiff, in any county wherein is situated any of the property sought to be taken, and said proceeding may be tried in said county, with reference to any property situated in the state; provided, however, that the right in this section granted to any plaintiff to commence and try an action in any county other than the county in which may be located any property in said action sought to be taken, shall be limited to property which is owned by the defendant, or by the defendant in common with the other defendants, or some of them.

[How proceedings are commenced.] All such proceedings must be commenced by filing a complaint and issuing a summons. The provisions of this code for the change of place of trial of actions shall apply to proceedings under this title except as in this section otherwise provided. Nothing herein contained shall be construed to repeal any law of this state giving jurisdiction to the state railroad commission to ascertain the just compensation which must be paid in eminent domain proceedings.

A lis pendens shall be filed at the time of the commencement of the action in every county in which any of the property to be affected shall be located.

History: Enacted March 11, 1872; amendment approved April 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 118; May 29, 1913, Stats. and Amdts. 1913, p. 349. In effect August 10, 1913.

EMINENT DOMAIN—JURISDICTION OF SUPERIOR COURT.

1. Defendant claiming interest nonresident—Venue.
2. Jurisdiction of superior court herein—From constitution.
- 3, 4. Proceeding in county in which land situated.
5. Same—Not commenced until summons issued.

See, ante, § 1237 and note.

1. **Defendant claiming interest nonresident—Venue.**—In an action by a power company to condemn land for purposes of its use under the provisions of the act regulating eminent domain in which a non-resident claims an interest in the land sought to be taken, the county in which the property sought is located is the only county in which the action can properly be brought under the provisions of the above section.—*Mono Power Co. v. City of Los Angeles*, 33 Cal. App. 675, 166 Pac. 387.

2. **Jurisdiction of superior court herein—From constitution.**—It is from the constitution, the provisions of which are repeated in section 76, ante, and from title VII, part III, ante, and not from any section or provision of the Municipal Government Act, that the superior court derives its jurisdiction in and over proceedings had in the exercise of the power of eminent domain.—*Bishop v. Superior Court*, 87 Cal. 226, 232, 25 Pac. 435.

3. **Proceedings in county where land situated.**—The language of above section means something more than that the proceeding must be commenced in the superior court. There are strong reasons why such proceeding should be had in the county where the land sought to be condemned is situated. The compensation for the land sought to be taken is to be determined on testimony, and the witnesses most competent to speak upon this subject will usually be found in the county referred to.—*California So. R. Co. v. Southern Pac. Co.*, 65 Cal. 394, 395, 4 Pac. 344; *California So. R. Co. v. Southern Pac. R. Co.*, 65 Cal. 409, 410, 4 Pac. 388; *Fresno Nat. Bank v. Superior Court*, 83 Cal. 491, 496, 24 Pac. 157. See *Buck v. City of Eureka*, 97 Cal. 135, 140, 31 Pac. 845.

4. By above section it is provided that all proceedings of this kind "must be brought in the superior court of the county in which the property is situated," and this implies that it must also be tried there, unless transferred by the court, to another county, as required or authorized by the provisions of section 394, ante.—*City of Santa Rosa v. Fountain Water Co.*, 138 Cal. 579, 580, 71 Pac. 1123, 1136.

5. **Same—Not commenced until summons issued.**—Above section provides that the proceedings "must be commenced by filing a complaint and issuing a summons thereon." Under this language, the proceedings are not commenced until the summons is issued.—*Pacific Cent. R. Co. v. Porter*, 74 Cal. 261, 263, 15 Pac. 774; *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 647, 57 Pac. 585.

§ 1244. THE COMPLAINT AND ITS CONTENTS. The complaint must contain:

1. **The name of the corporation, association, commission, or person in charge of the public use for which the property is sought, who must be styled plaintiff.**
2. **The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants.**
3. **A statement of the right of the plaintiff.**
4. **If a right of way be sought, the complaint must show the location, general route, and termini, and must be accompanied with a map thereof, so far as the same is involved in the action or proceeding.**
5. **A description of each piece of land, or other property or interest in or to property, sought to be taken, and whether the same includes the whole or only a part of an entire parcel or tract or piece of property, or interest in or to property. All parcels of land, or other property or interest in or to property, lying in the county, and required for the same public use, may be included in**

the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of the parties.

[Condemnation for sewer.] When application for the condemnation of a right of way for the purpose of sewerage is made on behalf of a settlement, or of an incorporated village or town, the board of supervisors of the county may be named as plaintiff.

History: Enacted March 11, 1872; amendment approved March 24, 1874, Code Amdts. 1873-4, p. 355; April 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 118; June 10, 1913, Stats. and Amdts. 1913, p. 555. In effect August 10, 1913.

EMINENT DOMAIN—COMPLAINT, AND ITS CONTENTS.

1. Complaint in eminent domain—As to sufficiency of.
2. Same—Sufficiently designates defendant as known owner.
- 3, 4. "Description of each piece of land sought to be taken."
- 5-7. Same—Rule of pleading in these cases.
8. Description of general route and proposed termini of right of way.
- 9-11. Same—Allegations as to location.
12. Same—Must show definite location on ground.
13. Failure to agree with owner as to price—In general.
- 14, 15. Same—Failure to allege attempt and inability to agree.
16. Grant of right of way by city to use streets.
17. Joinder of actions.
18. Same—Granting or denying motion for separate trial—Discretionary.
19. Location compatible with the greatest public good.
20. Manner in which plaintiff proposes to construct road.
21. Miscellaneous complaints.
- 22-24. Same—For complaint held sufficient.
25. Same—For complaint and map containing insufficient description.
26. More necessary public use.
- 27, 28. Necessity of taking land.
29. Parties defendant—Complaint must contain names of all owners and claimants.
30. Same—Determined by whom.
31. Same—Executrix proper party defendant.
32. Same—Where two corporations institute proceedings against the same person for the same land.
33. Parties plaintiff—County proper party plaintiff when.
34. Same—Substituted party.
- 35-37. Public character of use must appear.
38. Requirement of statute—Must be fully and fairly complied with.

39. School district—Condemnation of land for gymnasium—Complaint, necessary allegations.

40. Same—Same—Same—Code requirement—Statement of right of plaintiff—Meaning of.

41. Source of right.

42. Tender of compensation.

43. Value of land to be taken—Damage—Need not be alleged.

See, ante, § 1237 and note.

1. **Complaint in eminent domain—As to sufficiency of.**—"The complaint is sufficient. It contains all of the allegations required by above section. It declares that the use sought of the lands is a public use and that the plaintiff is intrusted with and in charge of such a public use. The action seeks to condemn the whole section and not rights of way thereover. It was unnecessary therefore that the complaint should conform to the requirements of above section which is applicable to cases where a right of way only is sought." This is a misleading statement and inartificially drawn, inasmuch as it is difficult to understand that if the complaint did contain all the allegations of the section and was declared sufficient why it should be held that the same complaint need not conform to above section. Apparently the last sentence is a mistake, as only subdivision 4 refers to cases where a right of way is sought.—Deseret Water, Oil & Irr. Co. v. California, 167 Cal. 147, 138 Pac. 981.

2. **Same—Sufficiently designates defendant as known owner** where it states name of defendant as corporation duly organized and acting under laws of state and describes proposed right of way as being "located through the lands of defendant."—California So. R. Co. v. Colton Land & Water Co., 2 Cal. Unrep. 244, 2 Pac. 38.

3. **"Description of each piece of land sought to be taken"** obviously means such description as will readily and conveniently identify the land before the road is constructed, and upon which alone its construction is to be authorized by the judgment.—San Francisco & S. J. V. R. Co. v. Gould, 122 Cal. 601, 602, 55 Pac. 411.

4. There is nothing more obviously essential to plaintiff's case than a sufficient description of that which it proposes to acquire by condemnation. If defendant makes

default, the plaintiff must still have a valuation made and tender the amount to the defendants as a consideration for property acquired through the proceeding. And the judgment, which can not include what is not in the pleadings, constitutes its muniment of title. If it has sufficiently described what it wishes to take, it may require the defendants to set out the extent of their interest in that, but plaintiff can not put upon defendants the burden of determining what or how much the plaintiff requires to accomplish its purpose. Plaintiff must specify with exactness the rights it seeks, not ask that defendants be compelled to state what rights they claim and ask for balance. It was so held in action where plaintiff sought to condemn all rights of each defendant to waters of creek, whether as riparian owners or acquired by appropriation, adverse use, or prescription, except for domestic use and reasonable irrigation of their riparian lands. Such description is too uncertain.—*Aliso Water Co. v. Baker*, 95 Cal. 268, 270, 271, 30 Pac. 537.

5. Same—Rule of pleading in these cases requires plaintiff to set out an accurate and intelligible description of the property or the particular interest in the property, which, even in case of default, must be valued before it is condemned.—*City of Los Angeles v. Pomeroy*, 124 Cal. 597, 613, 57 Pac. 585.

6. Complaint which shows that object of proceedings is to condemn all the estate and interest of defendants in certain three hundred and fifteen acres, which interest is alleged to be a fee-simple estate, subject only to asserted ownership by plaintiff of exclusive right to use of all the waters of river flowing through such land, contains sufficiently certain description of land sought to be condemned, where interest claimed by the plaintiff is described with certainty.—*City of Los Angeles v. Pomeroy*, 124 Cal. 597, 614, 57 Pac. 585.

7. For complaint containing sufficient description of land in action by city to condemn land for use as public street, see *City of Los Angeles v. Waldron*, 65 Cal. 283, 285, 3 Pac. 890.

8. Description of general route and proposed terminal of right of way of a sewer which shows that the termini of the sewer are at the city of Pasadena and at sewer farm, which is described as consisting of certain subdivisions of the government survey, and which also shows the particular route and is accompanied by a map of so much of the route as is involved in the proceeding, is sufficient. It is unnecessary to enter into minute particulars, showing, for instance, the exact location of the sewer with reference to the center line of a street.—*City of Pasadena v. Stimson*, 91 Cal. 238, 252, 253, 27 Pac. 604.

9. Same—Allegations as to location, general route, and terminal held to be sufficient. It is not necessary that the point of com-

mencement of the course located should be very exactly determined, and in above description there is nothing inconsistent with the alleged termini in the allegations as to location and general route.—*San Francisco & S. J. V. R. Co. v. Leviston*, 134 Cal. 412, 414, 66 Pac. 473.

10. An allegation in complaint as to terminal is sufficient if it follow the language contained in a valid certificate of incorporation. A complaint which states the "general route" and in which the termini are stated to be National City and "a connection with the Atlantic and Pacific Railroad Company at or near the thirty-fifth parallel of north latitude in the state of California" is sufficient.—*California So. R. Co. v. Southern Pac. R. Co.*, 67 Cal. 59, 61, 7 Pac. 123.

11. For sufficient description of location, general route, and terminal of railroad in action to condemn right to cross tracks of other railroad, see *Boca & L. R. Co. v. Sierra Valleys R. Co.*, 2 Cal. App. 546, 84 Pac. 298, 302.

12. Same—Must show definite location on ground.—Allegation "that said railroad has been definitely located by plaintiff over and through the parcel of land hereinafter described," where it is not shown or alleged that it was marked upon ground by stakes, or in any manner other than the mention of two "engineers' stations," nearly a mile apart, with no intimation as to whether the line between them is straight or curved, though map shows that a portion of the line is curved, but the radius of the curve, or where it begins, can not be accurately determined by map, is insufficient.—*San Francisco & S. J. V. R. Co. v. Gould*, 122 Cal. 601, 604, 55 Pac. 411.

13. Failure to agree with owner as to price.—In general.—Under general railroad law of 1861 it was essential for company seeking to condemn land for its purposes to have sought and failed to buy the land from the owner before instituting condemnation proceedings. Allegations stating such seeking and failure were necessary. But law was amended in 1863 so as to no longer make this inability to contract a condition on ground of jurisdiction.—*Contra Costa Coal Mines R. Co. v. Moss*, 23 Cal. 323, 325.

14. Same—Failure to allege attempt and inability to agree, even if such attempt and inability be by the Municipal Incorporation Act made preliminary requisites to proceeding in eminent domain by city, do not affect jurisdiction of court to entertain such suit, and writ of prohibition will not lie to arrest such proceeding. If absence of such averment bars right of plaintiff to maintain action, it is mere matter of defense, either by demurrer or plea. Error in determining such question is merely error in exercise of jurisdiction and subject to review on appeal.—*Bishop v. Superior Court*, 87 Cal. 226, 233, 25 Pac. 435.

15. In an action by a municipal corporation to condemn a right of way for a sewer,

it is unnecessary for complaint to contain an allegation of class to which city belongs, and, if of fifth or sixth class, of an effort to agree with the owner as to price to be paid for land. Provision of section 870 of Municipal Incorporation Act, requiring cities of such class to make an effort to agree with owner, is unconstitutional, as being a special law interfering with the uniform operation of the laws. While there is no doubt of the authority of the legislature to make an unavailing effort on the part of the person in charge of the use to agree with the owner of the property he seeks to acquire a condition precedent to the institution of any proceeding to condemn, there is no such provision in the general law of this state upon this subject. *City of Pasadena v. Stimson*, 91 Cal. 238, 246, 249, 252, 27 Pac. 604.

16. Grant of right of way by city to use streets, alleys, etc., need not be alleged in complaint in action brought by railroad company to condemn rights which owners of lands lying adjacent to such streets may have therein. Grant by city is not prerequisite to right to condemn interests of abutting owners.—*California So. R. v. Kimball*, 61 Cal. 90, 91.

17. Joinder of actions.—Proceedings to condemn two or more parcels for the purpose of a right of way may be united, although the result may not be to transfer the fee, or any estate in the lands, but only to impress them with an easement, and a proceeding to acquire a right of way across the right of way of defendant and to acquire a right of way over lands of defendant may be united.—*California So. R. Co. v. Southern Pac. R. Co.*, 67 Cal. 59, 61, 7 Pac. 123.

18. Same.—Granting or denying motion for separate trial.—Discretionary with trial court, and such order will not be reviewed on appeal where abuse of discretion is not shown.—*San Luis Obispo County v. Simas*, 1 Cal. App. 175, 182, 81 Pac. 972.

19. Location compatible with the greatest public good.—No allegation as to compatibility of location of plaintiff's railroad with the greatest public good and least private injury is required in complaint.—*San Francisco & S. J. V. R. Co. v. Leviston*, 134 Cal. 412, 416, 66 Pac. 473.

20. Manner in which plaintiff proposes to construct road need not be stated in complaint in action by county to condemn land for purpose of public road.—*San Luis Obispo County v. Simas*, 1 Cal. App. 175, 178, 81 Pac. 972.

21. Miscellaneous complaints.—Complaint by irrigation district, which, after alleging plaintiff's organization into an irrigation district, and the purpose of its organization, shows that the object sought by the use is to provide water for irrigating lands within the district, particularly describing such lands; that the defendants own the land over which the right of way is sought,

particularly describing it, and that such land adjoins plaintiff's district and constitutes its boundaries on two sides; that in order to properly irrigate the lands in the district it is necessary to construct the pipe line, which is particularly described, across defendant's land at the point designated; and that the right of way is sought for the purpose of establishing and maintaining such pipe line, and which is accompanied by proper maps, which are made part of it, showing survey and delineation of the proposed line upon the ground, is sufficient.—*Rialto Irr. Dist. v. Brandon*, 103 Cal. 384, 386, 37 Pac. 484.

22. Same.—For complaint held sufficient in action to condemn right of way for alley, see *City of Santa Ana v. Brunner*, 132 Cal. 234, 235, 236, 64 Pac. 287.

23. For complaint held sufficient in proceedings brought pursuant to section 2690 of the Political Code for the purpose of condemning land for public highway, see *Tehama County v. Bryan*, 68 Cal. 57, 59-62, 8 Pac. 673; *San Luis Obispo County v. Simas*, 1 Cal. App. 175, 179, 81 Pac. 972.

24. For complaint held to be sufficient in proceeding by municipality to condemn right of way for sewer, see *Bishop v. Superior Court*, 87 Cal. 226, 232, 233, 25 Pac. 435.

25. Same.—For complaint and map containing insufficient description of land sought to be taken, see *California Cent. R. Co. v. Hooper*, 76 Cal. 404, 413, 414, 18 Pac. 599; *San Francisco & S. J. V. R. Co. v. Gould*, 122 Cal. 601-604, 55 Pac. 411.

26. More necessary public use.—In action by one water company to condemn certain lands belonging to another water company, complaint which alleges that defendant is corporation organized under laws of state for purpose of supplying city of Oakland and its inhabitants with pure fresh water, and that defendant is the owner of the property sought to be taken, but does not allege that property in question is used by defendant in supplying Oakland or its inhabitants with water, or that it is appropriated to any other public use, does not present question which can arise on demurrer whether property appropriated to public use can be taken, unless for more necessary public use than that to which it has been already appropriated.—*Lake Pleasanton Water Co. v. Contra Costa Water Co.*, 67 Cal. 659, 660, 8 Pac. 501.

See, ante, § 1241 and note pars. 31, 32.

27. Necessity of taking land.—In proceeding by city to condemn land for public street the necessity of taking defendant's land is sufficiently shown by allegation "that the city council of said city on the fourth day of November, 1882, duly passed and adopted an ordinance in writing," directing proceedings to be taken to condemn certain property of defendants for purpose of widening designated street, and "that it is now necessary to condemn said land for public use agreeably to the provisions of"

said ordinance."—City of Los Angeles v. Waldron, 65 Cal. 283, 284, 3 Pac. 890.

28. For complaint insufficient under statute for opening of city street, see *In re Grove St. in City of Oakland*, 61 Cal. 438, 448.

29. Parties defendant—The complaint must contain names of all owners and claimants of the property, if known.—City of Los Angeles v. Pomeroy, 124 Cal. 597, 609, 57 Pac. 585.

As to parties defendant, see, post, § 1246 and note pars. 1-10.

30. Same—Determined by whom.—In actions to condemn land for road purposes the board of supervisors is not judge of question as to who are proper parties to the action. All that is essential is that board should give its sanction to commencement of suit.—Monterey County v. Cushing, 83 Cal. 507, 513, 23 Pac. 700.

31. Same—Executrix proper party defendant in proceeding in eminent domain. Monterey County v. Cushing, 83 Cal. 507, 511, 512, 23 Pac. 700.

32. Same—Where two corporations institute proceedings against the same person for the same land, it may be that either company might make the other a party defendant in its suit to condemn; or, failing that, that either of the companies might intervene in the proceedings of the other, so that the question of priority might be determined in advance of a purchase by either. Should one not thus become party to other proceeding, and should judgment of condemnation be made in each proceeding, land would belong to one over whose proceeding court first acquired jurisdiction.—Lake Merced Water Co. v. Cowles, 31 Cal. 214, 217.

33. Parties plaintiff—County proper party plaintiff when the suit is a county matter, as the opening of a road. It is the practice to bring such suits in name of county, and not in name of state.—Monterey County v. Cushing, 83 Cal. 507, 511, 23 Pac. 700.

34. Same—Substituted party.—Where corporation, after commencing proceedings to condemn land for public use, consolidates its franchises, properties, rights, and privileges with other corporations, the new corporation organized upon such consolidation may be substituted as plaintiff.—California Cent. R. Co. v. Hooper, 76 Cal. 404, 405, 18 Pac. 599.

35. Public character of use must appear.—Water company which seeks to condemn right to take water for use of "farming neighborhood" should show by its complaint what the "farming neighborhood" is, so that court may determine whether proposed use is public use.—Aliso Water Co. v. Baker, 95 Cal. 268, 269, 30 Pac. 537.

36. In an action by a railroad company to condemn a right of way for its tracks, the allegation of the complaint was in effect that plaintiff was incorporated for purpose

of constructing and operating a steam railroad "for the carrying of passengers and freight . . . for hire." This was demurred to on ground that complaint did not show that it was for "public transportation," as mentioned in subdivision 4 of section 1238, ante, that property was required; but it was held that complaint was sufficient to show that property was required for public use.—San Francisco & S. J. V. R. Co. v. Leviston, 134 Cal. 412, 413, 66 Pac. 473.

37. Complaint in action brought to condemn strip of land for ditch or canal designed to conduct water for mining, irrigation, manufacturing, and household and domestic purposes, showed that "uses for which said water is intended and designed are mining, irrigation, manufacturing, and household and domestic purposes; that the line of said canal has been surveyed and located upon the ground, and marked out, etc. . . . That along said line of canal there are many valuable mining claims and a large body of undeveloped mining land, besides much agricultural land. That said mining claims can not be worked, nor can said mineral land be developed, nor can said agricultural land be profitably cultivated without water brought upon the same by artificial means. That said canal is intended to and will supply this want by the sale and distribution of the said water along its line and at its terminus at Thompson's Flat, and such is the design and intention of the plaintiff; and he avers that it is a public use, and that he is in charge thereof. . . . That the taking of a portion of said land of defendant for said use is necessary." This was held to show use to be public and to bring case within provisions of statute and constitution.—Cummings v. Peters, 56 Cal. 593, 596.

38. Requirement of statute—Must be fully and fairly complied with, as proceedings to acquire portion of defendant's land without his consent and against his will are special.—San Francisco & S. J. V. R. Co. v. Gould, 122 Cal. 601, 605, 55 Pac. 411.

39. School district—Condemnation of land for gymnasium—Complaint, necessary allegations.—In a proceeding by a high-school district to condemn a tract of land for the site of a gymnasium or athletic building, it is not essential to the sufficiency of the cause of action pleaded that the complaint should contain an allegation that the plaintiff was empowered by a valid, or by any, resolution of the board of trustees to proceed to acquire the property by condemnation for the reason that the above section does not require a statement of the adoption of such a resolution.—Kern County Union High-School District v. McDonald, 180 Cal. 7, 179 Pac. 180, following the doctrine in *Central Pac. R. Co. v. Feldman*, 153 Cal. 308, 92 Pac. 489.

40. Same—Same—Same—Code requirement—Statement of right of plaintiff—

Meaning of.—The requirement of subdivision 3 of the above section that the complaint in condemnation proceedings shall contain a statement of the right of the plaintiff, has reference only to a statement of the legal right or authority of the plaintiff to exercise the power of eminent domain, and, as against a general demurrer, a complaint complies with the mandate of the statute by alleging, in effect, that the taking was sought pursuant to the provisions of Title VII, Part VIII, of the Code of Civil Procedure.—*Kern County Union High-School District v. McDonald*, 180 Cal. 7, 179 Pac. 180, approving doctrine in *Lake Shore & M. S. R. Co. v. Baltimore & O. & C. R. Co.*, 149 Ill. 272, 285, 37 N. E. 91.

41. Source of right.—Where easement or right of way for alley is sought, complaint

need not show express grant or implied reservation or user for any length of time, or any servitude, as the source of the right is in the statute of eminent domain.—*City of Santa Ana v. Brunner*, 132 Cal. 234, 235, 236, 64 Pac. 287.

42. Tender of compensation.—Allegation and denial of tender to defendant by plaintiff of certain sum as compensation is unnecessary and raises no issues essential to case.—*City of Santa Ana v. Brunner*, 132 Cal. 234, 235, 237, 64 Pac. 287.

43. Value of land to be taken and damage need not be alleged. In California burden of proof as to value and damage is on defendant.—*California S. R. Co. v. Southern Pac. R. Co.*, 67 Cal. 59, 64, 7 Pac. 123; *Monterey County v. Cushing*, 83 Cal. 507, 510, 23 Pac. 700.

§ 1245. SUMMONS, WHAT TO CONTAIN. HOW ISSUED AND SERVED.

The clerk must issue a summons, which must contain the names of the parties, a general description of the whole property, a statement of the public use for which it is sought, and a reference to the complaint for descriptions of the respective parcels, and a notice to the defendants to appear and show cause why the property described should not be condemned as prayed for in the complaint. In all other particulars it must be in the form of a summons in civil actions, and must be served in like manner.

History: Enacted March 11, 1872.

1. Appearance by attorney-general for state.—If attorney-general appears for state in case where state is proper party, state is just as much in court as though regularly summoned.—*California & N. R. Co. v. State*, 1 Cal. App. 142, 144, 81 Pac. 971. See, ante, § 1237 and note.

As to proceedings not being commenced

until summons is issued, see, ante, § 1243 and note.

As to service of summons in actions to condemn lands belonging to state, see, ante, § 1240 subdivision 7 and note.

As to summons, generally, see, ante, §§ 407 et seq. and notes.

§ 1246. WHO MAY DEFEND. All persons in occupation of, or having or claiming an interest in any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead, and defend, each in respect to his own property or interest, or that claimed by him, in like manner as if named in the complaint.

History: Enacted March 11, 1872.

EMINENT DOMAIN—WHO MAY DEFEND.

1. Necessary and proper parties defendant—All persons claiming an interest.
2. Same—Equitable title, holder of.
3. Same—Executrix.
- 4, 5. Same—Heirs of deceased party.
6. Same—Lessee pending suit.
7. Same—Mortgagee.
8. Same—Person holding legal title.
9. Same—Tax-payer.
10. Same—Widow in personal capacity.
11. Notice—Appearance.

See, ante, § 1237 and note.

1. Necessary and proper parties defendant.—All persons claiming an interest in land to be condemned, though not named as parties defendant.—*Drinkhouse v. Spring Valley Water Works*, 87 Cal. 253, 255, 25 Pac. 420; *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 609, 57 Pac. 585.

See par. 6, this note.

As to parties defendant, see, ante, § 1244 and note pars. 29-32.

As to parties plaintiff, see, ante, § 1244 and note pars. 32, 33.

2. Same.—Equitable title, holder of not necessary party, and not entitled to defend,

it seems.—*Hidden v. Davisson*, 51 Cal. 138, 139.

See par. 7, this note.

3. **Same—Executrix** proper party defendant in action for condemnation for road purposes.—*Monterey County v. Cushing*, 83 Cal. 507, 512, 23 Pac. 700. See *Bayly v. Muehe*, 65 Cal. 345, 3 Pac. 467, 4 Pac. 486; *Hibernia Sav. & L. Soc. v. Churchill*, 128 Cal. 633, 635, 79 Am. St. Rep. 75, 61 Pac. 278.

See, also, post, § 1582 and note.

4. **Same — Heirs of deceased party** thought not to be necessary defendants, although title vests in them; executor defends for them.—*Bayly v. Muehe*, 65 Cal. 345, 3 Pac. 467, 4 Pac. 486; *Bell v. Mills*, 123 Fed. 27. See *Dickey v. Gibson*, 121 Cal. 276, 278, 53 Pac. 704.

5. **Distinguished:** *Anrud v. Scandinavian-American Bank*, 27 Wash. 16, 22, 67 Pac. 364.

6. **Same—Lessee pending suit** entitled to appear, plead, and defend his interest, though not named as party defendant in an action to condemn land leased.—*Drinkhouse v. Spring Valley Water Works*, 87 Cal. 253, 255, 25 Pac. 420.

7. **Same—Mortgagee**, it seems, is not necessary party defendant to action for condemnation of land for street improvements.—*Schumacker v. Toberman*, 56 Cal. 508.

See par. 2, this note.

8. **Same—Person holding legal title** is only necessary party in action to take land for purposes of highway; and only one entitled to defend action.—*Hidden v. Davisson*, 51 Cal. 138, 139.

9. **Same—Tax-payer** may not defend an action for street improvement by condemnation, but may maintain injunction to prevent the action where such improvement would impose additional burden on taxpayers.—*Schumacker v. Toberman*, 56 Cal. 508, 511.

10. **Same—Widow in personal capacity** thought not to be necessary party where she defends as executrix.—*Dickey v. Gibson*, 121 Cal. 276, 53 Pac. 704.

11. **Notice—Appearance of parties** over whose land a proposed road passes, without objection for want of notice, dispenses with necessity of notice.—*Kimball v. Board of Supervisors*, 46 Cal. 19, 23.

§ 1247. COURT SHALL HAVE JURISDICTION TO REGULATE THE MODE OF MAKING CROSSINGS OR OF ENJOYING A COMMON USE. The court shall have power:

1. **To regulate and determine the place and manner of making connections and crossings**, or of enjoying the common use mentioned in the fifth subdivision of section twelve hundred and forty;

2. **To hear and determine all adverse or conflicting claims to the property sought to be condemned**, and to the damages therefor;

3. **To determine the respective rights of different parties seeking condemnation of the same property.**

History: Enacted March 11, 1872.

EMINENT DOMAIN—CROSSINGS— COURT TO REGULATE.

1. Construction of section—Subdivision 1.
- 2-4. Court's power—To hear and determine all adverse and conflicting claims.
5. Same—Disputed claim of plaintiff may be determined.
6. Railroad crossings.

See, ante, § 1237 and note.

1. **Construction of section—Subdivision 1.**—If this subdivision were construed to give the superior court power to determine the places where public streets should be allowed to cross existing railroads and to make regulations governing the manner of making such crossings it would confer legislative power upon the judicial department of the state. Above section is a general law and inconsistent with the Los Angeles charter and is superseded thereby.—*City of Los Angeles v. Central Trust Co.*, 173 Cal. 323, 159 Pac. 1169.

2. **Court's power—To hear and determine all adverse and conflicting claims to the property sought to be condemned**, and to the damages therefor.—*City of Los Angeles v. Pomeroy*, 124 Cal. 597, 609, 57 Pac. 585.

3. The court or judge before whom proceedings are conducted, and not the commissioners appointed under act of 1853 to estimate value of land, is proper tribunal to determine adverse claims to land condemned.—*Spring Valley Water Works v. San Francisco*, 22 Cal. 434, 443.

4. Under act of 1853 commissioners appointed to assess the value of the property had nothing to do with settlement of adverse claims. Persons in possession of land condemned for railroad were entitled to whole assessed value of land, as against third parties out of possession but claiming superior title.—*Sacramento Valley R. Co. v. Moffatt*, 7 Cal. 577, 579; *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 611, 57 Pac. 585.

5. **Same—Disputed claim of plaintiff may be determined.**—Express provision of section

applies only to conflicting claims of those who are made or who make themselves defendants in the proceeding. . . . Although this provision has no direct bearing on question whether court has jurisdiction to try any question of title of plaintiff to an interest in the land sought to be condemned, it contains an express legislative recognition of the entire competency of the court to try and determine adverse claims to the property in a proceeding to condemn. Convenience requires that an interest claimed by plaintiff in land sought to be condemned,

and disputed by defendant, may be determined in the condemnation suit.—*City of Los Angeles v. Pomeroy*, 124 Cal. 597, 608-614, 57 Pac. 585.

6. Railroad crossings.—Question as to whether manner of crossing (on a level, above, or below the other road) is compatible "with the greatest public benefit and least private injury," is a question of fact to be determined with reference to the circumstances proved in each case.—*California So. R. Co. v. Southern Pac. R. Co.*, 67 Cal. 59, 62, 7 Pac. 123.

§ 1247a. COURT MAY REGULATE THE REMOVING OF STRUCTURES.

The court shall also have power to regulate and determine the place and manner of removing or relocating structures or improvements, or of enjoying the common use mentioned in the fourth subdivision of section twelve hundred and forty.

History: Enactment approved April 5, 1911, Stats. and Amdts. 1911, p. 622. In effect immediately.

§ 1248. COURT OR JURY TO ASSESS DAMAGES. The court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

1. The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed;

2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff;

3. Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiff; and if the benefit shall be equal to the damages assessed under subdivision two, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value;

4. **[If property be water.]** If the property sought to be condemned be water or the use of water, belonging to riparian owners, or appurtenant to any lands, how much the lands of the riparian owner, or the lands to which the property sought to be condemned is appurtenant, will be benefited, if at all, by a diversion of water from its natural course, by the construction and maintenance, by the person or corporation in whose favor the right of eminent domain is exercised, of works for the distribution and convenient delivery of water upon said lands; and such benefit, if any, shall be deducted from any damages awarded the owner of such property;

5. [If property be for a railroad.] If the property sought to be condemned be for a railroad, the cost of good and sufficient fences, along the line of such railroad, and the cost of cattle-guards, where fences may cross the line of such railroad; and such court, jury or referee shall also determine the necessity for and designate the number, place and manner of making such farm or private crossings as are reasonably necessary or proper to connect the parcels of land severed by the easement condemned, or for ingress to or egress from the lands remaining after the taking of the part thereof sought to be condemned, and shall ascertain and assess the cost of the construction and maintenance of such crossings;

6. If the removal or relocation of structures or improvements is sought, the cost of such removal or relocation and the damages, if any, which will accrue by reason thereof;

7. As far as practicable, compensation must be assessed for each source of damages separately.

8. [If property is mortgaged.] When the property sought to be taken is encumbered by a mortgage or other lien, and the indebtedness secured thereby is not due at the time of the entry of the judgment, the amount of such indebtedness may be, at the option of the plaintiff, deducted from the judgment, and the lien of the mortgage or other lien shall be continued until such indebtedness is paid.

History: Enacted March 11, 1872; amendment approved March 19, 1889, Stats. and Amdts. 1889, p. 343; April 5, 1911, Stats. and Amdts. 1911, p. 622; May 22, 1913, Stats. and Amdts. 1913, p. 239; May 22, 1915, Stats. and Amdts. 1915, p. 940. In effect August 8, 1915.

EMINENT DOMAIN—DAMAGES—COURT AND JURY TO ASSESS.

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| <ol style="list-style-type: none"> 1. Adaptability to particular use—Which would render it more valuable. 2. Allowance by jury—Not included in judgment when. 3. Annoyance or discomfort — Merely, not elements. 4. Annual net profits — Derived from land for particular use. 5. Assessment for taxation—Not admissible to show value. 6. Assessment records—Incompetent to prove value. 7. Assessment of damages — By commissioners instead of jury. 8. Benefits of improvement — Legislative power of state to determine. 9. Benefits to land — Under constitution of 1849—Off setting permissible when. 10. Same — General, as distinguished from special, benefits. 11. Same—Where damages exceed benefits. 12-14. Same—Under constitution of 1879, article I, section 14—Benefits to land not taken. 15. Same—Same—Exceptions to rule. 16, 17. Same—Benefits to remaining land. | <ol style="list-style-type: none"> 18, 19. Same — Same — Private individuals condemning land. 20. Burden of proof—As to value. 21. Business on lot not taken—Damage to. 22. Same — In condemnation for public use. 23. Comparative value before and after taking—Of property. 24. Same—Of use before and after construction. 25. Compensation for property taken. 26, 27. Condemnation money paid on award —Not required to be refunded, when. 28-30. Conflicting claims — On condemnation. 31. Construction of section — Subdivision 2. 32. Counsel fees—Paid by owner. 33, 34. Court to determine what questions. 35. Damages—In general. 36. Same—Elements of damage—As to generally. 37. Dedication of land. 38. Dedication of benefits to land. 39. Deputy-assessor—Statements of not competent to prove value of land. 40. Estimate of value. 41. Same—By viewers. |
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- 42-49. Evidence and damages — Matters considered.
 50. Experts on value—Evidence of.
 51. Fences — An element of damage when.
 52. Same—In case of railroad.
 53. Same—Not an element of damages when.
 54. Findings—By court.
 55. Same — By jury—As to amount of damages.
 56. Same—Same—Damages and dedication.
 57. Same—Same—On issues submitted.
 58. Same—Same—Special findings.
 59. Same—Same—Same — Allowance by jury inconsistent with.
 60. Same—Facts found.
 - 61, 62. Gold-coin judgment — Can not be rendered.
 63. Hearsay or common report—Admissible when.
 64. Improvements on land—Are to be assessed.
 65. Same—Are not considered, when.
 - 66, 67. Same—Same—Made by trespasser.
 68. Increased cost of irrigating—Uncultivated land.
 69. Irrelevant evidence — Introduced on one side.
 70. Jury trial—Could not be claimed by owner under former constitution.
 71. Same—Owner entitled to trial by jury.
 - 72, 73. Market value, present—Not value to owner.
 74. Same—Same—Pretium affectionis.
 75. Same — "Present market value" — Means, what.
 - 76, 77. Same—Price paid for land in vicinity.
 - 78, 79. Measure of compensation—Rules as to.
 - 80-82. Opinion of witness—As to value of land—Admissible when.
 83. Same—Same—Based entirely on incompetent matters.
 84. Same—Same—By witness not an expert.
 85. Same—Same—By witness who had never seen the land.
 86. Same—Same—For a particular purpose.
 87. Same — Same — Former opinion of witness.
 88. Same—Same—Same — As to depreciation of value.
 - 88a. Payment of liens—Right to deduct from judgment—Construction of section.
 - 89, 90. Peculiar fitness for special purpose — Is an element in estimating value.
 91. Personal pleasure or enjoyment—Infringement of.
 92. Private road taken for public highway.
 93. Report of viewers—Need not draw a distinction.
 - 94, 95. Respective claims of parties — And amount coming to each.
 96. Rule for ascertaining damages.
 97. Same — Charge by court erroneous, when.
 98. Same — Property being part of larger parcel.
 99. Same—Separate assessment of each piece of property taken.
 100. Special damages—What are not.
 101. Special finding—Defendant entitled to when.
 102. Speculative damages — To property taken.
 103. Same—To property not taken.
 - 104-106. Street taken for railroad—Measure of damages.
 107. Time of assessment of damages—At date of summons.
 - 108, 109. Same—At time when "taken."
 110. Two condemnation suits—For same lands.
 111. Use of street by steam railroad—Damages to owner of fee.
 112. Value of land not taken—Determination of.
 113. Same—Offers of purchase, bona fide.
 114. Verdict—Form of.
 115. Same — Interest on is not provided for.
 116. Water-works—Estimate of value of.
- See, ante, § 1237 and note.
1. Adaptability to particular use—Which would render it more valuable to purchasers, —e. g., by reason of its situation and being part of a basin adopted for reservoir purposes,—owner should be permitted to show this fact in action to condemn for reservoir site.—Spring Valley Water Works v. Drinkhouse, 92 Cal. 528, 532, 28 Pac. 681; City of Santa Ana v. Harlin, 99 Cal. 538, 543, 34 Pac. 224; City of San Luis Obispo v. Brizzolara, 100 Cal. 434, 436, 34 Pac. 1083; City of Los Angeles v. Pomeroy, 124 Cal. 597, 644, 57 Pac. 585.
See pars. 89, 90, this note.
 2. Allowance by jury—Not included in judgment when inconsistent with special findings, e. g., allowance for cross-fences, fruit trees, inconvenience of curve, etc., with special findings of no damage to lands not taken.—San Jose & A. R. Co. v. Mayne, 83 Cal. 566, 570, 571, 23 Pac. 522.
See par. 85, this note.
 3. Annoyance or discomfort—Merely, not elements of damage.—See par. 78, this note.
 4. Annual net profits—Derived from land for a particular use not admissible to show

market value.—*Stockton & C. R. Co. v. Gaigiani*, 49 Cal. 139, 140; *San Diego Land & Town Co. v. Neale*, 88 Cal. 50, 62, 11 L. R. A. 604, 25 Pac. 977; *Los Angeles, Pasadena & G. R. Co. v. Rumpp*, 104 Cal. 20, 27, 37 Pac. 859.

See par. 24, this note.

5. Assessment for taxation—Not admissible to show value; and the signing of an assessment-list, with a valuation attached, by the owner is not a declaration by him as to the value of the land.—*San Jose & A. R. Co. v. Mayne*, 83 Cal. 566, 23 Pac. 522.

6. Assessment records—Incompetent to prove value of land sought to be taken.—*Concord Land & Water Power Co. v. Clough*, 69 N. H. 609, 45 Atl. 565.

See par. 39, this note.

7. Assessment of damages—By commissioners instead of jury, provision for, valid under former constitution, not under present.—*Koppikus v. State Capitol*, 16 Cal. 248, 253; *Heyneman v. Blake*, 19 Cal. 579, 596.

See pars. 70, 71, this note.

8. Benefits of improvement—Legislative power of state to determine whether benefits public will derive from improvements are of sufficient importance to justify exercise of power of eminent domain.—*San Francisco A. & S. R. Co. v. Caldwell*, 31 Cal. 368, 373.

9. Benefits to land—Under constitution of 1849—Offsetting permissible when there is evidence warranting, in widening street.—*Appeal of Piper*, 32 Cal. 530, 537.

10. Same—General, as distinguished from special, benefits in common with all contiguous territory, to be deducted.—*California Pac. R. Co. v. Armstrong*, 46 Cal. 85, 91.

11. Same—Where damages exceed benefits to land not taken, finding the gross amount of damages to the land not taken over benefits to land not taken, is sufficient compliance with statute.—*California Pac. R. Co. v. Frisbie*, 41 Cal. 356, 358.

12. Same—Under constitution 1879, article I, section 14—Benefits to land not taken, arising from construction of proposed improvement, can not be considered in fixing compensation to be awarded.—*Pacific Cent. R. Co. v. Porter*, 74 Cal. 261, 262, 15 Pac. 774; *San Diego Land & Town Co. v. Neale*, 78 Cal. 63, 3 L. R. A. 83, 20 Pac. 372; *San Jose & A. R. Co. v. Mayne*, 83 Cal. 566, 23 Pac. 522; *San Diego Land & Town Co. v. Neale*, 88 Cal. 50, 11 L. R. A. 604, 25 Pac. 977; *San Bernardino & E. R. Co. v. Haven*, 94 Cal. 489, 492, 29 Pac. 875.

13. But errors in this regard are cured by an instruction to the jury to disregard all testimony tending to show such benefits.—*Los Angeles, Pasadena & G. R. Co. v. Rumpp*, 104 Cal. 20, 29, 37 Pac. 859.

14. Error to permit proof of benefits resulting to land not taken that might result from the building of a railroad.—*San*

Jose & A. R. Co. v. Mayne, 83 Cal. 566, 569, 23 Pac. 522.

15. Same—Same—Exceptions to the rule.—The constitutional provisions relate only to private corporations, and do not include municipalities or private individuals exercising the power of eminent domain for a public use. Thus it has been held as set out in following paragraphs:

16. Same—Benefits to remaining land are to be deducted from damages suffered by taking of land for public road by municipal corporation.—*Butte County v. Boydston*, 64 Cal. 110, 29 Pac. 511; *Tehama County v. Bryan*, 68 Cal. 57, 65, 8 Pac. 673; *Pacific Cent. R. Co. v. Porter*, 74 Cal. 261, 262, 15 Pac. 774.

17. It has been held that this exception applies to municipal corporations only, under constitution 1879 article I, section 14.—*Pacific Cent. R. Co. v. Porter*, 74 Cal. 261, 262, 15 Pac. 774; *San Jose & A. R. Co. v. Mayne*, 83 Cal. 566, 569, 23 Pac. 522; *Beveridge v. Lewis*, 137 Cal. 619, 59 L. R. A. 581, 67 Pac. 1040, 70 Pac. 1083.

18. Same—Same—Private individuals condemning land for purposes of railroad are entitled to set-off of benefits to land not taken.—*Moran v. Ross*, 79 Cal. 549, 551, 21 Pac. 958.

19. It has been held by a divided court in a later case that under section 14, article I of the state constitution, which provides for just compensation in all cases of land taken for public use, the legislature can not provide that the property-owner shall receive a smaller sum for the taking of the land by a natural person than when it is taken by a corporation; and that there can be no deduction for general benefits to land not taken in any case; that above section allowing such benefits to be deducted in the case of a natural person which can not be allowed under the constitution in favor of a private corporation is invalid (*McFarland, J., diss.*).—*Beveridge v. Lewis*, 137 Cal. 619, 59 L. R. A. 581, 67 Pac. 1040, 70 Pac. 1083.

20. Burden of proof—As to value is on owner.—*Monterey County v. Cushing*, 83 Cal. 507, 510, 23 Pac. 700; *San Diego Land & Town Co. v. Neale*, 88 Cal. 50, 11 L. R. A. 604, 25 Pac. 977; *City of Alameda v. Cohen*, 133 Cal. 5, 7, 65 Pac. 127.

As to opinion evidence respecting value of land taken, see pars. 80-88, this note; also note 19 Am. St. Rep. 460.

21. Business on lot not taken—Damages to may be considered in fixing the damages to be awarded.—*Muller v. Southern Pac. Branch R. Co.*, 83 Cal. 240, 245, 23 Pac. 265.

22. Same—In condemnation for public use, e. g., for a street, the general rule is that no damages can be allowed for injury to business caused merely by the improvement and not by the taking of the property.—*City etc. of San Francisco v. Kierman*, 98 Cal. 614, 624, 33 Pac. 720.

23. Comparative value before and after taking—Of property.—Comparative value of property before and after the improvement for which the land is taken, not admissible in fixing compensation to be made.—*Los Angeles, Pasadena & G. R. Co. v. Rumpp*, 104 Cal. 20, 37 Pac. 859.

24. Same—Of use before and after construction of railroad, can not be considered in proceedings to condemn.—*Los Angeles, Pasadena & G. R. Co. v. Rumpp*, 104 Cal. 20, 27, 37 Pac. 859.

See par. 4, this note.

25. Compensation for property taken under exercise of power of eminent domain,—as to, see notes 31 Am. Dec. 373; 88 Am. Dec. 113; 9 Am. St. Rep. 140; 19 Am. St. Rep. 458; 22 Am. St. Rep. 50.

26. Condemnation money paid on award—Not required to be refunded on second trial resulting in a less award on appeal by defendant upon question of compensation alone.—*Los Angeles, Pasadena & G. R. Co. v. Rumpp*, 104 Cal. 20, 23, 37 Pac. 859.

27. Distinguished: *Pool v. Butler*, 141 Cal. 46, 50, 74 Pac. 444.

28. Conflicting claims—On condemnation, to the same property, may be considered together.—*Lake Merced Water Co. v. Cowles*, 31 Cal. 214, 217. See *Eureka & K. R. R. Co. v. California & N. R. Co.*, 103 Fed. 897, 901. See pars. 94, 95, 110, this note.

29. Obiter: So held in *San Francisco & A. W. Co. v. Alameda Water Co.*, 36 Cal. 639, 646.

30. Distinguished: *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. 585.

As to procedure in case of rival claims to condemn the same land, see *San Francisco & A. W. Co. v. Alameda Water Co.*, 36 Cal. 639.

31. Construction of section—Subdivision 2.—This subdivision limits in terms the award of damages to the property taken and the resultant damage to contiguous property injured by severance of the property taken. It has not the most remote applicability to the business, profession, or occupation which may be conducted on the premises.—*City of Oakland v. Pacific Coast Lumber & Mill Co.*, 171 Cal. 392, 153 Pac. 705.

32. Counsel fees—Paid by owner are not recoverable as a part of his compensation.—*San Jose & A. R. Co. v. Mayne*, 83 Cal. 566, 23 Pac. 522.

33. Court to determine what questions.—In an action by a municipal corporation to condemn a leasehold interest in real property used for wharf and lumber-yard purposes in connection with a planing-mill business situated on noncontiguous land, it is a question for the court, not for the jury, to determine whether the two pieces of property constitute one parcel within the meaning of above section.—*City of Oakland v. Pacific Coast Lumber & Mill Co.*, 171 Cal. 392, 153 Pac. 705.

34. The weight of authority seems to be in favor of the position that the assessment of damages must be determined by the court and not the jury.—*San Joaquin & Kings River Canal & Irr. Co. v. Stevenson*, 26 Cal. App. 274, sub nom. *San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, 147 Pac. 254, 258, affirmed by Supreme Court, 26 Cal. App. 285, 147 Pac. 258.

35. Damages—In general.—In an action brought by a county to condemn a strip of land through a larger tract of land owned by the defendant, over which the plaintiff proposed to construct a storm drain or canal in the manner described in the complaint, for the purpose of carrying flood waters which in times of heavy rains accumulated upon the watershed contiguous to defendant's tract of land, it is not error to admit testimony of witnesses who, in part, based their opinion as to the amount of damage sustained, upon the alleged fact that the proposed storm drain and canal would constitute a constant menace and danger in that, during times of heavy rainstorms when a large volume of water would gather and flow down through the drainage canal, it might flood the land, and that the effect of such threatened flooding due to the construction of the canal for the purpose intended was to greatly depreciate its market value.—*Los Angeles County v. Sullivan*, 32 Cal. App. 325, 162 Pac. 907.

As to estimate of value in ascertaining damages, see pars. 40, 41, this note.

As to evidence considered in determining damages, see pars. 42-49, this note.

As to expert valuation and evidence, see par. 50, this note.

As to findings by court and jury as amount of damages, see pars. 54-60, this note.

As to gold-coin judgment can not be rendered, see pars. 61, 62, this note.

As to hearsay or common report admissible when, see par. 63, this note.

36. Same—Elements of damage—As to generally.—In an action in eminent domain seeking to acquire as a roadway, for railroad purposes a strip of land, all matters and conditions which may reasonably be expected to follow the location and operation of the railroad, and affect the value of the land, should be considered.—*Colusa & Hamilton R. Co. v. Leonard*, 176 Cal. 109, 167 Pac. 878.

37. Dedication of land for street renders condemnation proceedings for that purpose improper.—*City of San Jose v. Freyschlag*, 56 Cal. 8, 9. See *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 612, 57 Pac. 585.

38. Deduction of benefits to land by reason of constructing the improvement, it is thought, can properly be made only in case of condemnation by a municipal corporation, although not finally settled whether private individual condemning can set off benefits.—See pars. 9-19, this note.

39. **Deputy-assessor—Statements of not competent to prove value of land sought to be taken.**—*San Jose & A. R. Co. v. Mayne*, 83 Cal. 566, 569, 23 Pac. 522; *Woolridge v. Boardman*, 115 Cal. 74, 78, 46 Pac. 868. See *Concord L. & W. P. Co. v. Clough*, 69 N. H. 609, 45 Atl. 565.

See par. 5, this note.

40. **Estimate of value in action to condemn for water-works, based on the cost of the proposed works, the increase of population, the extension of the water system, and the probable income and profit of the works are not admissible in fixing compensation for land taken.**—*San Diego Land & Town Co. v. Neale*, 88 Cal. 50, 11 L. R. A. 604, 25 Pac. 977.

41. **Same—By viewers, need not draw distinction between the value of the property taken and the damages resulting to owner from the taking.**—*Monterey County v. Cushing*, 83 Cal. 507, 514, 23 Pac. 700.

See pars. 96-99, this note.

42. **Evidence and damages — Matters considered.**—Physical contiguity, not unity of use, is the controlling factor in determining whether property sought to be condemned constitutes a part of a larger parcel.—*City of Oakland v. Pacific Coast Lumber & Mill Co.*, 171 Cal. 392, 153 Pac. 705.

See, also, pars. 35, 36, 40, 41, 50, this note.

43. **No compensation can be allowed in eminent domain proceedings for injury to business; by above section, damages are limited to property taken.**—*City of Oakland v. Pacific Coast Lumber & Mill Co.*, 171 Cal. 392, 153 Pac. 705.

44. **It is quite within the power of the legislature to declare that a damage to that form of property known as business or the good-will of a business shall be compensated for, but unless the constitution or the legislature has so declared, it is the universal rule of construction that an injury or inconvenience to a business is *damnum absque injuria* and does not form an element of the compensating damages to be awarded.**—*City of Oakland v. Pacific Coast Lumber & Mill Co.*, 171 Cal. 392, 153 Pac. 705.

45. **It is the market value, that is, the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, which measures the damages for a taking.**—*City of Oakland v. Pacific Coast Lumber & Mill Co.*, 171 Cal. 392, 153 Pac. 705.

46. **In the case of a leasehold, unless exceptional circumstances are shown, the value of the lease is its market value.**—*City of Oakland v. Pacific Coast Lumber & Mill Co.*, 171 Cal. 392, 153 Pac. 705.

47. **The value in use, as contradistinguished from the estimated value of a proposed problematical use, may be given in terms of money, not as determinative of the question, but as being evidence of the util-**

mate fact which the jury is called upon to find, namely, the market value.—*City of Oakland v. Pacific Coast Lumber & Mill Co.*, 171 Cal. 392, 153 Pac. 705.

48. **Cross-examination of a witness testifying to value as to particular sales in the district does not justify the plaintiff on redirect examination taking up the sales of other land.**—*Reclamation Dist. No. 730 v. Inglin*, 81 Cal. App. 495, 160 Pac. 1098.

49. **In an action for the condemnation of land, while witnesses may upon their examination in chief give the reasons upon which they base their opinions, they should never be allowed to go into details of particular sales or transactions.**—*Reclamation Dist. No. 730 v. Inglin*, 81 Cal. App. 495, 160 Pac. 1098.

50. **Experts on value—Evidence of.**—As to generally, see notes 19 Am. St. Rep. 460; 27 Am. St. Rep. 677.

As to evidence of nonexperts as to value, see par. 84, this note.

51. **Fences—An element of damage when rendered necessary by reason of the improvement through or along the land not taken, and the cost of construction and maintenance is to be included in award.**—*Butte County v. Boydston*, 64 Cal. 110, 113, 29 Pac. 511. See *California So. R. Co. v. Southern Pac. R. Co.*, 67 Cal. 59, 64, 7 Pac. 123; *Colusa County v. Hudson*, 85 Cal. 633, 638, 24 Pac. 791; *Los Angeles, Pasadena & G. R. Co. v. Rumpp*, 94 Cal. 432, 434, 29 Pac. 872; 104 Cal. 20, 37 Pac. 859; *Glenn County v. Johnston*, 129 Cal. 407, 62 Pac. 66.

52. **Same—In case of railroad, cost of fencing is an assessment to enforce a duty imposed by law, and not as damages to the landowner for an injury to his land.**—*Los Angeles, Pasadena & G. R. Co. v. Rumpp*, 94 Cal. 432, 434, 29 Pac. 872.

53. **Same—Not an element of damages when there are no circumstances showing increased cost in this respect to owner; statute imposing on railroad company duty to fence or pay for fencing does not affect compensation to be awarded for the taking of land.**—*California So. R. Co. v. Southern Pac. R. Co.*, 67 Cal. 59, 64, 7 Pac. 123.

54. **Findings—By court, in action to condemn lands for use of private road, must be separately as to (1) the value of the land sought to be condemned and the improvements thereon, (2) the damages to the remaining land by reason of severance, and (3) the benefits which will accrue to the remaining portion of the land by the opening of the road.**—*Butte County v. Boydston*, 64 Cal. 110, 113, 29 Pac. 511.

55. **Same—By jury—As to amount of damages to be awarded, is conclusive though unjust, if it can be sustained in any aspect of evidence.**—*Colusa County v. Hudson*, 85 Cal. 633, 636, 24 Pac. 791.

As to necessity for fence, see para. 51-53 this note.

56. Same—Same—Damages and dedication, both being found by jury, allegations of complaint and answer relating merely to ownership, findings as to dedication are not within the issues and must be disregarded.—*City of San Jose v. Freyschlag*, 56 Cal. 8.

57. Same—Same—On issue submitted, e. g., the necessity for the use, can not be disregarded by the court.—*Wilmington C. & R. Co. v. Dominguez*, 50 Cal. 505, 506.

58. Same—Same—Special findings,—as to, see par. 100, this note.

59. Same—Same—Same—Allowance by jury inconsistent with, must be disregarded.—See par. 2, this note.

60. Same—Facts found must support judgment.—*North Pac. R. Co. v. Reynolds*, 50 Cal. 90, 93.

61. Gold-coin judgment—Can not be rendered in an action to condemn land for railroad purposes where the court finds generally value of land taken, and damage to remainder of tract, where it does not appear these damages were estimated on a gold-coin basis.—*Northern Pac. R. Co. v. Reynolds*, 50 Cal. 90, 94.

Gold-coin judgment, see, ante, § 667 and note.

62. Whether damages may be proved and allowed in gold coin, not decided.—*Northern Pac. R. Co. v. Reynolds*, 50 Cal. 90, 94.

63. Hearsay or common report—Admissible when action to assess damages for taking of street by railroad, for purposes of fixing boundary line, of street, provided it existed before controversy arose.—*Muller v. So. Pac. R. Co.*, 83 Cal. 240, 242, 23 Pac. 265.

64. Improvements on land—Are to be assessed as well as the land, but need not be separately assessed.—*Tehama Co. v. Bryan*, 68 Cal. 57, 64, 8 Pac. 673.

See par. 92, this note.

65. Same—Are not considered, when,—In determining compensation to be made, where place upon the land under an entry on proceedings to condemn which were afterwards dismissed.—*California Pac. R. Co. v. Armstrong*, 46 Cal. 85, 90. See *California So. R. Co. v. Southern Pac. R. Co.*, 67 Cal. 59, 62, 7 Pac. 123 (where entry and improvement by consent). Ill. *Chicago & A. R. Co. v. Goodwin*, 111 Ill. 202, 53 Am. Rep. 622 (made by consent of life tenant). *Kam. Cohen v. St. Louis, Ft. S. & W. R. Co.*, 34 Kan. 158, 167, 55 Am. Rep. 242, 8 Pac. 138 (track laid with permission of owner); *St. Louis, K. & S. W. R. Co. v. Nyce*, 61 Kan. 394, 401, 59 Pac. 1040 (such improvements not considered trade fixtures). N. J. *North Hudson Co. R. Co. v. Booraem*, 28 N. J. Eq. (1 Stew.) 450, 455. N. D. *Martin v. Tyler*, 4 N. D. 278, 294, 60 N. W. 392. Tex. *Preston v. Sabine & E. T. R. Co.*, 70 Tex. 375, 377, 7 S. W. 825 (such improvements not fixtures). Wash. *Seattle & M. R. Co. v. Corbett*, 22 Wash. 189, 191, 60 Pac. 127.

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66. Same—Same—Made by trespasser with bona fide intention to commence proceedings thereafter for appropriation of the land, not an element of damages in proceedings thus subsequently brought.—*Albion River R. Co. v. Hesser*, 84 Cal. 435, 439, 440, 24 Pac. 288; *San Francisco and N. R. Co. v. Taylor*, 86 Cal. 246, 248, 24 Pac. 1027.

67. "Even if entry had been without license or permission of any one authorized to grant the same, so that it was a trespass at the time, the law would not require the railroad company in seeking a condemnation of the lands so entered upon for a right of way, to pay the owner of land for structures placed upon it at its own expense, with a view of subsequently acquiring the right of way."—*Chicago & A. R. Co. v. Goodwin*, 111 Ill. 202, 53 Am. Rep. 622. See *Mich. Morgan's Appeal*, 39 Mich. 675; *Toledo A. A. & G. T. R. v. Dunlap*, 47 Mich. 456, 11 N. W. 271. Minn. *Greve v. First Division St. P. & P. R. Co.*, 26 Minn. 66, 1 N. W. 816. Pa. *Justice v. Nesquehoning Valley R. Co.*, 87 Pa. St. 28. Wis. *Lyon v. Green Bay R. Co.*, 42 Wis. 538.

68. Increased cost of irrigating—Uncultivated land shown to be adapted to cultivation, and to require irrigation, caused by building railroad through the land, is a legitimate subject of inquiry for purpose of ascertaining damage to be awarded.—*San Bernardino & E. R. Co. v. Haven*, 94 Cal. 489, 493, 29 Pac. 875.

69. Irrelevant evidence—Introduced on one side does not render competent such evidence on behalf of other side.—*San Diego Land & Town Co. v. Neale*, 88 Cal. 50, 11 L. R. A. 604, 25 Pac. 977.

70. Jury trial—Could not be claimed by owner under former constitution, the constitutional provision guaranteeing trial by jury related only to civil or criminal cases in which an issue of fact was joined.—*Kopplik v. State Capitol*, 16 Cal. 248, 253. See *Heyneman v. Blake*, 19 Cal. 579, 596; *Cassidy v. Sullivan*, 64 Cal. 266, 267, 28 Pac. 234; *Woods v. Varnum*, 85 Cal. 639, 645, 24 Pac. 843.

As to trial by jury in proceeding to condemn by power of eminent domain, see note 48 Am. Dec. 190.

71. Same—Owner entitled to trial by jury for assessment of damages under present constitution.—*Weber v. Santa Clara County*, 59 Cal. 265, 266; *Trahern v. San Joaquin County*, 59 Cal. 320, 321.

See, post, § 1256 and note.

72. Market value, present—Not value to owner, or for a particular use, or to the person or corporation seeking to condemn it, is the basis of compensation.—*San Diego Land & Town Co. v. Neale*, 88 Cal. 50, 11 L. R. A. 604, 25 Pac. 977; *City of Santa Ana v. Harlin*, 99 Cal. 538, 34 Pac. 224.

See pars. 89, 90, this note.

73. Compare: *Robb v. Turnpike Co.*, 60 Ky. (3 Met.) 117, where the owner was al-

lowed to recover more than the market value.

74. Same—Same—Pretium affectionis sometimes attaches to property and is recognized by the courts.—*Little Rock J. R. v. Woodruff*, 49 Ark. 381, 4 Am. St. Rep. 51, 5 S. W. 792.

75. Same—"Present market value"—Means not what the owner could realize at forced sale, but "the price he could obtain after reasonable and ample time, such as would ordinarily be taken by an owner to make sale of like property."—*Santa Ana v. Harlin*, 99 Cal. 538, 542, 34 Pac. 224. See *Little Rock J. R. v. Woodruff*, 49 Ark. 381, 4 Am. St. Rep. 51, 5 S. W. 792.

76. Same—Price paid for land in vicinity for some public use, as shown by report of commissioners, inadmissible.—*City of San Luis Obispo v. Brizzolara*, 100 Cal. 434, 436, 34 Pac. 1083.

77. "The price so fixed by compromise, when there can be no other purchasers, and seller has no option to refuse to sell, and can only elect between acceptance of price offered and the delay, uncertainty, and trouble of legal proceedings for assessment, is not a reasonable or fair test of market value. It is in no sense a sale in the market."—*City of San Luis Obispo v. Brizzolara*, 100 Cal. 434, 436, 34 Pac. 1083; *Cobb v. Boston*, 112 Mass. 181.

78. Measure of compensation—Rules as to.—See pars. 40, 41, 95-99, this note; also note 19 Am. St. Rep. 549.

79. In proceeding to acquire right of way for public road, the mere taking of property, damage to remainder of property being by severance alone, questions as to damages to abutting property on account of subsequent improvement by establishing grades, or otherwise, are not elements of damages to be considered in fixing compensation; such damages are to be determined and fixed when such improvements are made and the injury inflicted, not in the condemnation suit.—*County of San Luis Obispo v. Simas*, 1 Cal. App. 175, 178, 179, 81 Pac. 972.

80. Opinion by witness—As to value of land—Admissible when shown by the evidence that he is sufficiently qualified to give an opinion, and where testimony is uncontradicted, both as to the value of the land taken and as to effect upon value of land by extending street through same, is sufficient to support a judgment of condemnation for the value of the land so testified as to.—*City of Alameda v. Cohen*, 133 Cal. 5, 7, 65 Pac. 127.

81. To entitle a witness to give his opinion as to value of land sought to be taken, it is only necessary to show that he has some peculiar means of forming an intelligent and correct judgment as to the value of the property in question.—*Spring Valley Water Works v. Drinkhouse*, 92 Cal. 528, 28 Pac. 681.

82. Owner who has resided for twenty years upon the land sought to be condemned will be presumed to have acquired sufficient acquaintance with it, and of the value of land in that neighborhood, to be able to give an intelligent estimate of its value.—*Spring Valley Water Works v. Drinkhouse*, 97 Cal. 528, 28 Pac. 681.

83. Same—Same—Based entirely on incompetent matters, should be rejected.—*San Diego Land & Town Co. v. Neale*, 88 Cal. 50, 11 L. R. A. 604, 25 Pac. 977.

As to opinion evidence on value, see 19 Am. St. Rep. 460; 27 Am. St. Rep. 677.

84. Same—Same—By witness not an expert, who shows knowledge and experience as to values of lands in neighborhood, competent evidence as to market value of lands sought to be condemned.—*Santa Ana v. Harlin*, 99 Cal. 538, 34 Pac. 224.

85. Same—Same—By witness who had never seen the land until the action was brought, should not be received.—*San Diego Land & Town Co. v. Neale*, 88 Cal. 50, 11 L. R. A. 604, 25 Pac. 977.

86. Same—Same—For a particular purpose, not admissible.—*Santa Ana v. Harlin*, 99 Cal. 538, 543, 34 Pac. 224. See *National Docks & N. J. J. C. R. Co. v. Pennsylvania R. Co.*, 57 N. J. L. (28 Vr.) 265, 278, 31 Atl. 462.

87. Same—Same—Former opinion of witness as to the value, entertained by witness, can not be shown.—*San Diego Land & Town Co. v. Neale*, 88 Cal. 50, 11 L. R. A. 604, 25 Pac. 977.

88. Same—Same—Same—As to depreciation of value.—Opinion of witnesses that purpose for which land is sought to be taken will depreciate adjoining property, and amount of depreciation is competent in absence of special objection.—See *Eachus v. Los Angeles Consol. Elec. R. Co.*, 103 Cal. 614, 42 Am. St. Rep. 154, 37 Pac. 750.

88a. Payment of liens—Right to deduct from judgment—Construction of section.—Under the provisions of the above section a person taking property by proceedings in eminent domain has the right to retain from the sum of money he is required to pay as damage the amount of money necessary to discharge any lien existing against the land taken, but his neglect to adopt this course will not give rise, in the absence of some other provision of law creating it, a right of action to recover it when once it has been paid by him.—*Marin Municipal Water Dist. v. North Coast Water Co.*, 40 Cal. App. 260, 180 Pac. 620, approving the doctrine in *Gray v. Case*, 51 N. J. Eq. 246, 26 Atl. 805.

89. Peculiar fitness for special purpose—Is an element in estimating value of land sought to be condemned, and where shown forms a factor in solving problem of market value.—*San Diego Land & Town Co. v. Neale*, 78 Cal. 63, 3 L. R. A. 83, 20 Pac. 372; 88 Cal. 50, 56, 11 L. R. A. 604, 25 Pac. 977;

Spring Valley Water Works v. Drinkhouse, 92 Cal. 528, 28 Pac. 681; *Santa Ana v. Harlin*, 99 Cal. 538, 543, 545, 34 Pac. 224; *Eachus v. Los Angeles Consol. Elec. R. Co.*, 103 Cal. 614, 620, 42 Am. St. Rep. 154, 37 Pac. 750.

See para. 1, 72-77, this note.

90. "The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is applied, but with reference to the uses to which it is plainly adapted?"—*Mississippi & R. R. B. Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206.

91. **Personal pleasure or enjoyment—Infringement of**, or merely rendering property less desirable for certain purposes, or even causing personal annoyance or discomfort, does not constitute a damage for which compensation is required to be made by constitution, article I, section 14.—*Eachus v. Los Angeles Consol. Elec. R. Co.*, 103 Cal. 614, 42 Am. St. Rep. 154, 37 Pac. 750.

See par. 3, this note.

92. **Private road taken for public highway.**—Defendant is entitled to value of improvement, e. g., the cost of grading, in addition to value of land taken.—*Colusa County v. Hudson*, 85 Cal. 633, 637, 24 Pac. 791.

See para. 64-67, this note.

93. **Report of viewers—Need not draw a distinction** between the value of the property and the damages resulting to the owner from its taking; it is sufficient if they give a lump sum.—*Monterey County v. Cushing*, 83 Cal. 507, 23 Pac. 700.

94. **Respective claims of parties—And amount coming to each**, need not be determined by commissioners in appropriating lands under the railroad law; it is proper for them to report a gross sum as compensation for the tract.—*Spring Valley Water Works v. San Francisco*, 22 Cal. 434, 442. See *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 612, 57 Pac. 585.

See para. 28-30, 110, this note.

95. **Affirmed**: *San Francisco & S. J. R. Co. v. Mahoney*, 29 Cal. 112, 118.

96. **Rule for ascertaining damages.**—The only one is that laid down in subdivision 2 of above section.—*Southern Pac. R. Co. v. Hart*, 3 Cal. App. 11, 84 Pac. 218.

See para. 78, 79, this note.

As to rule as to estimating value, see para. 40, 41, this note.

97. **Same—Charge by court erroneous** when it instructs that if the land be more profitably used for residences than business property, the jury should determine the size, shape, and arrangements of the lots into which the property could be most profitably divided for residence purposes, then find the market value of the lots or parts of lots taken, and then find the damage to the remainder of the lots, parts of which are taken, without allowing any damage to lots no parts of which are taken.—*Southern*

Pac. R. Co. v. Hart, 3 Cal. App. 11, 84 Pac. 218.

98. **Same—Property being part of larger parcel** damages accruing to the portion not taken must be ascertained and allowed.—*Southern Pac. R. Co. v. Hart*, 3 Cal. App. 11, 84 Pac. 218.

99. **Same—Separate assessment of each piece of property taken** and for each source of damage must be made; and an objection to the action of commissioners that they have not done so, must be made before the commissioners themselves, in the first instance, to afford them an opportunity to obviate the objection.—*In matter Clear Lake W. Co.*, 48 Cal. 586, 588.

100. **Special damages—What are not** in action to condemn land for railroad purposes, and may be proved without setting up, e. g., damages resulting to remainder of tract not taken, on account of shape in which it will be left, and effect of embankment built, or from cutting off front from county road, so as to injure its sale for building site.—*Northern Pac. R. Co. v. Reynolds*, 50 Cal. 90, 94.

See para. 21, 22, this note.

101. **Special finding—Defendant entitled to when** there is no general verdict upon the affirmative in his answer, e. g., that it is intention of plaintiffs to use property taken for private use.—*Cummings v. Peters*, 56 Cal. 593, 595.

See para. 54-60, this note.

102. **Speculative damages—To property taken.**—Speculative conjectures based upon expenditures and profits not admissible in fixing present value.—*San Diego Land & Town Co. v. Neale*, 88 Cal. 50, 62, 11 L. R. A. 604, 25 Pac. 977. See *Stockton & C. R. Co. v. Galgiani*, 49 Cal. 139. *Ma. Tide W. C. Co. v. Archer*, 9 Gill & J. 481. *Mass. Burt v. Wigglesworth*, 117 Mass. 302; *Gardner v. Inhabitants of Brookline*, 127 Mass. 358. *Pa. Dorlan v. East Brandywine & W. R. Co.*, 46 Pa. St. 520; *Reading & P. R. Co. v. Balthaser*, 126 Pa. St. 1, 17 Atl. 518.

103. **Same—To property not taken** not admissible.—*Muller v. Southern Pac. Branch R. Co.*, 83 Cal. 240, 245, 23 Pac. 265.

As to speculative damages, see notes 88 Am. Dec. 120; 19 Am. St. Rep. 460.

104. **Street taken for railroad—Measure of damages.**—Where fee to one half street in plaintiff is the value of plaintiff's interest in the land when the railroad company entered to construct its road, subject to the easement for a public street; and the measure of damages to the lot not taken abutting on the street is the difference between its value when the railroad company entered and when its road was completed.—*Muller v. Southern Pac. Branch R. Co.*, 83 Cal. 240, 244, 23 Pac. 265. See *Weyl v. Sonoma Valley R. Co.*, 69 Cal. 202, 207, 10 Pac. 510; *Finch v. Riverside R. Co.*, 87 Cal. 597, 598, 602, 25 Pac. 765.

105. Compare: *Montgomery v. Santa Ana W. R. Co.*, 104 Cal. 186, 187, 43 Am. St. Rep. 98, 25 L. R. A. 654, 37 Pac. 786.

106. Where a party has dedicated a public street through his land, and a railroad afterwards procures condemnation of the street for right of way, for which owner is awarded damages, this will not prevent him from recovering damages from another railroad company condemning right of way through same street.—*Southern Pac. R. Co. v. Reed*, 41 Cal. 256, 261.

107. Time of assessment of damages.—At date of summons in action to condemn land for purposes of railroad, is the criterion; and it is error to confine the inquiry to the value of the land at the date of the trial.—*Tehama County v. Bryan*, 68 Cal. 57, 65, 8 Pac. 673; *San Jose & A. R. Co. v. Mayne*, 83 Cal. 566, 23 Pac. 522.

See, post, § 1249 and note.

108. Same.—At time when "taken," as used in statute. This is not when plat of survey is filed with secretary of state, nor when company enters for purpose of construction.—*San Francisco & S. J. R. Co. v. Denniston*, 29 Cal. 112, 116.

109. Land is not "taken for public use," in the sense in which word "taken" is used in constitution, until last act has been performed, which, under mode of condemnation adopted, is required to transfer title or subject it to servitude.—*Fox v. Western Pac. R. Co.*, 31 Cal. 538, 549.

110. Two condemnation suits.—For same lands, started by different corporations against same person for appropriation of same land, neither becoming party in action brought by other, preference will be given

to corporation over whose proceedings court first acquires jurisdiction.—*Lake Merced Water Co. v. Cowles*, 31 Cal. 214, 217.
See pars. 28-30, 94, 95, this note.

111. Use of street by steam railroad—Damages to owner of fee, as to generally.—See pars. 104-106, this note.

112. Value of land not taken.—Determination of to be made by ascertaining value of such part when defendant entered to build its road, and by deducting from it, if depreciation occurred, the value when the road was completed.—*Muller v. Southern Pac. Branch R. Co.*, 83 Cal. 240, 243, 23 Pac. 265. See *San Francisco A. & S. R. Co. v. Caldwell*, 31 Cal. 368, 376.

113. Same.—Offers of purchase, bona fide made of land abutting on the land taken, are admissible in evidence to prove value of land not taken upon issue of damages.—*Muller v. Southern Pac. Branch R. Co.*, 83 Cal. 240, 243, 23 Pac. 265. See *Harrison v. Glover*, 72 N. Y. 451.

See pars. 72-79, this note.

114. Verdict.—Form of.—"We, the jury, find damages: On the roadbed, forty-one dollars and twenty-five cents; on eighteen panels, thirty dollars; total, seventy-one dollars and twenty-five cents"; held sufficiently specific.—*Tehama County v. Bryan*, 68 Cal. 57, 64, 8 Pac. 673.

115. Same.—Interest on is not provided for by the code.—*San Francisco & S. J. V. R. Co. v. Leviston*, 134 Cal. 412, 416, 66 Pac. 473.

116. Water-works.—Estimate of value of in condemnation proceedings.—See pars. 40, 41, this note.

§ 1248a. REMOVAL OF RAILROADS, ETC., FROM RIGHTS OF WAY TAKEN FOR ROADS. In any proceeding taken under the provisions of this title, where any railroad, street or interurban railway tracks are situated on, upon, along or across any lands or rights of way sought to be taken therein, for road, highway, boulevard, street or alley purposes, or for the purposes of a right of way for any public utility to be constructed, completed and maintained by a county, city and county, or any incorporated city or town, or by a municipal water-district, the plaintiff shall, if the complaint contains a prayer therefor, and shows the matter hereinafter provided, obtained a final judgment of condemnation ordering, in addition to the condemnation of such lands or right of way for the purposes set forth in the complaint, the relocation or removal of any railroad, street or interurban railway tracks thereon. Where the removal or relocation of such tracks is sought in any such proceedings, the complaint must contain a description of the location and proposed location of such tracks, and must be accompanied by a map showing such location and the proposed location of such tracks. The compensation to be paid for such relocation or removal of tracks shall be ascertained and assessed in the action, as in other cases, and separately from other sources of damage.

History: Enactment approved April 10, 1911, Stats. and Amdts. 1911, p. 853; amendment approved May 22, 1913, Stats. and Amdts. 1913, p. 240. In effect August 10, 1913.

§ 1249. DATE WITH RESPECT TO WHICH COMPENSATION SHALL BE ASSESSED, AND THE MEASURE THEREOF. For the purpose of assessing compensation and damages the right thereof shall be deemed to have accrued at the date of the issuance of summons and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken but injuriously affected, in all cases where such damages are allowed as provided in section one thousand two hundred and forty-eight; provided, that in any case in which the issue is not tried within one year after the date of the commencement of the action unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of the trial. Nothing in this section contained shall be construed or held to affect pending litigation.

[Damage on letting into possession.] If an order be made letting the plaintiff into possession, as provided in section one thousand two hundred fifty-four, the compensation and damages awarded shall draw lawful interest from the date of such order. No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages.

History: Enactment approved March 11, 1872; amended April 10, 1911, Stats. and Amdts. 1911, p. 842.

EMINENT DOMAIN—DAMAGES—AS OF WHAT DATE.

1. Actual value.
2. Same—Market value.
3. Same—Same—Instruction — “Actual value” as measure of compensation.
4. Construction of statute—In general.
5. Date at which value estimated—Code section inapplicable when.
6. Fixing damages—Value at issuance of summons—Constitutional provisions.
7. Interest on award—Where appeal taken.
8. Valuation of land—As of date of issuance of summons.
- 9-11. Same—Constitutionality of provision.
12. Same—Instruction, sufficiency of.
13. Same—Means of ascertaining value.
14. Same—Owner is entitled to receive a sum equal to value.
15. Same—Ruling of court admitting evidence of value.
16. Same—Verdict finding value of land generally.
17. Same—Vesting of title.

See, ante, § 1237 and note.

1. Actual value.—Thing to be ascertained is not market value, but actual value, and the only reason why market value is taken as criterion of compensation in ordinary cases is because it is in such cases the true measure of actual value—the only practical test. But in a case where discoveries made after the issuance of summons demonstrate that the actual intrinsic value of the land at that date was greater than its market value

—in other words when it appears that market value is no criterion of actual value—those discoveries should be taken into consideration.—*City of Los Angeles v. Pomeroy*, 124 Cal. 597, 644, 57 Pac. 585.

2. Same—Market value.—Actual value means actual market value (*Temple, J.*).—*City of Los Angeles v. Pomeroy*, 124 Cal. 597, 648, 649, 57 Pac. 585.

3. Same—Same—Instruction — “Actual value” as measure of compensation.—Instructions which in substance state that “actual value” is measure of compensation, and lay down correct rule for ascertaining actual value, are not rendered uncertain and erroneous by statement that “market value” is criterion of actual value, and by defining market value in case in which there is not some peculiar feature, making market and actual values different, as in ordinary cases market value is only practical test of actual value.—*City of Los Angeles v. Pomeroy*, 124 Cal. 597, 643, 644, 57 Pac. 585.

4. Construction of statute—In general.—It being the rule of statutory construction that when a statute, by reference, adopts an entire provision of a section of a code by naming its descriptive number, the effect is the same as though the provision had been bodily incorporated in the adopting statute, the reference in the above section, as originally enacted, to section 1254, post, must be construed as referring to the provisions contained in said section 1254, as it existed at the time when the above section was passed.—*Vallejo & Northern R. Co. v. Reed*, 177 Cal. 249, 170 Pac. 426.

5. Date at which value estimated—Code section inapplicable when.—The provisions of the above section have no application in eminent domain proceedings authorized by section 47 of the Public Utilities Act, with respect to the date at which the value of property taken for public use shall be estimated.—*Marin Municipal Water District v. Marin Water & Power Co.*, 178 Cal. 308, 173 Pac. 489.

6. Fixing damages—Value at issuance of summons—Constitutional provisions.—Under the provisions of the above section the value of condemned property shall be fixed as of the date of the issuance of the summons, is constitutional.—*City of Oakland v. Wheeler*, 34 Cal. App. 442, 168 Pac. 23.

7. Interest on award—Where appeal taken.—Under the provisions of the above section and of section 1254, post, a special rule is provided under which a defendant in condemnation proceedings may refuse to accept the tender of an award made by deposit in court for his benefit; on appeal from the judgment, and upon affirmation thereof, such defendant can not insist upon the payment of interest on the amount of the award pending such appeal.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 177 Cal. 249, 170 Pac. 426.

8. Valuation of land—As of date of issuance of summons.—Where complaint was filed April 11, 1883, and trial was had June 5, 1883, and there was no evidence that there had been any increase in intrinsic value of land between commencement of action and trial, an instruction to consider market value of land April 12, 1883, is not prejudicial.—*Arcata & Mad River R. Co. v. Murphy*, 71 Cal. 122, 123, 11 Pac. 881.

9. Same—Constitutionality of provision.—Provision that for purpose of assessing compensation and damages for property condemned the right thereto shall be deemed to have accrued at date of summons is not inconsistent with section 14 of article I of constitution of state. Value of property at some period antedating judgment could alone be awarded to owner, because award must be made by judgment. Future value of property would be too uncertain to base an award of compensation upon. Constitution simply means that the compensation awarded in the manner prescribed by law shall be paid to the owner before his property shall be taken for public use.—*California So. R. Co. v. Kimball*, 61 Cal. 90, 91; *Tehama County v. Bryan*, 68 Cal. 57, 65, 8 Pac. 673.

10. Compare: Under constitutional provision value of land at time of trial is value to be determined.—*California So. R. Co. v. Colton Land & Water Co.*, 2 Cal. Unrep. 244, 2 Pac. 38. See *Stockton & C. R. Co. v. Galgiani*, 49 Cal. 139, 140; *Fox v. Western Pac. R. Co.*, 31 Cal. 538, 555, 556; *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306, 317.

11. In case where long time elapsed between issuance of summons and trial, defendant argued that provision fixing value at time of issuance of summons was unconstitutional and supreme court observed that argument was worthy of consideration; but in case at bar defendant had estopped himself from urging point and it was not determined.—*City of Los Angeles v. Pomerooy*, 124 Cal. 597, 643, 57 Pac. 585.

12. Same—Instruction, sufficiency of.—An instruction in exact accordance with above section prior to its amendment in 1911, that in determining the compensation to be given the defendant they must consider the value of the land as it was at the date of the commencement of the action is proper, notwithstanding the amendment to such section after the commencement of the action by providing "that in any action in which the issue is not tried within one year after the date of the commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of the trial. Nothing in above section contained shall be construed or held to affect pending litigation."—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

13. Same—Means of ascertaining value.—In an action by a reclamation district for the condemnation of land, the value of the land is not to be determined by what other land of a similar character in the district sold for. The owner is entitled to the actual market value of the land for the most valuable use or uses to which it is adapted or may be put, and the prices at which other lands of like quality and adaptation and similarly situated may have been sold can not reasonably be accepted as a just criterion for measuring and finally ascertaining the actual value of the land sought to be taken.—*Reclamation District No. 730, v. Inglin*, 31 Cal. App. 495, 160 Pac. 1098.

14. Same—Owner is entitled to receive a sum equal to value of land at the time when, in the language of the constitution, the land is "taken" . . . Under Act of 1861, authorizing condemnation of land by railroad company, it was held that taking was not accomplished at time of filing plat of location of road with secretary of state and in office of clerk of county; . . . nor should value be computed as of date when railroad entered for purposes of construction, as lawful entry must be preceded by right of entry, and that must be preceded by payment or tender of compensation previously assessed. Record on appeal in case did not disclose time with reference to which damages were in fact computed and it was presumed that commissioners had not erred in that respect.—*San Francisco & San Jose R. Co. v. Mahoney*, 29 Cal. 112, 116, 118.

15. Same—Ruling of court admitting evidence of value at time of trial and exclud-

ing evidence of value at time of issuance of summons, is erroneous.—*San Jose & Alameda R. Co. v. Mayne*, 83 Cal. 566, 568, 23 Pac. 522.

16. **Same—Verdict finding value of land generally** will be construed with reference to time of commencement of action, which in this kind of action is identical with issuance of summons.—*Pacific Coast R. Co. v. Porter*, 74 Cal. 261, 263, 15 Pac. 774.

17. **Same—Vesting of title** is not only meaning of word "taken" in eminent domain

clause of constitution. That was at one time held. (See *Fox v. Western Pac. R. Co.*, 31 Cal. 538.) But the position was receded from, and it was held that "the occupation by the corporation for its own purposes pending the proceedings for condemnation is a taking of the property within the meaning of the constitution." (Citing *Davis v. San Lorenzo R. Co.*, 47 Cal. 517, 523; *San Mateo W. W. v. Sharpstein*, 50 Cal. 284; *Sanborn v. Belden*, 51 Cal. 266; *Vilhac v. Stockton & Ione R. Co.*, 53 Cal. 208.)—*Callahan v. Dunn*, 78 Cal. 366, 370, 20 Pac. 737.

§ 1250. NEW PROCEEDINGS TO CURE DEFECTIVE TITLE. If the title attempted to be acquired is found to be defective from any cause, the plaintiff may again institute proceedings to acquire the same, as in this title prescribed.

History: Enacted March 11, 1872.

§ 1251. PAYMENT OF DAMAGES ASSESSED. [TIME OF.] The plaintiff must, within thirty days after final judgment, pay the sum of money assessed. In case the plaintiff is the state of California, or is a public corporation, and it appears by affidavit that bonds of said state or public corporation must be issued and sold in order to provide the money necessary to pay the sum assessed, then such sum may be paid at any time within one year from the date of such judgment; provided, further, that if the sale of any such bonds can not be had by reason of litigation affecting the validity thereof, then the time during which such litigation is pending shall not be considered a part of the one year's time in which such payment must be made.

[Property taken for railroad purposes.] In case the use is for railroad purposes, the plaintiff may, at the time of or before payment, elect to build the farm or private crossings, fences and cattle-guards; and if he so elect, shall execute to the defendant a bond, with sureties to be approved by the court in double the assessed cost of the same, to build such farm or private crossings, fences and cattle-guards within eighteen months from the time the railroad is built on the land taken, and if such bond be given, need not pay the cost of such farm or private crossings, fences and cattle-guards. In an action on such bond, the plaintiff may recover reasonable attorney's fees.

[Property taken for highway purposes.] In case of property being taken by the state or any county, or city and county, for highway purposes, the state or such county, or city and county, may elect to build the fences for which damages may have been assessed and in such case the amount assessed shall be deposited with the clerk of the court having jurisdiction of the action, and if such fences are not constructed within one year from the date of judgment the said money shall be paid to the defendant or defendants entitled thereto, or to his or their order, who shall immediately build said fences. In case the state, or county, or city and county, builds said fences the moneys deposited shall be returned to said state or county, or city and county, and in case the said moneys are paid to the owner or owners of the land condemned and are

not used for said purposes, within one year from the date of judgment, the same may be recovered by said state, or county, or city and county.

History: Enacted March 11, 1872; amendment approved February 28, 1911, Stats. and Amdts. 1911, p. 92; May 22, 1913, Stats. and Amdts. 1913, p. 241; May 20, 1915, Stats. and Amdts. 1915, p. 938. In effect August 8, 1915.

EMINENT DOMAIN—PAYMENT OF DAMAGES ASSESSED—TIME OF.

1. Appeal—By defendant—Effect of.
2. Same—By plaintiff—Effect of on payment of assessment.
3. Bond—In double assessed cost.
4. Same—Amended bond.
5. Same—Suit on bond.
6. Code does not require costs to be paid or deposited.
- 7, 8. Constitutionality of provision for bond.
9. Construction of section.
- 10-12. "Final judgment"—Is not the "final order of condemnation."
- 13, 14. Option to take land after judgment.
- 15-19. Payment within thirty days after final judgment.
20. Same—Payment or deposit made before entry of judgment.
21. Provision relating to fences.
22. Same—Duty of fencing.

See, ante, § 1237 and note.

1. Appeal—By defendant—Effect of.—Where defendant appeals without abandoning all defenses except claim for greater compensation, the entire judgment is suspended and defendant is not entitled to demand or receive money deposited.—*Pool v. Butler*, 141 Cal. 46, 50, 74 Pac. 444.

2. Same—By plaintiff—Effect of on payment of assessment.—The taking of an appeal by the plaintiff from the judgment prior to the expiration of the thirty day period mentioned in above section, has the effect of staying execution on the judgment pending the appeal without the giving of a stay-bond, and the appellant is entitled to a writ of supersedeas staying such execution.—*Colusa & H. R. Co. v. Superior Court*, 31 Cal. App. 746, 161 Pac. 1011.

3. Bond—In double assessed cost of fences and cattle-guards is required when plaintiff elects to build such fences and guards. Where assessed cost is eleven thousand nine hundred and fifty-four dollars statute is not satisfied by bond executed by four sureties in sum of six thousand dollars each. Such bond constitutes in aggregate but one surety in double assessed cost.—*California So. R. Co. v. Southern Pac. R. Co.*, 65 Cal. 293, 294, 4 Pac. 12.

4. Same—Amended bond can not be filed after lapse of prescribed time.—*California So. R. Co. v. Southern Pac. R. Co.*, 65 Cal. 293, 294, 4 Pac. 12.

5. Same—Suit on bond.—Landowner is not compelled to build fence in question

when obligor has failed to do so before suing on bond.—*Farley v. Moran*, 3 Cal. Unrep. 572, 31 Pac. 158, 160.

6. Code does not require costs to be paid or deposited in court, but "the sum of money assessed." Costs may be allowed or not, in the discretion of the court.—*City of Alameda v. Cohen*, 133 Cal. 5, 7, 65 Pac. 127.

7. Constitutionality of provision for bond.—It has been contended that bond given under above section was void, as such bond could, under the statute, only be given as compensation for damages done to plaintiff's land, or the taking of same for a public use; and that such bond is not just compensation "first made or paid into court" for the landowner, as required by section 14 of article I of state constitution; that, therefore, the statute which authorizes such bond is unconstitutional and the bond unauthorized by any valid law and entirely void as a contract. Supreme court did not determine point as to constitutionality, holding bond in case to be valid as voluntary bond given for valuable consideration.—*Farley v. Moran*, 3 Cal. Unrep. 572, 31 Pac. 158, 159.

8. That section 14 of article I of constitution has abrogated provision that plaintiff may elect to build fences and cattle-guards was contended in one case, but as bond given was insufficient point was not decided.—*California So. R. Co. v. Southern Pac. R. Co.*, 65 Cal. 293, 294, 4 Pac. 12.

9. Construction of section.—The "final judgment" mentioned in above section within which time the plaintiff must pay has reference to the preliminary judgment of condemnation entered by the superior court, and not to the final conclusion of the litigation.—*Colusa & H. R. Co. v. Superior Court*, 31 Cal. App. 746, 161 Pac. 1011.

10. "Final judgment"—Is not the "final order of condemnation" provided for in section 1253, post, but is, and must be, the judgment which adjudges the sum to be paid within thirty days after it is entered.—*California So. R. Co. v. Southern Pac. R. Co.*, 67 Cal. 59, 62, 63, 7 Pac. 123.

11. Final judgment is not the final order of condemnation mentioned in section 1253 post (latter is order after judgment).—*Glenn Co. v. Johnston*, 129 Cal. 404, 408, 409, 62 Pac. 66.

12. Judgment of condemnation is final judgment.—*City of Alameda v. Cohen*, 133 Cal. 5, 7, 65 Pac. 127.

13. Option to take land after judgment.—The government is under no obligation to take the land if the terms, when ascer-

tained are not satisfactory.—*Fox v. Western Pac. R. Co.*, 31 Cal. 538, 555.

14. Plaintiff seeking to condemn land for a public use does not, by bringing action to condemn, bind himself to take the land and pay the compensation fixed by the court or jury, since it may be so great as to make the proposed use impossible, or the delay in obtaining the right to use the land for the purposes intended may permit another to acquire a competitive use of other lands for same purpose, and thus make his use undesirable, even if the compensation were reasonable. Hence a plaintiff in such action is conceded to have a right to abandon the proceedings and decline to take the land . . . at any time before defendants are in position to demand payment. If money has been deposited with the clerk for defendant in sum assessed for compensation, it may be withdrawn. Such deposit is only a tender and money tendered does not vest in person to whom it is tendered unless it is accepted.—*Pool v. Butler*, 141 Cal. 46, 49, 50, 52, 74 Pac. 444.

15. **Payment within thirty days after final judgment** is general and applies to all cases.—*Glenn County v. Johnston*, 129 Cal. 404, 407, 62 Pac. 66.

16. It becomes duty of plaintiff to pay the money assessed as damages within thirty days after final judgment, or to deposit same in court.—*City of Alameda v. Cohen*, 133 Cal. 5, 7, 65 Pac. 127.

17. Payment or tender of the money awarded is a condition precedent to the right of railroad company to enter upon the land for the purposes of construction; and without compliance with the requirement such entry may be enjoined by court of equity or prosecuted for in trespass at law.—*San Francisco & S. J. R. Co. v. Mahoney*, 29 Cal. 112, 117.

18. Plaintiff can not after obtaining final judgment in his favor wait for years

and then, at his option, make payment and procure final order of condemnation.—*Bensley v. Mountain Lake Water Co.*, 13 Cal. 306, 317.

19. Payment or deposit after time fixed by above section will be too late.—*Madera County v. Raymond Granite Co.*, 139 Cal. 128, 132, 72 Pac. 915.

20. **Same—Payment or deposit made before entry of judgment** would not avoid the judgment and could not be injurious to defendant.—*Madera County v. Raymond Granite Co.*, 139 Cal. 128, 132, 72 Pac. 915.

21. **Provision relating to fences** is applicable only to railroad companies.—*Glenn County v. Johnston*, 129 Cal. 404, 407, 62 Pac. 66.

22. **Same—Duty of fencing and constructing cattle-guards along railroad right of way** must be performed either by the railroad company or the landowner. Assessment may be paid to landowner by company or it may elect to give bond in double the amount of the assessment, for the building of such fences and cattle-guards as may be needed upon the land taken for the road within eighteen months after the railroad is built on the land. If company fails to build the landowner may sue upon the bond. But if payment of assessment be made to the landowner and he fails to build and maintain such fences, etc., the law makes him liable to the company for any injuries which may be sustained by reason of his animals running at large upon the railroad, and relieves and exonerates the company from any damage or loss arising out of the killing or maiming of his cattle trespassing upon the road, unless it be proved that the loss or damage was caused wholly by the fault or negligence of the company.—*Butte County v. Boydston*, 64 Cal. 110, 113, 29 Pac. 511.

See *Kerr's Cyc. Civ. Code*, 2d ed., § 485 and also note.

§ 1252. DAMAGES, TO WHOM PAID. Payment may be made to the defendants entitled thereto, or the money may be deposited in court for the defendants, and be distributed to those entitled thereto. If the money be not so paid or deposited, the defendants may have execution as in civil cases; and if the money can not be made on execution, the court, upon a showing to that effect, must set aside and annul the entire proceedings, and restore possession of the property to the defendant, if possession has been taken by the plaintiff.

History: Enacted March 11, 1872.

EMINENT DOMAIN—DAMAGES—TO WHOM PAID.

1. Construction of section.
2. Costs—Deposit of award.
- 3, 4. Deposit of amount assessed for damages.
5. Non-payment of award—Annulment of proceedings.

6, 7. **Same—Remedy.**

8. Payment to be made to true owner.

9, 10. **Same—Title contingent.**

See, ante, § 1237 and note.

1. **Construction of section.**—Under above section, such preliminary judgment after the expiration of thirty days becomes substantially a personal judgment for the di-

rect payment of money, and execution may issue as in civil cases.—*Colusa & H. R. Co. v. Superior Court*, 31 Cal. App. 746, 161 Pac. 1011.

2. **Costs**—Deposit of award in final judgment in condemnation proceedings within thirty days does not cover costs, which may be allowed or not in the discretion of court.—*City of Alameda v. Cohen*, 133 Cal. 5, 7, 65 Pac. 127.

3. **Deposit of amount assessed for damages**, as found by court in final order of condemnation unappealed from, is conclusive upon defendant.—*City of Alameda v. Cohen*, 133 Cal. 5, 10, 65 Pac. 127; *Madera County v. Raymond Granite Co.*, 139 Cal. 128, 72 Pac. 915.

See par. 2, this note.

4. Any error in form of judgment as being in personam against the city, on which an execution can not issue, is without prejudice to defendant.—*Madera County v. Raymond Granite Co.*, 139 Cal. 128, 72 Pac. 915.

5. **Non-payment of award**—Annulment of proceedings, at action of owner, where award is not paid into court within thirty days from date of final judgment.—*Glenn*

County v. Johnston, 129 Cal. 404, 407, 62 Pac. 66; *Madera County v. Raymond Granite Co.*, 139 Cal. 128, 133, 72 Pac. 915.

6. **Same**—Remedy is by ordinary action. Owner can not resort to summary remedy of motion upon affidavit unless his case comes within some provision of statute to that effect, which is not case in condemnation proceedings.—*San Diego Land & Town Co. v. Neale*, 78 Cal. 80, 83, 20 Pac. 380.

7. **Distinguishing**: In matter of Bryan, 65 Cal. 375, 4 Pac. 304; *Neale v. Superior Court*, 77 Cal. 28, 18 Pac. 790.

8. **Payment to be made to true owner** of land condemned for railroad purposes, although trespasser was in possession at time of damages, who had filed his claim for damages, where such owner recovers possession before payment is made.—*Rooney v. Sacramento Valley R. Co.*, 6 Cal. 639, 641.

9. **Same**—Title contingent, e. g., dependent upon confirmation of a Mexican grant by United States, the location of which may be changed, the money should be paid into court.—*San Francisco & San Jose R. Co. v. Mahoney*, 29 Cal. 112, 119.

10. **Distinguished**: *Fox v. Western Pac. R. Co.*, 31 Cal. 538, 548.

§ 1253. FINAL ORDER OF CONDEMNATION, WHAT TO CONTAIN. WHEN FILED, TITLE VESTS. When payments have been made and the bond given, if the plaintiff elects to give one, as required by the last two sections, the court must make a final order of condemnation, which must describe the property condemned and the purposes of such condemnation. A copy of the order must be filed in the office of the recorder of the county, and thereupon the property described therein shall vest in the plaintiff for the purposes therein specified.

History: Enacted March 11, 1872.

EMINENT DOMAIN—FINAL ORDER OF CONDEMNATION.

1. Contents of order of condemnation.
2. Copy of order must be filed in recorder's office.
3. Interest on judgment.
- 4-7. Final order of condemnation.
- 8-11. **Same**—Authority to make final order of condemnation depends upon proof that the money has been paid.
12. **Same**—**Same**—No bond is required.
- 13-16. **Same**—Description.
- 17-19. **Same**—Making of final decree without notice.
- 20, 21. **Same**—Takes effect, when.
22. Recital, in final order, of payment of damage money.
- 23-25. Vesting of title.

See, ante, § 1237 and note.

1. **Contents of order of condemnation.**—In a condemnation proceeding the court in making its interlocutory judgment prop-

erly refused to reserve the action for further orders covering the matter of taxes and assessments accruing subsequent to the commencement of the action.—*City of Los Angeles v. Los Angeles Pac. Co.*, 31 Cal. App. 100, 159 Pac. 992.

2. **Copy of order must be filed in recorder's office** of county where land is situated, and thereupon title vests in plaintiff for purposes specified.—*City of Alameda v. Cohen*, 133 Cal. 5, 7, 65 Pac. 127.

3. **Interest on judgment.**—There is no provision that judgment shall require payment of interest from date of verdict on amount found by jury, or payment of costs, before final order of condemnation.—*San Francisco & San Jose Valley R. Co. v. Levi-ston*, 134 Cal. 412, 416, 66 Pac. 473.

As to interest on damages in cases where order has been made letting plaintiff into possession, see, ante, § 1249 and note.

4. **Final order of condemnation** is an order after judgment and is not the final judgment mentioned in section 1251, ante.—*Glenn County v. Johnston*, 129 Cal. 404,

408, 409, 62 Pac. 66; *City of Los Angeles v. Pomeroy*, 132 Cal. 340, 341, 64 Pac. 477.

5. After payment has been made court must make a final order of condemnation.—*City of Alameda v. Cohen*, 133 Cal. 5, 7, 65 Pac. 127.

6. Until assessment of damages and benefits, adjudication of compensation, and payment, or tender of compensation, owner can not be deprived of land, and any judgment of condemnation rendered against him would be illegal and void.—*Butte County v. Boydston*, 64 Cal. 110, 112, 29 Pac. 511.

7. Final order is not void by reason of fact that money paid into court for defendant was thereafter deposited by clerk with county treasurer subject to the order of the court, and not subject to order of defendant. Such deposit by clerk with treasurer is made under section 2104, post, and is not ground for objection that deposit with clerk was not kept good.—*City of Los Angeles v. Pomeroy*, 133 Cal. 529, 532, 65 Pac. 1049.

8. Same—Authority to make final order of condemnation depends upon proof that the money has been paid into court, or to clerk, which is its equivalent.—*San Luis Obispo County v. Simas*, 1 Cal. App. 175, 181, 81 Pac. 972.

9. Only condition imposed is payment of "the sum of money assessed" within thirty days after final judgment," and that "when payments have been made," etc., a final order of condemnation shall be rendered, which seems to exclude the idea of any other condition than the one specified being proper.—*San Francisco & San Jose Valley R. Co. v. Leviston*, 134 Cal. 412, 416, 66 Pac. 473.

10. Court has no power to make final order of condemnation until after judgment of condemnation.—*Madera County v. Raymond Granite Co.*, 139 Cal. 128, 131, 72 Pac. 915.

11. It is competent for the legislature to fix the mode of condemnation, the method by which the damages to individuals shall be determined, and the proceedings for their recovery.—*Lincoln v. Colusa County*, 28 Cal. 663, 667.

12. Same—Same—No bond is required before making such final order other than in those cases mentioned in subdivision 5 of section 1248, ante.—*San Luis Obispo County v. Simas*, 1 Cal. App. 175, 181, 81 Pac. 972.

13. Same—Description may be aided by map attached to complaint and referred to in judgment.—*Madera County v. Raymond Granite Co.*, 139 Cal. 128, 129, 72 Pac. 915.

14. The judgment must be so far certain as that the parties, and any ministerial officer who may be called on to enforce the judgment, may know what land is to be taken and paid for.—*California Cent. R. Co. v. Hooper*, 76 Cal. 404, 413, 18 Pac. 599; *San Francisco & San Jose Valley R. Co. v. Gould*, 122 Cal. 601, 602, 55 Pac. 411.

15. If surveyor could, with description and accompanying map, have no difficulty in definitely locating road (land condemned) description is sufficient.—*Madera County v. Raymond Granite Co.*, 139 Cal. 128, 134, 72 Pac. 915.

16. Judgment containing such description that if surveyor were to take it and go upon land it would be impossible for him to locate the line of the road between two engineers' stations there named, or if these were destroyed he could only determine that the right of way entered defendant's land somewhere on the northwest side and left it somewhere on the east side is insufficient.—*San Francisco & San Jose Valley R. Co. v. Gould*, 122 Cal. 601, 604, 55 Pac. 411.

As to description required in complaint, see, ante, § 1244 and note.

17. Same—Making of final decree without notice and opportunity to defendants to be heard is error, but such decree is not void. But where bill of exceptions concedes payment, such error can not be held prejudicial.—*San Luis Obispo County v. Simas*, 1 Cal. App. 175, 181, 81 Pac. 972.

18. If final order is entered without notice to appellant, record should so show if it is desired to urge that fact on appeal.—*Madera County v. Raymond Granite Co.*, 139 Cal. 128, 131, 72 Pac. 915.

19. Refusal of court to hear read affidavits on file in opposition to granting final order of condemnation, although an irregularity, will not be ground for reversal on appeal where objections urged by affidavits were insufficient.—*City of Los Angeles v. Pomeroy*, 133 Cal. 529, 531, 65 Pac. 1049.

20. Same—Takes effect, when.—Order of condemnation takes effect when entered, and nunc pro tunc clause attempting to give it effect as of date of final judgment will be disregarded.—*Madera County v. Raymond Granite Co.*, 139 Cal. 128, 131, 72 Pac. 915.

21. Where judgment of condemnation was made on March 11, and filed March 12, and final order of condemnation was made and entered on May 23 for and as of date March 11, 1902, court held that if trial court had power to make nunc pro tunc order it would be presumed that it did not take effect until after judgment was entered.—*Madera County v. Raymond Granite Co.*, 139 Cal. 128, 130, 131, 72 Pac. 915.

22. Recital, in final order, of payment of damage money, is conclusive on appeal on judgment-roll alone.—*Madera County v. Raymond Granite Co.*, 139 Cal. 128, 131, 72 Pac. 915.

23. Vesting of title.—The right to take on the terms adjudicated—which is a compulsory statutory sale—accrues from the legal proceedings, the petition, the report, the confirmation; then the price becomes fixed. But no right of entry—much less a title—accrues so far. The party condemn-

ing, the representative of a state, is then in a condition to become a purchaser; the other party is in a situation of a vendor making an agreement of sale on condition precedent, but retaining his title and possession until payment.—*Bensley v. Mountain Lake Water Co.*, 13 Cal. 307, 316.

24. Title does not vest in plaintiff until final order of condemnation is made and

recorded.—*Callahan v. Dunn*, 78 Cal. 366, 368, 20 Pac. 737; *Pool v. Butler*, 141 Cal. 46, 50, 74 Pac. 444.

25. Where there is no payment, and no final order of condemnation, and plaintiff corporation is dissolved after final judgment of condemnation, title can never pass.—*Callahan v. Dunn*, 78 Cal. 366, 369, 20 Pac. 737.

§ 1254. PUTTING PLAINTIFF IN POSSESSION. At any time after trial and judgment entered or pending an appeal from the judgment to the supreme court, whenever the plaintiff shall have paid into court, for the defendant, the full amount of the judgment, and such further sum as may be required by the court as a fund to pay any further damages and costs that may be recovered in said proceeding, as well as all damages that may be sustained by the defendant, if, for any cause, the property shall not be finally taken for public use, the superior court in which the proceeding was tried may, upon notice of not less than ten days, authorize the plaintiff, if already in possession, to continue therein, and if not, then to take possession of and use the property during the pendency of and until the final conclusion of the litigation, and may, if necessary, stay all actions and proceedings against the plaintiff on account thereof.

[Payment to defendant of money paid in—Duty of court.] The defendant, who is entitled to the money paid into court for him upon any judgment, shall be entitled to demand and receive the same at any time thereafter upon obtaining an order therefor from the court.

It shall be the duty of the court, or a judge thereof, upon application being made by such defendant, to order and direct that the money so paid into court for him be delivered to him upon his filing a satisfaction of the judgment, or upon his filing a receipt therefor, and an abandonment of all defenses to the action or proceeding, except as to the amount of damages that he may be entitled to in the event that a new trial shall be granted.

[Abandonment of defense.] A payment to a defendant, as aforesaid, shall be held to be an abandonment by such defendant of all defenses interposed by him, excepting his claim for greater compensation. In ascertaining the amount to be paid into court, the court shall take care that the same be sufficient and adequate.

[Payment into court does not discharge plaintiff.] The payment of the money into court, as hereinbefore provided for, shall not discharge the plaintiff from liability to keep the said fund full and without diminution; but such money shall be and remain, as to all accidents, defalcations, or other contingencies (as between the parties to the proceedings), at the risk of the plaintiff, and shall so remain until the amount of the compensation or damages is finally settled by judicial determination, and until the court awards the money, or such part thereof as shall be determined upon, to the defendant, and until he is authorized or required by rule of court to take it. If, for any reason, the money shall at any time be lost, or otherwise abstracted or withdrawn, through no fault of the defendant, the court shall require the plaintiff to make and keep the sum good at all times until the litigation is finally brought to an end, and

until paid over or made payable to the defendant by order of court, as above provided, and until such time or times the county clerk shall be deemed to be the custodian of the money, and shall be liable to the plaintiff upon his official bond for the same, or any part thereof, in case it be for any reason lost or otherwise abstracted or withdrawn.

The court may order the money to be deposited in the state treasury, and in such case it shall be the duty of the state treasurer to receive all such moneys, duly receipt for, and to safely keep the same in a special fund, to be entered on his books as a condemnation fund for such purpose, and for such duty he shall be liable to the plaintiff upon his official bond.

The state treasurer shall pay out such money so deposited in such manner and at such times as the court or a judge thereof may, by order or decree, direct. In all cases where a new trial has been granted upon the application of the defendant, and he has failed upon such trial to obtain greater compensation than was allowed him upon the first trial, the costs of such new trial shall be taxed against him.

History: Enacted March 11, 1872; amendment approved April 1, 1878, Code Amdts. 1877-8, p. 108; April 26, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 119; March 27, 1897, Stats. and Amdts. 1897, p. 186; March 9, 1903, Stats. and Amdts. 1903, p. 109.

EMINENT DOMAIN — PUTTING PLAINTIFF IN POSSESSION.

1. Abandonment of defenses—Plaintiff's right to property confirmed.
2. Adequate fund—In custody of agent of public.
3. Appeal—Defenses not abandoned—Is refusal of deposit.
4. Same—On compensation alone—Judgment not vacated.
5. Compensation—Ascertained by jury—Unless waived.
6. Same—To owner of land not taken.
7. Same—Without respect to benefits.
8. Condemned land subject to tax—Duty of owner to pay tax.
9. Constitutionality of section.
10. Counsel fees—Not allowed in general judgment for defendant.
11. Damages — Averred, property not taken.
12. Same—Award not enforced—No possession.
13. Demand upon principal unnecessary—In suit against sureties.
14. Deposit accepted—Defense abandoned, conditionally.
15. Same—Same—Plaintiff may occupy.
16. Same — Need not be made — Pending motion and appeal.
17. Mandamus for possession denied — After appeal from order.
18. Money—Ordered paid by treasurer—Need not be brought into court.
19. Occupation during proceedings a taking.

20. Order *ex parte* dissolving injunction invalid.
21. Orders in proceedings subject to be modified.
22. Owner not compensated until he can take the deposit.
23. Same—Out of possession, has ordinary, not summary, remedy.
24. Plaintiff not bound to take the land.
25. Possession — In plaintiff, court may legalize but not eject.
26. Same—Not given until compensation paid.
27. Proceeding — Abandoned, money not accepted.
28. Same—Adversary subject to constitution.
29. Same—Has no element of contract.
30. Property taken and used—If deposit adequate.
31. Provision—Allowing possession on payment—Constitutional.
32. Same—For costs, not unconstitutional.
33. Same — For possession without compensation.
34. Same — Touching bond — Unconstitutional.
- 35, 36. Provisions of constitution, article I, section 14—Not in conflict with federal constitution.
37. Right—In land does not vest upon deposit.
38. Same—To deposit—Vesting coincident.
39. Right of way—Conditions alike to all.
40. Section consistent with section 2104, post.

41. Stay of proceedings, exceptions to.
42. Taking before order prevented—Restoration compelled.
43. Title in land upon—Bind order of condemnation.
44. Undertaking—Appeal—Order of possession.
45. Same—No recovery unless accepted as payment.
- 46, 47. Same—Is not adequate compensation.

See, ante, § 1237 and note.

1. Abandonment of defenses—Plaintiff's right to property confirmed.—The abandonment by defendant of all defenses, except her claim for greater compensation, confirmed plaintiff's right to the property, and estopped her from denying that right, and the plaintiff is equally estopped to say that the money received by the defendant is not hers.—*Los Angeles, Pasadena & G. R. Co. v. Rumpp*, 104 Cal. 20, 25, 37 Pac. 859.

2. Adequate fund—In custody of agent of public.—When property is taken by a private corporation, which, although for this purpose it is regarded as the agent of the state, appropriates it as well for the benefit and profit of the members of the corporation as for public use, it is at least essential that an adequate fund (in the custody of an agent of the public other than the corporation or its officers) be provided, from which the owner of the property can certainly obtain compensation.—*Sanborn v. Belden*, 51 Cal. 266, 268; *Steinhart v. Superior Court*, 137 Cal. 575, 578, 59 L. R. A. 404, 70 Pac. 629.

3. Appeal—Defenses not abandoned—Is refusal of deposit.—In an action to condemn land for a ferry landing, the court gave judgment to plaintiff who deposited the amount required. Defendants did not accept the money but perfected an appeal, and did not abandon all defenses except for greater compensation, and could not demand nor obtain the money until the appeal should be determined. The court had no power, under the circumstances, to make the requisite order for the payment of the money, the judgment having been suspended by the appeal, which was a refusal to accept the money, or to treat the judgment as a final determination of the rights of the parties, though it was in form final.—*Pool v. Butler*, 141 Cal. 46, 48, 74 Pac. 444.

4. Same—On compensation alone—Judgment not vacated.—An appeal by defendant upon the sole question whether she was entitled to "greater compensation," and, if so, how much additional compensation she was entitled to, does not vacate the judgment.—*Los Angeles, Pasadena & G. R. Co. v. Rumpp*, 104 Cal. 20, 25, 37 Pac. 859.

5. Compensation—Ascertained by jury—Unless waived.—In a case to condemn a right of way, which can not be appropriated until full compensation therefor be made in

money or ascertained and paid into court for the owner, and this compensation must be ascertained by jury, unless a jury is waived as in other cases.—*Steinhart v. Superior Court*, 137 Cal. 575, 579, 59 L. R. A. 404, 70 Pac. 629.

6. Same—To owner of land not taken.—If the proceeding shall ultimately fail and the land for any cause shall not be taken for public use, the provision of above section secures to the owner compensation for the use of the land and for waste committed upon it whilst the corporation was in the possession.—*Davis v. San Lorenzo R. Co.*, 47 Cal. 517, 520.

7. Same—Without respect to benefits.—Where evidence had been received tending to show that the construction of the road would be a benefit to the remainder of the land, but the court in its instructions to the jury expressly charged that "the compensation to be awarded the owner must be ascertained without respect to any benefits that would accrue to the remainder of the land from the building of the road," this was an instruction to disregard all testimony tending to show benefits resulting to the remaining land, including that asked to be stricken out, and was sufficient to remove any prejudice to the defendant from the refusal to strike out.—*Los Angeles, Pasadena & G. R. Co. v. Rumpp*, 104 Cal. 20, 28, 37 Pac. 859.

8. Condemned land subject to tax—Duty of owner to pay tax.—In a case where a municipal water district condemned certain land, and pursuant to proceedings had in accordance with the provisions of the above section was let into possession thereof the court held that there was no obligation on the part of the former owner to pay any taxes which were due and a lien upon the land, but not at the time delinquent.—*Municipal Water District v. North Coast Water Company*, 40 Cal. App. 260, 180 Pac. 620.

9. Constitutionality of section.—This provision is constitutional.—*Oakland v. Pacific Coast Lumber & Mill Co.*, 172 Cal. 332, 156 Pac. 468.

10. Counsel fees—Not allowed in general judgment for defendant.—There is no law that allows counsel fees in a general judgment for a defendant in a proceeding for condemnation.—*Coburn v. Townsend*, 103 Cal. 233, 236, 37 Pac. 202.

11. Damages—Averred, property not taken.—A recovery can not be had for the damages sustained by the preliminary taking, where such damages are not averred, and where the only damages mentioned in the undertaking are such as may be sustained "if, for any cause, the said described property, or any of it, shall not be finally taken," and it is not averred that the property was not so finally taken, nor that by reason thereof the plaintiff has sustained any damage.—*Vilhac v. Stockton & I. R. Co.*, 53 Cal. 208, 212.

12. Same—Award not enforced—No possession.—Justice requires that where possession has not been taken, and the purpose for which condemnation was sought has been abandoned, that the award of damages should not be enforced, especially where the defendants have prevented, for an unreasonable time, the accomplishment of the purpose.—*Pool v. Butler*, 141 Cal. 46, 54, 74 Pac. 444.

13. Demand upon principal unnecessary—In suit against sureties.—In an action against defendants as sureties in an undertaking given under above section in a proceeding in eminent domain, wherein the condition was that the sureties "undertake, promise, and agree that the plaintiffs in this case shall and will pay all such damages or compensation as may be awarded to defendants, or either of them, . . . If for any cause such land shall not be finally taken for public use, or in default thereof we will pay the same," etc., there is no need of an averment or proof of a demand upon the principal named in the undertaking.—*Coburn v. Brooks*, 78 Cal. 443, 444, 448, 21 Pac. 2; *Pleper v. Peers*, 98 Cal. 42, 43, 32 Pac. 700; *Treweek v. Howard*, 105 Cal. 434, 441, 39 Pac. 40; *Pierce v. Merrill*, 128 Cal. 464, 469, 79 Am. St. Rep. 60, 61 Pac. 64; *Carpenter v. Furrey*, 128 Cal. 665, 668, 61 Pac. 369; *Bolles v. Bird*, 12 Colo. App. 78, 54 Pac. 403.

14. Deposit accepted—Defense abandoned, conditionally.—The amount of money awarded by the jury as compensation for the land taken, and also that awarded for damages to the land not taken, was paid into court for the plaintiff, and accepted by defendant upon the following terms: "And I hereby abandon all defense to this action, except as to the amount of damages that I may be entitled to in the event that a new trial shall be granted herein," signed by the defendant and his attorneys of record, and such proceeding is in accordance with the provisions of above section.—*San Jose & Alameda R. Co. v. Mayne*, 83 Cal. 566, 567, 23 Pac. 522.

15. Same—Same—Plaintiff may occupy.—Where the payment of the condemnation money by the plaintiff was not accompanied by a motion for a new trial or notice of appeal, or other objection to the amount found by the jury, and upon such payment it took possession of the land condemned, under the statute the defendant received the money without prejudice to any proceeding authorized by it to recover greater compensation, but under a condition that plaintiff's right to occupy the land shall not be questioned. Upon such payment plaintiff acquired a vested right in the property and the defendant a vested right in the compensation.—*Los Angeles, Pasadena & G. R. Co. v. Rumpp*, 104 Cal. 20, 25, 37 Pac. 859.

16. Same—Need not be made—Pending motion and appeal.—Pending a motion for a new trial by a defendant, and, later

pending the appeal by defendant, it is clear that plaintiff is not bound to pay or deposit the damages assessed upon the trial; and it is equally clear, by the motion and the appeal, that the defendants refused to accept payment, at least until they have exhausted all their resources to defeat the condemnation, and during all that time the plaintiffs have a right to abandon the enterprise and refuse to pay the compensation assessed by the court.—*Pool v. Butler*, 141 Cal. 46, 49, 74 Pac. 444.

17. Mandamus for possession denied—After appeal from order.—If the corporation is in possession of property as trespasser without any authority, owners may proceed against it by an ordinary action to recover possession; but having elected to proceed through the instrumentality of an order requiring delivery of possession, from which an appeal lies, they subject themselves to the condition of such appeal.—*Neale v. Superior Court*, 77 Cal. 28, 30, 18 Pac. 790; *San Diego, Land & Town Co. v. Neale*, 78 Cal. 80, 83, 20 Pac. 380.

18. Money—Ordered paid by treasurer—Need not be brought into court.—Where the court, in the final judgment, ordered that a county treasurer forthwith pay the money to the defendants, and "that this be his warrant therefor," and there is no pretense that the money was not in the county treasury, and the defendants could not have immediately taken it, it is apparent that they would not have received the money under any circumstances, and, these being the facts, the judgment should not be reversed on the technical point that the money—quite a large sum—was not actually carried from the treasurer's room to the court-room.—*City of Los Angeles v. Pomeroy*, 133 Cal. 529, 533, 65 Pac. 1049.

19. Occupation during proceedings a taking.—The occupation of land by a corporation for its own purposes pending the proceedings for condemnation, is a taking of private property for public use within the meaning of the constitution.—*Davis v. San Lorenzo*, 47 Cal. 517, 523; *San Mateo Water Works v. Sharpstein*, 50 Cal. 284; *Sanborn v. Belden*, 51 Cal. 266; *Vilhac v. Stockton & Ione R. Co.*, 53 Cal. 208; *Callahan v. Dunn*, 78 Cal. 366, 370, 20 Pac. 737; *Steinhart v. Superior Court*, 137 Cal. 575, 579, 59 L. R. A. 404, 70 Pac. 629.

20. Order ex parte dissolving injunction, invalid.—In an action to condemn land to extent of easement thereon for purpose of conveying water over same, and to condemn water in the stream for public use, and also for permission during pendency of action to continue in possession of land sought to be condemned, the district court had no authority to make ex parte order dissolving injunction granted by county judge against further trespass and authorizing continuance in possession upon giving bond under above section.—*Loomis v. Andrews*, 49 Cal. 239, 240.

21. Orders in proceedings subject to be modified.—An order authorizing the plaintiffs to take possession of and use the lands during the pendency of the proceedings and until their conclusion was incidental to the proceedings and interlocutory in its character, and during the pendency of the proceedings was subject to be modified or vacated altogether by the court, as the circumstances from time to time appearing might seem to require. This is the general rule as to such orders entered in the progress of a cause in court, and there is no principle of law which excepts proceeding taken in the exercise of the power of eminent domain from the operation of the general rule in this respect.—*Templeton v. District Court*, 47 Cal. 70, 71; *People v. District Court*, 11 Colo. 147, 150, 17 Pac. 298.

22. Owner not compensated until he can take the deposit.—Compensation is not made to the owner by paying into court a sum of money before the damage has been judicially determined, and when the property-owner can not take the money, surely he is not compensated until he may take the money. It is not paid into court for him until he can take it.—*Steinhart v. Superior Court*, 137 Cal. 575, 579, 70 Pac. 629; *Pool v. Butler*, 141 Cal. 46, 51, 74 Pac. 444.

23. Same—Out of possession, has ordinary, not summary, remedy.—Owner of land whereon the plaintiff in proceedings in eminent domain has entered without authority and without pay or deposit in court of the amount awarded, the defendant is to be left to his ordinary remedy by action, and can not resort to the summary one of a motion upon affidavits for an order requiring plaintiff to restore possession, unless the case comes within some provisions of statute to that effect.—*San Diego Land & Town Co. v. Neale*, 78 Cal. 80, 82, 20 Pac. 380.

24. Plaintiff not bound to take the land.—A plaintiff seeking to condemn land for public use does not by bringing the action to condemn bind himself to take the land and pay the compensation fixed by the court or jury, since it may be so great as to make the proposed use impossible, or the delay in obtaining the right to use the land for the purpose intended may permit another to acquire a competitive use of other lands for the same purpose, and thus make his use undesirable, even if the compensation were reasonable.—*Pool v. Butler*, 141 Cal. 46, 49, 74 Pac. 444.

25. Possession—in plaintiff, court may legalize but not eject.—There can be no doubt that plaintiff had no right to flood defendants' land before payment or deposit. Above section provides that after a proper deposit the court may authorize the plaintiff, if already in possession, to continue therein, which means merely that upon certain conditions, the court may anticipate its final action, so far as to authorize or legalize a possession pending the litigation. It does not expressly provide that the plain-

tiff may be ejected from a possession taken independently of the eminent domain proceedings, or be required to tear down valuable improvements which may have been previously made thereto, and contains no such implication.—*San Diego Land & Town Co. v. Neale*, 78 Cal. 80, 81, 20 Pac. 380.

26. Same—Not given until compensation paid.—To hold that possession of land may be given to a person seeking to acquire a right of way by condemnation, during the pendency of the proceeding and before the amount of compensation has been determined and paid to the owner or into court for him, would be to hold that this so-called temporary possession is not a taking of private property for public use. But both on authority and reason it is so.—*Steinhart v. Superior Court*, 137 Cal. 575, 579, 59 L. R. A. 404, 70 Pac. 629.

27. Proceeding—Abandoned, money not accepted.—Where plaintiff made the deposit required under above section, and defendant not having accepted the money, perfected an appeal without abandoning all defenses except for greater compensation, plaintiff has a right to abandon the proceeding and decline to take the land at any time before the defendants are willing to receive the deposit, or are in a position to demand it.—*Pool v. Butler*, 141 Cal. 46, 49, 74 Pac. 444.

28. Same—Adversary subject to constitution.—Proceeding in eminent domain is an adversary proceeding wherein the state appropriates the use of the land to the public, subject only to the requirement of the constitution that the land shall not be taken or damaged for public use without just compensation having been first made or paid into court for the owner.—*Pool v. Butler*, 141 Cal. 46, 49, 74 Pac. 444.

29. Same—Has no element of contract.—The owner of the land sought to be appropriated to a public use may voluntarily agree with the plaintiff, the agent of the state, as to price, and convey it to the person or corporation who may desire it for a public use, but in a proceeding under the statute there is no element of contract.—*Pool v. Butler*, 141 Cal. 46, 49, 74 Pac. 444.

30. Property taken and used—If deposit adequate.—The framers of above section and of article I, section 14 of the constitution evidently had in view the delays incident to condemnation proceedings, and the necessity in many cases of allowing property to be taken and used for a public use during the progress of the litigation, provided an adequate fund to fully reimburse the landowner was first paid into court.—*Spring Valley Water Works v. Drinkhouse*, 95 Cal. 220, 223, 30 Pac. 218.

31. Provision—Allowing possession on payment—Constitutional.—The provision of above section that upon payment of the sums therein indicated the court "may authorize the plaintiff, if already in possession, to continue therein, and if not, then to take possession and use the property during

the pendency of and until the final conclusion of the litigation," is not violative of any provision of the constitution, but directly in line with that instrument wherein it treats of such matters.—*Spring Valley Water Works v. Drinkhouse*, 95 Cal. 220, 223, 30 Pac. 218.

32. Same—For costs, not unconstitutional.—After providing for an appeal to the supreme court in condemnation proceeding, further provides: "In all cases where a new trial has been granted upon the application of the defendant, and he has failed upon such trial to obtain a greater compensation than was allowed him upon the first trial, the costs of such new trial shall be taxed against him," such provision is not unconstitutional.—*Los Angeles, Pasadena & G. R. Co. v. Rumpff*, 104 Cal. 20, 22, 37 Pac. 859.

33. Same—For possession without compensation.—The provisions of the code and of the statute which preceded the code, under which orders for possession are made in condemnation proceedings without first requiring compensation to be paid therefor, are unconstitutional.—*Coburn v. Townsend*, 103 Cal. 233, 235, 37 Pac. 202; *Steinhart v. Superior Court*, 137 Cal. 575, 579, 59 L. R. A. 404, 70 Pac. 629.

34. Same—Touching bond—Unconstitutional.—A bond given under above section in condemnation proceedings is to secure a statutory privilege upon conditions to its enjoyment imposed by the statute; but the privilege is a constitutional privilege, which can not be conferred by statute, and the bond is therefore wholly without consideration and void.—*Coburn v. Townsend*, 103 Cal. 233, 235, 37 Pac. 202; *Shaughnessy v. American S. Co.*, 138 Cal. 543, 544, 69 Pac. 250, 71 Pac. 701.

35. Provisions of constitution, article I, section 14—Not in conflict with federal constitution.—The provisions of article I, section 14 of the constitution for taking private property for public use are not in conflict with the fourteenth amendment of the federal constitution, and are but limitations upon the power of the legislature.—*Steinhart v. Superior Court*, 137 Cal. 575, 579, 59 L. R. A. 404, 70 Pac. 629.

36. The provisions of article I, section 14 of the constitution do not require the passage of any laws upon the subject, but state the conditions upon which the legislature may authorize the taking of private property for public use. If capable of two constructions, one of which would cause a conflict with the federal constitution, the other must be adopted.—*Steinhart v. Superior Court*, 137 Cal. 575, 579, 59 L. R. A. 404, 70 Pac. 629.

37. Right—In land does not vest upon deposit.—The right of the defendants to the land or the easement therein does not vest in the plaintiff by the deposit with the clerk of the court. The deposit is only a tender, and in such cases the money tendered does C. C. P.—174

not vest in the person to whom it is tendered unless it is accepted.—*Pool v. Butler*, 141 Cal. 46, 50, 74 Pac. 444.

38. Same—To deposit—Vesting coincident.—The vesting of title to the deposit in the defendants is coincident with the right to the land or its use under the judgment which has been stayed and suspended by an appeal, during which time the court is powerless to enforce it. Nor can the defendants say: "The right to the money is vested in us, but you shall not have the land."—*Pool v. Butler*, 141 Cal. 46, 50, 74 Pac. 444.

39. Right of way—Conditions alike to all.—Construed with the fourteenth amendment of the federal constitution, it would seem that the condition which the constitution, article I, section 14 expressly imposes upon the legislature in granting the right to private corporations to acquire a right of way under the power of eminent domain must apply to all other persons.—*Steinhart v. Superior Court*, 137 Cal. 575, 579, 59 L. R. A. 404, 70 Pac. 629.

40. Section consistent with section 2104, post.—Section 2104, post, which provides that "whenever moneys are paid into or deposited in court the same shall be delivered to the clerk in person or to such of his deputies as shall be specially authorized by his appointment, in writing, to receive the same; he must, unless otherwise directed by law, deposit it with the county treasurer, to be held by him subject to the order of the court." This seems to be a general provision applicable in all cases, and is not inconsistent with above section, which provides that where, in a condemnation suit, the plaintiff may be authorized to take possession of the premises involved before trial, upon the payment into court of a sum of money to be fixed by the judge, the court "may" order that money to be deposited in the state treasury.—*City of Los Angeles v. Pomeroy*, 133 Cal. 529, 532, 65 Pac. 1049.

41. Stay of proceedings, exceptions to.—Above section must be taken as creating an addition to the class of cases heretofore constituting exceptions to the general stay of proceedings provided by section 941, ante.—*San Luis Obispo County v. Simas*, 1 Cal. App. 175, 181, 81 Pac. 972.

42. Taking before order prevented—Restoration compelled.—Superior court in which the proceeding for condemnation is brought has full jurisdiction to prevent the plaintiff or any one claiming under it from taking possession of the land sought to be condemned, until order for such taking possession has been made by said court. If possession has been taken in advance of such order by the court, allowing plaintiff to take possession, the superior court has power to cause the possession restored to defendant.—*Matter of Bryan*, 65 Cal. 375, 376, 4 Pac. 304; *Neale v. Superior Court*, 77 Cal. 28, 29, 18 Pac. 790; *San Diego Land &*

Town Co. v. Neale, 78 Cal. 80, 83, 20 Pac. 380.

43. Title in land upon—Binds order of condemnation.—The title to the land does not vest in the plaintiff until "the final order of condemnation" is made by the court, and a copy of the order filed in the office of the county recorder, "and thereupon the property described therein shall vest in the plaintiff for the purpose therein specified."—Pool v. Butler, 141 Cal. 46, 50, 74 Pac. 444.

44. Undertaking—Appeal—Order of possession.—An undertaking on appeal from an order requiring delivery of possession of real property stays the execution of the order. The very object of the undertaking is to secure the person in whose favor the judgment or order is made for the damages which he may sustain by the delay.—Neale v. Superior Court, 77 Cal. 28, 29, 18 Pac. 790.

45. Same—No recovery unless accepted as payment.—On an undertaking, for the just compensation to which plaintiff would be entitled, upon the taking of the property, no recovery can be had, unless it is alleged that plaintiff accepted the undertaking in lieu of the payment to which he is entitled, upon final taking of the prop-

erty, and that the property was taken, and the amount of compensation to which he is entitled.—Vilhac v. Stockton & Ione R. Co., 53 Cal. 208, 212.

46. Same—Is not adequate compensation.—Wise policy and sound constitutional principles require the supreme court to hold that a bond executed by sureties who may be supposed to be, or who in fact may be responsible when the preliminary order is made, does not constitute a certain and adequate compensation.—Sanborn v. Belden, 51 Cal. 266, 269; Vilhac v. Stockton & Ione R. Co., 53 Cal. 208, 212; Coburn v. Townsend, 103 Cal. 233, 238, 37 Pac. 202.

47. The undertaking for paying compensation given under above section is void as not constituting just compensation in the sense of article I, section 8 of the constitution for the taking of property upon the preliminary order of the court.—Vilhac v. Stockton & Ione R. Co., 53 Cal. 208, 211; Callahan v. Dunn, 78 Cal. 366, 370, 20 Pac. 737; People v. Munroe, 100 Cal. 664, 670, 37 Am. St. Rep. 327, 24 L. R. A. 33, 35 Pac. 326; Coburn v. Townsend, 103 Cal. 233, 235, 37 Pac. 202; Steinhart v. Superior Court, 137 Cal. 575, 578, 59 L. R. A. 404, 70 Pac. 629. See Davis v. San Lorenzo R. Co., 47 Cal. 517, 520.

§ 1255. COSTS MAY BE ALLOWED, APPORTIONMENT THEREOF.

Costs may be allowed or not, and if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court.

History: Enacted March 11, 1872; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 195, held unconstitutional, see history, § 5 ante.

EMINENT DOMAIN—COSTS.

1. Apportionment of costs—Improper in action in eminent domain.
2. Bill of costs—Must be presented by defendant.
3. Same—Prima facie evidence.
4. Construction—Constitution 1879, article I, section 14.
- 5-7. Costs in eminent domain proceedings—Construction.
- 8, 9. Same—Must be paid party seeking to condemn.
10. Same—To require defendant to pay any portion of the costs, unjust.
11. Cost of transcript.
12. Counsel fees.
- 13, 14. Discretion of court—Limited.
15. Payment or deposit of award—Costs not included.

See, ante, § 1237 and note.

1. Apportionment of costs—Improper in action in eminent domain, and order will be reversed and trial court directed to award the owner full costs claimed by him and not disputed as containing improper items.—

City, etc., San Francisco v. Collins, 98 Cal. 259, 262, 33 Pac. 56.

See pars. 8-10, this note.

2. Bill of costs—Must be presented by defendant in order to have same allowed; simple appeal on judgment-roll will not be sufficient to secure defendant his costs.—Alameda County v. Crocker, 125 Cal. 101, 106, 57 Pac. 766; Madera County v. Raymond Granite Co., 133 Cal. 128, 136, 72 Pac. 915.

3. Same—Prima facie evidence that the items thereof have been necessarily incurred by defendant; when not objected to because of improper items, it is conclusive.—City, etc., San Francisco v. Collins, 98 Cal. 259, 33 Pac. 56.

4. Construction—Constitution 1879, article I, section 14 limits this section so that the court is without power to apportion costs between the parties.—City, etc., San Francisco v. Collins, 98 Cal. 259, 262, 33 Pac. 56. See San Diego Land & Town Co. v. Neale, 88 Cal. 50, 25 Pac. 977; Los Angeles, Pasadena & G. R. Co. v. Rumpp, 104 Cal. 20, 23, 37 Pac. 859.

5. Costs in eminent domain proceedings—Construction.—There may be some ground to doubt whether the costs herein provided

were intended to apply to costs other than those incurred in the trial court.—City of Oakland v. Pacific Coast Lumber & Mill Co., 172 Cal. 332, 156 Pac. 468.

6. The prevailing party, in an eminent domain proceeding, will be allowed his costs on appeal under section 1027, ante.—City of Oakland v. Pacific Coast Lumber & Mill Co., 172 Cal. 332, 156 Pac. 468.

7. Where, however, an appeal is taken by the owner, and his appeal is entirely unsuccessful, the respondent is entitled to recover his costs on appeal, and such constitutional provision is not thereby violated.—City of Oakland v. Pacific Coast Lumber & Mill Co., 172 Cal. 332, 156 Pac. 468.

8. Same—Must be paid by party seeking to condemn land; and it is a proper exercise of discretion to require such party to pay the costs not only of the condemnation trial, but also the costs of an appeal by the owner from an order awarding the condemning party a new trial, although the order is affirmed.—San Diego Land & Town Co. v. Neale, 88 Cal. 50, 68, 25 Pac. 977. See City, etc., San Francisco v. Collins, 98 Cal. 259, 262, 33 Pac. 56; Alameda County v. Crocker, 125 Cal. 101, 106, 57 Pac. 766; Calissa Parrot M. & S. Co. v. Anaconda C. M. Co., 104 Fed. 514, 516.

9. This rule has been held not to apply to a second trial when the owner appeals and fails to recover a greater amount of damages than was awarded in the first trial.—Los Angeles, Pasadena & G. R. Co. v. Rumpp, 104 Cal. 20, 23, 37 Pac. 859.

10. Same—To require the defendant to pay any portion of the costs necessarily incurred in the trial of the issues on his part, or any portion of the costs of the plaintiff, would reduce the just compensation

awarded by the jury by a sum equal to the amount thus paid for costs.—City, etc., San Francisco v. Collins, 98 Cal. 259, 262, 33 Pac. 56.

11. Cost of transcript of testimony furnished to party by official reporter during progress of trial is not proper item in cost bill, where it was furnished by private arrangement with reporter.—City of Los Angeles v. Pomeroy, 124 Cal. 597, 647, 57 Pac. 585.

12. Counsel fees can not be recovered as part of compensation or damages.—San Jose & Alameda R. Co. v. Mayne, 83 Cal. 566, 568, 23 Pac. 522.

13. Discretion of court—Limited to determination of what are proper items and what are improper items of cost, as in other cases.—City, etc., San Francisco v. Collins, 98 Cal. 259, 33 Pac. 56.

14. An absolute discretion to grant or refuse costs is announced in an opinion by the court in City of Alameda v. Cohen, 133 Cal. 5, 7, 65 Pac. 127, without argument and without citation of any authority. No reference is made to City, etc., San Francisco v. Collins (see pars. 8, 13, this note), wherein the opposite conclusion is arrived at in a well-reasoned opinion, nor to Los Angeles, Pasadena & G. R. Co. v. Rumpp, 104 Cal. 20, 23, 37 Pac. 859, where former decision is recognized but distinguished. It is further to be noted that holding is an obiter interjection, although duly head-noted as an affirmative decision by the reporter. See also loose remarks by Chipman, C., in Madera County v. Raymond Granite Co., 139 Cal. 128, 136, 72 Pac. 915.

15. Payment or deposit of award—Costs not included in the requirement of the statute.—City of Alameda v. Cohen, 133 Cal. 5, 7, 65 Pac. 127.

§ 1255a. ABANDONMENT OF CONDEMNATION PROCEEDINGS. Plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of thirty days after final judgment, by serving on defendant and filing in court a written notice of such abandonment; and failure to comply with section one thousand two hundred and fifty-one of this code shall constitute an implied abandonment of the proceeding. Upon such abandonment, express or implied, on motion of defendant, a judgment shall be entered dismissing the proceeding and awarding the defendant his costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees. These costs and disbursements, including expenses and attorney fees, may be claimed in and by a cost bill, to be prepared, served, filed and taxed as in civil actions; provided that said costs and disbursements shall not include expenses incurred in preparing for trial where the said action is dismissed forty days prior to the time set for the trial of the said action.

History: Enactment approved March 17, 1911, Stats. and Amdts. 1911, p. 377.

EMINENT DOMAIN — ABANDONMENT OF CONDEMNATION PROCEEDINGS.

1. As to constitutionality of section.
2. Attorney's fees as costs.
3. Costs which will not be allowed.
4. Dismissal of proceedings—Entry by clerk.
5. Motion to amend description of land so as to exclude a portion—Denial error.
6. Street-Opening Act of 1903—Abandonment of proceedings—Attorney's fees.

See, ante, § 1237 and note.

1. As to constitutionality of section.—That part of this section authorizing the payment of attorney fees does not violate the fourteenth amendment of the federal constitution, nor the provisions of the state constitution requiring that laws of a general nature shall be uniform in their operation and prohibiting the passage of special laws.—*City of Sacramento v. Swanston*, 29 Cal. App. 212, 155 Pac. 101; *Silver Lake Power & Irr. Co. v. City of Los Angeles*, 32 Cal. App. 123, 162 Pac. 432.

2. Attorney's fees as costs.—Where the plaintiff in an action of eminent domain, abandoned by it after issue joined and before trial, files its notice of motion to have the costs awarded to the defendant taxed, by striking from the cost bill the item of reasonable attorney fees, and specifies as the sole ground for the motion that the item is "unlawful and not properly taxable as costs," it is error to require the defendant upon the hearing of the motion to produce further evidence in support of the fact established by his affidavit that the attorney fee claimed is proper and reasonable in amount for the services performed.—*Mojave & B. R. Co. v. Cuddeback*, 28 Cal. App. 439, 152 Pac. 943.

See par. 6, this note.

3. Costs which will not be allowed.—The defendant in such an action is not entitled to have taxed as costs the fee paid by him to the clerk of the district court of appeal upon the filing of an application for a writ of mandate to compel the trial judge

to try the case, as such proceeding was not an action or proceeding against the plaintiff, or for which costs could be claimed or taxed against it.—*Mojave & B. R. Co. v. Cuddeback*, 28 Cal. App. 439, 152 Pac. 943.

4. Dismissal of proceedings—Entry by clerk.—Where the plaintiff in an action in eminent domain proposes to abandon his action, the clerk has no authority to enter the dismissal of the action at the written request of the plaintiff, as provided by subdivision 1 of section 581, ante, but such an action can only be dismissed upon application made therefor to the court by the defendant as provided by above section of such code.—*Silver Lake Power & Irr. Co. v. City of Los Angeles*, 32 Cal. App. 123, 162 Pac. 432.

5. Motion to amend description of land so as to exclude a portion—Denial error.—Under the provision of the above section a person seeking to condemn land under the power of eminent domain has the unconditional right to abandon the proceedings at any time during the trial or even after judgment; hence where the applicant in a condemnation proceeding sought to amend the description of the property involved so as to exclude all lands lying above high-water mark, and the court declined to permit the amendment of the order denying the application to amend was erroneous.—*Yolo Water & Power Co. v. Edmonds*, — Cal. App. —, 195 Pac. 463.

6. Street-Opening Act of 1903—Abandonment of proceedings—Attorney's fees.—Under the provision of section 14 of the Street-Opening Act of 1903, as amended in 1911 that if the proceedings to condemn and take land for street purposes be abandoned or the action dismissed "no attorney's fees shall be awarded the defendant or either or any of them" for contrary to the limitations prescribed by the constitution and for that reason may not be enforced.—*City of Los Angeles v. Cline*, 40 Cal. App. 487, 181 Pac. 78.

As to attorney's fees as costs, see par. 2, this note.

§ 1256. RULES OF PRACTICE. Except as otherwise provided in this title, the provisions of part two of this code are applicable to and constitute the rules of practice in the proceedings mentioned in this title.

History: Enacted March 11, 1872.

EMINENT DOMAIN—RULES OF PRACTICE.

- 1-3. Construction of section.
4. Finding of jury—As to necessity of taking, final.
5. Lis pendens, notice of, applicable.
6. Sections 394 and 1243, ante, brought by construction into same title.

See, ante, § 1237 and note.

1. Construction of section.—This section gives the right to a jury trial under section 592, ante.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

2. Except those relating to compensation, the issues of fact in a condemnation suit are to be tried by the court, and that if the court submits them to a jury it is nevertheless required to make findings either by adopting the verdict thereon or by making findings in its own language.—

Vallejo & Northern R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238.

3. Error in instructions in a condemnation suit upon other issues than that of compensation, and upon which the court itself has weighed the evidence and made findings, will not justify a reversal, unless upon the whole case, including the evidence, it is found that substantial injury has been caused thereby, or a miscarriage of justice resulted.—*Vallejo & Northern R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

4. Finding of jury—As to necessity of taking for public use, is final; court has no power to disregard finding of jury and make its own finding.—*Wilmington Canal & Reservoir Co. v. Dominguez*, 50 Cal. 505, 506; *Cummings v. Peters*, 56 Cal. 593, 597.

5. *Lis pendens*, notice of, applicable.—The provision of section 409, ante, which provides with reference to notice of *lis pendens* that "from the time of filing such record only shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency

of the action," applies to condemnation proceedings.—*Roach v. Riverside Water Co.*, 74 Cal. 263, 265, 15 Pac. 776; *Drinkhouse v. Spring Valley Water Works*, 87 Cal. 253, 256, 25 Pac. 420.

6. Sections 394, and 1243, ante, are brought by construction into same title.—The general rule that proceedings to condemn must be commenced in the county where the property is situated is in nowise impaired by giving effect to the special and exceptional provision that when such a proceeding has been commenced by a county or city against citizens of another county, the proceeding must on demand of the defendants be transferred to a county other than the plaintiff county or the county where the plaintiff, if a city, is situated. If sections 394 and 1243, ante, were in the same title, there could be no doubt of this construction, and this section has the effect of bringing them for the purpose of construction into the same title—"eminent domain" (dis. op. Beatty, C. J.).—*City of Santa Rosa v. Fountain Water Co.*, 138 Cal. 579, 582, 71 Pac. 1123, 1136.

§ 1257. NEW TRIALS AND APPEALS. The provisions of part two of this code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title; provided, that upon the payment of the sum of money assessed, and upon the execution of the bond to build the fences and cattle-guards, as provided in section twelve hundred and fifty-one, the plaintiff shall be entitled to enter into, improve, and hold possession of the property sought to be condemned (if not already in possession) as provided in section twelve hundred and fifty-four, and devote the same to the public use in question; and no motion for new trial or appeal shall, after such payment and filing of such bonds as aforesaid, in any manner retard the contemplated improvement. Any money which shall have been deposited, as provided in section twelve hundred and fifty-four, may be applied to the payment of the money assessed, and the remainder, if any there be, shall be returned to the plaintiff.

History: Enacted March 11, 1872; amendment approved April 1, 1878, Code Amdts. 1877-8, p. 109; March 27, 1897, Stats. and Amdts. 1897, p. 188; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 195, held unconstitutional, see history, § 5 ante; amendment re-enacted March 9, 1903, Stats. and Amdts. 1903, p. 110.

EMINENT DOMAIN—NEW TRIALS AND APPEALS.

1. Appeal lies from judgment.
2. Same—By defendant—Upon question of compensation.
3. Same—Judgment on appeal by petitioner.
- 4, 5. Final order of condemnation.
6. New trial—Properly granted, when.
7. Special proceeding—Action for condemnation.
8. Same—Appeal.
9. Same—"Party aggrieved."
10. Undertaking.

See, ante, § 1237 and note.

1. **Appeal lies from judgment** in proceeding to condemn lands to use of corporation.—*Sacramento, Placer & N. R. Co. v. Harlan*, 24 Cal. 334, 337; *San Francisco & San Jose R. Co. v. Mahoney*, 29 Cal. 112, 115.

See pars. 6-8, this note.

2. **Same—By defendant—Upon question of compensation** alone, abandoning all other defenses, does not vacate the judgment.—*Los Angeles, Pasadena & G. R. Co. v. Rumpff*, 104 Cal. 20, 27, 37 Pac. 859.

3. **Same—Judgment on appeal by the petitioner.**—Where more than one tract of land is affected, may reverse as to one and

affirm as to the others.—*Stockton & C. R. Co. v. Galgiani*, 49 Cal. 139, 140.

4. **Final order of condemnation** must be considered a special order made after final judgment, from which an appeal must be taken within sixty days after its entry.—*California So. R. Co. v. Southern Pac. R. Co.*, 67 Cal. 59, 63, 7 Pac. 123.

5. Is order made after final judgment, and is appealable.—*City of Los Angeles v. Pomeroy*, 132 Cal. 340, 341, 64 Pac. 477. See *Glenn County v. Johnston*, 129 Cal. 404, 408, 409, 62 Pac. 66.

6. **New trial**—Properly granted when the decision is wrong upon the evidence.—*Monterey County v. Cushing*, 83 Cal. 507, 510, 511, 23 Pac. 700.

7. **Special proceeding**—Action for condemnation is, from final judgment in which

an appeal may be taken.—*People v. Pfeiffer*, 59 Cal. 89, 90.

8. **Same**—Appeal in proceeding for condemnation may be taken by party aggrieved.—*People v. Pfeiffer*, 59 Cal. 89, 90; *Stockton & C. R. Co. v. Galgiani*, 49 Cal. 139, 140.

See pars. 1-3, this note.

9. **Same**—"Party aggrieved" means a party to the action or a person aggrieved thereby.—*People v. Pfeiffer*, 59 Cal. 89, 91. See *Adams v. Woods*, 8 Cal. 306, 315.

10. **Undertaking** for three hundred dollars, provided for by section 941, ante, given on appeal from final order of condemnation, stays all proceedings in court below.—*City of Los Angeles v. Pomeroy*, 132 Cal. 340, 341, 64 Pac. 477.

§ 1258. WHEN TITLE TAKES EFFECT, AND CONSTRUCTION OF. With relation to the acts passed at the present session of the legislature, this title must be construed in the same manner as if this code had been passed on the last day of this session, and from and after the time this code takes effect, all laws of this state in relation to the taking of private property for public uses are abolished, and all proceedings had in the exercise of the powers of eminent domain must conform to the provisions of this title.

History: Enacted March 11, 1872.

§ 1259. WHEN TITLE TAKES EFFECT. Title seven of part three of the Code of Civil Procedure of the state of California (this title) shall be in force and effect from and after the fourth day of April, one thousand eight hundred and seventy-two.

History: Added April 1, 1872.

§ 1260. CONSTRUCTION. From and after the time this title takes effect, it must be construed in the same manner as it would be were sections four and seventeen of this code in force and effect.

History: Added April 1, 1872.

§ 1261. PENDING PROCEEDINGS NOT AFFECTED. No proceeding to enforce the right of eminent domain commenced before this title takes effect, is affected by the provisions of this title.

History: Added April 1, 1872.

§ 1262. RULES OF PRACTICE. Until the first day of January, one thousand eight hundred and seventy-three, at twelve o'clock noon, the provisions of sections twelve hundred and fifty-six and twelve hundred and fifty-seven of this title are suspended, and until then, except as otherwise provided in this title, the rules of pleading and practice in civil actions now in force in this state are applicable to the proceedings mentioned in this title, and constitute the rules of pleading and practice therein.

History: Added April 1, 1872.

See, ante, § 1237 and note.

§ 1263. EXCEPTIONS. Nothing in this code must be construed to abrogate or repeal any statute providing for the taking of property in any city or town for street purposes.

History: Added April 1, 1872.

See, ante, § 1237 and note.

§ 1264. PREFERENCE OF PROCEEDINGS OVER OTHER CIVIL ACTIONS. In all actions brought under the provisions of this title, to enforce the right of eminent domain, all courts wherein such actions are or may hereafter be pending, shall give such actions preference over all other civil actions therein, in the matter of setting the same for hearing or trial, and in hearing the same, to the end that all such actions shall be quickly heard and determined.

History: Enacted March 16, 1903, Stats. and Amdts. 1903, p. 165.

[Title VIII of Part III of the Code of Civil Procedure and each and every section of said Title VIII are repealed, and a new Title VIII is substituted to take the place thereof in said Code to read as follows:]

TITLE VIII.

OF ESCHEATED ESTATES.

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| <p>§ 1269. Manner of commencing proceedings relative to escheated estates.</p> <p>§ 1269a. Action to determine state's right to escheated property.</p> <p>§ 1270. Receiver of rents and profits may be appointed.</p> <p>§ 1271. Appearance, pleadings, trial and judgment.</p> | <p>§ 1272. Proceedings by persons claiming escheated estates.</p> <p>§ 1272a. Petition showing claim to state deposited with state treasurer.</p> <p>§ 1273. Unclaimed bank deposits escheat to state.</p> <p>§ 1274. Sale of escheated property by board of control.</p> <p>§ 1274a. Disposition of unclaimed property.</p> |
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§ 1269. MANNER OF COMMENCING PROCEEDINGS RELATIVE TO ESCHATED ESTATES. At any time after two years after the death of any decedent, leaving property to which the state is entitled by reason of its having escheated to the state, the attorney-general shall commence a proceeding on behalf of the state in the superior court for Sacramento county to have it adjudged that the state is so entitled. Such action shall be commenced by filing a petition, which shall be treated as the information elsewhere referred to in this title.

[Description of property.] There shall be set forth in such petition a description of the property, the name of the person last possessed thereof, the name of the person, if any, claiming such property, or any portion thereof, and the facts and circumstances by virtue of which it is claimed the property has escheated.

[Order to appear.] Upon the filing of such petition, the court must make an order requiring all persons interested in the estate to appear and show cause, if any they have, within sixty days from the date of the order, why such estate should not vest in the state. Such order must be published at least once a week for four successive weeks in a newspaper published in said county of Sacramento, the last publication to be at least ten days prior to the date set for the hearing. Upon the completion of the publication of such order the court shall have full and complete jurisdiction over the [e]state, the property, and the person of everyone having or claiming any interest in the said property, and shall have full and complete jurisdiction to hear and determine the issues therein, and render the appropriate judgment thereon.

[If proceedings for administration have been instituted.] If proceedings for the administration of such estate have been instituted, a copy of such order must be filed with the papers in such estate in the office of the county clerk where such proceedings were had. If proceedings for the administration of any estate of any such decedent have been instituted and none of the persons entitled to succeed thereto have appeared and made claim to such property, or any portion thereof, before the decree of final distribution therein is made, or

before the commencement of such proceeding by the attorney-general, or if the court shall find that such persons as have appeared are not entitled to the property of such estate, or of any portion thereof, the court shall, upon final settlement of the proceedings for the administration of such estate, after the payment of all debts and expenses of administration, distribute all moneys and other property remaining to the state of California.

[State treasurer to hold property.] The property so distributed shall be held by the state treasurer for a period of five years from the date of the decree making such distribution within which time the same may be claimed in the manner in this title hereafter provided, but a nonresident foreigner claiming succession in any case must appear and claim within five years from the death of the decedent, and any person who does not appear and claim as herein required shall be forever barred, and such property, or so much thereof as is not so claimed, shall vest absolutely in the state. In any proceeding brought by the attorney-general under this title any two or more parties and any two or more causes of action may be joined in the same proceeding and in the same petition without being separately stated, and it shall be sufficient to allege in the petition that the decedent left no heirs to take the estate and the failure of heirs to appear and set up their claims in any such proceeding, or in any proceedings for the administration of such estate, shall be sufficient proof upon which to base the judgment in any such proceeding or such decree of distribution. Where proceedings for the administration of any estate have not been commenced within six months from the death of any decedent the attorney-general may direct the public administrator to commence the same forthwith.

History: Enacted March 11, 1872; amendment approved April 16, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 110; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 195, held unconstitutional, see history, § 5 ante; former section repealed and present section enacted in place thereof, March 16, 1907, Stats. and Amdts. 1907, p. 315, Kerr's Stats. and Amdts. 1906-7, p. 489; amendment approved May 28, 1915, Stats. and Amdts. 1915, p. 936; May 5, 1917, Stats. and Amdts. 1917, p. 253. In effect July 27, 1917.

ESCHEATED ESTATES.

1. Action by state—Complaint, sufficient—As to resident heirs, when.
 2. Same—Same—As to nonresident alien heirs, when.
 3. Same—Limitation on.
 4. Same—Necessary to bar rights.
 5. Same—Time for proceedings restricted to five years.
 6. Appeal by state—From order of distribution.
 7. Alien heirs not affected, when.
 8. Appearance to claim estate—By nonresident heir.
 - 9, 10. Constitutional provisions—Do not inhibit legislature.
 11. Limitation of action—Citizen heirs are not barred.
 12. Same—Nonresident alien heirs.
 13. Nonresident aliens—Share equally with resident heirs.
 14. Same—Estate vests in.
1. Action by state—Complaint, sufficient—As to resident heirs, when it alleges there is "no wife or kindred of any kind or degree" and "there are no heirs to take the estate."—State v. Miller, 149 Cal. 208, 85 Pac. 609. See People ex rel. Attorney-General v. Roach, 76 Cal. 294, 296, 18 Pac. 407.
 2. Same—Same—As to nonresident alien heirs, when it alleges that none have appeared within five years to claim the estate.—State v. Miller, 149 Cal. 208, 85 Pac. 609.
 3. Same—Limitation on, none when attorney-general shall commence action to have property escheated.—State v. Smith, 70 Cal. 153, 157, 12 Pac. 121.
 4. Same—Necessary to bar rights of citizen heirs.—See pars. 11, 12, this note.
 5. Same—Time for proceeding—Restricted to five years after death of intestate, within which time alien heirs may appear (see pars. 9, 12, 13, this note) and claim the property; an action by the state before five years have elapsed is premature.—State v. Smith, 70 Cal. 153, 156, 12 Pac.

.121; *People ex rel. Attorney-General v. Roach*, 76 Cal. 294, 296, 18 Pac. 407.

See *Kerr's Cyc. Civ. Code*, 2d ed., § 672 and note.

6. **Appeal by state**—From order of distribution, when it is claimed the estate should be escheated.—See *Estate of Pendergast*, 143 Cal. 135, 76 Pac. 962.

7. **Same**—**Alien heirs not affected** when parties to decree, but not made parties upon appeal by due service of proper notice upon them.—*Estate of Pendergast*, 143 Cal. 135, 76 Pac. 962.

8. **Appearance to claim estate**—By non-resident heir must be made within five years and property claimed by action or act.—*Estate of Pendergast*, 143 Cal. 135, 140, 76 Pac. 962.

See *Kerr's Cyc. Civ. Code*, 2d ed. § 672 and note.

9. **Constitutional provisions**—Do not inhibit legislature from extending right of inheritance to nonresident alien heirs.—*Estate of Billings*, 65 Cal. 593, 595, 4 Pac. 639.

See *Lyons v. State*, 67 Cal. 380, 381, 385, 7 Pac. 763.

10. Under constitution of 1849 same ruling was made.—*People v. Rogers*, 13 Cal. 159.

11. **Limitation of action**—**Citizen heirs are not barred** by any limitation where no action has been brought by the state to have the money declared escheated to the state (*Henshaw, McFarland, and Lorigan, J. J.*, dissenting).—*Estate of Miner*, 143 Cal. 194, 197, 198, 76 Pac. 968.

See *Kerr's Cyc. Pol. Code*, 2d ed., § 4480 and note.

12. **Same**—**Nonresident alien heirs, is five years**—See par. 8, this note.

13. **Nonresident aliens**—**Share equally with resident heirs**, of the same degree of kindred, in estate of intestate.—*Estate of Billings*, 65 Cal. 593, 595, 4 Pac. 639.

14. **Same**—**Estate vests in nonresident alien heirs**, and not in state.—*Lyons v. State*, 67 Cal. 380, 385, 7 Pac. 763.

See, post, § 1272 and note pars. 9-12.

§ 1269a. ACTION TO DETERMINE STATE'S RIGHT TO ESCHEATED PROPERTY. Whenever the attorney-general is informed that any estate has escheated or is about to escheat to the state or that the property involved in any action or special proceeding has escheated or is about to escheat to the state, he may commence an action on behalf of the state to determine its rights to said property or may intervene on its behalf in any action or special proceeding affecting any such estate and contest the rights of any claimant or claimants thereto. He may also apply to the superior court, or any judge thereof, for an order directing the county treasurer to deposit in the state treasury all moneys and effects in his possession which may become payable to the state treasury pursuant to section one thousand seven hundred thirty-seven of this code.

History: Enactment approved May 28, 1915, Stats. and Amdts. 1915, p. 935. In effect August 8, 1915.

1. **Action to determine right to escheated property**—**Rights of attorney-general on intervention**—**Power of court to determine ownership**.—Under the provision of the above section the attorney-general has a right to intervene in any action involving the right to property which has escheated or is about to escheat to the state but it does not carry with it the right to delay the trial of such action nor change the posi-

tion of the party. He must take the suit as he finds it and jurisdiction having attached in the court in which the action is pending; such court should determine the issue of the ownership of the property, notwithstanding that, since the commencement of the action, the statutory suit has been commenced by the attorney-general in Sacramento County to determine the question.—*Matthews v. Savings Union Bank & Trust Co.*, 43 Cal. App. 45, 184 Pac. 418.

§ 1270. RECEIVER OF RENTS AND PROFITS MAY BE APPOINTED. The court, upon the information being filed, and upon application of the attorney-general, either before or after answer, upon notice to the party claiming the estate, if known, may upon sufficient cause therefor being shown, appoint a receiver to take charge of such estate, or any part thereof, or to

receive the rents, income and profits of the same until the title of such estate is finally settled.

History: Enacted March 11, 1872; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 195, held unconstitutional, see history, § 5 ante; former section repealed and present enacted in place thereof March 16, 1907, Stats. and Amdts. 1907, p. 316, Kerr's Stats. and Amdts. 1906-7, p. 489.

See, post, § 1469 and note.

As to appointment of receiver, generally, see, ante, §§ 564-569 and notes.

§ 1271. APPEARANCE, PLEADING, TRIAL AND JUDGMENT. All persons named in the information may appear and answer, and traverse or deny the facts stated therein at any time before the time for answering expires, and any other person claiming an interest in such estate may appear and be made a defendant, by motion for that purpose in open court within the time allowed for answering, and if no such person appears and answers within the time, then judgment must be rendered that the state is the owner of the property in such information claimed.

[**Trial of issues.**] But if any person appears and denies the title set up by the state, or traverses any material fact set forth in the information, the issue of fact must be tried as issues of fact are tried in civil actions. If, after the issues are tried, it appears from the facts found or admitted that the state has good title to the property in the information mentioned, or any part thereof, judgment must be rendered that the state is the owner and entitled to the possession thereof, and that it recover costs of suit against the defendants who have appeared and answered.

[**Order of sale.**] In any judgment rendered, or that has heretofore been rendered by any court, escheating property to the state, on motion of the attorney-general, the court must make an order that such property, unless it consists of money, be sold by the sheriff of the county where it is situate, at public sale, for gold coin, after giving notice of the time and place of sale, as may be prescribed by the court in such order; that the sheriff, within five days after such sale, make a report thereof to the court, and upon the hearing of such report, the court may examine the report and witnesses in relation thereto, and if the proceedings were unfair, or if the sum bid disproportionate to the value, or if it appears that a sum exceeding said bid, exclusive of the expense of a new sale, may be obtained, the court may vacate the sale, and direct another to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place.

[**New sale may be ordered, when.**] If an offer greater in amount than that named in the report is made to the court in writing, by a responsible person, the court may, in its discretion, accept such offer and confirm the sale to such person, or order a new sale. If it appears to the court that the sale was legally made, and fairly conducted, and that the sum bid is not disproportionate to the value of the property sold, and that a sum exceeding such bid, exclusive of the expense of a new sale, can not be obtained, or if the increased bid above mentioned is made and accepted by the court,

The court must make an order confirming the sale, and directing the sheriff, in the name of the state, to execute to the purchaser or purchasers a conveyance of said property sold; and said conveyance vests in the purchaser or purchasers all the right and title of the state therein, and the sheriff must, out of the proceeds of such sale, pay the cost of said proceedings incurred on behalf of the state, including the expenses of making such sale, and also an attorney's fee, if additional counsel was employed in said proceedings, to be fixed by the court, not exceeding ten per cent on the amount of such sale, and the residue thereof must be paid by said sheriff into the state treasury.

History: Enacted March 11, 1872; amendment approved March 2, 1881, Stats. and Amdts. 1881, p. 11; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 196, held unconstitutional, see history, § 5 ante; former section repealed and present enacted in place thereof March 16, 1907, Stats. and Amdts. 1907, p. 316, Kerr's Stats. and Amdts. 1906-7, p. 489.

As to answer, see, ante, § 437 and note.

As to appearance in proceedings, see, ante, § 1014 and note.

As to costs, see, ante, §§ 1021 et seq. and notes.

As to issue of fact, see, ante, §§ 590, 592 and notes.

As to judgment, see, ante, §§ 585, 664 and notes.

As to time within which state may bring action to have property escheated, see, ante, § 1269 and note par. 5.

As to trial, see, ante, §§ 600-645 and notes.

§ 1272. PROCEEDINGS AFTER JUDGMENT BY PERSONS CLAIMING ESTATES. Within five years after judgment in any proceeding had under this title, a person not a party or privy to such proceeding may file a petition in the superior court of the county of Sacramento, showing his claim or right to the property, or the proceeds thereof. Said petition shall be verified, and, among other things must state:

The full name, and the place and date of birth of the decedent whose estate, or any part thereof, is claimed.

The full name of such decedent's father and the maiden name of his mother, the places and dates of their respective births, the place and date of their marriage, the full names of all children the issue of such marriage, with the date of birth of each, and the place and date of death of all children of such marriage who have died unmarried and without issue.

Whether or not such decedent was ever married, and if so, where, when and to whom.

How, when and where such marriage, if any, was dissolved.

Whether or not said decedent was ever remarried, and, if so, where, when and to whom.

The full names, and the dates and places of birth of all lineal descendants, if any, of said decedent; the dates and places of death of any thereof who died prior to the filing of such petition; and the places of residence of all who are then surviving, with the degree of relationship of each of such survivors to said decedent.

Whether any of the brothers or sisters of such decedent ever married, and, if so, where, when and whom.

The full names, and the places and dates of birth of all children the issue of the marriage of any such brother or sister of decedent, and the date and place of death of all deceased nephews and nieces of said decedent.

Whether or not said decedent, if of foreign birth, ever became a naturalized citizen of the United States, and if so, when, where, and by what court citizenship was conferred.

The post-office names of the cities, towns or other places, each in its appropriate connection, wherein are preserved the records of the births, marriages and deaths hereinbefore enumerated, and, if known, the title of the public official or other person having custody of such records.

If for any reason, the petitioner is unable to set forth any of the matters or things hereinabove required, he shall clearly state such reason in his petition.

A copy of such petition must be served on the attorney-general at least twenty days before the hearing of the petition, who must answer the same; and the court thereupon must try the issue as issues are tried in civil actions, and if it is determined that such person is entitled to the property, or the proceeds thereof, it must order the property, if it has not been sold, to be delivered to him, or if it has been sold and the proceeds paid into the state treasury, then it must order the controller to draw his warrant on the treasury for the payment of the same, but without interest or cost to the state, a copy of which order, under the seal of the court, shall be a sufficient voucher for drawing such warrant.

[Failure to appear.] All persons who fail to appear and file their petitions within the time limited are forever barred; saving, however, to infants, and persons of unsound mind, the right to appear and file their petitions at any time within the time limited, or within one year after their respective disabilities cease.

History: Enacted March 11, 1872; amendment approved April 16, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 110; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 197, held unconstitutional, see history, § 5 ante; former section repealed and present section enacted in place thereof March 16, 1907, Stats. and Amdts. 1907, p. 317, Kerr's Stats. and Amdts. 1906-7, p. 490; amendment approved May 29, 1915, Stats. and Amdts. 1915, p. 934. In effect August 8, 1915.

ESCHEATED ESTATES—PROCEEDINGS AFTER JUDGMENT—BY PERSONS CLAIMING. .

1. As to payment of money from funds in state treasury—Credited estates of deceased persons.
2. Appeal by state.
3. Same—Alien heirs not made parties.
4. Appearing and claiming property—Limitation on right.
5. Same—No action to escheat.
6. How property claimed—Personal appearance.
7. Nonresident aliens.
8. Same—May inherit.
9. Property of intestate—Vests in non-resident alien heirs.
- 10-12. Same—Constitution does not prohibit.

1. As to payment of money from funds in state treasury—Credited estates of deceased persons of awards, final orders, or judgments by any court having jurisdiction of an action commenced in conformity to above section.—See Stats. and Amdts. 1915, p. 470, I Henning's General Laws, 3d ed., p. 708.

2. Appeal by state may be taken by service of proper notice upon heirs and claimants, foreign and resident.—Estate of Pendergast, 143 Cal. 135, 140, 141, 76 Pac. 962.

3. Same—Alien heirs not made parties by due service of notice not affected.—Estate of Pendergast, 143 Cal. 135, 140, 141, 76 Pac. 962.

4. Appearing and claiming property—Limitation on right of five years; but any appearance within the state, and the assertion of a claim to the property, e. g., by action in court, by taking possession of or

by conveying it, will be sufficient to protect interests.—*State v. Smith*, 70 Cal. 153, 157, 12 Pac. 121.

5. *Same*.—No action to escheat the money having been brought by the state, where the estate of the intestate has been sold and proceeds deposited in the state treasury, the above limitation does not apply, and action to secure such money may be maintained by nonresident alien heir more than twenty years after placed with treasurer.—*Estate of Miner*, 143 Cal. 194, 197, 76 Pac. 968 (*Henshaw, McFarland and Lorigan, J.J.*, dissent).

6. *How property claimed*.—Personal appearance by a nonresident alien is not necessary; he may act through attorney.—*Lyons v. State*, 67 Cal. 380, 384, 7 Pac. 763.

7. *Nonresident aliens* are persons who are neither citizens of the United States nor resident of the state.—*State v. Smith*, 70 Cal. 153, 12 Pac. 121.

8. *Same*.—May inherit property, and there is nothing in the constitution to the contrary.—*Lyons v. State*, 67 Cal. 380, 382, 7

Pac. 763. See *People v. Rogers*, 13 Cal. 159; *Estate of Billings*, 64 Cal. 427, 1 Pac. 701; *Purezell v. Smidt*, 21 Iowa 540.

9. *Property of intestate*.—Vests in nonresident alien heirs, and not in state, subject to be divested by failure to appear and claim within five years.—*Lyons v. State*, 67 Cal. 380, 384, 7 Pac. 763.

10. *Same*.—Constitution does not prohibit legislature from conferring upon nonresident foreigners the same rights to inherit property as are granted by that instrument to resident foreigners.—*State v. Smith*, 70 Cal. 153, 157, 12 Pac. 121.

11. The interest of nonresident alien who fails for five years to appear and claim the property passes to the state, and he is after that time barred of all right.—*Estate of Pendergast*, 143 Cal. 135, 140, 76 Pac. 962.

12. Consequently where no administration was had for twenty-three years after death of intestate a decree of distribution to nonresident alien heirs was erroneous.—*Estate of Pendergast*, 143 Cal. 135, 140, 76 Pac. 962.

§ 1272a. PETITION SHOWING CLAIM TO ESTATE DEPOSITED WITH STATE TREASURER. When the estate, or any portion thereof, of any decedent has been deposited with the state treasurer under the provisions of this code, any person entitled to succeed and not a party or privy to any proceeding had under any of the foregoing sections of this title, and who has not appeared in the proceedings for the administration of such estate, may, within five years after the date of the decree of final distribution, unless otherwise barred, file a petition in the superior court for Sacramento county against the state of California showing his claim or right to the property, or the proceeds thereof, or to any portion thereof. Said petition shall be verified, and, among other things, must state the facts required to be stated in a petition filed under section one thousand two hundred and seventy-two of this code, and upon the filing thereof the same proceedings shall be had as are therein required.

[**Claim for less than three hundred dollars.**] Whenever the amount claimed by any such person is less than three hundred dollars any such claimant may, in lieu of filing such petition, present his claim to the state board of control, showing the same facts required to be stated in such petition and said board may, upon recommendation of the attorney-general, allow and order paid such claim, provided that no such claim shall be so allowed or paid until at least five years after the death of the decedent and then, only, in the event that no other claim is made to such property. When payment has been made under this title to any claimant no suit shall thereafter be maintained by any other claimant against the state, or any officer thereof, for or on account of such property.

History: Enactment approved May 5, 1917, Stats. and Amdts. 1917, p. 254. In effect July 27, 1917.

§ 1273. UNCLAIMED BANK DEPOSITS ESCHATE TO STATE. All amounts of money heretofore or hereafter deposited with any bank to the credit of depositors who have not made a deposit on said account or withdrawn

any part thereof or the interest and which shall have remained unclaimed for more than twenty years after the date of such deposit, or withdrawal of any part of principal or interest, and where neither the depositor [n] or any claimant has filed any notice with such bank showing his or her present residence, shall, with the increase and proceeds thereof, escheat to the state.

[Action commenced.] Whenever the attorney-general shall be informed of such deposits, he shall commence an action or actions in the name of the state of California, in the superior court for the county of Sacramento, in which shall be joined as parties the bank or banks in which the moneys are deposited and the names of all such depositors. All or any number of depositors or banks may be included in one action.

Service of process in such action or actions shall be made by delivery of a copy of the complaint and summons to the president, cashier or managing officer of each defendant bank, and by publication of a copy of such summons in a newspaper of general circulation published in said county for a period of four weeks. Upon the trial the court must hear all parties who have appeared therein and if it be determined that the moneys deposited in any defendant bank or banks are unclaimed as hereinabove stated, then the court must render judgment in favor of the state declaring that said moneys have escheated to the state and commanding said bank or banks to forthwith deposit all moneys with the state treasurer, to be received, invested, accounted for and paid out in the same manner and by the same officers as is provided in the case of other escheated property.

History: Enactment approved April 21, 1915, Stats. and Amdts. 1915, p. 107. In effect August 8, 1915.

ESCHEATED ESTATES—UNCLAIMED BANK DEPOSIT.

1. Escheat to state—Construction of statute.
2. Same—Jurisdiction of courts in relation to deposit.
3. Same—Recovery by administrator.

1. Escheat to state—Construction of statute.—The above section and section 15 of the Bank Act, as they were amended in 1915, are correlative and deal with bank deposits upon which, except for the accumulation of interest, neither deposits or withdrawals have been made for a period of twenty years, and are not to be given the construction that title to such money passes to the state absolutely on the expiration of twenty years, without compensation to the owner and without notice and a hearing.—*Matthews v. Savings Union Bank & Trust Co.*, 43 Cal. App. 45, 184 Pac. 418.

2. Same—Jurisdiction of courts in relation to deposit.—After the expiration of such twenty-year period jurisdiction to make any order in relation to such dormant deposits is not exclusively in the superior court of Sacramento County. Until suit is brought by the attorney-general in Sacra-

mento County, the court having jurisdiction of an action by any one for property which another with right withholds is open to the depositor, as well after as before the expiration of such period.—*Matthews v. Savings Union Bank & Trust Co.*, 43 Cal. App. 45, 184 Pac. 418, following doctrine in *Hibernia Sav. & L. Soc. v. Lewis*, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714; approving doctrine in *Peck v. Jenness*, 48 U. S. (7 How.) 612, 624, 12 L. ed. 841, 846.

3. Same—Recovery by administrator.—In the case of a bank account which has remained inactive and unclaimed for a period of twenty years, after the expiration of that period but prior to the bringing of the statutory suit by the attorney-general having escheat of the property, the administrator of the estate of the person to whom the bank deposit belonged may bring suit against the bank to recover the deposit, with accrued interest, and the plaintiff is entitled to judgment, notwithstanding the attorney-general intervenes and claims the money on behalf of the state.—*Matthews v. Savings Union Bank & Trust Co.*, 43 Cal. App. 45, 184 Pac. 418, applying the doctrine in *People v. Roach*, 76 Cal. 297, 18 Pac. 407.

§ 1274. SALE OF ESCHEATED PROPERTY BY BOARD OF CONTROL.

The state board of control is hereby authorized to sell, on behalf of and in the name of the state of California, at any time and in any manner it may deem advisable, personal property heretofore or hereafter distributed to the state of California pursuant to the provisions of section one thousand two hundred sixty-nine of the Code of Civil Procedure, and the proceeds of such a sale shall be delivered to and held by the state treasurer. Any real property so distributed to the state may be sold by the board of control, at public auction, to the highest bidder, for cash, after notice thereof by publication, as hereinafter provided, in a newspaper published in the county in which such real property is situate, or, in an adjoining county if there be no newspaper published in such county. Such notice shall be published once a week for at least three weeks immediately preceding the date of such sale, and shall be sufficient for all the purposes of such sale if said real property be described therein in general terms. The board of control may, in its discretion, reject any and all bids.

History: Enactment approved May 3, 1919, Stats. and Amdts. 1919, p. 189. In effect July 22, 1919.

§ 1274a. DEPOSIT OF UNCLAIMED PROPERTY. All money or other property distributed in the administration of an estate of a decedent and heretofore or hereafter deposited with a county treasurer to the credit of the distributee, must be forthwith delivered into the state treasury by the county treasurer upon the expiration of one year from the date of such deposit. Money so deposited in the state treasury may be recovered by the person or persons entitled thereto, upon the conditions herein prescribed, in the manner provided in section one thousand six hundred ninety-six of this code.

[Proceeding to vest title in state.] Money or other property so deposited in the state treasury, if not claimed by the person or persons entitled thereto within five years from the date of such deposit, shall become the property of the state of California by escheat, and the attorney-general shall commence a proceeding on behalf of the state in the superior court for Sacramento county, in accordance with this title, to have it adjudged that the title to such property has vested in the state.

History: Enactment approved May 10, 1919, Stats. and Amdts. 1919, p. 451; amendment approved May 14, 1921, Stats. and Amdts. 1921, p. 148. In effect July 29, 1921.

TITLE IX.

OF CHANGE OF NAMES.

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| § 1275. Jurisdiction. | § 1278. Hearing of application and remonstrance. |
| § 1276. Application for change of name, how made. | § 1279. Certified copy of decree to be filed with secretary of state, when. |
| § 1277. Publication of petition for. | |

§ 1275. JURISDICTION. Applications for change of names must be heard and determined by the superior courts.

History: Enacted March 11, 1872; amendment approved April 23, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 117.

CHANGE OF NAME.

1. Constitutionality of provision.
2. Judicial proceeding.

1. Constitutionality of provision for changing name of corporation upheld in Matter of La Societe Francaise etc., 123 Cal. 525, 528, 56 Pac. 458.

2. Judicial proceeding.—Held to be a judicial proceeding, although neither controversy, nor an actual or threatened denial by any person of petitioner's right, is disclosed (dictum).—Title & Documents Rest. Co. v. Kerrigan, 150 Cal. 320, 88 Pac. 356.

§ 1276. APPLICATION FOR CHANGE OF NAME, HOW MADE. All applications for change of names must be made to the superior court of the county where the person whose name is proposed to be changed resides, by petition, signed by such person; and if such person is under twenty-one years of age, if a male, and under the age of eighteen years of age, if a female, by one of the parents, if living, or if both be dead, then by the guardian; and if there be no guardian, then by some near relative or friend.

The petition must specify the place of birth and residence of such person, his or her present name, the name proposed, and the reason for such change of name, and must, if the father of such person be not living, name, as far as known to the petitioner, the near relatives of such person, and their place of residence.

Any religious, benevolent, literary, scientific, or other corporation, or any corporation bearing or having for its name, or using or being known by the name of any benevolent or charitable order or society, may, by petition, apply to the superior court of the county in which its articles of incorporation were originally filed, or in which the property of such incorporation is situated, for change of its corporate name. Such

Petition must be signed by a majority of the directors or trustees of the corporation, and must specify the date of the formation of the corporation, its present name, the name proposed, and the reason for such change of name. Upon filing such petition, on behalf of such corporation, the same proceedings shall be had as upon applications for changes of names of natural persons, and no banking corporation hereafter organized shall adopt or use the name of any friendly association.

History: Enacted March 11, 1872; amendment approved March 28, 1878, Code Amdts. 1877-8, p. 110; April 23, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 117; March 12, 1885, Stats. and Amdts. 1884-5, p. 112; by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 197, held unconstitutional, see history, § 5 ante.

CHANGE OF NAME—APPLICATION FOR.

1. Construction of section.
2. Disqualification of judge.
3. No discretion given to court.
4. Sufficiency of reason.
5. Whole purpose of order to show cause.

1. **Construction**—"Or other corporation," in this section is not limited to include only corporations ejusdem generis with those specifically enumerated.—*Matter of La Societe Francaise etc.*, 123 Cal. 525, 530, 56 Pac. 458.

2. **Disqualification of judge** to hear the proceeding would not disqualify him from making the order to show cause.—*In re Los Angeles Trust Co.*, 158 Cal. 603, 112 Pac. 56.

3. **No discretion is given to the court** in matter of the making of the order to show

cause. It must be made upon the filing of the petition in the form prescribed by law.—*In re Los Angeles Trust Co.*, 158 Cal. 603, 112 Pac. 56.

4. **Sufficiency of reason**.—Fact that a trust company proposed to also conduct a savings bank department and its belief that it would be to its advantage to have its name indicate that fact, so that its customers and the general public might be informed thereof by its name, is a sufficient reason for so changing its name as to indicate the purpose stated.—*In re Los Angeles Trust Co.*, 158 Cal. 603, 112 Pac. 56.

5. **Whole purpose of order to show cause** is simply to give notice to the general public of the making of the application and of the time when the same will come on for hearing so that any person interested may present his objections.—*In re Los Angeles Trust Co.*, 158 Cal. 603, 112 Pac. 56.

§ 1277. PUBLICATION OF PETITION FOR. Upon the filing of the said petition the court shall thereupon make an order reciting the filing of the application, the name of the person or corporation by whom it is filed and the name proposed, and directing all persons interested in said matter to appear before the court, at a time and place specified, not less than four or more than eight weeks from the time of making such order, to show cause why the application for change of name should not be granted.

A copy of the order to show cause must be published for four successive weeks in some newspaper of general circulation to be designated in the order, printed in the county, if a newspaper be printed therein, or, if no newspaper be printed in the county, a copy of such order to show cause shall be posted by the clerk of the court in three of the most public places in the county in which the court is held, for a like period.

Proof must be made to the satisfaction of the court, of such publication, or posting, at the time of the hearing of the application.

History: Enacted March 11, 1872; amendment by Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 198, held unconstitutional, see history, § 5 ante; amendment approved March 3, 1905, Stats. and Amdts. 1905, p. 40.

CHANGE OF NAME—PUBLICATION OF PETITION.

1. Order to show cause—Discretion of court.
2. Publication—Sufficiency of.

1. **Order to show cause—Discretion of court** does not extend beyond mere fixing of date of hearing.—*In re Los Angeles Trust Co.*, 158 Cal. 607, 112 Pac. 56.

2. **Publication—Sufficiency of.**—Requirement as to full four weeks' publication is

complied with by publication in an evening paper from and including July 27, 1909, upon the morning of which day the order was made, to and including August 23, 1909, the hearing being held on the morning of August 24, 1909, section 12, ante, providing for the exclusion of the first day and the inclusion of the last day being applicable.—*In re Los Angeles Trust Co.*, 158 Cal. 603, 112 Pac. 56.

§ 1278. HEARING OF APPLICATION AND REMONSTRANCE. Such application must be heard at such time as the court may appoint, and objections may be filed by any person who can, in such objections, show to the court good reason against such change of name. On the hearing, the court may examine

on oath any of the petitioners, remonstrants, or other persons, touching the application, and may make an order changing the name, or dismissing the application, as to the court may seem right and proper;

[**Certificate of secretary of state.**] provided, that if the applicant for a change of name be a corporation, such applicant shall file in court at the time of hearing the application the certificate of the secretary of state that the name desired to be used by the applicant is not the corporate name of any corporation existing at said time and that said name does not so closely resemble the name of any such existing corporation as will tend to deceive;

[**Certificate of superintendent of banks.**] provided further that if the applicant for a change of name be a banking corporation such applicant shall file in court at the time of hearing the application the certificate of the superintendent of banks that the name desired to be used by the applicant does not resemble so closely as to be likely to cause confusion the name of any other bank previously formed under the laws of this state.

History: Enacted March 11, 1872; amendment approved April 23, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 117; March 14, 1905, Stats. and Amdts. 1905, p. 99; April 21, 1915, Stats. and Amdts. 1915, p. 108. In effect August 8, 1915.

CHANGE OF NAME—HEARING OF APPLICATION.

1. Formal findings of fact.
2. Object of above section.
3. Same—"Los Angeles Trust and Savings Bank," held sufficiently distinguished.

1. **Formal findings of fact** are not required in a proceeding under above section.—In re Los Angeles Trust Co., 158 Cal. 603, 112 Pac. 56.

2. **Object of above section** is to prevent the proposed name so closely resembling the name of another corporation that its adoption would tend to deceive the public

as to the identity of the two corporations and a mere possibility by the suggestion of extreme instances that might never occur should never be the basis of the court's action, the duty being to determine what with reasonable certainty would be the actual consequences of granting the application.—In re Los Angeles Trust Co., 158 Cal. 603, 112 Pac. 56.

3. **Same**—"Los Angeles Trust and Savings Bank," held sufficiently distinguished from "Los Angeles Savings Bank" within the meaning of above section, especially where the latter was no longer actively engaged in business.—In re Los Angeles Trust Co., 158 Cal. 603, 112 Pac. 56.

§ 1279. CERTIFIED COPY OF DECREE TO BE FILED WITH SECRETARY OF STATE WHEN. A certified copy of the decree of the court changing the name of a person or corporation shall within thirty days from the date of such decree be filed in the office of the secretary of state.

History: Enactment approved March 13, 1874, Code Amdts. 1873-4, p. 413; amendment approved April 23, 1880, Code Amdts. 1880 (C. C. P. pt.), p. 118; amended March 18, 1907, Stats. and Amdts. 1907, p. 345, Kerr's Stats. and Amdts. 1906-7, p. 491.

TITLE X.

OF ARBITRATIONS.

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| <p>§ 1281. What may be submitted to arbitration, and when.</p> <p>§ 1282. Submission to arbitration to be in writing.</p> <p>§ 1283. Submission may be entered as an order of the court. Revocation.</p> <p>§ 1284. Powers of arbitrators.</p> <p>§ 1285. Majority of arbitrators may determine any question. They must be sworn.</p> | <p>§ 1286. Award to be in writing. When judgment to be entered.</p> <p>§ 1287. Award may be vacated in certain cases.</p> <p>§ 1288. Court may, on motion, modify or correct the award.</p> <p>§ 1289. Decision, on motion, subject to appeal, but not the judgment entered before motion.</p> <p>§ 1290. If submission be revoked and an action brought, what to be recovered.</p> |
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§ 1281. WHAT MAY BE SUBMITTED TO ARBITRATION AND WHEN.

Persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them except a question of title to real property in fee or for life. This qualification does not include questions relating merely to the partition or boundaries of real property.

History: Enacted March 11, 1872, re-enactment of § 380 Practice Act.

ARBITRATION AND AWARD—IN
GENERAL.

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| <p>1. After suit brought.</p> <p>2. Agreement to arbitrate — Common-law agreement for arbitration.</p> <p>3. Same—Matters subject to arbitration.</p> <p>4. Same—Statutory arbitration not provided for.</p> <p>5. Same—What constitutes breach.</p> <p>6. All arbitrators must be named.</p> <p>7. Authority of clerk to enter submission—Stipulation required.</p> <p>8. Award before evidence submitted, erroneous.</p> <p>9. Commencement of suit on award—Notice of award prerequisite.</p> <p>10. Construction of section — What may be submitted.</p> <p>11. Creditor may petition.</p> <p>12. Fire insurance—Award upon limited submission.</p> <p>13. Jurisdiction—An award based on submission not statutory.</p> <p>14. Jurisdiction of parties.</p> <p>15. Jurisdiction special.</p> <p>16. Kinds of submission to determine values.</p> <p>17. Misconduct of arbitrators.</p> <p>18. Object of submitting questions.</p> <p>19. Partition — Agreement for — Partitioners not arbitrators.</p> <p>20. Status of petitioner.</p> <p>21. Stipulation that agreement shall be considered as statutory arbitration, and entered as order of court.</p> <p>22. Same—Effect of—Proceedings to be conducted in statutory mode.</p> | <p>23. Same—Effective only as part of agreement.</p> <p>24. Same—Waiver of stipulation—Entry as order of court.</p> <p>25. Same—Waiver of stipulation as to swearing arbitrators and delivery of award.</p> <p>26. Same — Same — Sufficiency of evidence showing waiver.</p> <p>27. Submission to arbitration—Agreement between municipality and individual—Validity of agreement.</p> <p>28. Same—Same—Power of municipality to submit to arbitration.</p> <p>29. Submission of question of loss by fire to arbitration.</p> <p>30. Testacy favored.</p> <p>As to actions for partition of real property, see, ante, §§ 752 et seq. and notes.</p> <p>As to agreement to submit questions arising under contracts, see note 2 Am. St. Rep. 569-571.</p> <p>As to agreement to submit questions arising under insurance policies, see note 2 Am. St. Rep. 569, 570.</p> <p>As to agreement to submit question to arbitration, when valid, see note 2 Am. St. Rep. 568.</p> <p>As to distinction between arbitration and appraisal or valuation and a complete discussion of the subject, with numerous cases cited, see California Annual Conference of M. E. Church v. Seitz, 74 Cal. 287, 291 et seq., 15 Pac. 839.</p> <p>As to executors submitting claims to arbitration, see note 78 Am. St. Rep. 187.</p> <p>As to guardian, submission of claims for and against ward, see note 89 Am. St. Rep. 291.</p> |
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As to liability of infant on submission to arbitration, see note 18 Am. St. Rep. 619.

As to majority of arbitrators empowered to make award, see, post, § 1285 and note.

As to married woman, whether may act as arbitrator, see note 39 Am. St. Rep. 36-38.

As to mutual benefit life insurance societies, submission of question to arbitration, etc., see note 52 Am. St. Rep. 546-548.

As to ousting courts of jurisdiction by agreement to arbitrate, see note 2 Am. St. Rep. 566.

As to powers of arbitrators, see, post, § 1284 and note.

As to submission to arbitration being a discontinuance of a pending cause, see note Ann. Cas. 1912A, 1263.

As to submission of controversies to arbitration in general, see notes 14 Am. Dec. 296, 297, 30 Am. Dec. 626-634, 29 Am. Rep. 602-604, 2 Am. St. Rep. 566-571, 18 Am. St. Rep. 619.

1. After suit brought.—In case where arbitration agreement is entered into after suit brought and while the action is pending between the parties, one of its avowed purposes being to relieve the parties from the necessity of having their differences determined by the court and to substitute for the judgment of the court the award of arbitrators of their own selection, it will be presumed even where the agreement is silent that it is the intent of the parties that the submission be entered as a rule of court, and the courts have, therefore, refused to listen to merely formal objections whether directed against the submission itself or addressed to the award.—*Silliman v. Carr*, 159 Cal. 155, 113 Pac. 135.

2. Agreement to arbitrate.—Common-law agreement for arbitration.—An agreement submitting a question as to the value of land is valid as a common-law agreement for arbitration. Under that law it is competent for persons to submit to arbitration any question or matter of difference between them, such as the value of property, whether it could be the subject of an action or not, and when they have done so, the decision, in the absence of fraud and if regularly made, will be binding and conclusive upon them.—*Dore v. Southern Pac. Co.*, 163 Cal. 182, 124 Pac. 817.

As to stipulation to arbitrate, see pars. 21-26, this note.

Agreements to submit to arbitration, see notes 14 Am. Dec. 296; 2 Am. St. Rep. 566.

3. Same.—Matters subject to arbitration.—The only matter that can be submitted to arbitration, under above section is a "controversy which might be the subject of a civil action" between the parties concerned. A question merely as to the value of the land is not such a controversy.—*Dore v. Southern Pac. Co.*, 163 Cal. 182, 124 Pac. 817.

See par. 10, this note.

4. Same.—Statutory arbitration not provided for.—A provision in a contract for the sale of land, whereby the parties agreed that the value of the land should be determined by a majority of a board of arbitration thereby appointed, whose award should be conclusive and binding on them, and which obligated the vendee to pay as the purchase-price of the land the amount so determined by the arbitrators as its value, and the vendors to convey the land upon receipt of such purchase-price, does not provide for a statutory arbitration, under the provisions of Title X, Part III of the Code of Civil Procedure (§§ 1281-1290).—*Dore v. Southern Pac. Co.*, 163 Cal. 182, 124 Pac. 817.

5. Same — What constitutes breach.—Where, in a building-contract, it was provided that extras were to be valued between the parties, and in case of dispute to be referred to arbitration, such agreement will not prevent suit by the contractor for breach of contract where he has made written demand upon the owner for arbitration which was entirely ignored by the owner.—*Tubbs v. Delillo*, 19 Cal. App. 612, 127 Pac. 515.

6. All arbitrators must be named.—As submission to arbitration is required to be in writing and as the clerk must upon submission being filed with him enter the names of the arbitrators in his register, it is plain the legislature intended to prescribe that all the arbitrators must be named in the submission agreement and the naming of two who may choose a third not named renders the submission void.—*Joshua Hendy Machine Works v. Gray*, 9 Cal. App. 610, 611, 99 Pac. 1110.

7. Authority of clerk to enter submission.—Stipulation required.—It may be well doubted if anything short of stipulation unequivocally authorizing entry of submission by clerk will confer upon that officer authority to make such entry in his register.—*Pieratt v. Kennedy*, 43 Cal. 393, 394.

8. Award before evidence submitted, erroneous.—The parties to a stipulation for a common-law arbitration have the right to introduce evidence in support of their claims; and to decide the matter in controversy before the evidence thereon, and the matter itself, have been submitted to the arbitrators for decision, is a denial of such right, and a defense to an action based on the attempted award of the arbitrators.—*Meloy v. Imperial Land Co.*, 163 Cal. 99, 124 Pac. 712.

9. Commencement of suit on award.—Notice of award prerequisite.—Suit can not be based upon an award made under common-law submission until notice of award has been given, this being necessary prerequisite to commencement of suit.—*Mahoney v. Spring Valley Water Works Co.*, 52 Cal. 159, 164.

10. Construction of section—What may be submitted.—The only matter that can be submitted to arbitration, under this section, is a "controversy which might be the subject of a civil action" between the parties concerned. A question merely as to the value of land is not such a controversy.—*Dore v. Southern Pac. Co.*, 163 Cal. 182, 188, 124 Pac. 817.

See par. 3, this note.

11. Creditor may petition.—A creditor is in no sense interested in upholding a will, but only in securing payment of his debt from the assets of the estate, yet he may petition for the probate of a will, his object in so petitioning being nothing more than to advance the administration of the estate to the end that he may be paid.—*Estate of Edwards*, 154 Cal. 91, 95, 97 Pac. 23.

See par. 20, this note.

12. Fire insurance—Award upon limited submission.—After an award has been made under submission limited to determining amount of loss sustained by plaintiff, and insurer has expressly promised to pay it, insured may maintain an action either upon policy alleging fact of award for purpose of fixing amount of recovery, or he may sue upon new or subsequent agreement to pay, in which latter case fact of agreement is material and must be proven.—*Stockton Combined Harvester & Agricultural Wks. v. Glen's Falls Ins. Co.*, 98 Cal. 557, 570, 33 Pac. 633.

13. Jurisdiction.—An award based on submission not statutory under above and the succeeding sections is not sufficient basis for judgment for want of jurisdiction.—*Kreiss v. Hotelling*, 96 Cal. 617, 619, 31 Pac. 740.

14. Jurisdiction of parties.—It does not follow that because matter in difference between parties may be submitted by them to arbitration that court of record, or any court, will thereby acquire jurisdiction of subject-matter or of parties.—*Ryan v. Dougherty*, 30 Cal. 218, 221.

15. Jurisdiction special.—Jurisdiction in arbitration proceeding is a special jurisdiction and it is only by a substantial compliance with all the requirements of the statutes that it attaches.—*Joshua Hendy Machine Works v. Gray*, 9 Cal. App. 610, 611, 99 Pac. 1110.

16. Kinds of submission to determine values.—Submissions to determine values are of two kinds, first, where the valuers are to examine the property and fix the value in accordance with their own opinion or judgment, in which case notice of the hearings of the valuers is not required, and, second, where they are to afford the parties a hearing, and an opportunity to offer evidence, and are to adjudge the value upon a consideration of the evidence, as well as their own opinion.—*Dore v. Southern Pac. Co.*, 163 Cal. 182, 124 Pac. 817.

17. Misconduct of arbitrators in receiving evidence without swearing witnesses is waived where the party objecting is present and makes no objection.—*Silliman v. Carr*, 159 Cal. 155, 118 Pac. 135.

18. Object of submitting questions of difference as to the rights of parties which are within the legitimate scope of a legal arbitration is to obviate or put an end to litigation, and it is essential to the validity of an award that it should be final—that it should finally determine the matter submitted to the arbitrators, thus leaving nothing to be done but to execute and carry out the terms of the award.—*Boyd v. Bargagliotti*, 12 Cal. App. 228, 238, 107 Pac. 150.

19. Partition—Agreement for—Partitioners not arbitrators.—In the absence of any prior controversy between the parties an agreement among tenants in common for the partition and allotment in severalty of the common property, to be made by three disinterested persons, the determination of the majority of them to be binding on the cotenants, is not an agreement for arbitration, under the provisions of the above and following sections; the partitioners do not act in the capacity of arbitrators, but merely as agents for the cotenants and the provisions regulating arbitration need not be complied with.—*Gonzalez v. Gonzalez*, 174 Cal. 588, 163 Pac. 993.

20. Status of petitioner.—One petitioning to have a will proved while holding the belief that it is invalid does not stultify himself. Generally it is true that the person who petitions for the probate is one interested in sustaining the validity of the instrument offered, but it is by no means necessary that he should be such a person. The purpose of the petition is to give jurisdiction to the court, and jurisdiction having been obtained, it becomes the duty of the court with or without contest to take all necessary and proper evidence not to the end of establishing the will or per contra not to the end of denying a probate, but to the end of determining whether or not it be a legal expression of a testamentary intent upon the part of the deceased.—*Estate of Edwards*, 154 Cal. 91, 94, 97 Pac. 23.

See par. 11, this note.

21. Stipulation that agreement shall be considered as statutory arbitration, and entered as order of court.—Notwithstanding the question of value submitted by such agreement did not come within the terms of the statute, the agreement and the award based thereon were not invalidated by reason of the inclusion in the agreement of a stipulation that it should be held and taken to be a submission within the meaning of section 1283, post, and might be entered as an order of the superior court.—*Dore v. Southern Pac. Co.*, 163 Cal. 182, 124 Pac. 817.

As to agreement to arbitrate, see para. 2-5, this note.

22. Same—Effect of—Proceedings to be conducted in statutory mode.—Such an agreement could not give the clerk power to enter judgment, as provided in section 1236, post, or give the court jurisdiction of such a matter, as of an arbitration proceeding. At most, it could only give the parties the right to have the proceedings before the arbitrators and by them conducted in the statutory mode. As the parties are presumed to know the law, it will be presumed, in the absence of any allegation of mistake, that this was the extent of their purpose in declaring that the submission might "be entered as an order of the superior court."—*Dore v. Southern Pac. Co.*, 163 Cal. 182, 124 Pac. 817.

23. Same—Effective only as part of agreement.—If the statutory regulations apply at all to such an agreement, it is not because of their force as statutes, but solely because of the agreement of the parties making them a part of the agreement.—*Dore v. Southern Pac. Co.*, 163 Cal. 182, 124 Pac. 817.

24. Same—Waiver of stipulation—Entry as order of court.—Such a stipulation, as it derived all its force from the agreement of the parties and none from the statute as such, could be waived, and it was waived so far as it required an entry as an order of court, when neither of the parties at any time caused the submission to be entered as an order of court, but each of them, well knowing that it had not been so entered, consented to and proceeded with the arbitration, introduced evidence before the arbitrators and proceeded to an award without objection on that score.—*Dore v. Southern Pac. Co.*, 163 Cal. 182, 124 Pac. 817.

25. Same—Waiver of stipulation as to swearing arbitrators and delivery of award.—Conceding that such stipulation was an agreement that the arbitrators should be sworn and that the award, signed by them, should be delivered, in accordance with sections 1285 and 1286, post, such requirements could be waived.—*Dore v. Southern Pac. Co.*, 163 Cal. 182, 124 Pac. 817.

26. Same—Same—Sufficiency of evidence showing waiver.—A waiver by the defendant of such requirements was sufficiently shown by evidence to the effect that many days were occupied in the hearings before the arbitrators and that the defendant appeared and presented evidence and conducted the proceeding on its part without ever demanding or suggesting that the arbitrators be sworn, or objecting because they had not been sworn; that pending the proceeding, it entered into agreements for a deduction from the amount awarded for a certain parcel of the land, and for an ex-

tension of the time in which the award might be made; that when the award was made, an unsigned copy was delivered to it, and it was then informed that the arbitrators had not been sworn, but no objection was then or ever made by it on either ground; and that thereafter it treated the award as valid on various occasions when payment was sought by the plaintiffs, and promised to pay the amount allowed.—*Dore v. Southern Pac. Co.*, 163 Cal. 182, 124 Pac. 817.

27. Submission to arbitration—Agreement between municipality and individual—Validity of agreement.—An arbitration agreement entered into between a municipality and an individual can not be attacked by the former, on the ground that the making of the same was beyond the power of the municipality, after the award has been filed pursuant to the code provisions relating to arbitration, and has been sustained by a judgment of the superior court it has become final.—*Cary v. Long*, 181 Cal. 443, 184 Pac. 857.

28. Same—Same—Power of municipality to submit to arbitration.—A municipal corporation, like an individual, has power to submit to arbitration any controversy which might be the subject of a civil action against it, under the provisions of the above section and of section 1283, post.—*Cary v. Long*, 181 Cal. 443, 184 Pac. 857.

29. Submission of question of loss by fire to arbitration.—Where complaint alleged that matter submitted to arbitration was question of amount of loss sustained by plaintiff, and court so finds, and where in addition to this record showed that in submission itself there was an express provision to effect that appraisal or award to be made thereunder should not operate or be taken as waiver by insurance companies or any of them of any provision or condition of their policies, held that an award in pursuance of such submission does not fix liability of insurer to pay under policy, but only determines amount to be paid in event that there is any liability at all, and no action can be maintained upon an award of this character standing alone.—*Stockton Combined Harvester & Agricultural Works v. Glen's Falls Ins. Co.*, 98 Cal. 557, 570, 33 Pac. 633. See *Soars v. Home Ins. Co.*, 140 Mass. 343, 5 N. E. 149; *Whipple v. North B. & M. F. Ins. Co.*, 11 R. I. 139.

30. Testacy favored.—Generally speaking the law favors testacy to intestacy and is zealous to see the testamentary directions of a testator fully complied with, and only in case of intestacy does the state distribute the property of the decedent under its laws of succession.—*Estate of Edwards*, 154 Cal. 91, 93, 97 Pac. 23.

§ 1282. SUBMISSION TO ARBITRATION TO BE IN WRITING. The submission to arbitration must be in writing and may be to one or more persons.

History: Enacted March 11, 1872, re-enactment of § 381 Practice Act.

1. **Stipulation as to submission—Entry of.**—If parties stipulate in submission that same may be entered as an order of court, and gives submission and stipulation to be filed with clerk of that court, he is required

to enter same in his register of actions.—*Ryan v. Dougherty*, 30 Cal. 218, 221.

As to stipulation for submission to arbitration generally, see, ante, § 1281, note par. 21.

§ 1283. SUBMISSION MAY BE ENTERED AS AN ORDER OF THE COURT. REVOCATION. It may be stipulated in the submission that it be entered as an order of the superior court, for which purpose it must be filed with the clerk of the county where the parties, or one of them, reside. The clerk must thereupon enter in his register of actions a note of the submission with the names of the parties, the names of the arbitrators, the date of the submission when filed, and the time limited by the submission, if any, within which the award must be made. When so entered the submission can not be revoked without the consent of both parties. The arbitrators may be compelled by the court to make an award, and the award may be enforced by the court in the same manner as a judgment. If the submission is not made an order of the court, it may be revoked at any time before the award is made.

History: Enacted March 11, 1872, re-enactment of § 382 Practice Act; amendment approved April 15, 1880, Code Amdts 1880 (C. C. P. pt.), p. 74.

ARBITRATION—AGREEMENT ENTERED AS ORDER OF COURT.

1. Agreement to submit matters to arbitrators in dispute — Is voluntary withdrawal of case from jurisdiction of court.
2. Same—Date when award to be made—Court may direct clerk to change, when.
3. Same—Filing of award, time of.
4. General rule.
5. Jurisdiction—How obtained by court.
6. Same—Requisites for conferring.
7. Mining claim—Section not applicable to.
8. Revocation—When may be made.
9. Submission of cause to arbitration—Operates as discontinuance.
10. Time of entry of judgment—Construction of word "thereupon."

See, also, ante, § 1281 and note.

1. **Agreement to submit matters in dispute to arbitrators—Is voluntary withdrawal of case from jurisdiction of court** by which court loses all control over cause.—*Heslep v. San Francisco*, 4 Cal. 1. See *Draghicevich v. Vulicevich*, 76 Cal. 378, 380, 18 Pac. 406.

See par. 9, this note.

2. **Same—Date when award to be made—Court may direct clerk to change, when.**—In a case in which a matter is submitted to arbitration under an arbitration agreement which required the arbitrators to make their award in writing and deliver the same to the parties or their attorneys within thirty days from the date within which the submission was made to the arbitrators, the arbitration agreement being

dated April 21, and the arbitrators being chosen on May 10, and that having filed with the clerk of the superior court, pursuant to the provisions of the above section the agreement of arbitration, with their qualification attached thereto, and thereafter and upon June 14, began to hold their several hearings in pursuance of their functions as such arbitrators, at all of which sessions the parties appeared without any objection to the prolongation of such hearing beyond the thirty days of the date of the agreement in question, the court may direct the clerk to change the entry in the register of actions the memorandum as to the time within which the award should be made, so as to conform to the requirements of the above section within the terms of the agreement of submission, the parties being estopped to object thereto and to the failure to submit the written arbitration within the thirty days originally specified by their attendance upon the sessions of the arbitration.—*Bank of Coronado v. Shreve*, — Cal. App. —, 196 Pac. 787, following doctrine in *California Academy of Sciences v. Fletcher*, 99 Cal. 207, 33 Pac. 855.

3. **Same—Filing of award, time of,** as fixed by arbitration agreement, to be within thirty days after filing the arbitration agreement in clerk's office, an award filed after that period will be void, although it was not essential to the validity of the arbitration agreement that it should limit the time of filing the award, as provided in above section.—*Abrams v. Brennan*, 2 Cal. App. 363, 84 Pac. 363.

4. **General rule** is that neither party can revoke submission to arbitration after award has been made; that rule is not in any way changed by provisions of above

section.—California Academy of Sciences v. Fletcher, 99 Cal. 207, 209, 33 Pac. 855.

5. **Jurisdiction—How obtained by court.**—By concurrence of several conditions set forth in prior sections, court obtains jurisdiction of subject-matter and of parties and power over arbitrators.—Ryan v. Dougherty, 30 Cal. 218, 222.

6. **Same—Requisites for conferring.**—The clerk must be authorized, in first place, by stipulation, to make note in his register. In second place, he must in fact make it there—the mere authority without act done is no more than act done without authority would be. Both must concur, and in absence of either there is no jurisdiction over subject-matter or parties.—Pieratt v. Kennedy, 43 Cal. 393, 394.

7. **Mining claim—Section not applicable to.**—Title to real property in fee, or for life, is expressly excepted in above section, and decisions of California hold that mining claim is real property and comes within this exception.—Spencer v. Winselman, 42

Cal. 479, 482. See Merritt v. Judd, 14 Cal. 59, 61; Blair v. Wallace, 21 Cal. 318; Hughes v. Devlin, 23 Cal. 501.

8. **Revocation—When may be made.**—A stipulation submitting matters in controversy to arbitration, which contains no provision by which order of court can be made upon it, and which is not made an order of court, may be revoked at any time before award is made.—Sidlinger v. Kerkow, 82 Cal. 42, 46, 22 Pac. 932.

9. **Submission of cause to arbitration—Operates as discontinuance of action commenced on matter in dispute.**—Gunter v. Sanchez, 1 Cal. 45. See Draghicevich v. Vulicevich, 76 Cal. 378, 380, 18 Pac. 406.

See, also, par. 1, this note.

10. **Time of entry of judgment—Construction of word "thereupon."**—Entry of judgment is not required to be made at any particular time. The word "thereupon," as used in this section, does not mean immediately.—California Academy of Sciences v. Fletcher, 99 Cal. 207, 210, 33 Pac. 855.

§ 1284. POWERS OF ARBITRATORS. Arbitrators have power to appoint a time and place for hearing, to adjourn from time to time, to administer oaths to witnesses, to hear the allegations and evidence of the parties and to make an award thereon.

History: Enacted March 11, 1872, re-enactment of § 383 Practice Act.

ARBITRATION—POWERS OF ARBITRATORS.

1. Delegation of authority.
2. Estimate of value of timber—Choosing of "arbitrators"—Nature of agreement—Appraisement.
3. Two time-honored rules in relation to arbitration.
4. Validity of an award.

See, ante, § 1281 and note.

1. **Delegation of authority.**—Statute does not authorize two arbitrators named to choose a third.—Kreiss v. Hotelling, 96 Cal. 617, 621, 31 Pac. 740. See Stockton Combined Harvester & Agricultural Wks. v. Glen's Falls Ins. Co., 98 Cal. 557, 567, 33 Pac. 633.

That arbitrators are not permitted to delegate their powers, see note 50 Am. St. Rep. 114.

2. **Estimate of value of timber—Choosing of "arbitrators"—Nature of agreement—Appraisement.**—A contract between the parties to a pending action with respect to their rights in growing and fallen timber, providing for the choosing of "arbitrators"

to estimate the value of the timber, and stipulating that neither party should offer any evidence, but that the arbitrators should go upon the ground and make their estimate from and on examination, is not a contract for arbitration under the provisions of the above and following section, but merely an agreement for the appointment of appraisers to determine the value of the timber, and therefore the rules governing arbitration proceedings are not required to be followed.—Thompson v. Newman, 36 Cal. App. 248, 171 Pac. 982.

3. **Two time-honored rules in relation to arbitration:** one, that courts will not enforce an agreement to submit to arbitration, and the other, that arbitrators must give notice of their session so as to afford parties right to be heard.—California Annual Conference of M. E. Church v. Seltz, 74 Cal. 287, 291, 15 Pac. 839.

4. **Validity of an award** depends not only upon the due and proper appointment of arbitrators, but upon regularity of proceedings, and if proceedings are had ex parte and without notice to parties of hearing, award is invalid and void.—Curtis v. Sacramento, 64 Cal. 102, 104, 28 Pac. 108.

§ 1285. MAJORITY OF ARBITRATORS MAY DETERMINE ANY QUESTION. THEY MUST BE SWORN. All the arbitrators must meet and act together during the investigation; but when met, a majority may determine any question. Before acting, they must be sworn before an officer authorized

to administer oaths, faithfully and fairly to hear and examine the allegations and evidence of the parties in relation to the matters in controversy and to make a just award according to their understanding.

History: Enacted March 11, 1872, re-enactment of § 384 Practice Act.

1. Void submission.—Where parties by stipulation, agree to submit controversy to arbitration, specifically ignoring nearly all of provisions of statutes, and repudiating any intention of following its requirement, it is not statutory submission, and is void.—*Kreiss v. Hotaling*, 96 Cal. 617, 621, 31 Pac. 740.

See, ante, § 1281 and note.

As to award by majority of arbitrators, see, ante, § 1053 and note.

Same—When and how made.—See note 1 Am. Dec. 200-202.

As to provision that three referees or three arbitrators all must meet, but two of them may do any act which might be done by all, see, ante, § 1053 and note.

§ 1286. AWARD TO BE IN WRITING. WHEN JUDGMENT TO BE ENTERED. The award must be in writing signed by the arbitrators or a majority of them and delivered to the parties. When the submission is made an order of the court the award must be filed with the clerk and a note thereof made in his register. After the expiration of five days from the filing of the award upon the application of a party and on filing an affidavit showing that notice of filing the award has been served on the adverse party or his attorney, at least four days prior to such application, and that no order staying the entry of judgment has been served, the award must be entered by the clerk in the judgment-book, and thereupon has the effect of a judgment.

History: Enacted March 11, 1872, re-enactment of § 385 Practice Act.

ARBITRATION—AWARD—JUDGMENT ON.

1. Agreement to submit to arbitration—When invalid.
2. Award valid as common-law award.
3. Award must be in writing.
4. Decision by chance—What is not.
5. Judgment—Agreement to arbitrate is itself consent that judgment be entered.
6. Same—Entry of.
7. Partnership matters in controversy.
8. Same—To determine difference between partners.
9. Waiver of error.

See, ante, § 1281 and note.

1. Agreement to submit to arbitration—When invalid.—Submission of controversy, as statutory submission to arbitration, is void, and award can not be enforced as judgment, although it is good as common-law award and basis of action, where parties by such agreement intended to ignore nearly all of material provisions of statute relating to arbitration, and expressly repudiated any intention of following its requirements, or of availing themselves of machinery of court to assist arbitrators, or to correct any errors of latter.—*Kreiss v. Hotaling*, 96 Cal. 617, 621, 31 Pac. 740.

2. Award valid as common-law award.—If award though not good under statute, is valid as common-law award, court may properly deny motion to set it aside where

effect of such order as motion called for would be to declare award invalid for any purpose.—*Kreiss v. Hotaling*, 96 Cal. 617, 620, 31 Pac. 740. See *Fink v. Fink*, 8 Iowa 313, 316.

3. Award must be in writing.—When arbitrators make an award, it must be in writing, and when submission is made on order of court, award must be filed with clerk, who shall enter award in judgment-book, and thereupon it becomes in effect a judgment.—*Ryan v. Dougherty*, 30 Cal. 218, 222.

4. Decision by chance—What is not.—Question presented as to determination by arbitrators is similar to that of verdict of jury, where it is agreed that each juror shall set down in figures what shall be amount of their verdict and divide whole sum by twelve to fix amount, and without agreeing to be bound by it, then afterwards agreeing to determine same upon consideration of evidence. A verdict so found has been held to be good.—*Simons v. Mills*, 80 Cal. 118, 120, 22 Pac. 25. See *Wilson v. Berryman*, 5 Cal. 44, 45.

5. Judgment—Agreement to arbitrate is itself consent that judgment shall be entered, and it may be entered by clerk like judgment by default, subject, as provided by statute, to action of court.—*Carsley v. Lindsay*, 14 Cal. 390, 395.

6. Same—Entry of.—Where judgment was entered by clerk in less than five days after award was filed, and without proof of service of notice of filing of award upon

defendant at instance of plaintiff himself, he can not take advantage of this fact. It would be good, however, if defendants wish to set aside judgment.—*Hoogs v. Morse*, 31 Cal. 128, 129.

7. Partnership matters in controversy.—Where matters referring to determination of arbitrators related to certain difference which had arisen between parties, growing out of partnership transactions in making and selling bricks, articles of copartnership were made part of submission and were attached to it as an exhibit; held, that arbitrators did not exceed their powers under submission, which further provides that they "shall decide upon amounts of money that each party hereto may owe the other hereto at date of this submission, arising or becoming due upon any of transactions, acts, or omissions referred to in preamble to this submission, and having found such amount shall therefrom arrive at their award and said award may be en-

tered as judgment," etc.—*Simons v. Mills*, 80 Cal. 118, 120, 22 Pac. 25.

8. Same—To determine difference between partners as to what is partnership property as distinguished from individual property of one of partners is clearly partnership matter, and falls within written submission of case providing for submission of "partnership matters and accounts," and where, furthermore, it was necessary to determine difference in order to adjust such partnership accounts.—*Fulmore v. McGeorge*, 91 Cal. 611, 617, 28 Pac. 92.

9. Waiver of error.—Action of party in taking judgment on an award, and then receiving amount of judgment in satisfaction waives any errors or misconduct on part of arbitrators, of which he had notice at time, and he is charged with notice of all errors or misconduct which were known to his attorney.—*Hoogs v. Morse*, 31 Cal. 128, 129.

§ 1287. AWARD MAY BE VACATED IN CERTAIN CASES. The court, on motion, may vacate the award upon either of the following grounds, and may order a new hearing before the same arbitrators, or not, in its discretion:

1. That it was procured by corruption or fraud;
2. That the arbitrators were guilty of misconduct, or committed gross error in refusing, on cause shown, to postpone the hearing, or in refusing to hear pertinent evidence, or otherwise acted improperly, in a manner by which the rights of the party were prejudiced;
3. That the arbitrators exceeded their powers in making their award; or that they refused, or improperly omitted, to consider a part of the matters submitted to them; or that the award is indefinite, or can not be performed.

History: Enacted March 11, 1872, re-enactment of § 386 Practice Act.

ARBITRATION—AWARD—VACATION OF.

1. Construction—Subdivision 2.
2. Same—Subdivision 3.
3. Equitable principles govern.
4. Gross error must appear.
5. Practice as to stating ground of motion.
6. Same—Facts must be stated.
7. Time in which appeal must be taken—When dismissed.
- 8-10. Vacation of award—Review.
11. Void judgment.

See, ante, § 1281 and note.

1. Construction—Subdivision 2 of above section means that error or misconduct complained of must be of such character that rights of party complaining were prejudiced thereby.—*Manson v. Wilcox*, 140 Cal. 206, 208, 209, 73 Pac. 1004.

2. Same—Subdivision 3 of above section that arbitrator "omitted to consider part of matter submitted" refers to matters set forth in the agreement for submission.—

Manson v. Wilcox, 140 Cal. 206, 208, 73 Pac. 1004.

3. Equitable principles govern.—Arbitrators are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make award *ex æquo et bono*.—In matter of Connor, 128 Cal. 279, 282, 60 Pac. 862.

4. Gross error must appear.—Awards will not be vacated for mere ordinary errors, nor even faults of judgment. The error must be gross.—In matter of Connor, 128 Cal. 279, 282, 60 Pac. 862.

As to ground of setting aside arbitration, see note 25 Am. Rep. 46, 47.

5. Practice as to stating ground of motion.—Motion to dismiss, which fails to state in motion ground that appeal was not taken within proper time, does not waive error, for it goes to jurisdiction of court, but it is better practice to state ground in motion.—*Fairchild v. Daten*, 38 Cal. 286, 287.

6. Same—Facts must be stated.—Under subdivision 2 misconduct or error must be made to appear by facts stated. Mere con-

clusions are not sufficient.—*Manson v. Wilcox*, 140 Cal. 208, 209, 73 Pac. 1004.

As to referees' or commissioners' reports and findings, see, ante, §§ 643, 645 and notes.

7. Time in which appeal must be taken—When dismissed.—An appeal from an order must be taken within sixty days from time order is made and entered in minutes of court, and if not made within that time appeal must be dismissed.—*Fairchild v. Daten*, 38 Cal. 286, 287.

As to modifying or correcting award on motion for mistake in calculation, see, post, § 1288 and note.

8. Vacation of award—Review.—An award made upon an unqualified submission can not be impeached on the ground that it is contrary to law, unless the error appears on its face and causes substantial injustice; where, however, the arbitrators are required, by the terms of the submission, to determine the rights of the parties according to law, a plain mistake in their construction of the law is sufficient ground upon which to avoid the award.—*Utah Construction Co. v. Western Pac. R. Co.*, 174 Cal. 156, 162 Pac. 631.

9. Where upon the submission of a controversy existing between the plaintiff and the defendant with regard to a claim of the former that the latter was indebted to it in a certain sum on account of the construction by the plaintiff of the defendant's railroad, and the claim of the defendant that such indebtedness had been discharged by the execution and delivery of certain checks, it is provided that if the arbitrator should

find that the defendant did not discharge the debt by the checks in question he should determine whether "in equity and fairness," upon all the circumstances, it should be required to pay interest on the debt, and that the arbitrator should "make his judgment and award according to the legal right of the parties, except as to the matter of interest, which shall, as hereinafter provided, be determined in accordance with equity and fairness under all the circumstances of the case," a mistake in the conclusion of law upon the findings, or a finding against uncontradicted evidence, as reported and attached to the award, is to be considered as a mistake appearing on the face of the award, and good ground for vacating it, if it affects the substantial rights of the plaintiff on the merits of its case, but the weight of the evidence can not be considered.—*Utah Construction Co. v. Western Pac. R. Co.*, 174 Cal. 156, 162 Pac. 631.

10. In arbitration proceedings the provisions of above section relating to such proceedings do not authorize a separate appeal from the judgment entered upon the award, but allow appeals only from the decision on the motions to vacate or modify the award, as provided for in above section and section 1288, post.—*Utah Construction Co. v. Western Pac. R. Co.*, 174 Cal. 156, 162 Pac. 631.

11. Void judgment.—A judgment entered by clerk, not supported by valid statutory agreement of submission, is absolutely void, and should be set aside by court with or without motion.—*Kreiss v. Hotaling*, 96 Cal. 617, 622, 31 Pac. 740.

§ 1288. COURT MAY, ON MOTION, MODIFY OR CORRECT THE AWARD. The court may, on motion, modify or correct the award, where it appears:

1. That there was a miscalculation in figures upon which it was made, or that there is a mistake in the description of some person or property therein;

2. When a part of the award is upon matters not submitted, which part can be separated from other parts, and does not affect the decision on the matters submitted;

3. When the award, though imperfect in form, could have been amended if it had been a verdict, or the imperfection disregarded.

History: Enacted March 11, 1872, re-enactment of § 387 Practice Act.

ARBITRATION—AWARD—MODIFYING.

1. Common-law rule.

2. Findings not required.

See, ante, § 1281 and note.

1. Common-law rule.—In this state rule of common law that statutes in derogation thereof are to be strictly construed has been abrogated by code, and it is sufficient

if there is substantial compliance with requirements of statute.—*Kreiss v. Hotaling*, 96 Cal. 617, 620, 31 Pac. 740.

2. Findings not required.—Arbitrators are not required to find facts, nor give reasons for their award.—In matter of *Connor*, 128 Cal. 279, 281, 60 Pac. 862. See *Muldrow v. Norris*, 2 Cal. 74, 77, 56 Am. Dec. 313; *Tyson v. Wells*, 2 Cal. 122, 131.

§ 1289. DECISION, ON MOTION, SUBJECT TO APPEAL, BUT NOT THE JUDGMENT ENTERED BEFORE MOTION. The decision upon the motion is subject to appeal in the same manner as an order which is subject to appeal in a civil action; but the judgment entered before a motion made can not be subject to appeal.

History: Enacted March 11, 1872, re-enactment of § 388 Practice Act.

ARBITRATION—DECISION—MOTION.

1. Appeal—From what may be taken.
2. Construction—Proceeding is a special one.
3. Jurisdiction—When not obtained.

See, ante, § 1281 and note.

1. **Appeal—From what may be taken.**—There is no appeal from judgment entered on an award before decision of motion to vacate or modify it; appeal must be from decision on said motion.—*In matter of Connor*, 128 Cal. 279, 281, 60 Pac. 862.

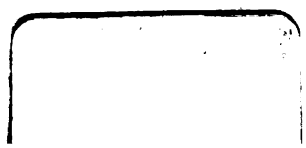
2. **Construction—Proceeding is a special one,** and statutory provisions must be substantially complied with, or judgment will not be valid.—*Fairchild v. Doten*, 42 Cal. 125, 128.

3. **Jurisdiction—When not obtained.**—If it clearly appear that parties meant merely that award and not submission should be made rule of court, or that judgment should be entered upon award, court has no jurisdiction.—*Fairchild v. Doten*, 42 Cal. 125, 129.

§ 1290. IF SUBMISSION BE REVOKED AND AN ACTION BROUGHT, WHAT TO BE RECOVERED. If a submission to arbitration be revoked, and an action be brought therefor, the amount to be recovered can only be the costs and damages sustained in preparing for and attending the arbitration.

History: Enacted March 11, 1872, re-enactment of § 389 Practice Act.

See, ante, § 1281 and note:



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